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

MICHAEL J. QUILLING, ET AL.,	§	
	§	
Plaintiff,	§	
v.	§	3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, ET AL.,	§	
	§	
Defendants and	§	
Third-Party Plaintiffs,	§	
	§	
MILLS, POTOCZAK & COMPANY,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Defendants, Erwin & Johnson ("E&J") and Christopher R. Erwin's ("Erwin") (collectively "Defendants"), Motion for Leave to Bring in Third-Party Defendants DMH Stallard and Christopher John William Stenning ("Stenning") (collectively "Third-Party Defendants") filed May 5, 2009. (Dkt. No. 62.) Plaintiff filed a Response in Opposition on May 22, 2009. Defendants filed a Reply on May 27, 2009. After reviewing the briefing and applicable law, for the reasons stated below the Court GRANTS Defendants' Motion for Leave.

I. Background and Procedural History

On November 17, 2006, the Securities and Exchange Commission ("SEC") filed suit alleging that ABC Viaticals, Inc. ("ABC") and other defendants fraudulently sold life settlement policies and made numerous misrepresentations to investors. ABC represented to investors that their contributions would be tied to a particular insurance policy; however, according to Plaintiff,

from the beginning, ABC commingled investor contributions in order to pay premiums and expenses on numerous policies. Additionally, the commingled accounts were allegedly underfunded, so that ABC had to solicit funds from additional investors in order to cover its obligation to the initial investors.

On November 17, 2006, this Court appointed Michael J. Quilling as Receiver ("Receiver" or "Plaintiff") for ABC, in order to protect the interests of those who had invested with ABC. (Order Appointing Receiver ("Order").) In accordance with that Order, Plaintiff has examined the business records of ABC and determined that, as ABC was insolvent and required new investments to honor obligations made to earlier investors, it was operating as a *Ponzi* scheme.

Plaintiff then brought this action alleging that the scheme involved the services of independent trustees – one of which was E&J – that handled all investor funds. (See generally Am. Compl.) E&J allegedly conducted its services through Erwin. (Id.) Investors were instructed to send their funds directly to E&J, where those funds were held in the law firm's trust account and disbursed from the Erwin & Johnson ABC Premium Escrow Account (collectively "E&J escrow accounts") in accordance with the investor's purchase agreement with ABC. (Id. at ¶ 19.)

After being appointed, Receiver sought to recover the investors funds from the E&J escrow accounts. The E&J escrow accounts however, held far less money than the amount Receiver believed should be in the accounts. (Id.) The under-funding of these E&J escrow accounts and the representations that E&J made to investors about the funding of these accounts are at the root of Plaintiff's claims against Defendants.

Defendants however, have maintained that they did not knowingly make any misrepresentations to investors. Additionally, Defendants claim that if the E&J escrow accounts were underfunded that it is, at least in part, due to their reliance on Third-Party Defendants to conduct due diligence on their behalf. (Defs.' Mot. for Leave 1.) Specifically, Defendants claim that they believed a bond, known as the "Albatros Bond," to be valid based on Third-Party Defendants' due diligence and opinion letter (hereinafter, "due diligence report"). According to Defendants, if the Albatros Bond had been valid then it would have significantly reduced the amount by which the E&J escrow accounts were allegedly underfunded. (Defs.' Reply 6.) But the validity of the Albatros Bond is now in question. As a result, Defendants claim that Third-Party Defendants may be liable to E&J and Erwin for all or part of Plaintiff's claims against them. (Defs.' Mot. for Leave 1.)

II. Legal Standard & Analysis

A. Legal Standard

Rule 14(a) states that:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Fed. R. Civ. P. 14(a) (2006). If the third-party complaint is not served within ten days of after serving the original answer, the third-party plaintiff must seek leave of court. *Id*. Whether to grant such leave is within the sound discretion of the trial court. *McDonald v. Union Carbide Corp*., 734 F.2d 182, 184 (5th Cir. 1984). Rule 14 is designed to reduce multiplicity of litigation and should, therefore, be construed liberally. 6 Charles Allen Wright, Arthur R. Miller, & Mary Kay Kane, Fed. Prac. & Proc. § 1442, at 293 (2d ed. 1990).

Rule 14, commonly known in the federal system as impleader, is used "when the defendant's right against the third party is merely an outgrowth of the same core of facts which determines the plaintiff's claim. *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967) (quoting *Falls Indus., Inc. v. Consol. Chem. Indus., Inc.*, 258 F.2d 277, 283 (5th Cir. 1959)); *see also Powell, Inc. v. Abney*, 83 F.R.D. 482, 485 (S.D. Tex. 1979) ("Rule 14 is operative where the third-party plaintiff's claim against the third-party defendant is the outgrowth of the same aggregate or core of facts which is determinative of the original claim."). However, Rule 14 may not be used to assert a separate and independent claim against a third-party, even if such claim arises from the same general set of facts; rather, such claim "must attempt to pass on to the third party all or part of the liability asserted against the defendant" and therefore must "be dependent upon the outcome of the main claim." *Joe Grasso & Son, Inc.*, 380 F.2d at 751-52 (internal citations omitted); *see also Wilkie v. United States*, 279 F. Supp. 671, 675 (N.D. Tex. 1968).

