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.	§	

THIRD-PARTY PLAINTIFFS' RESPONSE TO DMH STALLARD'S AND CHRISTOPHER JOHN WILLIAM STENNING'S MOTION TO DISMISS AND MOTION FOR STAY OF BRIEFING, AND TO PLAINTIFF'S RESPONSE

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Defendants Erwin & Johnson L.L.P. and Christopher R. Erwin (jointly "E&J" or "Third-Party Plaintiffs") respond to the Motion to Dismiss (Dkt. # 132 and 133) and Motion to Stay Briefing (Dkt. # 134) filed by DMH Stallard and Christopher John William Stenning (jointly "DMH Stallard" or "Third-Party Defendants") and to Plaintiff's Response (Dkt. # 135), and in support thereof would show as follows:

I.
SUMMARY

Third-Party Defendants' motions are nothing more than replications of their arguments filed in January 2008 in another case in Illinois.[1] By copying their prior motions and not focusing on the precise claims that *E&J* asserts against them in *this case*, they fail to offer any supportable ground for dismissal.

The overall fallacy in their reasoning is that E&J is not seeking to "enforce" the Albatross bond in their third-party claims against DMH Stallard. This Court has already recognized that this is not the case: "A possible dispute between the parties concerning the validity of the Albatross Bond however, played no role in the Court's decision" to permit impleader of Third-Party Defendants. (12/15/09 Order at 3). Yet, Third-Party Defendants spend a considerable amount of briefing arguing that a decision on the enforceability of the Albatross bond (or UniCredit's letter of credit) must precede E&J's claims. Even assuming that the bond or letter of credit could possibly be held enforceable, that would not alter any determination by the Court as to ABC's operation as a Ponzi scheme, nor would it negate Plaintiff's claims that E&J should have been on notice of such during their tenure. To be clear, E&J is not suing Third-Party Defendants because of the bond or letter of credit (neither of which they issued), but for their erroneous advice, E&J's reliance thereon, and the concomitant breaches of legal duties owed to E&J. As the Court correctly characterized it: "Defendants claim that Third-Party Defendants are liable to them for the exact same underfunding for which Plaintiff claims Defendants are liable."

[1] *See Neuma, Inc. v. DMH Stallard*, No. 1:07-cv-02723, Dkt. # 39 (N.D. Ill. January 18, 2008) (attached hereto as Exhibit A). Unfortunately, that case settled before the motions were decided.

(*Id.* at 4). Nothing in that statement requires a finding of enforceability of the bond or the letter of credit.

Third-Party Defendants' misunderstanding permeates their motions. They predicate their Rule 12(b)(1) motion on the faulty supposition that E&J seeks an "advisory opinion as to the enforceability of the a bond issued by Albatross and a support letter issued by UniCredit." Similarly, they mistakenly believe, in arguing Rule 12(b)(3), that venue is proper in England as to "the enforceability of the Albatross Bond and [the] UniCredit Support Letter." This same flawed understanding is demonstrated in their Rule 12(b)(7) and Rule 19 arguments that "Albatross and UniCredit are clearly indispensible parties." Because all of these motions are based on a failure to ascertain the actual foundation of E&J's claims (presumably due to copying the *Neuma* motion's arguments), these motions should be easily denied.

That leaves only the personal jurisdiction challenge. The argument that jurisdiction was "set" in England should be summarily rejected, as further concerning a suit to "enforce" the bond. Moreover, E&J was not a party to any such agreement. The real question is whether general or specific jurisdiction exists against Third-Party Defendants in Texas. E&J makes three important points, each of which independently establishes personal jurisdiction: (1) the traditional decisional framework (the only framework considered by DMH Stallard) has been supplanted in this receivership proceeding by a broader jurisdictional analysis; (2) specific jurisdiction exists against DMH Stallard in Texas; and (3) the only forum appropriate for such lawsuit against DMH Stallard is this one, as the scope of authority granted to Receiver precludes him from suing in any other forum for the recoupment of receivership assets. Further, the motion to stay briefing for Rule 12(b)(6) contravenes Rule 12(g) and (h) and thereby waives the Rule 12(b)(6) motion. Finally, Plaintiff's "response" is fundamentally flawed and has already

been **squarely rejected** by the Court. He should be agreeing with E&J and suing DMH Stallard in this Court. By the Court's Order, he simply cannot sue them in England.

II.
RELEVANT BACKGROUND

The relevant factual background is set out in the Third-Party Complaint filed against DMH Stallard, which E&J incorporates fully herein. In short, E&J hired DMH Stallard to perform due diligence regarding ABC's Albatross bond. DMH Stallard claimed to have done so and issued an opinion letter supporting the bond's letter of credit a**nd delivered that letter to ABC's offices in Houston, Texas**, after which it was relied upon by ABC and E&J.

