



firm of DMH Stallard and its partner Christopher John William Stenning (“Stenning”) at ABC's request to act as E&J's agents in investigating the validity of the Albatross Bond(s) and the letter of credit backing the bonds.

3. When E&J contacted DMH Stallard, it represented to E&J that it was a top 100 English law firm with expertise in conducting due diligence for bonds and letters of credit. It agreed to act on behalf of E&J in connection with this investigation. Subsequently, DMH Stallard issued an opinion letter stating that the Albatross Bond(s) and the letter of credit were valid and enforceable under English law.

4. Plaintiff is now alleging that the Albatross Bond(s) and the letter of credit backing the Albatross Bond(s) are fraudulent. Moreover, he is alleging that E&J and Erwin are legally liable for the alleged negligent due diligence conducted by DMH Stallard and its partner Stenning.

5. Specifically, in response to Erwin's Interrogatory No. 1 seeking to determine the basis for Plaintiff's contentions that Defendants were grossly negligent, Quilling responded, *inter alia* as follows:

- E&J accepted inadequate due diligence in February and March 2006 from DMH Stallard related to the Albatross bonds.
- E&J failed to notify investors in March 2006 about the inadequacy of due diligence regarding Albatross.

See Appendix, pg. 6.

6. Plaintiff gave the identical answer in response to the following interrogatories.

- Erwin's Interrogatory No. 2 seeking the basis for Plaintiff's allegations that Defendants' acts constituted malice, fraud and oppression;

See Appendix, pg. 10.

- Erwin's Interrogatory No. 5 seeking the basis for Plaintiff's allegations that the transfers from ABC to Defendants were fraudulent as a matter of law;

See Appendix, pg. 18.

- E&J's Interrogatory No. 5 seeking the basis for Plaintiff's allegations that E&J aided and abetted corporate waste;

See Appendix, pg. 36.

- E&J's Interrogatory No. 6 seeking the basis for Plaintiff's allegations that E&J committed professional malpractice/negligence.

See Appendix, pg. 39-40.

7. Although Plaintiff is contending that DMH Stallard's due diligence was inadequate, he has not sued DMH Stallard or its former partner Stenning. Instead, he is seeking to hold E&J and Erwin liable, as DMH Stallard's and Stenning's principals, for their alleged negligence. E&J and Erwin now seek leave to implead DMH Stallard and Stenning under Rule 14(a) of the Federal Rules of Civil Procedure.

#### **ARGUMENT AND AUTHORITY**

8. Rule 14(a) permits a defending party to bring a new party into the litigation if the absent party is or may be liable to the defending party for all or part of the claim against it. See Fed. R. Civ. P. 14(a)(5). The purpose of Rule 14(a) is to promote judicial efficiency by eliminating circuitry of action. See *e.g. Powell Inc. v. Abney*, 83 F.R.D. 482, 485 (S.D. Tex. 1979). It simplifies and expedites litigation by avoiding a situation where a defendant is found liable and then must bring a new action against a third party for indemnity or contribution. See *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008).

9. The court considers the following factors when deciding whether to grant leave to bring in a third party: 1) prejudice to the other parties; 2) undue delay by the third-party plaintiff;

3) the substance to the third-party claim; and 4) advancing the purposes of Rule 14, such as avoiding duplicative lawsuits on closely-related issues. *See* 6 *Charles Alan Wright & Arthur R. Miller*, FED. PRAC. & PROC. §1443, at 300-11 (2d ed. 1990). These are the same factors a court uses any time it considers granting leave to file an amended pleading. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9L. Ed. 2d 222 (1962). An analysis of these factors shows that the Court should give Defendants the requested relief.

10. First, there will be no prejudice to the other Parties if this motion is granted. Discovery is still in its early stages. No depositions have been taken. Trial is more than 11 months away. Indeed, only one of four parties to this litigation is opposed to the impleader of DMH Stallard and Stenning.