Even where a defendant's right against a third-party is an outgrowth of the same core of facts which determines the plaintiff's claim, there are other factors which must considered before granting leave to bring in a third-party defendant. *See Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967). Consistent results, reducing litigation, and prejudice to the parties are among the other factors that should be considered before bringing in a third-party defendant. As previously stated, Rule 14 provides a mechanism "to reduce litigation [and provide consistent results] by having one lawsuit do the work of two." *Id.* When determining whether a third-party defendant should be added, the court must balance the interest of avoiding duplicative litigation and obtaining consistent results against any prejudice to the impleaded party or the original plaintiff. *Am. Fid. & Cas. Co. v. Greyhound Corp.*, 232 F.2d 89, 92 (5th Cir. 1956); 6

Wright, et al., §1443, at 301. "Sufficient prejudice to warrant denial of impleader may be present when bringing in a third party will introduce unrelated issues and unduly complicate the original suit." 6 Wright, et al., § 1443, at 304. Avoiding the prejudice of introducing unrelated issues can often be achieved by ensuring that Defendant's claims are an outgrowth of the same core of facts which determines Plaintiff's claims.

B. Third-Party Defendants DMH Stallard and Stenning

In this case, Defendants claim that "DMH Stallard and Stenning are or may be liable to E&J for all or part of Plaintiff's claims against E&J and Erwin." (Defs.' Mot. for Leave 1.) Defendants base this claim on two separate but interrelated allegations. First, Defendants argue that "Plaintiff has alleged [they] were negligent and breached various duties to . . . ABC by relying on the Third-Party Defendants'" due diligence report. (Id.) And second, "Plaintiff is seeking damages from E&J based on Plaintiff's allegations that the reserves available to pay premiums were insufficient" which would not have been true if Defendants had not incorrectly relied on the due diligence report. (Id.)

Plaintiff admits that "DMH Stalllard and Stenning prepared a due diligence report about certain bonds that ABC purchased . . .. [And] that Defendants viewed that report and relied upon it." (Pl.'s Resp. 3.) But Plaintiff argues that the "due diligence report . . . is not a subject of this litigation and is not a basis for the Receiver's claims against the Defendants." (Id.) To further support that he is not bringing claims against Defendants for their reliance on the due diligence report Plaintiff has offered to enter a number of stipulations. (Id. at 4.) None of the stipulations however, indicate that Plaintiff will not seek damages "from E&J based on the alleged under-funding of the premium reserve account . . .." (Defs.' Reply 6.)

Defendants argue – and the Court agrees – that as long as Plaintiff is seeking damages for the alleged under-funding of the E&J escrow accounts that Defendants claims against DMH Stallard and Stenning are directly related to Plaintiff's claims against Defendants. (Id.) The claims are directly related because Plaintiff claims that Defendants under-funded the E&J escrow accounts, and Defendants claim that if the E&J escrow accounts were under-funded it was due to the actions of Third-Party Defendants. Accordingly, the Court is satisfied that Defendants claims against Third-Party Defendants arise from the same core of facts as Plaintiff's claims.

Nonetheless, Plaintiff argues that bringing in Third-Party Defendants will contravene the purpose of Rule 14 by creating duplicitous litigation. (Pl.'s Resp. 6.) Plaintiff claims it will create duplicitous litigation because he will be filing a lawsuit in the United Kingdom against DMH Stallard and Stenning. (Id.) It is true that there would be duplicitous litigation if Plaintiff pursued a lawsuit against Third-Party Defendants in the United Kingdom despite their being brought into this action. But Defendants' Motion cannot be denied based on Plaintiff's decision to someday pursue claims against Third-Party Defendants on another continent. Especially when Plaintiff's claims against Third-Party Defendants can be litigated in this single lawsuit. As Defendants point out, bringing in Third-Party Defendants would also obviate the need for separate litigation between Defendants and Third-Party Defendants based on the same core facts as Plaintiff's claims in this case. It is therefore possible to litigate three cases – based on the same core facts – in this single case.

Moreover, the ability to reduce litigation and provide consistent results far outweighs any possible prejudice to the parties involved. Though Plaintiff argues that bringing in Third-Party Defendants would result in undue delay and expense for all involved, Plaintiff does not provide any evidence to support this contention. And it is not the Court's job to speculate as to how

bringing in Third-Party Defendants would result in undue delay or expense. Accordingly, the Court finds that the requirements of Rule 14 have be met and the purposes behind it would be served by bringing in Third-Party Defendants.

III. Conclusion

For the foregoing reasons, the Court, in its discretion, GRANTS Defendants' Motion for Leave to Bring in Third-Party Defendants DMH Stallard and Stenning.

IT IS SO ORDERED.

Signed this 16th day of October, 2009.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE