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"), Defendants' Motion for Leave to Bring in Third-Party Defendant Jason Sun ("Sun" or "Third-Party Defendant") filed August 4, 2009. (Dkt. No. 86.) Plaintiff filed a Response in Opposition on August 24, 2009. Defendants filed a Reply on September 3, 2009. After reviewing the briefing and applicable law, for the reasons stated below Defendants' Motion for Leave is DENIED.

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.[1] ABC represented to investors that their contributions would be tied to a particular insurance policy; however, according to the *ABC Lawsuit* 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

[1] The action brought by the SEC against ABC is *SEC v. ABC Viaticals, Inc., et al*, Docket No. 3:06-CV-2136-P. Hereinafter, this case will be referred to as the *ABC Lawsuit*.

Receiver believed should be in the accounts. (Id.) Under-funding of these E&J escrow accounts, representations that E&J made to investors about the funding of these accounts, and E&J's failure to abide by the escrow agreement form the basis of Plaintiff's claims against Defendants. Defendants however, have maintained that they did not knowingly make any misrepresentations to investors or violate the applicable escrow agreement.

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 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 – but not always – 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 Defendant Jason Sun

In this case, Defendants claim that Sun is 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.) Specifically, Defendants allege that that Sun used E&J's name when marketing viatical or life settlements. (Id.) (Defs.' Ex. 4.) Plaintiff does not dispute Defendants' allegations against Sun. In fact, Plaintiff has filed a motion in the *ABC Lawsuit* seeking to disgorge Sun of more than $6 million dollars in profits he made from such misrepresentations. The *ABC Lawsuit* provides the *core* facts of this case.

Nonetheless, Plaintiff argues that Defendants' claims against Sun do not relate to the claims against defendants in this case. Plaintiff argues that his claims against Defendants are solely for their misrepresentations – not the misrepresentations made by Sun. Additionally, Plaintiff argues that the allegations of Defendants role in the scheme are different than the allegations of Sun's role in the scheme.

The fact remains however, that Plaintiff's claims against Defendants are based on E&J's alleged role in ABC's ponzi scheme. Though the these claims focus less on Defendants' misrepresentations than on Defendants' failure to properly manage the escrow accounts, Plaintiff does claim that Defendants made misrepresentations. Similarly, Defendants' claims against Sun are for making misrepresentations about E&J to induce people to invest in ABC's viatical or life settlement policies. If Defendants' allegations are found to be true, Sun may be liable for some of the misrepresentations Plaintiff claims are attributable Defendants. Accordingly, the Court is satisfied that Defendants' claims against Sun are merely an outgrowth of the same core set of facts as Plaintiff's claims against Defendants. But this does not necessarily mean that Defendants should be permitted to implead Sun.

As stated above, 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). Rather, the court must balance the interests of avoiding duplicative litigation and consistent results against the possible prejudice to Plaintiff and Sun. One factor the Court must consider when determining whether the possibility of prejudice exists is whether joining Sun will introduce unrelated issues to the trial.

Here, there is a strong likelihood that bringing in Sun will introduce unrelated issues to the trial. Defendants seek to recover against Sun for Intentional Infliction of Emotional Distress. (Defs.' Ex. 4.) Defendants base this claim against Sun on the allegation that Sun made misrepresentations on his website about his relationship with E&J and that Sun forged signatures of purported E&J authorized representatives. (Id. at 2-3.) In further support of this claim, Defendants allege that this was not the first time they believed Sun to be making such misrepresentations. (Id.) These allegations have the potential to make this case about a feud between Defendants and Sun rather than Plaintiff's claims that E&J mismanaged the escrow account. The possibility of changing the focus of this litigation by joining Sun as a party would cause substantial prejudice to the Plaintiff.

Sun would also would be prejudiced by allowing Defendants to join him as a party. Currently, Sun lives in Taiwan, his place of residence. The prejudice of having to defend a suit on the opposite side of the earth is self-evident. Of course, this prejudice is likely to delay the progress of this case as the Court will undoubtedly be faced with having to determine whether personal jurisdiction exists. Moreover, this case is near the end of discovery. Joining Sun would surely delay the end of the discovery process. These delays do not promote judicial economy – which Rule 14 typically seeks to accomplish.

It is also important to note that joining Sun has the potential to break down the settlement talks between Plaintiff and Sun. As Defendants are aware, Plaintiff and Sun have been engaging in on-going settlement talks. (*see* Defs.' Reply 4.) A settlement would serve to avoid possible litigation between Plaintiff and Sun. Accordingly, Rule 14's goal of avoiding duplicative litigation is also unlikely to be served.

The unlikelihood that joining Sun will reduce litigation leaves the goal of providing consistent results as the only thing to weigh against the prejudice that would be caused to Sun and Plaintiff. The Court has not been presented with any evidence that joining Sun is essential to providing consistent results. Even were the Court to assume that joining Sun would serve this goal, it would not be enough to overcome the prejudice of joining Sun. As stated above, joining Sun will likely introduce unrelated issues that will unduly complicate this litigation, prejudice Plaintiff, and prejudice Sun. These things strongly outweigh any possibility that joining Sun will ensure consistent results. Accordingly, the Court finds that Defendants' Motion must be denied.

III. Conclusion

For the foregoing reasons, the Court, in its discretion, DENIES Defendants' Motion for Leave to Bring in Third-Party Defendant Jason Sun.

IT IS SO ORDERED.

Signed this 11th day of December, 2009.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE