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

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

DMH STALLARD'S AND CHRISTOPHER JOHN WILLIAM STENNING'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE THIRD-PARTY COMPLAINT BASED ON LACK OF JURISDICTION, *FORUM NON CONVENIENS* AND FAILURE TO ADD AN INDISPENSABLE PARTY

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Third-Party Defendants, DMH Stallard ("DMH") and Christopher John William Stenning ("Stenning"), submit this Memorandum of Law in Support of Motion to Dismiss the Third-Party Complaint Based on the Lack of Jurisdiction, *Forum Non Conveniens* and Failure to Add an Indispensable Party.

The Third-Party Plaintiffs Erwin & Johnson, LLP and Christopher R. Erwin ("TP Plaintiffs") ask this Court to exercise jurisdiction over a law firm in England (DMH) and one of its former partners (Stenning), an English solicitor. DMH and Stenning were retained to investigate and issue an opinion letter with respect to a transaction based in England and Italy applying the laws of England and Wales. DMH and Stenning had absolutely no connection to Texas nor was any of the work performed in or connected to Texas.

The connection to Texas is nonexistent. Further, even if this Court were to find that adequate contacts exist to support specific jurisdiction, the doctrine of *forum non conveniens* provides adequate basis for dismissing this lawsuit in favor of the jurisdiction chosen by the parties.

BACKGROUND

ABC Viaticals, Inc. ("ABC") was involved in the viatical or life settlement business. (Receiver's Amended Complaint, Doc. 41 ¶ 7). ABC purchased insurance policies on the lives of third-party insureds, placed each policy into a separate trust and then sold fractionalized interests in the policies or trusts to investors. Id. at ¶¶ 7, 10. Investor funds were supposed to be used to cover the price of the policy, premium payments, sales commissions, operating expenses, trust fees and other costs. Id. ABC created a total of forty-nine life settlement trusts. Id. Erwin & Johnson and Christopher Erwin (collectively "E&J") were retained by ABC as its trustee and escrow agent to handle all of the investor funds. (Am. Comp., Doc. 41, ¶ 9).

One of the risks to ABC's investors is that the insured will outlive their projected life expectancy (also known as "Longevity Risk"). (TP Comp., Doc. 102, ¶¶ 6, 7). To protect against Longevity Risk ABC purchased longevity bonds from International Fidelity & Surety Limited and then through Life Settlement Risk Management Ltd. ("LSRM"). Id. Sometime prior to November 2005, ABC began bonding its policies through Albatross S.pA., an Italian company which was recommended by Life Settlement Risk Management Ltd. Id. In November or December 2005, E&J learned that Banca di Roma claimed that the Support Agreement Letter backing the Albatross bonds was fraudulent. (TP Comp., Doc. 102, ¶ 9). Albatross obtained a substitute Support Agreement Letter issued by UniCredit Xelion Banca S.P.A. ("UniCredit"). Id.

In or about January 16, 2006, Albatross issued Master Certificate No. RMPM2005BN/02/0000/0106/001 to ABC ("Master Certificate"). (A copy of the Master Certificate along with an Albatross bond is found at **Exhibit 1,** App pp 1-8.) The Master Certificate provided that payment under any Albatross bond would only be triggered after the expiration of a twelve month period which begins to run once the insured exceeds their life expectancy. (**Ex. 1**, App. p 1.) The Master Certificate further provides that: "Any disputes arising under this Master certificate and attendant Bond Declarations attached hereto shall be construed under the laws of England and Wales, and the English Courts shall have jurisdiction over any such disputes." (**Ex. 1**, App. p 4.) Albatross also provided a Support Agreement Letter ("the Support Agreement") acknowledging that their obligations were absolute and irrevocable and that the transaction was subject to prosecution in England. (A copy of the Support Agreement is found at **Exhibit 2**, App. pp 9-10.) ABC also received a Support Agreement Letter from UniCredit ("the UniCredit Support Letter") which was also made subject to the laws and

jurisdiction of the courts of England.[1] (Copies of the UniCredit Support Letters dated January 16 and February 27, 2006 are found at **Exhibit 3,** App. pp 11-14.) Collectively, the Master Certificate, Support Agreement, and UniCredit Support Letter constitute a single transaction which is subject to the laws of England and Wales and for which jurisdiction is set in England (the "Bond Transaction").

ABC's principal, Keith LaMonda, requested that E&J retain an English solicitor to investigate and render an opinion in connection with the UniCredit Support Letter. (TP Comp., Doc. 102, ¶ 10). On or about November 1, 2005, LaMonda transmitted an e-mail to Stenning which stated that he would like to retain Stenning to prepare a legal opinion with respect to Albatross Bonds and a new guarantee. Mr. LaMonda deferred to the Trustee E&J for directions and anticipated the opinion would be issued to E&J as Trustee. (A copy of the November 1, 2005 e-mail is found at **Exhibit 4,** App. p 15.) Stenning responded to LaMonda's e-mail on the following day requesting articles of association or bylaws for ABC, copies of a passport for at least one director, and a copy of a utility bill for the office of ABC. (A copy of the November 2, 2005 e-mail is found at **Exhibit 5**, App. p 16.) On December 9, 2005, LaMonda reminded E&J that the requested information would have to be provided before Stenning could represent ABC. (A copy of the December 9, 2005 e-mail is found at **Exhibit 6**, App. p 17.) On or about January 23, 2006, Stenning prepared a Letter of Engagement directed to E&J as agent for ABC, in Irvine, California. E&J executed and returned the signed engagement letter to DMH in England. (A copy of the Letter of Engagement is found at **Exhibit 7**, App. pp 18-25.) E&J, in its capacity as agent for ABC, retained Stenning, a partner at DMH, to conduct an investigation in Italy and to prepare a report and opinion directed to ABC analyzing the enforceability of the

[1] The February 27, 2006 UniCredit Support Letter was amended to provide for the application of English law and to select England as the venue for any disputes.

