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

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities,	§	**Cause No. 3:07-CV-1153-P-BF**
Plaintiff,	§	**ECF**
v.	§	
ERWIN & JOHNSON, LLP and CHRISTOPHER R. ERWIN,	§	
Defendants,	§	
v.	§	
MILLS, POTOCZAK & COMPANY, DMH STALLARD and CHRISTOPHER JOHN WILLIAM STENNING,	§	
Third-Party Defendants.	§	

REPLY IN SUPPORT OF THE RECEIVER'S MOTION TO RECONSIDER
(DMH Stallard and Christopher John William Stenning)

Michael J. Quilling, as the appointed Receiver for ABC Viaticals, Inc. and other related entities, ("Plaintiff" or "Receiver") files this Reply asking the Court to reconsider its Order [Dkt. No. 101] adding DMH Stallard and Christopher John William Stenning (collectively, "DMH Stallard") as third-party defendants. In support, the Receiver would respectfully show the Court as follows:

A. The Court May Reconsider An Order If It Misunderstood The Receiver's Damage Calculation In This Case.

Both parties agree that, under Federal Rule of Civil Procedure 60, the Court may reconsider an order containing a factual error. (Defs.' Resp. Br. [Dkt. No. 111] at 2.) In doing so, the Court exercises considerable discretion. *McKay v. Dallas Indep. Sch. Dist.*, 2009 WL

435292, *2 (N.D. Tex. Feb. 23, 2009) (O'Connor, J.). That discretion is reflected in Rule 60, which permits relief from orders containing a "mistake" or "any other reason that justifies relief." FED. R. CIV. P. 60(a), (b)(1), (b)(6). It is also reflected in the discretion given to courts under Rule 14. *Aerial Agr. Serv. of Mont. v. Richard*, 264 F.2d 341, 344-45 (5th Cir. 1959).

The Receiver's motion identifies four statements in the Order that contain mistakes. (Pl.'s Mot. to Reconsider [Dkt. No. 108] at 4, 6-7.) Each wrongly presumes that the Albatross bonds' validity is in question and that valid bonds or better due diligence would reduce the Receiver's damage calculation. If the Receiver can show those statements are untrue, then it is precisely the kind of order the Court may reconsider under Rule 60.

B. E&J Had Funding Obligations Independent Of The Albatross Bonds' Validity Or DMH Stallard's Due Diligence.

The Order incorporates E&J's mistaken allegation that the premium escrow deficit would somehow be different had the Albatross bonds been valid. (Order [Dkt. No. 101] at 3.) In calculating the premium escrow deficit, the Receiver only included amounts E&J had to reserve under its Trust Agreement whether or not the Albatross bonds were valid.

As explained in the motion to reconsider, ABC Viaticals, Inc. ("ABC") acquired a portfolio of 55 life insurance policies and sold interests in them to investors. Each of those policies had a bond that supposedly guaranteed payment of the policy's death benefit amount to ABC's investors by a date certain (the "bond maturity date"). E&J acted as the trustee and escrow agent for ABC. According to the Trust Agreement, E&J had to create a premium escrow account for each policy and ensure the deposit of a "sum certain" to pay all premiums due before its bond maturity date. The Receiver's calculation of damages for the premium escrow deficit is based upon that amount. (Pl.'s Mot. to Reconsider [Dkt. No. 108-2] at Ex. A.) Since the bonds were supposed to pay out after the bond maturity date, whether or not they actually did does not

affect the amount E&J had to reserve and pay in premiums before that date. Had E&J calculated and deposited the amounts required under the Trust Agreement, there would have been an additional $19,660,147.32 in the ABC Premium Escrow Account when the Receiver took over. (*Id.*)

In its response brief, E&J does not dispute the fact that the Trust Agreement (1) set the amount of E&J's premium escrow obligation or (2) required funding of the same premium escrow amount whether or not the Albatross bonds were valid. As a result, it is clear that statements made in E&J's briefs and adopted into the Order were mistaken. (Pl.'s Mot. to Reconsider [Dkt. No. 108] at 6-7; Order [Dkt. No. 101] at 3, 6.) The Receiver now asks the Court to reconsider those statements in light of the detailed explanation of the premium escrow deficit.

