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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

HANNOVER CORPORATION OF AMERICA, ET AL. )

Plaintiffs, )

v. )

DONALD L. BECKNER, ET AL. )

Defendants. )

CIVIL ACTION  
NO. 96-237

**BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,  
AMICUS CURIAE, IN OPPOSITION TO MOTION TO FILE  
THIRD-PARTY COMPLAINT AGAINST WILLIAM G. HAYS JR.**

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The Securities and Exchange Commission submits this brief as amicus curiae in opposition to the defendants' Motion for Leave to File Third-Party Complaint Against William G. Hays, Jr. The proposed third-party complaint for contribution alleges that Hays was negligent in performing his duties as Special Master in a Commission law enforcement action brought in the Eastern District of Louisiana<sup>1/</sup> against the corporations that are now plaintiffs in this case. Because Hays was serving as a judicial officer and carrying out the orders of the court in the Commission enforcement action, he is entitled to absolute immunity from damages liability. In addition, he is not subject to suit in this Court because the court that appointed him has not given its consent. Accordingly, defendants' motion should be denied.

**INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION**

Court-appointed officers, such as special masters and receivers, perform essential functions in the Commission's efforts to protect public investors. The Commission frequently

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<sup>1/</sup> Civ. Action No. 91-1422 (E.D. La.).

seeks the appointment of these court officers to uncover fraudulently obtained funds or to protect assets which could be restored to defrauded investors.<sup>2/</sup> Damages actions against individuals for their conduct while serving in these judicial capacities could substantially interfere with the Commission's remedial efforts by reducing the pool of individuals willing to serve in those capacities. Moreover, damages actions challenging a special master's performance of his duties could also interfere with the appointing court's ability to control the scope and expense of the special master's assignment.

This case presents a threat of such interference. At the request of the Commission, Hays was appointed by the United States District Court of the Eastern District of Louisiana as Special Master to conduct an accounting of the proceeds from the fraudulent sale of unregistered securities by the plaintiff corporations and their principals. While conducting his accounting, Hays unsuccessfully sought documents relating to the ongoing activities of the plaintiffs and their principals, who refused to produce any documents pertaining to their activities occurring after the preliminary injunction was entered. During the time that Hays was serving as Special Master, the principals continued the fraudulent sale of unregistered securities in violation of the preliminary injunction that was entered against them. Defendants, who were counsel representing the plaintiffs and their principals during the time that the documents were withheld, now seek contribution from Hays for any damages for which they may be found liable in connection with the ongoing fraudulent sales. Defendants have not, however, sought the appointing court's leave

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<sup>2/</sup> See, e.g., SEC v. Coates, 1996 WL 476987 (S.D.N.Y. 1996) (special master appointed to determine best method of reimbursing defrauded shareholders); SEC v. Courtois, Fed. Sec. L. Rep. (CCH) ¶ 92,000 (S.D.N.Y. 1985) (Special Escrow Agent appointed to formulate plan for disbursement of disgorgement fund).

to file this action against Hays. Defendants' action threatens to discourage individuals from serving as special masters, and also threatens to take away the appointing court's control over its officer.

## ARGUMENT

### 1. Special Masters Are Judicial Officers Entitled To Absolute Immunity.

Fed. R. Civ. P. 14(a) requires that defendants obtain leave before filing this third-party complaint. Leave should be withheld where it "would foster an obviously unmeritorious claim." Shafarman v. Ryder Truck Rental, Inc., 100 F.R.D. 454, 459 (S.D.N.Y. 1984). Defendants' third-party complaint is "obviously unmeritorious" -- it is barred by absolute immunity. Immunity is a proper ground for denying a Rule 14 motion. See FDIC v. diStefano, 839 F. Supp. 110, 120 (D.R.I. 1993) (denying Rule 14 motion where action was barred by sovereign immunity).

Absolute immunity serves not merely to bar an award of damages, but to bar a suit for damages altogether. Mireles v. Waco, 502 U.S. 9, 10 (1991) (per curiam) ("Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages."). The absolute immunity of judicial officers is long established. See Bradley v. Fisher, 80 U.S. 335 (1871). The policy supporting absolute immunity is also well established: "Liability to answer to every one who might feel himself aggrieved by the action of the judge \* \* \* would destroy that independence without which no judiciary can be either respectable or useful." Id. at 347. In determining whether absolute immunity shields an officer's acts, the Supreme Court has applied a "functional approach, which looks to the nature of the function performed, not the identity of the actor who performed it." Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993) (internal quotation marks and citations omitted). Accordingly, absolute immunity has not been

limited to judges, but has been extended to “others who perform functions closely associated with the judicial process.” Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). See also Johnson v. Kegans, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921 (1989) (“Officials whose responsibilities are ‘functionally comparable’ to those of a judge are also absolutely immune from liability.”) (quoting Butz v. Economou, 438 U.S. 478, 511-512 (1978)).

The courts of appeals have followed the Supreme Court’s lead, applying absolute judicial immunity to arbitrators, Corey v. New York Stock Exchange, 691 F.2d 1205, 1208-11 (6th Cir. 1982), commissioners, Ashbrook v. Hoffman, 617 F.2d 474, 476-77 (7th Cir. 1980), bar association disciplinary committee members, Slavin v. Curry, 574 F.2d 1256, 1266 (5th Cir. 1978), modified on other grounds, 583 F.2d 779 (5th Cir. 1978 (per curiam), rev’d sub nom. on other grounds, Sparks v. Duval County Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc), medical licensing boards, Bettencourt v. Board of Registration in Medicine, 904 F.2d 772 (1st Cir. 1990), parole board members, Hulsey v. Owens, 63 F.3d 354, 356-358 (5th Cir. 1995), probation officers, Johnson, 870 F.2d at 997, magistrates, Pressly v. Gregory, 831 F.2d 514, 517 (4th Cir. 1987), bankruptcy trustees, Boullion v. McClanahan, 639 F.2d 213, 214 (5th Cir. 1981) (per curiam), and receivers, Davis v. Bayless, 70 F.3d 367, 373-74 (5th Cir. 1995); T & W Inv. Co., Inc. v. Kurtz, 588 F.2d 801, 802 (10th Cir. 1978); Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976).<sup>3/</sup> Most importantly for the purposes of this case, absolute immunity has also been applied to special masters. Atkinson-Baker & Assoc., Inc. v. Kolts, 7 F.3d 1452, 1454-55 (9th Cir. 1993); Boston v. Lafayette County,

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<sup>3/</sup> The Supreme Court has stated that judicial immunity also extends to grand jurors. See Imbler v. Pachtman, 424 U.S. 409, 423 n. 20 (1976).

Mississippi, 744 F. Supp. 746, 750-51 (N.D. Miss. 1990), aff'd, 933 F.2d 1003 (5th Cir. 1991).

Judicial immunity “includes not only officials performing discretionary acts of a judicial nature, but also individual employees who assist such an official and who act under that official’s direction in performing functions closely tied to the judicial process.” Hill v. City of New York, 45 F.3d 653, 660 (2d Cir. 1995) (citation omitted). Judicial immunity extends to acts of even an administrative character if they are done pursuant to the direction of a judicial officer. Kincaid v. Vail, 969 F.2d 594, 601 (7th Cir. 1992), cert. denied, 506 U.S. 1062 (1993). Executing the order of a court “is intrinsically associated with a judicial proceeding,” and is therefore shielded by absolute immunity. Bush v. Rauch, 38 F.3d 842, 847 (6th Cir. 1994). Absolute immunity for officials who carry out the court’s order is essential to the maintenance of the court’s authority:

[O]fficials must be permitted to rely upon a judge’s findings and determinations to preserve the integrity of the court’s authority and ability to function. It does not seem logical to grant immunity to a judge in making a judicial determination and then hold the official enforcing or relying on that determination liable for failing to question the judge’s findings. This would result in the official second-guessing the judge who is primarily responsible for interpreting and applying the law.

Bush, 38 F.3d at 848. See also Kermit Construction, 547 F.2d at 3 (denying receiver immunity

“would make the receiver a lightning rod for harassing litigation aimed at judicial orders. \* \* \*

[A] fear of bringing down litigation on the receiver might color a court’s judgment in some cases; and if the court ignores the danger of harassing suits, tensions between the receiver and judge seem inevitable.”).

The Fifth Circuit recently has held that “an official acting within the scope of his authority is absolutely immune from a suit for damages to the extent that the cause of action arises from his compliance with a facially valid judicial order issued by a court acting within its jurisdiction.”

Mays v. Sudderth, 97 F.3d 107, 113 (5th Cir. 1996).<sup>4/</sup> In relevant part, the order appointing

Hays as Special Master directed him to:

perform an accounting of the defendants' offering of Hannover securities (including Preacquisition Investment Units and Notes), including but not limited to the defendants' solicitation, receipt, disposition and use of proceeds from their offering of Hannover securities (including Preacquisition Investment Units and Notes). In addition to all powers granted by Rule 53 of the Federal Rules of Civil Procedure, the Special Master shall have the power to compel, including by subpoena, the appearance and testimony of all persons and the production of originals of all records, of any sort whatsoever, within the possession, custody, or control of any person, when such persons or records reasonably may be expected to have or contain information that will assist the Special Master in the performing of his accounting.