Bond Transaction under English law. (TP Comp., Doc. 102, ¶¶ 11, 13, and **Exhibit 7**, App. p 24.) In connection with the Bond Transaction, ABC also received an opinion dated January 27, 2006 from an Italian attorney, Avv. Severino Coluccio, concerning the execution, delivery and enforceability of the Master Certificate, Support Agreement and UniCredit Support Letter. (A copy of the Coluccio Opinion can be found at **Exhibit 8**, App. pp 26-27.) The Coluccio Opinion concluded that Raffaele Tazza had the necessary authority from UniCredit and under Italian law to issue the UniCredit Support Letter. Avv. Coluccio also opined that Italian courts would give conclusive effect to a judgment entered by a court in England against UniCredit. (**Ex. 8**, App. pp 26-27.)[2] On or about March 2, 2006, DMH issued its Due Diligence Report and Opinion as English solicitors. (A copy of the Due Diligence Report can be found at **Exhibit 10**, App. pp 32-34, and a copy of the Opinion is at **Exhibit 11,** App. pp 35-46.)

On or about January 31, 2006, Mr. Stenning attended a meeting in Italy at the offices of Albatross attended by Matthew Searle, Darren Thomas, Franco Patulli, and Umberto Fiore. During this trip, Mr. Stenning was also introduced to Dott. Raffaele Tazza and visited one of UniCredit's local offices. (**Ex. 10**, App. p 32.) The Due Diligence Report opined that documents at issue were "executed by the corporation and people who had said they had executed them and … that they had the ostensible authority to do so." (**Ex. 10**, App. p 32.) The Due Diligence Report further explained that under English law, a document is "properly executed" when it is signed by someone who has the authority (ostensible or actual) to do so. *Id.* The March 2, 2006 Opinion issued by DMH ("Opinion Letter") stated that the Master Certificate, Support Agreement and UniCredit Support Letter would constitute legally valid and binding obligations under English and Welsh law and that they would be enforceable in England

[2] An additional letter opinion was issued by Coluccio dated February 28, 2006, which was addressed to ABC. (A copy of the February 28, 2006 Opinion can be found at App. **Exhibit 9**, pp 28-31.)

and Wales in any court having jurisdiction over Albatross or UniCredit. (**Ex. 11**, App. p 36.) To date, there has been no determination by any court in England regarding the enforceability of the Master Certificate, Support Agreement or UniCredit Support Letter. Further, the Receiver of ABC sold all of the policies covered by the Master Certificate, Support Agreement and UniCredit Support Letter prior to the point in time when any Bond or UniCredit Support Letter would have matured and become due. For liability to arise under the UniCredit Support Letter, the insured would have to exceed their life expectancy, the twelve month deferral period would have to pass and Albatross would have to fail to pay under the Bond. (See **Exs. 1, 3**, App. pp 1, 14.)

In a misguided effort to assert a basis for liability against DMH and Stenning, E&J alleges, upon information and belief, that both the Master Certificate and UniCredit Support Letter may not be enforceable against either Albatross or UniCredit, respectively. (TP Comp., Doc. 102, ¶ 14.) Based on the purported unenforceability of the Bonds or the UniCredit Support Letter, E&J seeks to recover damages from DMH and Stenning alleging claims for common law indemnity, negligence, breach of fiduciary duty and negligent infliction of emotional distress.[3]

ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction to Hear This Dispute

Third-Party Plaintiffs seek to obtain judgments against DMH and Stenning based on the alleged unenforceability of the Albatross Bond/Master Certificate and UniCredit Support Letter. The central issue in the Third-Party Complaint is the enforceability of the UniCredit Support Letter and the Bond issued by Albatross. (TP Comp., Doc. 102, ¶ 14-16, 19, and 33). E&J alleged that "[u]pon information and belief, both Albatross and UniCredit have failed to perform.

[3] The Complaint fails to state claims, but that is a matter reserved for further argument in the unlikely event this Court denies this motion.

Upon information and belief, Plaintiff now contends that the Albatross bond is not, or may not be, enforceable against UniCredit because Tazza did not have authority to act on behalf of Xelion." Id. Notwithstanding its conclusions about the theoretical value of the Bond and the UniCredit Support Letter, the TP Complaint is devoid of any allegation requiring immediate payment to ABC under the Bond or the UniCredit Support Agreement Letter. Further, no court has issued any ruling that is contrary to the opinions expressed in the Due Diligence Report and Opinion. Rather, and although it is not styled as such, this is an action for declaratory judgment with respect to the enforceability of UniCredit Support Letter and the Albatross Bond/Master Certificate under English and Welsh law. Clearly, if the UniCredit Support Letter is found to be enforceable by the courts in England, the TP Complaint would be without merit and moot.

Thus, at a minimum, this Court must first determine and declare whether Mr. Tazza had authority (actual or ostensible) to issue the UniCredit Support Letter, and whether it or the Albatross Bond/Master Certificate are enforceable in England under English and Welsh law. Without such a declaration of the rights of the parties, this Court will simply be issuing an advisory opinion as to the enforceability of the Albatross Bond/Master Certificate and UniCredit Support Letter as a basis for any decision as to the claims against DMH and Stenning.

"Article III of the Constitution confines federal courts to the decision of 'cases' and 'controversies.'" *Shields v. Norton*, 289 F.3d 832, 834-35 (5th Cir. 2002) (holding that "ripeness is a constitutional prerequisite to the exercise of jurisdiction.") An actual controversy must exist and a court will not issue advisory opinions. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F.Supp.2d 880, 883 (N.D.Tex. 2008) There are no actual facts which require adjudication of the potential claims against the Third-Party Defendants. Indeed, the Receiver has

admitted that the insurance policies owned by ABC were sold prior to the point in time when any of the Albatross Bonds would have come due. (Motion to Reconsider, Doc. 108, p. 7).

The Receiver has admitted that it only seeks to recover from E&J the shortfall in premium reserves. (Doc. 108, p. 5). In other words, at the time the Receiver took over, there was a shortfall of $19,660,147.32 in the premium escrow account as of November 2006. *Id.* This shortfall had nothing to do with the Albatross Bonds or UniCredit Support Letter since none of those obligations had matured. Further, the maturity of any of the Albatross Bonds after the point in time at which the insurance policies to which they relate were sold to third parties is irrelevant for purposes of the Receiver's damages calculations. *Id.* Suffice it say, none of the damages sought by the Receiver from E&J arise out of or relate to the alleged unenforceability of either the Albatross Bonds or the UniCredit Support Letter. (Doc. 108, pp. 6-8). In an attempt to create a controversy, E&J will seek what amounts to an advisory opinion informing it whether this Court believes that the UniCredit Support Letter or Albatross Bond/Master Certificate are enforceable in the courts of England and based under English and Welsh law. This is an improper use of this Court or an action for declaratory judgment and this Court should dismiss this entire Third-Party Complaint pursuant to Rule 12(b)(1) based on the lack of any subject matter jurisdiction.

B. This Court Lacks Personal Jurisdiction to Hear This Dispute

1. The Parties Selected an Alternative Forum, England, and Thereby Waived Jurisdiction in the United States

It is well established that contracting parties are free to decide what law will apply to their dispute, as well as, which court shall have jurisdiction. *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 9 (1972); *Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) ("federal courts presumptively must enforce forum selection clauses in international

transactions.") Parties can also waive their right to assert jurisdiction in a particular forum where, as here, they have chosen an alternative forum. *Bremen*, 407 U.S. at 2 and 20 (language which provided that '[a]ny dispute arising must be treated before the London Court of Justice[]' was held to constitute a mandatory forum selection clause); *Hull 735 Corp. v. Elbe Flugzeugwerke*, 58 F.Supp.2d 925, 927 (N.D.Ill. 1999) (language mandating jurisdiction in Dresden divests the court of personal jurisdiction over the parties). The Albatross Bond/Master Certificate, Support Agreement and UniCredit Support Letter clearly mandate that English courts ***shall*** have jurisdiction to hear any disputes arising under the Bond Transaction.

The English translation of the UniCredit Support Agreement Letter provides that it "should be construed in accordance with the law **and the Courts of England**, as per the Master Certificate[.]" (**Ex. 3**, App. p 14.) The Master Certificate provides, in relevant part, that:

> Any disputes arising under the Master certificate and the attendant Bond Declarations attaching hereto shall be construed under the laws of England and Wales, and the English Courts shall have jurisdiction over any such disputes.

(**Ex. 1**, ¶ 17, App. p 4.) Thus, it is beyond dispute that jurisdiction to decide the enforceability of or any disputes arising under the Bond Transaction or related to the UniCredit Support Letter is vested with the English courts and is to be decided under the laws of England and Wales. These documents divest this Court of personal jurisdiction to decide the enforceability of the Bond/Master Certificate, Support Agreement or UniCredit Support Letter and this case should be dismissed pursuant to Rule 12(b)(2).

2. DMH and Stenning Did Not Have Sufficient Contacts with Texas for This Court to Assert Personal Jurisdiction Against These Third-Party Defendants

The court's jurisdiction to hear a dispute in a diversity action is determined by reference to the forum's long-arm statute. *Kelso v. Lyford Cay Members Club Limited*, 2006 WL 83364 *2

(5th Cir. 2006). Since the Texas long-arm statute provides for jurisdiction to the full extent permitted under the Due Process Clause of the Fourteenth Amendment, the relevant inquiries here are whether the Third-Party Defendants had purposefully availed themselves of the benefits and protections of the forum state by establishing minimum contacts and whether the exercise of jurisdiction offends "traditional notions of fair play and substantial justice." *Id.* 2006 WL 83364 *2. The nature, quality and sustained nature of any contacts will either establish general or specific jurisdiction.

General jurisdiction arises where the defendant's contacts with the forum are "continuous and systematic." *Id.* The TP Complaint does not allege facts establishing the continuous and systematic contacts with the State of Texas sufficient to establish general jurisdiction over DMH or Stenning. The contacts necessary for general jurisdiction must be substantial, continuous and systematic. *Alpine View Company Limited*, 205 F.3d at 217 ("general jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed."); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (numerous contacts with forum by petitioner were insufficient to confer general jurisdiction) Here the only contact with Texas alleged in the TP Complaint appears to be the delivery of the Due Diligence Report and Opinion regarding an international transaction centered in England and occurring in England and Italy. The Third-Party Defendants (English solicitors) are not domiciled in Texas, they have no office in Texas, they do not conduct business in Texas, they performed no work in Texas and did not visit Texas. Such a limited contact is insufficient to establish general jurisdiction.

