

arguments set forth in the Third Party Defendants' Motion to Dismiss and would add the following arguments as set forth in previous filings:

1. The Receiver's claims against Erwin & Johnson, LLP and Christopher R. Erwin ("E&J") seek damages for their failure to create separate premium escrow accounts and set aside the money needed to pay premiums on each policy until maturity as set forth in the Trust Agreement between E&J and ABC Viaticals, Inc. ("ABC"). The Receiver does not seek to recover any damages as a result of the due diligence report regarding the Albatross bond prepared by the Third Party Defendants. The claims of the Receiver against E&J and the asserted third-party claims of E&J against the purported third-party defendants are entirely separate issues.

2. The Receiver's damage calculation against Defendants is based on E&J's obligation set forth in the Trust Agreement with ABC and specifically excludes any damages caused by the Third Party Defendants for preparing the due diligence report about the Albatross bonds.

3. The Receiver will be filing a lawsuit in the United Kingdom against the Third Party Defendants seeking separate and distinct damages caused to ABC as a result of the deficient due diligence report prepared by the Third Party Defendants. This is completely different and apart from the damages set forth in the present case which arises from the Trust Agreement between E&J and ABC. Only the Receiver has standing to assert these claims. E&J does not.

The Court should, therefore, grant the Third Party Defendants' Motion to Dismiss allowing the Receiver to directly pursue the claims against the Third Party Defendants in the United Kingdom.

II. STANDARD OF REVIEW

To survive a motion to dismiss, a plaintiff is required to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Pleadings that offer only “labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Id.* (internal citations and quotations omitted). Dismissal is also proper “if the complaint lacks an allegation regarding a required element necessary to obtain relief.” *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quoting 2A MOORE’S FED. PRAC. ¶ 12.07 (1995) (footnote omitted)).

III. ANALYSIS AND ARGUMENT

In addition to the arguments set forth in the DMH Stallard’s (“DMH Stallard”) and Christopher John William Stenning’s (“Stenning”) Motion to Dismiss, the Receiver reiterates his position that allowing the Third Party Complaint would result in duplicative litigation, undue delay and expense. The Receiver has not alleged that E&J has breached any duties by relying on the due diligence report from DMH Stallard or Stenning. The claim against E&J arises out of the Trust Agreement entered into between ABC and E&J. Pursuant to the Trust Agreement, E&J’s obligation to fund the ABC premium escrow account was as set forth in relevant part:

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

(Am. Compl. [Dkt. No. 41] at 5.)

The crux of Receiver's claims against E&J is that it failed as the Trustee to create separate premium escrow accounts for policies and failed to set aside the requisite amount needed to pay premiums on each policy, regardless of whether the bonds were valid or matured. E&J, as the Trustee, had an obligation to ensure that ABC, the Grantor, deposited the sum certain required to pay premiums for each policy until its bond maturity date. When the Receiver was appointed and assumed his duties, there were insufficient funds in the ABC premium escrow account to pay for premiums as they became due. After the Receiver assumed his duties and discovered that ABC's bonds proved to be fraudulent, the Receiver had to pay premiums on 13 policies after their fraudulent bonds failed to mature as scheduled. However, none of the 13 policies at issue were backed by Albatross bonds. Despite the fact the Receiver paid additional premiums for the 13 policies backed by fraudulent bonds, the Trust Agreement did not require E&J to reserve those funds. Therefore, the Receiver does not include any of those amounts in his calculation of damages in the Amended Complaint. The Receiver has specifically limited the damages sought against E&J to the ABC premium escrow deficiency in the amount E&J had to reserve regardless of whether or not the bonds were valid.

The damages sought by the Receiver in this case against E&J presume no liability for the due diligence report and representations made by DMH Stallard and Stenning. Allowing E&J's purported claim against DMH Stallard and Stenning to proceed in the Receiver's case against E&J will not diminish the amount of damages for which E&J would be ultimately responsible to the Receiver. The Receiver has limited his damage calculation to premiums due through the bond maturity date, *i.e.*, the difference between the amount that should have been in the ABC premium account at the time the Receiver took over his duties and the actual amount that was in the ABC premium escrow account. The Receiver is not seeking damages for any amounts E&J

might have deposited in the ABC premium escrow account had it known the Albatross bonds were fraudulent.

Moreover, the Receiver, the only party with standing to bring a claim directly against the Third Party Defendants for damages that ABC suffered as a result of the due diligence report, is in the process of filing a lawsuit in the United Kingdom asserting claims for those damages suffered by ABC. The due diligence report was prepared for E&J acting as agent for ABC. The engagement between E&J and the Third Party Defendants was ultimately for the benefit of ABC. Allowing the third party complaint to go forth here will obstruct the Receiver's efforts to pursue his claims directly against DMH Stallard and Stennings in the United Kingdom.

IV. CONCLUSION

In addition to the arguments set forth in the DMH Stallard's and Christopher John William Stenning's Motion to Dismiss the Third Party Complaint based on Lack of Jurisdiction, *Forum Non Conveniens* and Failure to Add an Indispensable Party, the Receiver submits that the issues and claims set forth in the Third Party Complaint filed by E&J are separate and distinct claims that belong to the Receiver. The damages claimed by the Receiver against E&J are not affected by the actions of the Third Party Defendants. Including the claims in the present lawsuit would result in duplicate litigation, cause undue delay and expense.

WHEREFORE PREMISES CONSIDRED, the Receiver respectfully asks the Court to grant DMH Stallard's and Christopher John William Stenning's Motion to Dismiss the Third Party Complaint based on Lack of Jurisdiction, *Forum Non Conveniens* and Failure to Add an Indispensable Party in its entirety.

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/ Michael J. Quilling