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

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities,	§	
Plaintiff,	§	**Civil Action No. 3:07-CV-1153-P**
v.	§	
	§	**ECF**
ERWIN & JOHNSON, LLP, and CHRISTOPHER R. ERWIN,	§	
Defendants and Third-Party Plaintiffs,	§	
v.	§	
MILLS, POTOCZAK & COMPANY,	§	
Third-Party Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT AGAINST DMH STALLARD AND CHRISTOPHER JOHN WILLIAM STENNING

DEFENDANTS ERWIN & JOHNSON, L.L.P. and CHRISTOPHER R. ERWIN (jointly "E&J") reply as follows to Plaintiff's Response to Defendants' Motion for Leave to File a Third-Party Complaint Against DMH Stallard and Christopher Stenning (jointly "DMH Stallard").

A. Introduction

E&J urges the Court to grant its Motion because:

- Plaintiff's reasons for asking this Court to deny the Motion are illogical, legally incorrect and disingenuous;
  - It is illogical to contend that granting the Motion will force duplicative lawsuits;
  - It is legally incorrect to claim that E&J does not have a proper derivative claim against DMH Stallard;

- It is disingenuous to contend that Plaintiff's claim against E&J has nothing to do with DMH Stallard;

- Plaintiff has failed to provide any evidence of prejudice to the other Parties if the Motion is granted or any evidence of undue delay by E&J in bringing the Motion;

- Granting the Motion will advance the goals of Rule 14 by preserving judicial resources, avoiding inconsistent results on closely-related issues and reducing litigation costs and expenses to the Parties.

B. Plaintiff's Response is Illogical in Contending That Granting the Motion Will Result in Duplicative Lawsuits and That Denying the Motion Will Advance the Goals of Rule 14

Plaintiff goes to tortious lengths to attempt to fashion a cogent argument as to why denial of E&J's Rule 14 motion will supposedly advance the goals of Rule 14, but he fails. The goal of Rule 14 is to avoid duplicative litigation on closely-related issues. *See e.g. United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967) ("impleader is properly used 'to reduce litigation by having one lawsuit do the work of two.'"). [1]

Plaintiff makes the confusing argument that this Court should deny E&J's Motion because Plaintiff intends – at some unspecified point in the future – to bring a lawsuit against DMH Stallard in England. According to Plaintiff, unless the Court denies E&J's Motion, duplicative lawsuits will result – once Plaintiff files a second lawsuit.

Plaintiff's contention that granting the Motion will result in duplicative lawsuits is illogical. If DMH Stallard is joined in this lawsuit – which is already pending – then only one

[1] Although Plaintiff "quotes" this case in his Response, he fails to provide the Court with the full sentence leaving the impression that the Fifth Circuit would disapprove of impleader in a situation like this one. When in fact, the Fifth Circuit specifically observed that impleader should be used if it will eliminate the need for multiple lawsuits – something this impleader will accomplish.

lawsuit will be necessary, as Plaintiff can assert his claims against DMH Stallard in this Court. Plaintiff does not have to file a second lawsuit in England.

The problem of multiple lawsuits will actually arise if this Court denies E&J's motion. In that case, there will be three lawsuits. There will be a lawsuit in this Texas Court, styled *Quilling v. E&J et al*; there will presumably be a lawsuit in England styled *Quilling v. DMH Stallard*, and there will be a third lawsuit, styled *E&J v. DMH Stallard*, in yet another court. All of these lawsuits will be concerned with precisely the same operative facts: DMH Stallard's due diligence in connection with the letter of credit backing the Albatross Bond that secured a portion of the policy portfolio belonging to ABC Viaticals, Inc. ("ABC"). Yet, because three different courts will be sitting in judgment on this same issue, there is a strong possibility of inconsistent judgments. Significantly, the avoidance of inconsistent judgments on closely-related issues is one of reasons that Rule 14 exists.

Plaintiff's argument becomes even more confusing because he simultaneously tries to contend that his future English lawsuit will "duplicate" this lawsuit (Resp. at 2, 4, 6), while also asserting that his future English lawsuit does not arise out of the same transaction or occurrence as his claims against E&J in this lawsuit (Resp. at 5-7). This is also illogical and demonstrates to the Court the weakness of Plaintiff's arguments against joining DMH Stallard. If the litigation is duplicative, then it must arise out of the same transaction or occurrence. If it does not arise out of the same transaction or occurrence, then it can hardly be duplicative. Indeed, the very case authority relied on by Plaintiff is inapposite because of that logical inconsistency.[2]

[2] (Resp. at 5) (citing *Frank's Casing Crew & Rental Tools, Inc. v. PMR Tech.*, 292 F.3d 1363 (Fed. Cir. 2002). The other case cited by Plaintiff – *McDonald v. Union Carbide Corp.*, 734 F.2d 182, 183 (5th Cir.1984) – also does not support Plaintiff's position. In *McDonald*, after a significant amount of discovery, the plaintiffs, intervenors, and most of the defendants settled. As part of a judgment entered under FED. R. CIV. P. 54(b), the court prohibited third-

In fact, E&J's claims against DMH Stallard arise out of the same transaction as Plaintiff's claims against E&J and granting impleader in this case will advance the goals of Rule 14. It exists, in part, to avoid the waste of judicial resources that occurs when different courts hear claims involving closely-related issues. In this case, denial of E&J's Motion will result in a particularly egregious waste of judicial resources. Every other claim arising out of the ABC Receivership has been litigated in this Court. As a result, this Court is intimately familiar with the facts, the parties, the claims and the law. Why should multiple dockets be tied up with this complicated matter?

Rule 14 is also intended to reduce costs and expenses to a defendant by allowing that defendant to bring in any other person who owes defendant contribution and/or indemnity arising out of the plaintiff's claim against the defendant. If this Motion is denied, then E&J will be forced to litigate with Plaintiff and then file a separate lawsuit against DMH Stallard. In this particular instance, the cost of prosecuting E&J's claims against DMH Stallard in another court will be considerably more expensive than prosecuting those claims in this Court. The underlying claim is complex, which will naturally result in delays and additional costs, due to a new judge's lack of familiarity with the case.

To put it bluntly, Plaintiff's contention that granting E&J's Motion will force duplicative litigation is nonsense. Instead, granting E&J's Motion will advance the goals of Rule 14 by preventing multiple lawsuits on the same issues, and thereby, preserving judicial resources, avoiding inconsistent results and reducing litigation costs and expenses to the Parties.

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party actions by the non-settling defendants against the settling defendants. That situation is not before the Court here.

C. Plaintiff's Response is Legally Incorrect in Contending That Plaintiff is The Only Party With Standing to Assert Claims Against DMH Stallard

Plaintiff's statement that he is the only party with legal standing to assert a claim against DMH Stallard is legally incorrect. Rule 14 exists so that a third-party plaintiff may assert any derivative claims – such as indemnity and contribution – against the third-party defendant.

E&J has claims for indemnity and/or contribution against DMH Stallard. E&J retained DMH Stallard to act as its agent and to conduct due diligence to determine the validity of the Albatross Bond, including the validity of the support letter backing the Albatross Bond. DMH Stallard advised E&J that the Bond and support letter were valid. The validity of the Bond was important because a valid bond reduces the reserve necessary to pay premiums. It is thus certainly related to Plaintiff's claims against E&J. Specifically, Plaintiff is seeking damages from E&J based on Plaintiff's allegations that the reserves available to pay premiums were insufficient. E&J believes that ABC's assets would have been more than sufficient to fund the premiums if the Albatross Bond had been valid, as represented to E&J by its agent DMH Stallard.

DMH Stallard's malfeasance is a cause, at least in part, of E&J being hauled into this Court. E&J is entitled to indemnity from DMH Stallard to the extent that E&J's damages arise out of DMH Stallard's due diligence. To the extent that Plaintiff is seeking to hold E&J liable for the entire loss, E&J is entitled to contribution from other tortfeasors whose malfeasance may have contributed to the loss. These tortfeasors include DMH Stallard. E&J has standing to bring claims for indemnity and contribution against DMH Stallard.

Despite this, Plaintiff tries to fashion the argument that reliance on an invalid bond damaged the investors, but the invalidity of the bond itself and the circumstances of that reliance

matter not – that somehow those are issues best resolved separately on another continent, by a different court, perhaps even after this litigation has concluded.

D. Plaintiff is Disingenuous in Contending That His Claims Against E&J Have Nothing to do With DMH Stallard

Plaintiff's contention that his claims against E&J "have nothing to do" with the due diligence conducted by DMH Stallard is particularly disingenuous. Plaintiff admits in his response that his claim against E&J arises out of E&J's alleged failure to set aside funds necessary to pay the policy premiums. It is undisputed – even by Plaintiff– that a valid bond would reduce the amount of money that would have to be set aside to pay the premiums. It is undisputed – even by Plaintiff – that E&J retained DMH Stallard as its agent to investigate the validity of the bond. It is undisputed – even by Plaintiff – that DMH Stallard represented to E&J that the bond was valid. As long as Plaintiff is going to continue to seek any amount of damages from E&J based on the alleged under-funding of the premium reserve account, then E&J's claims against DMH Stallard "have something to do" with Plaintiff's claims against E&J.

Moreover, Plaintiff knows that E&J's claims against DMH Stallard have "something to do" with Plaintiff's claims against E&J, as evidenced by both the responsive and affirmative discovery generated by Plaintiff. Not only did he repeatedly cite E&J's reliance on DMH Stallard's due diligence as evidence of E&J's malfeasance in his interrogatory responses, he solicited discovery from E&J on this same issue. (See Supplemental Appendix pages 1, 2, and 3)[3] Why would he conduct discovery on an issue that has nothing to do with his damage claim?

[3] Interrogatory No. 15 asked E&J to identify all evidence that satisfied E&J that Albatross would actually pay on its bonding obligations to ABC. Interrogatory No. 16 asked E&J to identify all evidence that satisfied E&J that Unicredit would actually pay on its bonding obligations to ABC. Requests for Production 15 and 16 relate to these same issues. E&J retained DMH Stallard to confirm that the letter of support issued by Unicredit backing the Albatross Bond was valid and enforceable.

His statement that the damages that he seeks from E&J presume that the bonds are good is particularly implausible. He admits in his response that he thinks E&J is legally responsible for DMH Stallard's negligence. Yet, he attempts to explain away his references to DMH Stallard in the discovery as follows:

> At that 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 immediately and is not suing Defendants in this case for the same Damages.

Response, pg. 6.[4]

Plaintiff expects us to believe that at the inception of this lawsuit, for some inexplicable reason, he decided to seek only a subset of the damages that he believes E&J owes. Why would he do this? It would be a breach of his fiduciary duty to the estate.[5] He has certainly not reduced his damages claim after his supposed recent realization that he would be better off seeking some of those damages from DMH Stallard in England.

E. Plaintiff Has Not Met His Burden to Show Prejudice to the Other Parties or Undue Delay by E&J

Plaintiff has no evidence that granting the Motion will result in prejudice to any other Party. Three of the four Parties to this litigation have no objection to the Motion.

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[4] What happens if the English litigation against DMH Stallard proves to be too expensive and too difficult – a possibility that Plaintiff acknowledges in his response? There is no reason to assume the risk that English litigation will be too expensive and difficult, since this Court has subject matter jurisdiction over the claim and personal jurisdiction over DMH Stallard.

[5] Plaintiff's belated offer to agree to stipulate that Plaintiff will not mention DMH Stallard in its affirmative case against E&J isn't worth anything to E&J. Indeed, accepting this "offer" would deprive E&J of a defense and another pocket for payment of a judgment. E&J's counsel explained this to Plaintiff's counsel verbally. Given the feigned nature of this "offer," there was no need to respond to Receiver's counsel's letter separately from the contents of this Reply itself.

Plaintiff gives no explanation for wanting to bring his claims against DMH Stallard in England, other than to make a conclusory and unsubstantiated statement that it will somehow be cheaper. Plaintiff presents no evidence that it will be cheaper to litigate two lawsuits instead of one. He presents no evidence that it will be cheaper to litigate in a foreign courtroom, which is 4700 miles from his office, before a judge who has no knowledge of the facts and/or the law, as opposed to litigating in this courtroom which is less than a mile from his office and before a Judge who is intimately familiar with the facts and the law, because that Judge has heard every other claim arising out of the ABC Receivership. He presents no evidence that it will be cheaper for Plaintiff to prosecute the claims against DMH Stallard alone, rather than have E&J pay a significant percentage of the cost of prosecuting DMH Stallard.

Finally, Plaintiff has no evidence that E&J unduly delayed in bringing the Motion. This Motion is filed months before the parties' agreed upon deadline for leave to bring in third-party defendants. Discovery is still in its early stage. Trial is more than 10 months away. The Motion was brought shortly after E&J received Plaintiff's discovery asserting the allegation regarding the due diligence.

CONCLUSION

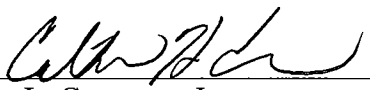
A federal court should freely grant leave to amend pleadings unless there is good reason to deny the motion. *Cf. Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227 (1962) (good reason for denying leave to amend includes bad faith, dilatory motive, undue delay or undue prejudice to other parties). This Court should grant E&J's Motion because there is no evidence that granting the Motion will prejudice any other party nor is there evidence that E&J has unduly delayed in bringing the Motion. Most importantly, E&J seeks derivative relief from DMH Stallard and

thus, granting this Motion will advance the purpose of Rule 14 which is to avoid duplicative lawsuits on closely-related issues and thereby preserve judicial resources, reduce the costs and expense of the litigation to the parties and avoid the risk of inconsistent verdicts. *See* 6 *Charles Alan Wright & Arthur R. Miller,* FED. PRAC. & PROC. §1443, at 300-11 (2d ed. 1990).

WHEREFORE, Defendants/Third-Party Plaintiffs, Erwin & Johnson, L.L.P. and Christopher R. Erwin, respectfully ask this Court to grant their Motion for Leave to File a Third-party Complaint against DMH Stallard and Christopher J.W. Stenning and order the Clerk to file the Third-Party Complaint and to issue summons to DMH Stallard and Christopher J.W. Stenning and give Defendants/Third-Party Plaintiffs whatever and further relief to which they may be entitled.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

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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 27th day of May 2009, to all known counsel of record, listed herein below, as required by the Federal Rules of Civil Procedure.

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