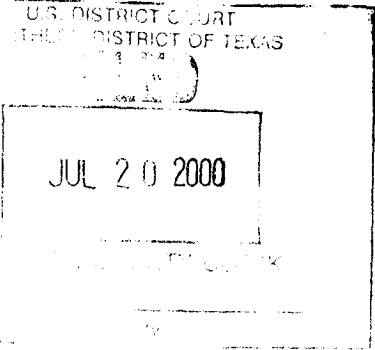


IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



MICHAEL J. QUILLING, RECEIVER FOR §  
HOWE FINANCIAL TRUST, MVP §  
NETWORK, INC. D/B/A MVP TRUST, §  
AND TREDS FINANCIAL TRUST §

PLAINTIFF, §

v. §

JAMES W. CONWAY, AN INDIVIDUAL AND, §  
JAMES W. CONWAY, P.S.C., A KENTUCKY §  
PROFESSIONAL SERVICES CORPORATION §

DEFENDANTS. §

CIVIL ACTION No. 3:99-CV-2699-M

**PLAINTIFF'S OBJECTIONS TO FINDINGS AND RECOMMENDATION**  
**OF THE UNITED STATES MAGISTRATE AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff, Michael J. Quilling, the Receiver ("Receiver") appointed by the Court in the above-entitled cause, and files this his Objections to Findings and Recommendation of the United States Magistrate and in support would show the Court as follows:

- 1. *Summary*
  - a. *Undisputed Facts*

The Receiver filed his Original Complaint and instituted this lawsuit against James W. Conway, an individual and James W. Conway, P.S.C., a Kentucky Professional Services Corporation ("Defendants") on November 29, 1999. The Defendants filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) and supporting Brief on or about January 31, 2000. On March 6, 2000, the Receiver filed a Response to the Defendants' Motion and Brief. On April 24, 2000, the Receiver filed his First Amended Complaint. On April 24, 2000, the Defendants filed a Motion to

Strike portions of the Receiver's Response and a Reply to the Receiver's Response. On April 25, 2000, the Receiver filed a Response to the Motion to Strike.

The Honorable Jeff Kaplan, United States Magistrate Judge filed his Findings and Recommendation ("Recommendation") on July 10, 2000.

*b. Objections to Magistrate's Recommendation*

In his Recommendation, Magistrate Kaplan found that the Court did not have personal jurisdiction over the Defendants and, therefore, recommended the granting of the Defendants' Motion, pursuant to Fed. R. Civ. P. 12(b)(2). The Magistrate did not rule on the Fed. R. Civ. P. 12(b)(6) aspect of the case since these issues became moot because of his recommendation regarding the 12(b)(2) issue. The Magistrate found a lack of personal jurisdiction over the Defendants based upon the following findings:

- The Receiver did not fulfill the statutory requirements of 28 U.S.C. § 754, at the time he filed his Original Complaint, therefore, when the Receiver did comply with the requirements of 28 U.S.C. § 754 at the time he filed his First Amended Complaint, the provisions of 28 U.S.C. § 754 did not relate back to the time of the Receiver's filing of his Original Complaint.
- The Receiver did not provide any evidence that the Defendants had sufficient minimum contacts with the forum state (Texas) to confer personal jurisdiction.

The Receiver objects to the Recommendations because (1) the Magistrate is incorrect in finding that jurisdiction did not relate back to the filing of the Original Complaint when the Receiver filed his First Amended Complaint. *See Recommendation, page 6, fn. 4.*; and (2) the Receiver did produce evidence that the Defendants had sufficient minimum contacts with the State of Texas to confer specific jurisdiction over the Defendants. *See Recommendation, page 7, section C.*

## 2. *Argument and Authorities*

- a. *When the Receiver complied with the provisions of 28 U.S.C. § 754 at the time he filed his First Amended Complaint, jurisdiction related back to the time of the filing of the Original Complaint.*

The crux of the Receiver's argument is that the Magistrate was simply incorrect when he found that the relation back doctrine did not apply when the Receiver filed his First Amended Complaint. As his authority for this proposition of law, the Magistrate cites, *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270, fn. 21 (5<sup>th</sup> Cir. 1981), and *Lamb v. United States Postal Service*, 852 F.2d 845, 847 (5<sup>th</sup> Cir. 1988). *See Recommendation, page 6, fn. 4.* However, these cases, and specifically the footnote cited in the Recommendation, are clearly distinguishable from the present case.