Specific jurisdiction arises when the contacts with the forum are directly related to the cause of action alleged in the complaint. *Kelso*. 2006 WL 83364 *2. For example, specific

jurisdiction may arise where a party has purposefully directed its activities at the forum and the injuries or litigation arise out of those activities. *Alpine View Company Limited v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). Jurisdiction is not proper if the contacts with the forum were caused by the unilateral actions of the plaintiff. *Bullion v. Gillespie, M.D.*, 895 F.2d 213, 216 (5th Cir. 1990); *Bearry v Beech Aircraft Corporation*, 818 F.2d 370, 374 (5th Cir. 1987) (where action does not arise from purposeful conduct within state, "due process requires that there be *continuous and systematic contacts* between the State and the defendants).

In *Hanson v. Denckla* the issue was whether the courts in Florida had jurisdiction over a trust company domiciled in Delaware. *Hanson v. Denckla*, 357 U.S. 235, 252 (1958). An agreement establishing a trust had been executed by a settlor domiciled in Pennsylvania. The settlor subsequently moved to Florida and the trust would periodically mail checks to the settlor in Florida. Further, the settlor executed powers of appointment for the trust in Florida. *Id.* The Court held that the trust company's contacts with Florida did not establish that the trust company purposefully availed itself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.*, 357 U.S. at 253.

In *Stuart v. Spademen* the court held that the number of contacts is not what is important, rather it is the quality of the contacts and whether those contacts demonstrate purposeful availment invoking the benefits and protection of the forum state's laws. *Stuart v. Spademen*, 772 F.2d 1185, 1191, 1194 (5th Cir. 1985) ("the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") The plaintiff in Texas contacted Spademen in California in order to solicit interest in a product design change which plaintiff had developed. *Id.*, 772 F.2d at 1188. The plaintiff and Spademen corresponded with each other for some time regarding the design change and patent obtained by

the plaintiff. Eventually, the parties entered into an agreement which plaintiff executed in Texas and Spademen executed in California wherein plaintiff assigned the rights to the patent and Spademen agreed to make certain payments to plaintiff in Texas. *Id.* As a result of an issue with payment, the parties entered into an amended agreement. Spademen made eight annual payments to plaintiff in Texas under the amended agreement. Spademen encountered some problems when he sought to reissue the patent and the patent office eventually declined to reissue the patent. Spademen stopped making payments to plaintiff and was sued in Texas.

The court in *Stuart* held that while there were contacts by Spademen with the State of Texas, these contacts did not rise to the level required to establish purposeful availment of the benefits and protections of the laws of the forum. *Stuart*, 772 F.2d at 1192-94 (exchange of communications in developing a contract are insufficient to establish purposeful availment). The court considered the totality of the circumstances and concluded that the limited contacts which Spademen had with Texas such as communications to negotiate a contract, transmission of product specimens, and payments, among others, were insufficient to meet the requirements of due process and affirmed dismissal of the lawsuit.

Finally, in *Kelso* the court declined to find that there were significant contacts with Texas in relation to membership in an exclusive club in the Bahamas. *Kelso*, 2006 WL 83364 (5th Cir. 2006). The Club contacted the plaintiff in Texas regarding potential membership. A membership application was transmitted to plaintiff and it was returned to the Club in the Bahamas. Plaintiff paid the membership dues through the mail and received statements and membership material through the mail. The Club eventually cancelled plaintiff's membership and plaintiff filed suit in Texas for breach of contract. The *Kelso* court dismissed the claim against the Club based on lack of jurisdiction. While Kelso claimed that the Club purposefully

availed itself of the benefits of the State by soliciting Kelso's business in Texas, the communications are not of the type and quality of contact with the state which would be sufficient to establish personal jurisdiction.

The contract in question here had nothing to do with Texas. E&J, California residents, entered into a Retention Agreement with DMH and Stenning, English solicitors, to perform due diligence and issue an opinion. The Retention Agreement was executed by DMH in England and by E&J in, presumably, California. The Retention Agreement was executed by E&J, acting as agents for ABC. None of the work to be performed under the Retention Agreement had anything to do with Texas. Rather, the work to be performed under the Retention Agreement concerned a Bond Transaction centered in both England and Italy. The Bond Transaction which was subject to the laws and jurisdiction of England was an international transaction involving an Italian corporation, an Italian financial institution and ABC. Stenning was required to travel to Italy in order to conduct due diligence with respect to the Bond Transaction. Finally, the Retention Agreement also selected English law for purposes of any disputes. Consequently, while ABC was located in Texas and the Due Diligence Report and Opinion letters transmitted to Texas, the Retention Agreement and Bond Transaction and the work performed by Stenning pursuant to the Retention Agreement had absolutely nothing to do with the State of Texas. The Third-Party Defendants did not solicit or engage in any business in the State of Texas. The Third-Party Defendants have insufficient contacts with Texas related to the work performed under the Retention Agreement to satisfy the minimum contacts requirement for jurisdiction. The plaintiff bears the burden of establishing that the defendants had the requisite minimum contacts with the forum. *Stuart*, 772 F.2d at 1192. E&J has failed to meet its burden and the Third-Party Complaint must be dismissed.

However, even if this Court were to find that there were minimum contacts, it must still determine whether the fairness prong of the jurisdictional inquiry is satisfied. The factors considered are: (1) the burden upon the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in securing relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. First, as is discussed in more detail below, the burdens on the defendants are substantial.[4] The evidence and witnesses relating to the work performed and the Bond Transaction are in Italy and England. Second, the interests of the forum are slight. While E&J has been sued in this forum because of its dealings with ABC, E&J is not a citizen of Texas. All of the work performed under the Retention Agreement occurred overseas and had nothing to do with Texas. Third, the Third-Party Plaintiffs' interests in securing relief are suspect. Third-Party Plaintiffs were acting in their capacity as agent of ABC, used ABC funds to pay the Third-Party defendants and the work was performed for the benefit of ABC, not E&J. Consequently, E&J's claim that the work was performed for their benefit and that they, not ABC, was the client is not supported by the evidence. Fourth, the most efficient resolution of any controversy involving the Third-Party Defendants requires litigation in England where all of the necessary parties, UniCredit and Albatross, can be added in one lawsuit. For that matter, the Receiver of ABC has made it abundantly clear that this is exactly what he intends to do. (A copy of the Receiver's Letter dated May 14, 2009 can be found at **Exhibit 12**, App. pp 47-48.) Thus, if E&J seriously believes that it was a client and that the Third-Party Defendants had duties to them under English law, then the proper forum is and will be England.

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[4] See, factors supporting dismissal based on the doctrine of *forum non conveniens* beginning on page 15.

The Third-Party Plaintiffs cannot meet their burden in establishing jurisdiction over these Third-Party Defendants and the TP Complaint must be dismissed.

C. Plaintiff Failed to Add an Indispensable Party

A two step process is employed to determine whether the failure to join an indispensable party will result in dismissal of the lawsuit. *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999); *Schutter v. Shell Oil Co.*, 421 F.2d 869, 874-75 (5th Cir. 1970) (applying similar factors); *Harrell & Sumner Contracting Co., Inc. v. Peabody Peterson Co.*, 546 F.2d 1227, 1228-29 (5th Cir. 1977). First, the court must determine whether the party is necessary based on whether (1) complete relief can be had without joinder, (2) the absent party's ability to protect its interest will be impaired, and (3) the existing parties will face a substantial risk of inconsistent obligations unless the absent party is joined. *Thomas*, 189 F.3d at 667. If the court determines that a party is necessary, then it must determine whether the party is indispensable. *Id.* If the court cannot fashion a judgment in the absence of the necessary party which would protect the rights of both the existing and absent parties, then the case must be dismissed. *Id.*

A central question in the Third-Party Complaint is whether the UniCredit Support Letter is enforceable under the laws of England and Wales. Clearly, if the UniCredit Support Letter is enforceable, then E&J's claims against DMH and Stallard are without merit and moot. On the other hand, if this Court were to determine that the UniCredit Support Letter is unenforceable, it would leave open the possibility of inconsistent results since an English court faced with this very same question and with all the parties present, may find otherwise. Notwithstanding this dilemma, E&J asks this Court to declare that the UniCredit Support Letter is unenforceable in England so that it may pursue damages against the Third-Party Defendants in Texas for

indemnity, negligence, breach of fiduciary duty, negligent infliction of emotional distress and contribution.

"As a general rule in a suit to obtain relief from a contract all the parties thereto are indispensable." *Texas Utilities Company v. Santa Fe Industries, Inc.*, 553 F.Supp. 106, 110-111 (N.D.Texas 1982), *citing Mallow v. Hinde*, 25 U.S. 193, 6 L.Ed. 599 (1827); *Bryn-Man's, Inc. v. Stute*, 312 F.2d 585, 587 (5th Cir. 1963) ("all persons materially interested in a suit ought to be made parties to a suit in order to prevent multiplicity [of] suits.") As the obligor on the UniCredit Support Letter, UniCredit is a necessary party to any action addressing the rights and liabilities under that instrument or the Bond Transaction. If judgment is entered against Third-Party Defendants, there is a real risk for double recovery since the real parties in interest (i.e., the beneficiaries of the policies which the Receiver of ABC admits have been sold) could recover under the Albatross Bonds or seek to enforce UniCredit's obligations under the Support Agreement Letter or seek to recover from the Third-Party Defendants in England.[5] Without Albatross and UniCredit as parties, there is a real risk of inconsistent results when the rights and obligations under the Albatross Bonds and UniCredit Support Letter are ultimately determined in the agreed forum, England.

A judgment entered here will be inadequate since Albatross and UniCredit would not be bound and the issue of enforceability of the Albatross Bonds and UniCredit Support Letter would still have to be litigated in England. Ultimately, complete relief can not be afforded without joinder of Albatross and UniCredit or, at a minimum, a binding determination of Albatross's liability under the Bonds and UniCredit's liability under the UniCredit Support Letter. Finally,

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[5] The Receiver has indicated that it intends to file an action in England naming DMH and Stenning, among other defendants. Doc. # 70, attached as App. **Ex. 12**, pp 47-48.

as is discussed below, E&J has an adequate remedy and an available forum. Thus, this Court should dismiss this lawsuit pursuant to Fed. R. Civ. Pro. 12(b)(7) and Rule 19.

D. The Doctrine of *Forum Non Conveniens* Supports Dismissal of This Lawsuit

The common law doctrine of *forum non conveniens* allows a court to dismiss a suit if it serves the convenience of the parties and the interests of justice. *BBC Chartering & Logistics GMBH & Co. v. Siemens Wind Power A/S*, 546 F.Supp.2d 437 (S.D. Texas 2008). Although the plaintiff's choice of forum is normally given great weight, where as here the parties engaged in an international transaction a plaintiff cannot expect to bring foreign defendants into a U.S. forum "when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere." *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 795 (5th Cir. 2007). Deference to the plaintiff's choice is not a hard and fast rule. *Iragorri v. United Tecnologies Corp.*, 274 F.3d 65, 72 (2nd Dist. 2001). In *Iragorri* the court held that plaintiff's choice of forum is given deference because it is presumed to be convenient. *Id.* at 71. "In contrast, when a foreign plaintiff chooses a U.S. forum, it 'is much less reasonable' to presume that the choice was made for convenience." *Id.* (citing Piper 455 U.S. at 256); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 222 (5th Cir. 2000) (holding that a foreign plaintiff's choice of forum merits less deference than courts typically give to such decisions.) A plaintiff's choice of forum is afforded less deference where another forum has a stronger relationship or connection to the lawsuit. *Iragorri*, 274 F.3d at 72; *DTEX, LLC*, 508 F.3d at 795.

Further, a plaintiff's choice should also be accorded less deference where it was motivated by forum shopping. Circumstances indicative of forum shopping include:

> [1] attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [2] the habitual generosity of juries in the United States or in the forum district, [3] the plaintiff's popularity or the defendant's unpopularity in the

> region, or [4] the inconvenience and expense to the defendant resulting from litigation in that forum.

Norex Petroleum Ltd. v. Access Industries, 416 F.3d 146, 155 (2d Cir. 2005).

As is discussed in more detail below, E&J's lawsuit has little, if any, connection to this forum. E&J, acting as agent for ABC, hired Third-Party Defendants in England to perform legal work in England and Italy in connection with the Bond Transaction. The Bond Transaction occurred in England and all of the third-party witnesses are located in either England or Italy. The only connection to Texas is the fact that E&J was named as a defendant here by the ABC Receiver. More importantly, there is little question that English law applies to the entire transaction, as well as to the work performed by the Third-Party Defendants. Thus, the only connection to U.S. law appears to be E&J's desire to obtain a tactical advantage by asserting threadbare U.S. claims and seeking punitive damages. As established below, England is a proper forum for plaintiff's claims and the public and private factors overwhelmingly favor dismissal of this case.

1. English Courts Provide Plaintiff with an Adequate Alternative Forum

U.S. courts have uniformly concluded that English courts provide an adequate, impartial and available alternative forum for the resolution of claims. *See M/S Bremen*, 407 U.S. at 12; *In re Factor VII or IX Concentrate Blood Products Litigation*, 484 F.3d 951, 957 (7th Cir. 2007); *Capital Markets Int'l, Ltd. v. Geldermann, Inc.*, 1998 WL 473468 *4 (N.D.Ill. 1998); *Pollux Holdings Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2nd Cir. 2003), *cert denied*, 540 U.S. 1149 (2004) ("we have expressed high regard for [English] courts' fairness and commitment to the rule of law"); *CNA Reinsurance Co., Ltd. v. Trustmark Ins. Co.*, 2001 WL 648948 at *7 (N.D.Ill. 2001) ("English courts are rightly esteemed").

In the present case, an alternative forum is available since all parties are amenable to process and are within the alternative court's jurisdiction. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Both Third-Party Defendants reside in England and are clearly subject to jurisdiction there. (TP Comp. ¶¶ 1-2). In fact, ABC, Albatross and UniCredit have all consented to the jurisdiction of English courts, and to the application of English law with respect to the Bond Transaction and UniCredit Support Letter. Nevertheless, as a condition of dismissal, the Third-Party Defendants agree to accept service of any proceedings filed in London, England. Thus, English courts are unquestionably available for the purpose of this dispute.

In addition, England is considered an "adequate" forum if the parties will not be deprived of **all** remedies or be treated unfairly there. *See Piper*, 454 U.S. at 255. The only requirement is that the forum is not "so clearly inadequate or unsatisfactory that it is no remedy at all[.]" *Id.* at 254. Simply because a party may not be able to rely on certain theories of liability or "potential damages award may be smaller," does not mean "that they will be deprived of any remedy or treated unfairly." In *Piper* the Court held that:

> If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non conveniens* would become quite difficult. … The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As was stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.'

Piper, 454 U.S. at 251

While E&J has alleged a claim for indemnity, negligence, breach of fiduciary duty, negligent infliction of emotional distress, and contribution, the essence of E&J's claim is a legal malpractice claim with alternative theories for liability. While England may not be likely to recognize a claim for common law indemnity, negligent infliction of emotional distress or

contribution, English courts recognize claims for negligence and breach of fiduciary duty and allow for compensatory damages. (Affidavit of Rhodri James, ¶¶ 10-12). England provides Plaintiff with an adequate remedy and is, therefore, an adequate alternative forum.

2. Private and Public Interest Factors Require Dismissal of This Action

Once it is established that England is an adequate alternative forum, the court must balance the public and private interests which exist in a given case. *Kamel v. Hill-Rom Co., Inc.*, 108 F.3d 799, 803 (7th Cir. 1997). The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for unwilling witnesses; (3) cost of attendance of willing witnesses; (4) possibility of viewing the premises; and (4) all other practical problems which make trial easy, efficient and economical. *Id.* The private interests clearly support dismissal of this case.

i. The Relative Ease of Access to Sources of Proof Favors Dismissal

Courts consider the claims and facts which plaintiff has placed at issue in evaluating this factor. Third-Party Plaintiffs have alleged that LSRM and Martin and Matthew Searle, of Cornwall, U.K., marketed the Albatross bonds to ABC. (TP Comp., Doc. 102, ¶ 7). All of the events relating to the issuance of the Albatross Bond/Master Certificate, Support Agreement and UniCredit Support Letter occurred in either England or Italy, and each of these agreements were expressly made subject to the laws of and jurisdiction in England. The work relating to the preparation and issuance of the Opinion and Due Diligence Report all occurred in either England or Italy. Further, the Opinion was based entirely on "the laws of England and Wales." **(Ex. 11,** App. pp 35-46.) Third-Party Plaintiffs have alleged that DMH and Stenning were negligent in rendering the Opinion and Due Diligence Report, and failed to disclose material facts relating to UniCredit, Tazza and Albatross. (*See* TP Comp., ¶ 24.)

