

case. In fact, the Receiver is bringing a cause of action directly against DMH Stallard and Kit Stenning in the United Kingdom. If this Court were to grant Defendants' motion, it would only result in duplicative litigation and greatly increased expenses for all involved. The Receiver proposed several stipulations that would render Defendants' motion moot but Defendants insisted on pursuing this motion without explanation.

BACKGROUND FACTS

1. On November 17, 2006, the United States Securities and Exchange Commission filed a lawsuit against ABC Viaticals, Inc. and others for violations of securities laws.¹ In that case, this Court appointed Plaintiff as Receiver for ABC Viaticals, Inc. and other related companies and trusts (collectively, "ABC").

2. ABC acquired life insurance policies on third parties and sold fractional interests in those policies to investors. Investors were attracted to ABC's offering because it was supposedly guaranteed to pay returns of 30% to 150% by a date certain. It described the product as a "bonded life settlement policy." For each policy, ABC obtained a life expectancy report that supposedly forecast when the insured was likely to die. It also obtained a bond that supposedly guaranteed payment of the death benefit amount if the insured did not die by a date certain (e.g., the life expectancy date plus two years).

3. To add legitimacy to this investment, ABC touted the fact that it hired an independent trustee and escrow agent to handle investor funds and payments for the policies. Defendant Erwin & Johnson, LLP served as the trustee and escrow agent during a period of time from 2005 to 2006. Those duties were principally handled by Defendant Christopher R. Erwin.

4. The Receiver believes Defendants' most important duty is described as follows:

¹ That case is styled *SEC v. ABC Viaticals, Inc., et al.*, Cause No. 3:06-CV-2136-P (N.D. Tex.).

Trustee shall establish a "Policy Premium Payment Account" into which the Grantor will deposit a sum certain for the payment of premiums on the Policy equal to the term of the bond . . .

(Amended Complaint [Dkt. No. 41] at 5.) When the Receiver took over ABC's accounts, he discovered that Defendants had not created separate premium escrow accounts and had not set aside the amount needed to pay premiums on each policy until the bonds matured. That is the principal breach of duty the Receiver alleges in this case. (Id.)

5. Defendants' motion presumes that the Receiver is pursuing causes of action on a completely separate and unrelated matter that has nothing to do with this lawsuit. Defendants explain the basis for their motion as follows:

Plaintiff has alleged that E&J and Erwin were negligent and breached various duties to ABC Viaticals, Inc. ("ABC") by relying on the Third-Party Defendants' due diligence and opinion letter.

(Defendants' Motion for Leave [Dkt. No. 62] at ¶ 1.) It is true that DMH Stallard and Kit Stenning prepared a due diligence report about certain bonds that ABC purchased. It is also true that Defendants viewed that report and relied upon it. That due diligence report, however, is not a subject of this litigation and is not a basis for the Receiver's claims against the Defendants.

6. The Receiver's counsel has made that point abundantly clear. Attached as Exhibit 1 is a true and correct copy of a letter to Defendants' counsel that states as follows:

a. For purposes of this lawsuit, the Receiver is not alleging that Defendants breached any duties by relying upon representations from DMH Stallard or Kit Stenning.

b. The Receiver is stating a damage calculation against Defendants that presumes no liability for the representations made by DMH Stallard and Kit Stenning.

c. The Receiver is filing a lawsuit in the United Kingdom that directly states ABC's claims against DMH Stallard and Kit Stenning for their role in preparing the due

diligence report.² He is not trying to obtain a double-recovery for the same damages against Defendants in this case. In fact, Defendants' counsel in California and the United Kingdom know this and are cooperating with the Receiver in that effort.

7. The Receiver attempted to resolve this matter without undue expense and Court intervention by offering to stipulate the following facts that would render Defendants' motion moot:

a. "The Receiver will not allege that Erwin & Johnson or Chris Erwin breached any duties in the purchase of Albatross bonds for ABC Viaticals. We do not seek any damages for those acts and will not mention it in pleadings or at trial."

b. "The Receiver will not allege that Erwin & Johnson or Chris Erwin breached any duties in the way due diligence was handled for the Albatross bonds. We do not seek any damages for those acts and will not mention it in pleadings or at trial."

c. "The Receiver will not allege that Erwin & Johnson or Chris Erwin breached any duties by soliciting or relying upon the due diligence of DMH Stallard or Kit Stenning. We do not seek any damages for those acts and will not mention it in pleadings or at trial."

