IN THE CHANCERY COURT OF THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

MARIE MURPHY, Special Deputy Commissioner of the Department of Commerce and Insurance for the State of Tennessee,	)	
Petitioner,	)	
v.	)	No. 10-507-III
SMART DATA SOLUTIONS, LLC, et. al,	)	**Damages Petition Against Evans Petree PC and William L. Hendricks, Jr.**
Respondents.	)	

MEMORANDUM IN SUPPORT OF LIQUIDATOR'S MOTION TO ALTER OR AMEND JUDGMENT

INTRODUCTION

On December 13, 2011, the Court issued a Memorandum and Order ("the Order") dismissing the Petitioner's ("the Liquidator") Amended Petition. The Liquidator respectfully submits that the Court reconsider in light of the legal authority and argument herein and alter or amend the Order to deny the Respondents' motion to dismiss the Amended Petition.

LEGAL AUTHORITY AND ARGUMENT

I. The Amended Petition meets the notice pleading standard.

The Supreme Court of Tennessee has rejected the more stringent plausibility pleading standard, made applicable to federal court matters by *Twombly* and *Iqbal*. Instead, in *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.2d 422 (Tenn. 2011), the Supreme Court

reaffirmed Tennessee's adherence to the well-established notice pleading standard. The Petitioner's Amended Petition meets the notice pleading standard applicable in this Court.

Tennessee Rule of Civil Procedure 8.01 requires simply that a petition "contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." A Rule 12.02(6) motion to dismiss does not test the strength of the Liquidator's evidence; rather, it challenges the legal sufficiency of the complaint. *Webb*, 346 S.W.2d at 426. In considering such a motion, the court "must construe the complaint liberally, presuming all factual allegations to be true and *giving the plaintiff the benefit of all reasonable inferences*." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (emphasis added). "Where reasonable persons might draw differing inferences from undisputed facts, the issue of proper inference to be drawn is for the jury. It is only where the evidence is uncontradicted and a reasonable mind could draw only one conclusion from the evidence that the issue may be decided by the court as a matter of law." *Woods & Woods v. Lewis*, 902 S.W.2d 914, 917 (Tenn. Ct. App. 1994) (citing *Keller v. East Tenn. Prod. Credit Ass'n*, 501 S.W.2d 810 (Tenn. Ct. App. 1973)). A court should grant a Rule 12.02(6) motion "only when it appears that the plaintiff can prove *no set of facts* in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002) (emphasis added).

In Tennessee, "[t]he object and purpose of any pleading is to give notice of the nature of the wrongs and injuries complained of with reasonable certainty, and notice of the defenses that will be interposed, and to acquaint the court with the real issues to be tried." *Hammett v. Vogue, Inc.*, 165 S.W.2d 577, 579 (Tenn. 1942). A complaint merely must contain sufficient factual allegations to support a claim for relief; it is not necessary for the complaint to contain detailed

allegations of all facts giving rise to the claims. *Webb* 346 S.W.2d at 427 (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010)).

By its Order, this Court dismissed the Amended Petition, finding that it failed to state a claim against the Respondents for legal malpractice. The Liquidator respectfully disagrees and asserts that its 111 paragraph Amended Petition, containing numerous exhibits of proof, asserts very specific factual allegations to support a malpractice claim against the Respondents; therefore, it far exceeds the notice pleading requirement. The Liquidator respectfully requests that the Court reconsider whether the Amended Petition meets the liberal notice pleading requirement, in light of the case law and arguments offered herein.

II. Whether the Lawyers owed SDS a professional duty of care is a factual issue to be determined by a jury; it is not appropriately decided on a Rule 12.02(6) motion.