C. The Court Need Not Consider E&J's New Arguments That Were Never Addressed In Its Order Or The Briefs.

E&J raises completely new and additional arguments that were never even briefed to the Court or considered in its Order. The Court should ignore those and, instead, limit its reconsideration to the alleged factual mistakes in the Order itself. *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex.) (new theories that could have been advanced earlier are not properly raised upon reconsideration).

To the extent the Court considers E&J's new arguments, they are unavailing. First, E&J speculates what might have happened had DMH Stallard issued an unfavorable opinion about the Albatross bonds. (Defs.' Resp. Br. [Dkt. No. 111] at 3.) That argument simply advances another mistaken presumption. Had DMH Stallard issued an unfavorable opinion, E&J speculates it might have altered its "conduct" by not purchasing eight policies backed by Albatross bonds. (*Id.*) But E&J already concedes that it did not purchase those policies—ABC did. (Defs.' Third-

Party Compl. [Dkt. No. 59] at ¶¶ 7, 8.) Instead, E&J's conduct was governed by the Trust Agreement, which required it to ensure the deposit of premium amounts for whichever policies ABC purchased. The question is not whether E&J's conduct would have changed but whether its obligations under the Trust Agreement were the same. The fact is E&J had an obligation under the Trust Agreement to reserve the exact same amount whether or not ABC's bonds ultimately paid out after the fact.

Second, E&J claims that "the under-funding would not be anywhere close to $19 million if the bonds had been good." (Defs.' Resp. Br. [Dkt. No. 111] at 4-5.) That statement is not based on any cited fact, it is illogical, and E&J fails to explain it.[1] Whether or not a policy's bond was good, the premium escrow account had to contain enough money to pay all premiums due before its bond maturity date. Had the bonds been valid, ABC would have the exact same portfolio of 55 policies and E&J would have the exact same premium funding obligation under the Trust Agreement.

Third, DMH Stallard's opinion letter is immaterial in this case because the Receiver was forced to sell the ABC policy portfolio before any Albatross bonds matured. Nevertheless, E&J tries to tie DMH Stallard to this case by speculating what would have happened "[i]f the letter of credit backing the Albatross bonds had paid" and if the Receiver's bank had "knowledge that there were valid bonds backing the policies." (*Id*. at 5.) The flawed logic is obvious. Albatross was a fraud that never intended to pay on its bonds. DMH Stallard's opinion—whether favorable or unfavorable—could never make Albatross obtain a valid letter of credit or pay its obligations to the receivership estate. E&J cannot implead DMH Stallard based upon defenses that only exist in fantasy.

[1] Instead, E&J offers it as the unstated and unsupported conclusion of a company called Data Life, which it admits is based upon incomplete calculations. (Defs.' Resp. Br. [Dkt. No. 111] at 5 n.4.)

Finally, E&J argues that it has a derivative action against DMH Stallard as its agent. (*Id.* at 2.) A derivative action is a suit brought by a beneficiary in the place of its fiduciary. BLACK'S LAW DICTIONARY (8th ed.). Clearly E&J cannot bring a derivative action here because it is the fiduciary whereas the beneficiaries are ABC and the ABC Trusts.

What E&J actually describes is a claim for indemnity and contribution. The Court would only add DMH Stallard as a third-party defendant if it were liable for all or part of the Receiver's claims against E&J. FED. R. CIV. P. 14. Obviously DMH Stallard is not liable for E&J's failure to meet its own funding obligations under the Trust Agreement. The only party to which DMH Stallard would be liable is ABC because it paid for the due diligence, relied upon it, and purchased the Albatross bonds. (Defs.' Third-Party Compl. [Dkt. No. 59] at ¶¶ 7, 8.) The law is clear that E&J cannot add third-party defendants under Rule 14 when ABC is the party with a right to sue them. *McCain v. Clearview Dodge Sales, Inc*., 574 F.2d 848, 849-50 (5th Cir. 1978).

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully asks the Court to reconsider its Order [Dkt. No. 101] adding DMH Stallard and Christopher John William Stenning as third-party defendants. That Order incorporates statements made by E&J that are clearly mistaken or otherwise erroneous. The Court should enter an Amended Order denying E&J's motion to add those third-party defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of this pleading was served upon all interested parties through the Court's electronic filing system.

/s/ Brent J. Rodine