Unquestionably, the sources of proof relating to Plaintiff's claims for negligence or fraud are all located in either England or Italy. (Aff. of James, Ex. 14 ¶¶ 13-18; App. pp 55-56.) Facts surrounding the creation and marketing of the Longevity Bond Program and certain witnesses connected with LSRM are located in England. (Aff. of James, ¶ 17; App. pp 55-56.) Facts relating to the UniCredit Support Agreement and Support Letter and Albatross Bond/Master Certificate, and the Italian legal opinion issued to ABC by its Italian attorney Avv. Severino Coluccio are all located in Italy, but would be easily accessible to the courts in England as a member state of the European Union. (Aff. of James, ¶¶ 13-16, 22; App. pp 55, 57.) On the other hand, if the case remains here, this Court and the parties will have limited access to any such evidence. (Aff. of James, ¶¶ 22-24; App. p 57.) As a result, the Third-Party Defendants will be at an extreme disadvantage in addressing the claims and proving their defenses.

Further, evidence necessary to prove any affirmative defenses or third-party claims would also be centered in England or Italy. For example, even if it is true that UniCredit reneges on its obligations under the UniCredit Support Letter, it will remain liable based on Mr. Tazza's ostensible authority to sign on behalf of UniCredit under the law of England and Wales. Even if UniCredit can establish the lack of actual authority, the UniCredit Support Letter should be enforced under English law.[6] UniCredit and Albatross could be joined as parties in an action pending in England in order to determine whether the Albatross Bond/Master Certificate is valid and/or backed by adequate funding and whether UniCredit is liable under the UniCredit Support Letter.[7] (Aff. of James, ¶¶ 4-9; App. pp 53-54.) Clearly, if these parties stand behind these

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[6] Liability may be premised on contract, agency law or negligence.

[7] As stated above, there is no allegation in the TP Complaint establishing that any of the conditions necessary under the UniCredit Support Agreement Letter have actually occurred. Thus, any action against UniCredit would be in the nature of a declaratory judgment.

obligations (voluntarily or otherwise), then this premature claim will become moot. The central issue, however, is the enforceability of the UniCredit Support Letter.

Ultimately, all of the sources of proof available in the U.S., if any, would be in the possession and control of the Third-Party Plaintiff or ABC and will be available whether this lawsuit proceeds here or in an alternative forum. On the other hand, sources of proof in England and Italy may not be obtainable in a proceeding pending in the U.S. (Aff. of James, ¶¶ 22-24; App. p 57.) These facts weigh heavily in favor of dismissal.

ii. The Availability of Compulsory Process of Witnesses Favors Dismissal

Key witnesses such as Matthew Searle are outside of the subpoena power of this Court and can only be compelled if this case were pending in England (Aff. of James, ¶ 22; App. p 57.) Similarly, evidence may be obtained from witnesses in Italy, a member of the European Union ("EU"), through streamlined procedures which are only available to other EU members. *Id.* Albatross, which expressly consented to jurisdiction in England, could be added as a defendant making evidence and key witnesses available for trial. Similarly, UniCredit could also be made a defendant and the issue of ostensible or actual authority can be litigated at the same time in one proceeding. (Aff. of James, ¶¶ 4-9; App. pp 53-54.) Since England appears to be the only forum where key witnesses can be compelled and necessary parties can be added as defendants, this factor weighs strongly in favor of dismissal.

iii. Other Practical Problems That Make Trial Easy, Expeditious and Inexpensive Favor Dismissal

As addressed above, third parties which may have responsibility or underlying liability for some or all of the damages claimed by Plaintiff cannot be joined as defendants here, but could be joined and have consented to jurisdiction in England. Enforceability of a judgment

either against or in favor of the Defendants is also an issue which will have to ultimately be decided in England. The U.S. is not a party to any international treaty with England governing the reciprocal enforcement of civil judgments. (U.S. Department of State Circular: Enforcement of Foreign Judgments, **Exhibit 13,** App. pp 49-51.)

Since this Court will not have jurisdiction over UniCredit and has no jurisdiction to decide issues relating to the UniCredit Support Letter, a judgment either in favor of or against Third-Party Defendants may ultimately prove to be unenforceable in England. Ultimately, the courts in England will have to address Mr. Tazza's authority to bind UniCredit, as well as the enforceability of the UniCredit Support Letter. In essence, Third-Party Plaintiffs are asking this Court to issue an advisory opinion as to the enforceability of the UniCredit Support Letter, which is unlikely to be given conclusive effect by Courts in England that have been vested with jurisdiction to hear this controversy. Clearly, this factor weighs strongly in favor of dismissal.

