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, DMH STALLARD and CHRISTOPHER JOHN WILLIAM STENNING, **Third-Party Defendants.**	§	

DEFENDANTS ERWIN & JOHNSON L.L.P.'S AND CHRISTOPHER R. ERWIN'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE ORDER GRANTING LEAVE TO BRING IN THIRD-PARTY DEFENDANTS

Defendants Erwin & Johnson L.L.P. and Christopher R. Erwin (jointly "E&J") urge this Court to deny Plaintiff's Motion asking this Court to reconsider the order allowing E&J to implead DMH Stallard and Christopher Stenning (jointly "DMH Stallard") because the Court's analysis was sound and its decision legally correct.

A. Standard for Reconsideration

Plaintiff seeks relief under Federal Rule of Civil Procedure 60, which provides for reconsideration, *inter alia,* based on: 1) mistake, inadvertence, surprise or excusable neglect; 2) newly-discovered evidence; or 3) fraud, misrepresentation or misconduct by the opposing party. Despite his perfunctory reference to the exacting standards of Rule 60, Plaintiff fails to point to

any mistake, inadvertence, or surprise on his part, any newly discovered evidence, or any fraud on the part of E&J. Instead, Plaintiff re-argues the same points previously alleged in hopes that he will be more persuasive this time. That is not a reason to grant a motion for reconsideration. *See e.g. Arrieta v. Yellow Transp., Inc.*, 2009 WL 129731, at * 2 (N.D. Tex. Jan. 20, 2009) (Fitzwater, C.J.) ("A motion for reconsideration is not ordinarily a mechanism for litigants to plug holes in their arguments after the court has informed them that they are deficient.").

A motion for reconsideration serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly-discovered evidence. *See Texas Instruments, Inc. v. Hyundai Elec. Indus. Co., Ltd.,* 50 F. Supp. 2d 619, 621 (E.D. Tex. 1999). It is not the proper vehicle for rehashing old arguments or advancing theories of the case that could have been presented earlier. *Resolution Trust Corp. v. Holmes*, 846 F. Supp 1310, 1316 (S.D. Tex. 1994). A motion for reconsideration based only on recycled arguments serves only to waste the court's time. *See Texas Instruments*, 50 F. Supp 2d at 621.

B. The Court Properly Granted Leave to Bring in Third-Party Defendants

1. E&J is asserting a classic derivative claim

This Court's analysis of the requirements of Rule 14 in the context of the respective allegations of Plaintiff against E&J, and E&J against DMH Stallard, was sound. Rule 14 permits impleader when the third party is liable to the defendant for losses sustained by the defendant as a result of the plaintiff's claim. *See* FED. R. CIV. P. 14(a)(1). Plaintiff is seeking $19 million from E&J for the alleged under-funding of the premium reserve account. E&J is seeking indemnity and contribution from its agent DMH Stallard for its misrepresentations that caused or contributed to E&J's alleged under-funding of the premium reserve account by $19 million (assuming for the sake of this Response only that Plaintiff's calculations are correct). E&J is

attempting to pass on all or part of the liability asserted against it to DMH Stallard; therefore, impleader is proper. *See United States v. Joe Grasso & Son, Inc.*, 380 F. 2d 749, 751 (5th Cir. 1967).

2. This Court recognized the flaws in Plaintiff's strained attempts to turn a derivative claim into an independent claim

Plaintiff asserts the following points as reasons why impleader is improper: 1) DMH Stallard said that the letter of credit backing the Albatross bond was good; 2) if the letter of credit backing the Albatross bond had been good, the premium escrow account would have been under-funded by $19 million;[1] 3) Plaintiff is seeking $19 million from E&J; 4) hence, E&J will not incur any damages as a result of DMH Stallard's misrepresentations; 5) since E&J will not incur any damages as a result of DMH Stallard's misrepresentations, impleader is improper.

In rendering its decision, this Court astutely recognized the deficiencies in Plaintiff's logic. Plaintiff's analysis is flawed because it assumes that E&J's conduct would have been identical without regard to whether DMH Stallard provided a favorable or an unfavorable opinion on the Albatross bond and the letter of credit backing that bond. That is a baseless assumption. Eight policies were purchased after DMH Stallard provided a favorable opinion on the letter of credit backing the Albatross bond. If these eight additional policies had not been purchased, then the required premium reserve would have been reduced by millions of dollars.[2] On this basis alone, a fact finder could conclude that E&J is entitled to indemnity and/or contribution from DMH Stallard for the under-funding of the premium reserve related to the eight policies purchased after DMH Stallard rendered its opinion, even if the calculation of the

[1] E&J is assuming Plaintiff's calculations are correct for this response only.

[2] This is evidenced by the chart attached to Plaintiff's Motion for Rehearing. DMH Stallard provided a written opinion in early 2006. Column B of the Chart shows which policies were purchased after the first week of March 2006 and based on Column D and E, one can determine the dollar amount of under-funding attributable to those policies. It is a significant amount of money.

under-funding assumes that the bonds were good. This is because the fact finder might conclude that those eight policies would never have been purchased, if DMH Stallard's advice had been different and it had provided an unfavorable opinion on the letter of credit backing the bonds.

The failure to account for the effect of the DMH Stallard opinion on E&J's conduct, with respect to its actions after it received the favorable opinion on the letter of credit and bond is not the only deficiency in Plaintiff's analysis. The entire basis for Plaintiff's motion for rehearing is his contention that E&J has no contribution or indemnity claim against DMH Stallard because Plaintiff has reduced the amount of the damages that he seeks from E&J by the percentage that *Plaintiff deems* attributable to DMH Stallard. In Plaintiff's view, there is no reason to submit the issue of the respective liability of DMH Stallard and E&J to the fact finder, as Plaintiff has already made that determination.

The Court has previously and properly rejected this contention. As E&J objects to Plaintiff's allocation of the respective liability of E&J and DMH Stallard, E&J will be forced to litigate this issue in a separate lawsuit. Rule 14 was created so that a defendant does not have to pursue a claim for contribution and indemnity in a separate lawsuit.

The Court cannot rule in Plaintiff's favor unless it makes a factual determination which would be inappropriate at this stage in the litigation. Plaintiff's entire motion assumes that the Court will accept without question Plaintiff's damage calculations and his representation that the $19 million assumes that the bonds were good [3] It is E&J's contention that the under-funding

[3] There is a significant problem with Exhibit A, attached to Plaintiff's Motion for Reconsideration. E&J's tenure as ABC's escrow agent began in late April 2005. All bonded policies acquired during E&J's tenure were bonded by Albatross. Exhibit A indicates that there were policies acquired during E&J's tenure that were bonded by another company. For example, according to the chart, Policy POW-W and Policy ROG-L (1) and (2) were bonded but were not bonded by Albatross.

would not be anywhere close to $19 million if the bonds had been good.[4] It is improper for this Court to make such an important factual determination in the context of a motion for reconsideration at a relatively early point in the course of discovery.

Plaintiff's final point is that the erroneous DMH Stallard opinion is immaterial because none of the Albatross bonds matured prior to the auction of the ABC policy portfolio in October 2008 and therefore, the failure of the bonds could not possibly have affected damages. That is simply not true. If the letter of credit backing the Albatross bonds had paid, as it was supposed to pay, then Plaintiff would have been paid ten million dollars between October 2008 and today and he would have been paid at least $21 million by February 2010. The knowledge that there were valid bonds backing the policies in the portfolio would have substantially reduced the risk to the bankers who extended the line of credit and therefore, would likely have reduced the interest rate on the letter of credit.[5] Plaintiff is seeking to recover interest paid on the line of credit from E&J.

3. The Court's Analysis was Sound and its Conclusion Proper

As Plaintiff stated in his motion to this Court to pool assets, "[s]itting in equity, this Court is a 'court of conscience.' *Wilson v. Wall*, 73 U.S. 83, 90 (1867). As such, this Court has the power in equity 'to do what is right under the circumstances.' *U.S.* [sic] *v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996)." This Court correctly analyzed the claims asserted by Plaintiff against E&J

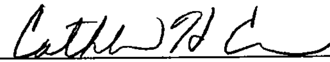
[4] Plaintiff has asked how E&J can make this allegation. ABC retained a company called Data Life to calculate the required premium reserve. It calculations were substantially complete when the Receivership was created and show that Keith LaMonda had assets sufficient to fund the entire deficiency in the premium reserve assuming the bonds had been good.

[5] In December 2008, the Albatross bond on policy San-R should have paid five million dollars. In October 2009, the Albatross bond on policy ACK-M should have paid another five million dollars. In February 2010, the bonds on policies MOS-M(1) and (2) would have paid six million dollars and the bond on policy BER-S would have paid five million. The damages to investors could have for the most part been avoided and this would be a completely different lawsuit.

and by E&J against DMH Stallard. It properly concluded that as long as the Plaintiff is seeking damages for the alleged under-funding of the E&J escrow accounts, then E&J's claims against DMH Stallard are directly related to Plaintiff's claims against E&J. Accordingly, the Court's order allowing E&J to implead DMH Stallard and its former partner Christopher Stenning was legally correct under Rule 14 and Plaintiff's Motion for Reconsideration should be denied.

WHEREFORE, DEFENDANTS Erwin & Johnson L.L.P. and Christopher R. Erwin ask this Court to deny Plaintiff's Motion for Reconsideration of the Order Granting Leave to Bring in Third-Party Defendants DMH Stallard and Christopher Stenning and ask this Court to grant any further relief to which they may be entitled.

Respectfully submitted,



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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 11th day of November, 2009, to all known counsel of record as required by the Federal Rules of Civil Procedure.

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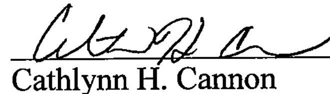

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