"When a person adopts the profession of the law, and assumes to exercise its duties in behalf for another for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill; and if any injury result to the client from want of such reasonable care and skill, the attorney must respond to the extent of the injury sustained." *Bruce v. Baxter*, 75 Tenn. 477, 481 (Tenn. 1881). In a legal malpractice action, expert testimony is needed to determine the two elements stated by the *Bruce* court: (1) that a breach of the professional standard of care occurred, and (2) that the breach was the proximate cause of the injuries. *See Somma v. Gracey*, 544 A.2d 668, 670 (Conn. App. 1988) (citing *Pearl v. Nelson*, 534 A.2d 1257 (Conn. App. 1988)). The scope of an attorney's duty, and whether the attorney satisfied that duty, is a very fact-specific inquiry for which expert testimony is required. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 406 (Tenn. 1991) ("Thus, except in cases involving clear and palpable negligence, most courts considering the issue have held that cases

of legal malpractice cannot be decided without expert proof regarding the applicable standard of care and whether the lawyer's conduct complies with this standard."). The finder of fact must then weigh the expert testimony in determining the scope of a lawyer's duty, and whether his actions satisfied that duty.

In this case, despite numerous and specific allegations of malpractice, the Liquidator has been denied the opportunity to present expert evidence to a finder of fact regarding the scope of the Respondents' duty to SDS and the breach of that duty. Instead, the Court found in its Order that the Amended Petition failed to establish that the Respondents owed SDS a duty (1) to prevent its principal from making unlawful distributions and (2) to advise SDS on how to comply with applicable regulations, investigate potential insurers or advise SDS on whether to make any particular insurance premium payment. Order at p. 5. The Liquidator respectfully asserts that the scope of an attorney's duty to his client is a question for the jury, not the Court.

A. A jury should determine whether Respondents owed SDS a duty to prevent, or abstain from participation in, fraudulent transfers to insiders.

In dismissing the legal malpractice claims related to the Respondents' participation in and/or failure to prevent fraudulent transfers to Bart Posey and other insiders, the Court found that there were both legal and factual deficiencies in the Amended Petition.

First, the Court held that, as a matter of law, attorneys cannot be liable for fraudulent transfers made by their clients. To support this finding, the Court relied upon a literal interpretation of T.C.A. § 48-249-307, which creates liability for unlawful distributions to members, managers and directors under certain specified situations. The Court noted that, because attorneys are not listed in the statute, they may not be held liable for their clients' fraudulent transfer.

However, the Amended Petition does not rely upon a statutory duty of attorneys to prevent fraudulent transfers; rather, under the facts of this case, the Liquidator has asserted that it was negligence and a breach of the professional standard of care for the Respondents to allow and, indeed in some cases participate in, fraudulent transfers from SDS (the Respondents' client) to Bart Posey (another of the Respondents' clients).[1] These facts are somewhat analogous to the facts in *Somma v. Gracey*, 544 A.2d 668 (Conn. App. 1988). In *Somma,* a third party purchaser misappropriated funds from plaintiff, a client of the defendant attorney. While there was no allegation that the defendant attorney committed theft himself, plaintiff alleged that the defendant attorney should have warned plaintiff of the likelihood that the third party might misappropriate funds. The *Somma* court allowed the jury to determine the scope of the defendant attorney's duty and whether he satisfied that duty. That court did not rely upon an independent, statutory duty that attorneys owed to their clients to prevent theft; rather, it found that an attorney might commit negligence simply by failing to adequately conduct due diligence on the background of the third party.

The facts in this case are more compelling than those in *Somma.* The allegations contained in the Amended Petition, taken as true, establish that the Respondents knew or should have known that SDS was insolvent. *See, e.g.*, Amended Petition ¶¶ 50, 59. The Respondents knew or should have known that SDS and its purported insurance policies were a sham. *See, e.g.*, Amended Petition ¶¶ 35-37, 47-49, 84-86, 93-94 and 98-100. Despite this knowledge, the

[1] In fact, the Amended Petition alleges that the conflict of interest created by the Respondents' dual representation of SDS and Posey is malpractice in and of itself. *See Amended Petition,* ¶¶ 51, 58 and 65. Certainly, this conflict of interest may have violated Rule 1.7 of the Rules of Professional Conduct. While an ethical violation is not determinative of a malpractice action, it may provide guidance as to an attorney's standard of care. *Lazy Seven Coal Sales, Inc.*, 813 S.W.2d at 405. "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." *Id.* at 408.

Respondents took no action on behalf of SDS to prevent Bart Posey from making transfers to himself and other insiders. *See, e.g.*, Amended Petition ¶ 66. Indeed, on at least one occasion, the Respondents directly facilitated the fraudulent transfer to Bart Posey by allowing him to funnel money from SDS for use by himself through an Evans Petree trust account. *See, e.g.*, Amended Petition ¶¶ 55-60. Based upon these facts and the inferences therefrom, a jury could reasonably determine that the Respondents breached a duty of care that it owed to SDS.

In addition to finding that attorneys cannot be held liable for their clients' fraudulent transfers as a matter of law, the Court also found that the Amended Complaint lacked sufficient factual allegations to support a malpractice claim based upon the fraudulent transfers to Posey. Specifically, the Court said the Amended Petition lacked the following factual allegations:

1) The Attorneys knew about any transfer of funds from SDS to Mr. Posey;
2) The Attorneys opined on the advisability of the alleged fraudulent transfers;
3) The Respondents were involved in the day-to-day business operations; and
4) The only fact alleged of the Attorneys' knowledge is that their fees were being paid slowly and with delay. That fact is insufficient to state a claim of knew or should have known.

While the Liquidator does not believe these particular facts are determinative of whether or not the Amended Petition states claims upon which relief may be granted; nevertheless, facts contained in the Amended Petition and inferences drawn therefrom satisfy the notice pleading standard with regard to each fact above:

1) The Attorneys were on notice that Posey was fraudulently transferring funds from SDS to himself. *See, e.g.*, Amended Petition ¶ 63.

2) The Attorneys not only knew of and opined on the fraudulent transfers to bogus insurers, they assisted in the search for such insurers. *See, e.g.*, Amended Petition ¶¶ 92 (searched for reinsurance), 98 (had knowledge of transfer) and 104 (helped acquire bogus insurance).

3) In addition to dealing with regulators, the Attorneys were involved in the administrative and operational structure and functioning of the receivership entities, restructuring of the entities to avoid regulatory agencies, the business and transactional operations, and the numerous other tasks and duties set out in ¶¶ 39-42 of the Amended Petition. These allegations and the reasonable inferences that could be drawn therefrom place the Attorneys in the middle of knowledge of the business purpose and operations of the receivership entities.

4) Because the Attorneys were knowledgeable about the entire SDS operation, knew that SDS's business was a sham in that it was providing bogus insurance and knew that states were taking action to shut down SDS's ability to conduct business, they knew that SDS was insolvent and unable to pay the claims of SDS members. *See, e.g.*, Amended Petition ¶¶ 35, 47-50 and 59.

The Liquidator has adequately stated a claim that the Respondents committed legal malpractice by participating in and/or failing to stop fraudulent transfers from SDS to Bart Posey and others. Its allegations in this regard satisfy the notice pleading requirements, and a jury must determine the scope of the Respondents' duty to SDS in this regard, and whether that duty was met.

B. A jury should determine whether Respondents owed SDS a duty to offer prudent advice regarding regulatory and insurance matters.

Likewise, a jury should determine whether the Respondents owed SDS a duty to advise it regarding insurance and regulatory matters and, if so, whether that duty was met. "An attorney-client relationship is established when the advice and assistance of the attorney is sought and received in matters pertinent to his profession." *Somma*, 544 A.2d at 672 (citations omitted). As noted above, the question of the scope of an attorney's duty is a matter of fact, not law. *See id.* ("Although the plaintiffs disputed the extent of the representation, there was sufficient evidence to present to the jury the question of what the attorneys' obligations were."); R. Mallen & V. Levit, Legal Malpractice (2d Ed.) § 659.

With all due respect, the Liquidator asserts that the allegations contained in the Amended Complaint paragraphs cited on page 5 of the Order (paragraphs 38-39, 41, 42, 69, 83-84) are sufficient to raise a factual question about whether the Respondents owed SDS a duty to advise it on compliance with applicable regulations, investigation of potential insurers, whether to make an insurance premium payment, or any of the other factual deficiencies noted by the Court. Whether SDS asked the Attorneys to render this advice or whether the Attorneys merely assumed that duty on their own, when they offered advice they had a duty to do so diligently.

In fact, as discovery involving the Attorneys has progressed, more evidence has been collected that supports the Amended Petition's allegations concerning the broad scope of the Respondents' representation of SDS. Mr. Hendricks reviewed insurance binders for SDS and negotiated services provided by its vendors. *See* January 5, 2010, email from Bart Posey to William Hendricks, attached hereto as Exhibit 1. He began (but did not complete) due diligence into Beema, the purported insurance provider that was bogus. *See* March 14, 2008, email from

William Hendricks to William Worthy, attached hereto as Exhibit 2.[2] The Attorneys even continued advising SDS to simply "keep the ball in the air" despite the advice of Jule Rousseau, a New York attorney specializing in insurance regulatory matters, that SDS cease operating immediately. *See* February 10, 2010, email correspondence between Bart Posey, William Hendricks and Jule Rousseau, attached hereto as Exhibit 3; February 12, 2010, email from William Hendricks to Russell Hensley, attached hereto as Exhibit 4; and March 1, 2010, letter from Jule Rousseau to Bart Posey, with copy to William Hendricks, attached hereto as Exhibit 5.

These documents are illustrative of the proof that the Liquidator will offer to prove that the Attorneys were retained and/or assumed the duty to advise SDS on regulatory and insurance matters. They are examples of the facts that exist to support this lawsuit. A jury should determine whether these facts adequately establish the scope and possible breach of the Attorneys' duty.

III. No damages sought in the Amended Complaint were incurred beyond the one-year statute of limitation.

The Order finds that "any associated malpractice claim was time-barred (a one-year statute of limitations) before the receivership liquidation was filed in March, 2010." Order at p. 6. The Liquidator maintains that, while certain facts giving rise to the malpractice claim were known before March 2009, the acts of malpractice and resulting damage occurred from March 2009, through March 2010. Because the Liquidator seeks recovery for damages that occurred subsequent to March 23, 2009, only, the claims are not time-barred.

In determining whether the Liquidator's malpractice claims are time-barred, the Court must first determine when the cause of action accrued. Under Tennessee law, claims for

[2] This email precedes the March 11, 2008, response by William Worthy to which there was no apparent follow-up at the time. *See* Amended Petition ¶ 83, Ex. 13.

professional malpractice do not accrue until there is knowledge of both the negligent act *and* the resulting injury: "In respect to professional malpractice, the right of action accrues when the harmful result of the negligence becomes irremediable." *Woods & Woods v. Lewis*, 902 S.W.2d 914, 916 (Tenn. Ct. App. 1994). The cause of action does not accrue until damage results from the negligence.

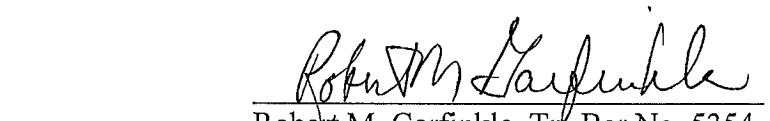
The so-called "discovery rule" is applicable to legal malpractice claims, *Security Bank & Trust Co. v. Fabricating, Inc.*, 673 S.W.2d 860 (Tenn. 1983), and is relevant to this case. The discovery rule dictates that a cause of action for malpractice does not accrue until the plaintiff discovers the negligence *and* resulting injury. *Woods & Woods*, 902 S.W.2d at 917. While SDS (or at least its controlling member) had knowledge, no later than February 2009, that certain insurance products were a sham, it had yet to suffer the damages from the Respondents' negligence that are sought in the Amended Complaint. Each time the Attorneys assisted Mr. Posey and others in their misappropriation of ATA/SDS funds, or each time the Attorneys negligently turned a blind eye to these actions, the one-year statute of limitations began tolling for that action. These actions occurred in the face of escalating warning signs and accumulating administrative actions from numerous states to halt the entities' business. *See* Amended Petition, ¶ 32. Because all damages alleged in the Amended Petition were suffered during the one-year before to the appointment of a receiver in this case, these claims are not time-barred.

In this case, it goes one step further. The knowledge that no insurance existed is not the act of negligence itself. The mere fact of knowledge does not create a cause of action. Negligence is found in the acts that occurred after that knowledge of no insurance. All of the acts alleged in the Amended Complaint that resulted in injury occurred within the one year Statute of Limitations. All monetary losses alleged occurred within one year. All losses of

monies alleged are the result of negligent acts with damages, all of which occurred within the one year Statute of Limitations.

CONCLUSION

For the foregoing reasons, the Liquidator respectfully requests that the Court alter or amend its December 13, 2011, Memorandum and Order, so as to deny the Respondents' Motion to Dismiss.



Robert M. Garfinkle, Tn. Bar No. 5354
Phillip G. Young, Jr., Tn. Bar No. 21087
Garfinkle, McLemore & Young, PLLC
2000 Richard Jones Road, Suite 250
Nashville, Tennessee 37215
Phone: (615) 383-9495
Fax: (615) 292-9848
E-mail: bgarfinkle@gmylaw.com
E-mail: pyoung@gmylaw.com

Special Counsel for Marie Murphy,
Special Deputy Commissioner, in her
Official Capacity as Statutory Liquidator

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document has been forwarded by United States Mail, first class, with sufficient postage, and by e-mail, on this, the 12th day of January, 2012, to the following parties:

Craig V. Gabbert, Jr., Esq. cvg@h3gm.com
D. Alexander Fardon, Esq. alex.fardon@h3gm.com
Harwell, Howard, Hyne, Gabbert & Manner PC
315 Deaderick Street, Suite 1800
Nashville, Tennessee 37238

Attorneys for Evans Petree, PC, William L. Hendricks, Jr., Russell J. Hensley, and Theodore T. Kitai

Robert M. Garfinkle

From:	Bart Posey
To:	'William L. Hendricks Jr.'
Sent:	1/5/2010 8:41:38 AM
Subject:	FW: Binder without Participation
Attachments:	ATA Amended Binder.doc

Bill, here is the binder for converge for the ata. Please get mult-plan turned back on ASAP

From: Gary Ketchum [mailto:glkprof@yahoo.com]
Sent: Tuesday, December 29, 2009 2:53 PM
To: bposey@sdsfirst.com
Subject: Binder without Participation

Bart, please find the amended binder as requested by Dale.

From: eneyman@Glankler.com [mailto:eneyman@Glankler.com]
Sent: Friday, March 14, 2008 2:09 PM
To: Wworthy35@comcast.com
Cc: bhendricks@Glankler.com; bposey@sdsfirst.com
Subject: Smart Data Solutions - Email from Bill Hendricks

William:

Bart has acquainted me with the status of the above matter and as he has probably expressed to you that I have some concerns about the present structure.

First and foremost, in our meeting, you were to provide me the name of Beema's attorney so that we could discuss an appropriate indemnity of SDS first. That has not transpired. In fact, I have had no communication from you or anyone at Beema whatsoever.

As the matter presently stands, I understand you are requesting that SDS forward certain funds to an account which I presume you have set up known as Easy Pay Financial Services, Inc. While I have some familiarity with this organization, I certainly think an appropriate escrow account should be established to deal with this in the future and I likewise think that there needs to be some steps taken to insulate SDS from liability not only from any claims by Beema, but from policy holders based upon the fact that business was placed as of February 1st based upon representation regarding an appropriate indemnity to SDS. More importantly, from a pragmatic standpoint, I understand the common practice is for a certain portion of the funds to be retained in an appropriate escrow account, the terms of which can be established under an escrow agreement. I have seen no escrow agreement, nor has one been proposed. SDS's preference is to retain a certain portion of the funds for purposes of processing claims and that can be established through an appropriate escrow agreement with joint signatures or whatever is necessary to provide the parties assurances. Much of this should have been worked out ahead of time and I assumed that such had transpired based upon our meeting, but as I have said, I have had no contact from Beema, Beema's attorney or the representative you made reference to in the meetings or whom you had negotiated the matter.

I am happy to try to work with you or a representative of Beema on any of these matters, but until we have an appropriate escrow agreement, can make some determination and negotiations regarding the processing of claims on behalf of SDS, I am hesitant to simply wire $32,000 to an Easy Pay trust account.

The first priority would be determine whether Beema is agreeable to our retaining a portion of the funds for processing claims, assuming we provide them evidence of the deposit and an appropriate escrow agreement or escrow arrangement and secondly I want to put in place a mechanism to reestablish exactly how this is going to be taken care of in the future, whether through a contract written document, addendum or otherwise.

As I said previously in our meeting, I am happy to negotiate this with Beema, their attorney or the individual you referenced as your contact, but nothing has transpired since our meeting and this is the first contact I have had

EX. 2

regarding the matter.

Please let me know what you suggest.

Sincerely,

Bill Hendricks

cc: Bart Posey

Emily Neyman
Legal Assistant to William L. Hendricks, Jr.,
Ashlee B. Ellis, & Monica Wharton
Glankler Brown, PLLC
One Commerce Square, 17th Floor
Memphis, TN 38103
(901) 525-1322 Main
(901) 576-1819 Direct
(901) 525-2389 Fax
eneyman@glankler.com

From: Bart Posey [bposey@sdsfirst.com]
Sent: Wednesday, February 10, 2010 11:45 AM
To: Rousseau, Jule
Subject: RE: Premium

That's what I am doing I have nothing to hide my friend, I am just tired of being the bad guy.

Bart

-----Original Message-----
From: Rousseau, Jule [mailto:jrousseau@herrick.com]
Sent: Wednesday, February 10, 2010 10:34 AM
To: Bart Posey
Cc: William L. Hendricks Jr.; Kroll, Elliott
Subject: RE: Premium

Bart

You cannot change names and try to hide. You have to address this head on, full transparency, if we are going to represent you.

Jule

-----Original Message-----
From: Bart Posey [mailto:bposey@sdsfirst.com]
Sent: Wednesday, February 10, 2010 11:38 AM
To: Rousseau, Jule
Cc: 'William L. Hendricks Jr.'
Subject: RE: Premium

Do you want me to change our name and move all members in to another Association like all the other guys have done, pretty quick fix. Hard to hit a moving target. In 2009 we paid William $2.311.777.17 over and above what we paid in claims, we paid 17,588 claims for a total of $4,614,555.64 looks like someone used the plans.

-----Original Message-----
From: Rousseau, Jule [mailto:jrousseau@herrick.com]
Sent: Wednesday, February 10, 2010 10:17 AM
To: William L. Hendricks Jr.; Bart Posey
Cc: Kroll, Elliott; Kline, Jonathan
Subject: RE: Premium

I agree. We need full transparency at this point. If we can't satisfy the DOIs, SDS/ATA cannot continue.

-----Original Message-----
From: William L. Hendricks Jr. [mailto:bhendricks@evanspetree.com]
Sent: Wednesday, February 10, 2010 10:48 AM
To: Rousseau, Jule; Bart Posey
Cc: Kroll, Elliott; Kline, Jonathan
Subject: RE: Premium

Jules I,m going to send you the files on Indiana and tenn and bart you should also dig up all williams/youells repeated emails re serveamerica etc.While the dois don't seem interested ,at all in william or youell,at this point, I think that's partially due to the fact that they do not believe any premium was actually paid to beema serve America and of course as we learned of the dois contention that serve America didn't exsist we immediately forwarded these concerns on and as we were

EX. 3

assured in writing repeatedly that the dois contention was erroneous.Lastly I have never produced the bank account or other financial information and have repeatedly asked Indiana to identify any unpaid claims which they,ve never responded to.We also have got to make it clear that we have no affiliation w the myriad of other entities they,ve named in these investigations but it will take more than our simply saying so to convince them>I have intimated to several investigators over the past several months that I have information on willam worthy that they should be interested in but to this point theyve shown no interest but hopefully will once they learn that in fact premiums have been paid.I would suggest,subject to jules correction that we show them a spread sheet of payments w some kind of basic documentation showing the wire transfers all the while being aware that if and when they receive our banking info that they(one of the dois as they all share info)will seek to disrupt that relationship.I just saw a subpoenae come across my desk from citm so I reiterate my statements regarding the drafting company issue>As I said these are my thoughts but jule makes the call>Thanks bill

-----Original Message-----
From: Rousseau, Jule [mailto:jrousseau@herrick.com]
Sent: Wednesday, February 10, 2010 8:31 AM
To: Bart Posey
Cc: William L. Hendricks Jr.; Kroll, Elliott; Kline, Jonathan
Subject: RE: Premium

Bart

As discussed last night, by Fri am mtg with TN DOI, we need an accounting of premium for last 4 months of 2009, claims paid and payable, and financial ability to represent that either ATA or SDS will pay all claims, even if insurers do not perform. We also need to explain who we believe the responsible insurers to be--its not clear to me who you think insured the program in the last 4 months.

For 2010, we need accounting of all premiums collected by ATA and the financial ability to represent that ATA can transfer 100% of collected premium to a licensed insurer. While we will attempt to collect money back from Choi, we cannot advise the DOI that the premium is missing--your company will be dead if that is the answer.

I realize these are tough assignments and facts, but we face a very uphill battle to restore your, SDSs and ATAs credibility, and the ability to pay claims and transfer premium to licensed company are mandatory.

I am reachable by cell all day.

Jule 917 533 2034.

-----Original Message-----
From: Bart Posey [mailto:bposey@sdsfirst.com]
Sent: Tuesday, February 09, 2010 2:30 PM
To: Rousseau, Jule
Subject: FW: Premium

-----Original Message-----
From: Comcast [mailto:wworthy35@comcast.net]
Sent: Monday, November 09, 2009 10:43 AM
To: Bart Posey; Kristy Wright
Subject: Premium

Bart,

Thank you for the $180,000 that was received on Friday. Please wire the $100,000 deposit for September's premium today . The balance is due on the 15th.

How much do you need to keep this month??

Thanks ,

William

From: William L. Hendricks Jr. [mailto:bhendricks@evanspetree.com]
Sent: Friday, February 12, 2010 9:16 AM
To: bposey@sdsfirst.com
Subject: Fw: Sds

Heres. What I sent this morn.Let me have your thoughts recommendations

----- Original Message -----
From: William L. Hendricks Jr.
To: Russell Hensley
Sent: Fri Feb 12 08:29:47 2010
Subject: Sds

Rusty we brought the new yorker around a bit at dinner but he still says there is no surplus lines carrier available on health ins and that a reisurance contract won't comply w what the DOIS want.I'm not concerned w what they want at this point but we,ve got nothing behind us now although it was again represented to us thru a binder that Andone was binding the coverage but I've checked on andone and its no diff that the beema situation where we paid based on promises and docs that looked official but of course we were in a difficult position and the sharks in this bus circle just like in jaws.I'm gonna recommend that we do ,whether new york thinks its perfect or not that we be allowed to set up either a captive or to negotiate a reinsurance and or surplus lines carrier contract as (1) it keeps the ball in the air and (2) as we,re adding members at a rapid rate at least we have something behind the members as as it stands right now we,re selling a product that doesn't exsist so put some thought into our options as no decent carrier is gonna pick up this business till I straighten out the 6 Cease and desist orders ,although we have paid premium'and have paid all claims of members.Additionally we,re going to sue worthy beema and seek an original attachment for purposes of obtaining service number (1) and (2) to show the dois and further corroborate were not the bad guys. And to get finding from a court of record that the dois will have to acknowledge even though theyll still have their regulatory powers.ill check in after our meeting w the tenn DOI.If you have a better idea let me know.Thanks

EX. 4

From: DiOrio, Erica on behalf of Rousseau, Jule
Sent: Monday, March 01, 2010 11:58 AM
To: BPosey@SDSfirst.com
Cc: bhendricks@evanspetree.com; Rousseau, Jule; Kroll, Elliott; DiOrio, Erica
Subject: Current Status
Attachments: Scan_Attachment0.PDF

Dear Mr. Posey,

Please see attached.

Thanks you,
Erica

Erica Di Orio
Legal Secretary
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
Tel: (212) 498-6523
Fax: (212) 592-1500
edlorio@herrick.com
www.herrick.com

EX. 5

HERRICK

NEW YORK
NEWARK
PRINCETON

JULIUS A. ROUSSEAU III
PARTNER
Direct Tel: 212.592.1493
Direct Fax: 212.545.3381
Email: jrousseau@herrick.com

March 1, 2010

VIA E-MAIL

Mr. Bart S. Posey
Smart Data Solutions, LLC
4676 Highway 41 North
Springfield, TN 37172

Re: Current Status

Dear Bart:

This will summarize the key points of discussions Bill and I had last week with the Texas DOI and Express Scripts. I also set forth our recommendations for immediate action.

The first of the bad news is from Express Scripts, which Bill has probably already shared with you. It does not appear likely that this company will extend the provision of benefits beyond today.

The next piece of bad news comes from Texas, a state that has at least 10% of ATA members and one of the few that has not issued a cease and desist order. However, it is clear that Chris Orr, the investigator, understands the legal and practical implications of the ATA/SDS business better than any of the other states with whom I have talked. The bottom line from Ore is that, to the extent any additional moneys are collected from Texas residents, do not expect any leniency or cooperation hereafter. It also appears that he is not fully satisfied that Worthy, not you, has pocketed the premium dollars, and Bill and I assured him that we could provide banking details to show that, in fact, the money was paid to accounts as directed by Worthy that you do not control. It is imperative to provide that information to him, as well as to the other states.

At this point, I have no choice but to recommend the following:

1. Cease accepting, drawing or collecting money from any one in any state.

2. Any funds that have been drawn, collected or received from members for March 2010 should be immediately refunded.

3. A mailing needs to be prepared to all members explaining, among other things, that the plan is not and has not been insured since August 2009, that the Multi-Plan

benefits ceased in December and the Express Scripts benefits ceased at the end of February, that ATA can no longer accept membership dues related to the provision of health insurance and that, until further notice, ATA can not provide health insurance. It would be acceptable, I believe, to advise the members that you are diligently working to find a licensed company to provide the coverage and are hopeful that it could be effective from March 1, if not even sooner, and ATA will provide immediate notice when that becomes available and ask for their participation.

4. Terminate all Oklahoma members.

5. Commence the actions against Worthy and Choi.

6. Advise Tennessee of the current status.

As you can tell, the program is at an immediate standstill. Bill and I are happy to discuss all of these points when you are ready.

Sincerely,

Jule Rousseau

JAR:ed

cc: Elliott Kroll
William L. Hendricks, Jr.