Thus, the order delegates to the Special Master responsibility for factfinding, a function "normally performed by a judge" ( Stump v. Sparkman, 435 U.S. 349, 362 (1978)) under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 52(a) ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially"). Individuals who assist judges in the process of factfinding have traditionally been given absolute immunity. See Johnson, 870 F.2d at 996 ("Witnesses, including police officers, are absolutely immune from liability for their testimony in judicial proceedings, and grand jurors, and jurors, are likewise absolutely immune from liability arising out of their service.") (citations omitted). This immunity is essential to the integrity of the court's decision-making process:

The "cluster" of absolute immunities that protect participants in judicial and other adjudicatory proceedings exist to help guarantee an independent, disinterested decision-making process. These absolute immunities prevent the harassment and intimidation that could otherwise result if disgruntled litigants \* \* \* could vent

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<sup>4/</sup> The facts relating to Hays' duties as Special Master are not in dispute. Because his acts "are so plainly within the usual powers of [his office] \* \* \* the court [can] take judicial notice of the facts necessary to its finding of absolute immunity." Tarter v. Hury, 646 F.2d 1010, 1011 n.3 (5th Cir. 1981).

their anger by suing either the person who presented the decision maker with adverse information or the person or persons who rendered an adverse decision. When determining the scope of judicial immunity, the requirements of judicial acts and jurisdiction are to be broadly construed to effectuate these policies. A similar approach, of course, should be taken when determining whether an act by a prosecutor, juror, grand juror, or witness is integral to the judicial process and therefore protected by absolute immunity.

Johnson, 870 F.2d at 996-97. Defendants have not alleged that the appointing court exceeded its jurisdiction in making Hays the Special Master. Nor have they alleged that the scope of Hays' duties under the appointing order was beyond the court's authority or that Hays exceeded his authority under the order. Instead, defendants' third-party complaint charges that Hays was negligent as Special Master for not going beyond the terms of the order to uncover the ongoing fraud that was being committed by the plaintiff corporations' principals. See, e.g., Complaint ¶ XII. These allegations are barred by absolute immunity because Hays was acting within the scope of the court's order. Mays, 97 F.3d at 113. Any mistake he is alleged to have made in carrying out that order does not negate his absolute immunity. See Mireles, 502 U.S. at 12 ("If judicial immunity means anything, it means that a judge will not be deprived of immunity because the action he took was in error") (citations and internal quotation marks omitted).

2. **This Action Cannot Be Brought Without The Consent Of The Court Which Appointed Hays As Special Master.**

Hays cannot be sued for his conduct as Special Master without the consent of of the court that appointed him. The long-established rule is that an action may not be brought against a receiver without leave of the court by which the receiver was appointed. Ex parte Tyler, 149 U.S. 164, 182 (1893); Barton v. Barbour, 104 U.S. 126, 128 (1881); J.I. Case Plow Works v. Finks, 81 F. 529 (5th Cir. 1897); National Union Fire Ins. Co. v. Ambassador Group, Inc., 691 F. Supp.



618, 624 (E.D.N.Y. 1988); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia, 311 F. Supp. 149, 160 (S.D.N.Y. 1970); Love v. Louisville & E.R. Co., 178 F. 507, 509 (W.D. Ky. 1910); Balboa Improvements Ltd. v. Bartlett, 99 B.R. 966 (B.A.P. 9th Cir. 1989). Accord, IV Pomeroy's Equity Jurisprudence § 1336 (Spencer W. Symons ed., 5th ed. 1941). 5/ This rule affords the receiver, as an officer of the court that appointed him, protection from litigation that could interfere with the discharge of his duties. It additionally ensures that adjudications as to liability will be made by the court most familiar with the role assigned to the receiver in the context of the litigation in which he was appointed.

This general rule applies to special masters as well as receivers. Both are officers of the court, and both should be protected from having to defend against litigation in other courts. Increasing the exposure of receivers and special masters to litigation would make it more difficult to find persons willing to serve in those capacities. Moreover, the court that appoints a special master is in the best position to determine whether his conduct is consistent with the terms of the appointing order. Finally, in those unusual circumstances in which another forum might be more appropriate, the appointing court can give leave for the action to proceed there. Defendants have not sought the consent of the court that appointed Hays as Special Master. Accordingly, their

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5/ A statutory exception to this rule provides that "[R]eceptors or managers of any property \* \* \* may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. 959(a). The statute, however, is inapplicable here; it does not mention special masters, and because it is an exception, it should be narrowly construed. Additionally, as noted above, the Special Master was charged only with rendering an accounting, not with carrying on business connected with property of the estate, so the conduct at issue cannot properly be characterized as an "act[] or transaction[] in carrying on business" within the terms of the statute. See Balboa Improvements, 99 B.R. at 970 (Section 959(a) "was intended to permit actions redressing torts committed in furtherance of the debtor's business").

motion must be denied.

### CONCLUSION

For the foregoing reasons, defendants' Motion for Leave to File Third-Party Complaint should be denied.

Respectfully submitted,

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December 31, 1996