(Letter to Defendant's Counsel, Ex. 1.) Without explanation, Defendants refused the proposal and could not articulate any other reason why DMH Stallard or Kit Stenning ought to be involved in this case.

² The Receiver is the only party with standing to bring a claim directly against DMH Stallard and Kit Stenning for damages ABC suffered as a result of the due diligence report. Therefore, the Receiver—not Defendants—will choose the jurisdiction and venue where those claims are litigated. If the Court were to grant Defendants' motion, it would unnecessarily delay this case and obstruct the Receiver's litigation in the United Kingdom.

ARGUMENTS & ANALYSIS

Defendants ask for leave to file a third-party complaint against DMH Stallard and Kit Stenning for indemnity and other relief. (Proposed Third-Party Complaint [Dkt. No. 62-2].)

Federal Rule of Civil Procedure 14 governs third party practice:

A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.

FED. R. CIV. P. 14(a)(1) (emphasis added). Third-party complaints are only proper when “defendant’s right against the third party is merely an outgrowth of the same core of facts which determines the plaintiff’s claim.” *U.S. v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967); *cf. Frank’s Casting Crew & Rental Tools, Inc. v. PMR Techs.*, 292 F.3d 1363, 1372 (Fed. Cir. 2002) (motions seeking to bring “new claims against new parties, not arising out of the same transaction or occurrence . . . [are] not authorized”). District Courts have discretion to deny leave to file third-party complaints and may strike any claim filed either by right or by leave. *McDonald v. Union Carbide Corp.*, 734 F.2d 182, 184 (5th Cir. 1984).

The Court should deny Defendants’ request because it does not meet the requirements of Rule 14. DMH Stallard and Kit Stenning are in no way connected to the Receiver’s claims against Defendants. The Receiver’s Amended Complaint [Dkt. No. 41] states claims against Defendants for their failure to create separate premium escrow accounts and set aside the amount needed to pay premiums on each policy until the bonds matured. Defendants do not allege that DMH Stallard and Kit Stenning “[are] or may be liable” to them for those acts or any others described in the Amended Complaint.

Rather, Defendants’ motion for leave is based solely on two statements from a list of thirty-three appearing in discovery responses prepared two months ago. (Defendants’ Brief in

Support [Dkt. No. 60] at ¶ 5.) In his written discovery responses, the Receiver mentioned that Defendants' acts and omissions regarding the due diligence report may be included among others that amount to gross negligence, malice, fraud, oppression, aiding & abetting corporate waste, and malpractice/negligence. At the time, the Receiver wanted to preserve his right to recover those damages from Defendants if his lawsuit against DMH Stallard and Kit Stenning in the United Kingdom proved too difficult or expensive to file. The Receiver, however, will be filing that lawsuit imminently and is not suing Defendants in this case for the same damages. This has been made clear to Defendants' counsel on numerous occasions. (Letter to Defendant's Counsel, Ex. 1 at 2.)

The Receiver has been unsuccessful in his effort to resolve this matter without court intervention. His counsel has told Defendants' counsel by telephone call, face-to-face meeting, and letter that the third-party complaint is not related to this case. He offered to stipulate to that fact or amend the Receiver's discovery responses to expressly state it. Without explanation, Defendants have refused the Receiver's proposed stipulations and have not articulated any other reasons why DMH Stallard or Kit Stenning ought to be involved in this case.

If the Court were to grant Defendants' motion, it would result in duplicative litigation, undue delay and expense for all involved, and obstruct the Receiver's efforts to pursue his claims directly against DMH Stallard and Kit Stenning in the United Kingdom. The Receiver has made it abundantly clear that the due diligence report is not an issue in this case and Defendants' motion is unfounded. The Court should, therefore, exercise its discretion and deny the motion.

Respectfully submitted,

QUILLING, SELANDER, CUMMISKEY
& LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201-4240
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

By: /s/ Brent J. Rodine

Michael J. Quilling
State Bar No. 16432300
Brent J. Rodine
State Bar No. 24048770

- and -

Bruce Kramer
Tennessee Bar No. 7472
BOROD & KRAMER, PC
80 Monroe, Suite G-1
Memphis, TN 38103
(901) 524-0200 (Telephone)
(901) 523-0043 (Facsimile)

ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

A true and correct copy of this motion shall be served on all interested parties through the Court's electronic filing system.

/s/ Brent J. Rodine