### i. The *Prejean* and *Lamb* analysis does not apply to this case.

In *Prejean*, the Fifth Circuit held that, "... personal jurisdiction must exist at the time **service is made**, ...). *Id. at fn. 21.* However, the Magistrate cited the footnote for the proposition that, "Here, the Receiver neither alleged nor proved an adequate basis for jurisdiction over defendants at the time **suit was filed.**" *See Recommendation, page 6.* It should be initially noted that there is a legal difference between when **service is made** versus when **suit was filed**. If this Court finds that an amended complaint's jurisdiction allegation relates back to the time of the filing of the original complaint, as the authority cited by the Receiver below holds, then the distinction between filing and service is materially important. The Magistrate is correct when he states, "Not surprisingly, there is paucity of authority on this issue." *See Recommendation, page 5.* In continuing his analysis, the Magistrate finds that the relation back doctrine does not apply to jurisdictional allegations citing *Lamb v. United States Postal Service*, 852 F.2d 845 (5<sup>th</sup> Cir. 1988). However, the Receiver respectfully contends that in reaching his conclusion, the Magistrate applied the wrong legal analysis. The Receiver did not add a new party in his amended complaint. The analysis the

Magistrate applied in this case ONLY applies when a new party is being added, through an amended complaint, and the statute of limitations has expired.

The *Lamb* decision does not apply to this case because in the *Lamb* case, the issue was, **can adding a new defendant in an amended complaint, after the statute of limitations has expired, relate back to the date of the filing of the original complaint.** In *Lamb*, the Fifth Circuit applied the four prong test (for adding a **new** defendant after the limitations has run) as set forth by the United States Supreme Court in *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). One of the elements of the four prong test, as set forth in *Schiavone*, is that the party to be added should not be prejudiced. *Id. at 847*. Magistrate Kaplan applied the *Schiavone* test to the present case. This was error because in the present case, the Receiver did not add a new defendant. The Receiver simply amended his complaint to comply with the provisions of 28 U.S.C. § 754 in order to correct the technical defect relating to personal jurisdiction. There is a big difference between adding a new defendant and adding a new jurisdictional allegation as to an existing defendant.

**ii. The relation back doctrine does apply to this case.**

In addition, the Magistrate apparently did not consider cases which are directly on point to the present issue before this Court, which is whether an amended complaint may confer personal jurisdiction over a defendant pursuant to the relation back doctrine. According to the foremost treatise on federal procedure, it is settled law that amendments which cure a defective statement of subject matter jurisdiction, **personal jurisdiction**, or venue will relate back to the date of the filing of the original complaint, pursuant to Fed. R. Civ. P. 15(c). *6A Wright, Miller, & Kane, Federal Practice & Procedure, Civil 2d § 1497 (West 2000)*. In accord, several different federal courts have ruled that an amended complaint does, indeed, relate back to the filing of the original complaint and

therefore, pursuant to an amended complaint, personal jurisdiction is conferred upon the court *even if* there was a defect as to the original complaint. In short, an amended complaint can cure technical defects in the original complaint relating to personal jurisdiction. *Kammerman v. Pakco Companies, Inc.*, 75 F.R.D. 673, 675 (S.D. N.Y. 1977). Such is precisely the case here.

In *Kammerman*, as in this case, the amended complaint was served by serving the attorney for the defendant while the defendant's motion to dismiss was pending before the Court. *Id.* The amended complaint added a claim pursuant to the Securities and Exchange Act, which provided for nationwide service of process. *Id. at 674.* The court ruled that by amending the complaint to add a provision which provides for a nationwide service of process, the allegation **related back** to the date of the filing of the original complaint and therefore, personal jurisdiction was conferred upon the court, by the amended complaint, pursuant to the relation back doctrine. *Id. at 675; citing Kane v. Central American Mining & Oil, Inc.*, 235 F.Supp. 559, 565-67 (S.D.N.Y. 1964)<sup>1</sup>. Likewise, the Second Circuit has held that an amended complaint can cure a defective allegation of personal jurisdiction. *MacGowan v. Barber*, 127 F.2d 458, 459-60 (2d Cir. 1942). Finally, in a case involving unspecified jurisdictional defects, the Fifth Circuit held that the filing of a "proper, decent and acceptable amendment" would relate back to the original filing, thus eliminating any question concerning the statute of limitations and, apparently, curing any jurisdictional defect. *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979), *cert. denied*, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434. These cases are directly on point and the Receiver would respectfully request that this Court adopt the analysis and findings of these courts.

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<sup>1</sup> In *Kane*, the court held that the amended complaint, which added a Securities Exchange Act violation which provided for nationwide service of process, related back. The court further held, "The defendants having appeared, there is no requirement that, upon amendment of the complaint, service of process upon them be effected anew." *Id. at 566.*

Although the Magistrate found there to be a jurisdictional defect as to the Receiver's Original Complaint, Fed. R. Civ. P. 15(c) and the case law cited above provides the Receiver the opportunity to amend his complaint. When he did so, the jurisdictional allegations related back to the filing of the Original Complaint. The Magistrate's Recommendations to the contrary should not be adopted by this Court and the Receiver's lawsuit against the Defendants should be allowed to continue before this Court.

**iii. The case should be transferred, not dismissed.**

The Magistrate's Recommendation has a draconian effect upon the Receiver's case. If the relation back doctrine is found not to apply, the effect is to eliminate the Receiver's ability to pursue the case because of limitations issues. This result is especially harsh in that the Receiver was ORDERED by this Court (through Judge Kendall) to file all his actions here<sup>2</sup>. All the Receiver did was comply with the Court mandate. Instead, at a maximum, the Defendants should be entitled to have the case transferred to a federal district court in Kentucky, but the case should not be dismissed. The Supreme Court has noted that one of the circumstances which can justify a transfer, in the interest of justice, is when the statute of limitations has run and dismissal would prevent the plaintiff from refileing the case in the proper forum. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962). Generally, a transfer is preferred over dismissal. *DeMoss v. First Artists Production Co., Ltd.*, 571 F.Supp. 409, 412 (D.C.Ohio 1983), *appeal dismissed*, 734 F.2d 14 (6<sup>th</sup> Cir. 1984).

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<sup>2</sup> See Order Appointing Temporary Receiver dated November 13, 1998, paragraph E, page 4. Thereafter, on February 24, 2000, the Court, through Judge Lynn, issued an Order Reappointing Receiver which incorporated the provisions of the November 13, 1998 Order.

iv. **The Defendants will not be prejudiced.**

The Magistrate further finds that the defendants would be prejudiced because the statute of limitations has expired. This definition of prejudice is contrary to case authority. *S.E.C. v. Equity Service Co.*, 632 F.2d 1092, 1095 (3rd Cir. 1980) (allowing a receiver to reassume jurisdiction after a late Sec. 754 filing, when there was no prejudice to other claimants, finding that prejudice means **lack of notice**). The entry of a permanent appointment order sets a new 10-day period running. *S.E.C. v. American Capital Investments, Inc.*, 98 F.3d 1133 (9th Cir. 1996), *abrogated on other grounds*, *Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1012 L.Ed.2d 210 (1998); *see also*, *S.E.C. v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C.Cir. 1996) (reappointment of receiver will start the ten-day clock of § 754 ticking anew). Here, the Defendants clearly had notice of the Receiver's allegations when they were first served with the Original Complaint, a time at which the limitations period had not expired.

b. ***In the alternative, the Receiver provided evidence that the Defendants had sufficient minimum contacts with Texas in order to confer specific jurisdiction.***

The Receiver submitted evidence, as part of the Receiver's Response to the Defendants' Motion to Strike filed on April 25, 2000, that the Defendants have availed themselves to the jurisdiction of this Court by having maintained sufficient minimum contacts with the State of Texas to confer specific jurisdiction over the Defendants. In particular, in support of his Motion to Dismiss, Defendant James Conway filed an affidavit in which he stated that he had neither solicited nor transacted business within this judicial district or within the State of Texas. However, as set forth in Exhibit B, attached to the Receiver's Response to the Defendants' Motion to Strike, the evidence demonstrates that Mr. Conway had solicited a twenty-eight-million dollar (\$28,000,000.00) project in Texas associated with transactions which formed the basis of this lawsuit.

i. **Mr. Conway's sworn affidavit in support of his Motion to Dismiss contains a false position.**

In his affidavit to support his Motion to Dismiss, Mr. Conway, an attorney, swears under oath that:

I have neither **solicited** nor transacted business within this judicial district or within the State of Texas.