11. There has been no undue delay on the part of the Defendants in bringing this Motion. This Motion is brought four months prior to the deadline set by the Court for Rule 14(a) motions, which is August 28, 2009. It is brought within weeks of Plaintiff serving his interrogatory responses in which Plaintiff first asserted that he is seeking to impute DMH Stallard's and Stenning's alleged negligence to Defendants.

12. DMH Stallard and Stenning were E&J's and Erwin's agents in connection with the due diligence. *See e.g. Gudger v. Manton*, 134 P.2d 217, 224 (Cal. 1943) (California attorney was agent of New York attorney); *Clark Equip. Co. v. Wheat*, 154 Cal. Rptr. 874, 884 (Cal. App. 1979) (attorney may be agent of the client). A principal who incurs a loss as the result of the negligence of its agent is entitled to indemnity under the common law. *See e.g. Fireman's Fund Ins. Co. v. Haslam*, 35 Cal. Rptr. 2d 135, 140 (Cal. App. 1994). *See also St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 178 (Tex. App. – Amarillo 1997, pet. denied). An indemnity claim based on respondeat superior is a classic claim that is subject to Rule 14(a).

See e.g. *Thompson v. American Export Lines, Inc.*, 15 F.R.D. 125, 126 (S.D.N.Y. 1953) (an employer sued on the theory of respondeat superior may implead his employee who was guilty of active negligence). As E&J and Erwin's Third-Party Complaint states a claim for derivative relief, the motion is proper under Rule 14(a). See e.g. *Baylor Univ. Med. Center v. Epoch Group, L.C.*, No. 3:03-CV-2392-G, 2005 U.S. Dist. LEXIS 44681, at 13-14 (N.D. Tex. Sept. 1, 2005).

13. Moreover, a Rule 14(a) motion is properly granted when the applicable state's law provides for contribution between joint tortfeasors. See e.g. *Travelers Ins. Co. v. Busy Elec. Co.*, 294 F.2d. 135 (5th Cir. 1961). In this case, the law of the potentially applicable states provide for contribution between and among multiple tortfeasors. See Cal. Civ. Proc. Code § 875 et seq. (2008); *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 912-13 (Cal. 1978) (superseded by statute on other grounds); TEX. CIV. PRAC. & REM. CODE § 33.015.

14. Granting E&J and Erwin's motion will promote the goal of Rule 14(a). As the alleged acts and omissions of DMH Stallard and Stenning form part of the basis of the Plaintiff's claims against E&J and Erwin, it will be more efficient to have all of the litigation combined in one action. Moreover, it will eliminate the possibility of inconsistent results which can occur if these issues are litigated in two separate actions.

### CONCLUSION

15. A court should freely grant leave to amend or supplement pleadings when justice requires it. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct 227, 9L. Ed. 2d 222 (1962); *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002). The purpose of Rule 14(a) is to allow a defendant with a claim for contribution and/or indemnity to bring in the third party in order to avoid inconsistent results and the unnecessary expense of litigating the same

issues. E&J and Erwin have a valid claim for common law indemnity and/or contribution against DMH Stallard and Stenning. No Party will be prejudiced by E&J's filing of a Third-Party Complaint against DMH Stallard and Stenning. Significantly, only one of the four Parties to this litigation is objecting to this Motion. Granting leave to file the Third-Party Complaint will not cause undue delay as this Motion is being brought months before this Court's own deadline to add new parties.

**THEREFORE**, Defendants respectfully ask this Court to grant its Motion, Order the Clerk to file Defendants' Third-Party Complaint against DMH Stallard and Christopher J.W. Stenning and to issue summons to them.

Respectfully submitted,

**WILSON, ELSER, MOSKOWITZ, EDELMAN  
& DICKER LLP**


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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served on this 05 day of May, 2009, to all known counsel of record as required by the Federal Rules of Civil Procedure.

  
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Cathlynn H. Cannon