

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

MICHAEL J. QUILLING, RECEIVER
FOR MEGAFUND CORPORATION
AND LANCORP FINANCIAL GROUP,
LLC,

Plaintiff,

vs.

KENNETH WAYNE HUMPHRIES,

Defendant.

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Civil Action No. 3:06-CV-0299-L (BD)

ECF
Referred to U.S. Magistrate Judge

MOTION FOR COURT ORDER DISMISSING
PLAINTIFF’S REMAINING CLAIMS AND BRIEF IN SUPPORT

TO THE HONORABLE JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE:

Plaintiff Michael J. Quilling, as Receiver for Megafund Corporation and Lancorp Financial Group, LLC, (“Plaintiff” or “Receiver”) hereby files this his Motion for Court Order Dismissing Plaintiff’s Remaining Claims under Federal Rule of Civil Procedure 41(a)(2) and, in support, would respectfully show the Court as follows:

1. Michael J. Quilling is the Receiver appointed for Megafund Corporation, Lancorp Financial Group LLC, and other associated individuals and entities in *Securities and Exchange Commission v. Megafund, et al.*, Civil Action No. 3:05-1328-L, pending before the United States District Court for the Northern District of Texas.

2. The Receiver filed his Complaint [Dkt. No. 1] against Defendant on February 16, 2006, alleging causes of action for: (1) negligence; (2) negligent misrepresentation; (3) aiding and

abetting corporate waste; (4) aiding and abetting breach of fiduciary duty; (5) breach of contract; (6) civil conspiracy; (7) fraud; and (8) fraudulent transfer of funds from a *Ponzi* scheme. As damages, the Receiver sought to recover the \$19,000.00 that Defendant received from Megafund and the \$9.365 million that Lancorp lost after relying on Defendant's misrepresentations.

3. On July 7, 2006, Plaintiff filed his Motion for Partial Summary Judgment [Dkt. No. 21], which sought relief on two of those causes of action: negligent misrepresentation and fraudulent transfer.

4. On August 14, 2006, the United States Magistrate Judge issued his Findings and Recommendation [Dkt. No. 23], which recommended granting the Receiver's motion and all relief requested in his Complaint. On October 13, 2006, this Court issued a Memorandum Opinion and Order [Dkt. No. 33], which accepted the Magistrate Judge's findings as the opinion of this Court.

5. The Court then issued an Order requiring the parties to jointly file either (1) a Status Report in anticipation of trial or (2) a Stipulation of Dismissal and proposed Final Judgment with respect to their remaining claims. *Order*, October 18, 2006 [Dkt. No. 34], as amended on November 2, 2006 [Dkt. No. 36]. Unfortunately, the parties were unable to agree on the terms for the Stipulation of Dismissal. Defendant insists that the stipulation should include an agreed finding that (1) he did not participate in fraud and other torts alleged in the Complaint or (2) no evidence exists to support such a finding. *See E-mail Correspondence*, Nov. 15, 2006, Exhibit "A". The Receiver, however, contends that he is not authorized to stipulate to such conclusions of law. *Id.*

6. Although the parties were unable to agree on a Stipulation of Dismissal as ordered, Rule 41 of the Federal Rules of Civil Procedure permits the Receiver to seek dismissal of his claims

through an order of the Court:

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation.

Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

* * *

(2) By Order of Court.

Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Fed. R. Civ. P. 41(a) (emphasis added); *see also Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002) (under Rule 41(a)(2), motions for voluntary dismissal should be “freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit”).

7. Since the Receiver has already obtained full satisfaction of his claims through summary judgment, there is no need to pursue the additional causes of action listed in his Complaint. He, therefore, respectfully requests that this Court issue an Order dismissing, without prejudice, his remaining claims against Defendant in this case.

WHEREFORE, PREMISES CONSIDERED, the Receiver respectfully requests that this Court issue an Order dismissing, without prejudice, the Receiver's claims for negligence, aiding and abetting corporate waste, aiding and abetting breach of fiduciary duty, breach of contract, civil conspiracy, and fraud. The Receiver also requests such other and further relief, general or special, at law or in equity, to which he may show himself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

On November 15, 2006 the undersigned counsel personally conferred with the Defendant by telephone and it was determined Defendant opposes the requested relief at this time.

 /s/ Brent J. Rodine

CERTIFICATE OF SERVICE

On the 15th day of November, 2006 a true and correct copy of the above and foregoing was sent via first class mail, with full and proper postage prepaid thereon, to:

Kenneth Wayne Humphries
Post Office Box 74
110 East Ninth Street
Hopkinsville, Kentucky 42241-0074

/s/ Brent J. Rodine

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