3. Public Interest Factors Also Weigh in Favor of Dismissal

Public factors include: (1) administrative difficulties caused by court congestion; (2) local interest in having localized disputes decided at home; (3) having the trial of a diversity case in a forum that is at home with the law that governs the action; (4) avoidance of unnecessary problems in conflicts of laws or application of foreign law; and (5) unfairness of burdening citizens of unrelated forum with jury duty. *Kamel*, 108 F.3d at 803.

i. Local Interests in Having Controversies Decided at Home Favors Dismissal

The defendants' home forum always has an interest in redressing injuries allegedly caused by one of its citizens. *Piper*, 454 U.S. at 241, 260; *Kamel*, 108 F.3d at 804. In the present case, Third-Party Plaintiff sought out and hired an English solicitor to issue an opinion relative to a transaction based in England and Italy. The Albatross Bond/Master Certificate, the

Support Agreement and the UniCredit Support Letter each provide that they are to be interpreted under English and Welsh law and are expressly subject to jurisdiction in England. The attorney-client relationship was formed in England and Third-Party Plaintiff sought an opinion based on English law. Finally, the alleged negligence and duties to disclose were also based on transactions and occurrences centered in England. The only connection to the U.S. and Texas is that Third-Party Plaintiff was located in California while transacting business overseas and it was sued in Texas. All of these facts strongly favor having the courts in England decide a controversy which was based in England, is subject to English law and for which jurisdiction is set in English courts. *See Pollux Holding Ltd.*, 329 F.3d at 76; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

ii. The Administrative Burdens on This Court Favor Dismissal

The administrative burdens which would be placed on this Court overwhelmingly favor dismissal. A central issue in this case, the authority of Mr. Tazza to issue the UniCredit Support Letter is subject to jurisdiction of the English courts and will have to be decided based upon English or Welsh law. Since the obligation under the UniCredit Support Letter did not mature prior to the sale of viatical policies and since no decision has been made regarding the enforceability of the UniCredit Support Letter or the Albatross Bond/Master Certificate, this Court is asked to render an advisory opinion about the ostensible authority of Mr. Tazza and the enforceability of the UniCredit Support Letter. After all, if UniCredit stands behind the UniCredit Support Letter or the courts in England ultimately find that it is enforceable, then there are no damages to speak of and Third-Party Plaintiffs' claims would be moot. Yet, this Court will be asked to wrestle with all of these issues in a vacuum since it will not have the benefit of having all of the relevant parties or issues before it. The administrative burden of having to

interpret and apply English law is a reason enough for this court to grant the motion. *See Piper*, 454 U.S. at 243-244. However, the posture in which this case has been brought, the lack of jurisdiction to decide central issues and the questionable enforceability of an advisory opinion about the UniCredit Support Letter all create overwhelming reasons for this Court to avoid the administrative burdens placed on it for a claim which could and should be resolved in England.

iii. The Problems That Would Be Encountered in Conflicts of Law or Application of Foreign Law Favor Dismissal

English courts would be better equipped to handle the numerous issues involving English law rather than having this Court untangle the conflicts of laws issues. *Id.* At any rate, applying the appropriate conflicts of law analysis, this Court would, in any event, apply English law to the transactions and occurrences which were primarily based in England. *See Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex.App.-San Antonio 1995) (requiring expert testimony to establish standard of care); *Ramsey v. Reagan, Burrus, Dierksen, Lamen & Bluntzer, P.L.L.C.*, 203 WL 124206, *4 (applying "locality" rule for determining legal malpractice standard of care).

Texas applies the most significant relationships test in determining conflicts of laws issues for torts. *Cates v. Creamer*, 431 F.3d 456, 463 (5th Cir. 2005). The test requires the court to consider the respective interests each state might have in having its laws applied. *Id.*, 431 F.3d at 464. Factors to be considered in applying this test include: (1) where the injury occurred; (2) where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) where the relationship of the parties is centered. *Id.* The court looks at the contacts with each jurisdiction and must analyze the respective interest of each state. *Id.*, 431 F.3d at 465. In other words, this Court will have to engage in a complicated conflicts of law analysis which militates in favor of dismissal. *Piper*, 454 U.S. at 251. This Court will have to weigh all of these factors and will have to analyze the

policies underlying the relevant laws of England to determine whether England has a strong interest in regulating the practice of law within its boundaries. For obvious reasons, we believe that this Court would agree that English law should apply to the practice of law in England by licensed English solicitors.

In the end, the need to engage in complicated conflicts of law analysis, coupled with the possibility of applying the laws of multiple jurisdiction, also strongly favors dismissal.

William N. Radford
State Bar No. 16455200
Elaine T. Lenahan
State Bar No. 24008170

THOMPSON, COE, COUSINS & IRONS, L.L.P.
Plaza of the Americas, 700 North Pearl Street
Twenty-Fifth Floor
Dallas, TX 75201-2832
Telephone: (214) 874-8200
Facsimile: (214) 871-8209

Respectfully submitted,

DMH STALLARD and CHRISTOPHER JOHN WILLIAM STENNING

By: /s/Richard B. Polony

Thomas P. McGarry, #3128079
Richard B. Polony, #6227043
HINSHAW & CULBERTSON LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601-1081
Telephone: (312) 704-3000
Facsimile: (312) 704-3001

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the 20th day of January 2010 to all known counsel of record listed below by means of the Court's electronic filing system as required by the Federal Rules of Civil Procedure:

Bruce S. Kramer
Borod & Kramer, PC
80 Monroe Avenue, Suite G1
Memphis, TN 38103

Michael J. Quilling
Brent Rodine
Quilling, Selander, Cummiskey & Lownds, PC
Bryan Tower, Suite 1800
2001 Bryan Street
Dallas, TX 75201

Christopher Trowbridge
Wendy Ann Duprey
Bell Nunnally & Martin, LLP
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, TX 75204

Lee L. Cameron, Jr.
Cathlynn H. Cannon
William J. Akins
Herbert J. Gillies
E. Stratton Horres, Jr.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
901 Main Street, Suite 4800
Dallas, TX 75202

/s/ Richard B. Polony
Richard B. Polony