*Affidavit of James Conway, page 2, paragraph 8*, a copy of which is attached to this Objection as Exhibit "A" and incorporated by reference as if fully set forth. This statement by Mr. Conway is false. Attached as Exhibit "B" to this Objection and incorporated herein by reference is a letter from James W. Conway to Mr. Darney Butler.<sup>3</sup> As can be observed, Mr. Conway is soliciting/transacting business with the Butler Group of Companies. Not only is the Butler Group of Companies in Texas, it is within the Northern District (Dallas). The deal Mr. Conway was trying to secure would have paid out twenty-eight million (\$28,000,000.00) dollars. Had this deal gone forward, it would not have been a small or minimal business transaction. This business transaction involved Howe Financial which is a Relief Defendant in the underlying SEC action. Specific jurisdiction exists when the defendant's contacts with the forum state arise from, or are directly related to, the plaintiff's cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8, 104 S.Ct. 1868, 1872 n.8 (1984). *See also, Electrosorce, Inc. v. Horizon Battery Tech., Ltd.*, 176 F.3d 867, 871 (5<sup>th</sup> Cir. 1999).

**3. Conclusion**

In conclusion, the Receiver would respectfully request this Court to not adopt the Recommendation submitted by the Magistrate and deny the Defendants' Motion to Dismiss on the grounds that the relation back doctrine applies to this case and that the jurisdictional allegations

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<sup>3</sup> This letter is authenticated by Mr. Conway's deposition, relevant excerpts of which were attached to the Receiver's Response to Defendants' Motion to Strike.



contained in the Receiver's First Amended Complaint related back to the filing of his Original Complaint. Therefore, pursuant to 28 U.S.C. § 754, this Court has personal jurisdiction over the Defendants. In the alternative, the Receiver has also produced evidence that the Defendants had sufficient minimum contacts with the State of Texas in order to confer specific jurisdiction over the Defendants. In the alternative, the Receiver requests that the case be transferred to Kentucky instead of dismissed.

WHEREFORE PREMISES CONSIDERED, the Receiver respectfully requests this Court to not adopt the Recommendation by the Magistrate and deny the Defendants' Motion to Dismiss and for any such other relief, general or special, either in law or in equity, to which he may show himself justly entitled.

Respectfully submitted,

By:

  
Michael J. Quilling

S.B. #16432300

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ATTORNEYS FOR RECEIVER

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 20<sup>th</sup> day of July, 2000 a true and correct copy of this Response was sent, via the U.S. Postal Service, certified mail, R.R.R., to the following:

Mr. Gary D. Elliston  
DeHay & Elliston, L.L.P.  
3500 Bank of America Plaza  
901 Main Street  
Dallas, Texas 75202-3736

Michael J. Quilling

Sender: RE: 911.50 - OBJECTIONS TO MAGISTRATE'S FINDINGS	
<del>CAMP A. Trusevich</del> QUILLING SELANDER CUMMISKEY 2001 BRYAN STREET, SUITE 1800 DALLAS, TX 75201	
4a. Article Number p 903 381 392	4b. Service Type <b>CERTIFIED</b>
2. <input type="checkbox"/> RESTRICTED DELIVERY	
5. Received By: (Please print clearly)	6. Signature: ( <input type="checkbox"/> Addressee or <input checked="" type="checkbox"/> Agent ) <b>X</b>
 903 381 392	
8. Addressee's Address (if different from address used by sender.) Secondary Address / Suite / Apt. / Floor (Please Print Neatly)	3. Article Addressed to: JAN 21 2000 GARY D. ELLISTON DEHAY & ELLISTON, L.L.P. 3500 BANK OF AMERICA PLAZA 901 MAIN STREET DALLAS TX 75202-3736
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