After ABC was sued as a Ponzi scheme, Plaintiff was appointed as Receiver and, in turn, sued E&J, claiming that E&J should have realized – or did realize – that ABC was being operated as a Ponzi scheme. Plaintiff's theories are that E&J breached its legal duties by under-funding the premium reserve escrow account and making misrepresentations to ABC's investors. E&J answered and maintained that they did not make any such misrepresentations and complied with all contractual responsibilities concerning account funding. Moreover, to the extent that any claim for under-funding is asserted against E&J, Third-Party Defendants are liable because E&J relied on them to conduct due diligence on their behalf. Plaintiff admits in his pending "response" that DMH Stallard's due diligence report was "deficient." Thus, to the extent that E&J is liable for any purported under-funding of the premium reserve account because (as Plaintiff argues) they should have realized that ABC was a Ponzi scheme, Third-Party Defendants are liable for their "deficient" support of the Albatross bond; such support failed to apprise E&J of any issues with ABC's business.

E&J filed a Third-Party Complaint against DMH Stallard, asserting common law indemnity, legal malpractice and gross negligence, breach of fiduciary duty, negligent infliction of emotional distress, and contribution. No claim seeks to "enforce" the Albatross bond or letter of credit as a contractual right. Rather, as agents of E&J, Third-Party Defendants owed E&J certain legal duties. E&J's pending claims are founded on breaches of these legal duties.

As mentioned above, Third-Party Defendants' arguments are largely identical to their arguments made in the *Neuma* litigation. The Amended Complaint and motions are attached hereto for the Court's review. In *Neuma*, the plaintiff – Neuma, Inc. – was a viaticals company, not a trustee/escrow agent. Yet, like E&J, Neuma also requested and relied upon the opinion letter issued by Third-Party Defendants concerning the Albatross bond.[2] Although two of the legal claims in that complaint and E&J's complaint are similar (legal malpractice and breach of fiduciary duty), the remaining claims (RICO, fraud, and constructive fraud) are not currently being asserted by E&J. Yet, the divergence of legal theories did not stop Third-Party Defendants from making substantially the same arguments throughout their motions pending before this Court. E&J addresses each of those motions, in context of E&J's claims, below.

III.
THIRD-PARTY DEFENDANTS' MOTIONS SHOULD BE DENIED

A. Rule 12(b)(1): Facial Attack and Actual Controversy

1. *DMH Stallard's Facial Attack Should be Denied*

As an initial matter, Third-Party Defendants fail to apprise the Court as to whether they intend their 12(b)(1) motion to be a "facial" or "factual" challenge. "A 'facial attack' on the complaint requires the court merely to look and see if plaintiff has sufficiently alleged a basis of

[2] *See* Neuma, Inc.'s Amended Complaint, attached hereto as Exhibit B and fully incorporated herein.

subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). A "factual" attack, however, is made by providing affidavits, testimony and other evidentiary materials challenging the court's jurisdiction. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981).

Third-Party Defendants are making a facial attack. They rely on pleadings on file with the Court, citing solely E&J's Third-Party Complaint and Plaintiff's motion for reconsideration. (Br. at 5-7). They cite no testimony, affidavits or evidentiary materials in challenging subject matter jurisdiction.[3] (*Id.*). The Court, therefore, need only to look and see if E&J has sufficiently alleged a basis for subject matter jurisdiction, and the allegations in the Third-Party Complaint are taken as true for the purposes of that evaluation. *See Menchaca*, 613 F.2d at 511.

2. *E&J's Pleaded Jurisdictional Bases are Ignored by DMH Stallard*

E&J pleaded two bases for subject matter jurisdiction: (1) supplemental jurisdiction under 28 U.S.C. §1367(a), and (2) diversity jurisdiction under 28 U.S.C. §1332(a)(2). Third-Party Defendants ignore the very language of Section 1367(a), chiefly that the asserted claims "form part of the same case or controversy[.]" 28 U.S.C. § 1367(a). Third-Party Defendants do not dispute the existence of a case or controversy between *all other parties*, and the Court has already found that E&J's claims against Third-Party Defendants "arise from the same core of facts as Plaintiff's claims." (10/16/09 Order at 6). They fail to cite any authority by which the Court should ignore its prior ruling and decline to exercise supplemental jurisdiction over claims

[3] DMH Stallard may argue in reply that they attached evidentiary materials that should be considered, thereby transforming their attack into one of the "factual" variety. Yet, stating so in a reply would not change the fact that not a single piece of evidence is cited in the four paragraph motion challenging subject matter jurisdiction. Evidence was certainly cited in other motions for dismissal. Should DMH Stallard actually make that argument, E&J would request leave to file a sur-reply attaching such evidence then, rather than transform their current argument into a factual attack by attaching evidence showing jurisdiction.

that form part of the same case or controversy currently pending before the Court. As a result, the pleaded allegations, which are taken true, in connection with the Court's prior ruling establish that the Court has supplemental jurisdiction over these third-party claims.

Even if the Court were to delve into whether an independent actual controversy existed between E&J and Third-Party Defendants, it would not have to search far to find one. By limiting their argument to the *enforceability* of the bond, Third-Party Defendants ignore the import and effect of their opinion and E&J's reliance thereon, especially in light of their failure to acknowledge the public notice posted by the bank that issued the substitute letter of credit – Xelion – disavowing any authority for the Mr. Tazza. It is perhaps most telling that this issue is completely ignored in Third-Party Defendants' recitation of the applicable "background." (Br. at 1-5). Whether Third-Party Defendants failed to properly investigate Mr. Tazza's authority to bind Xelion or intentionally concealed his lack of authority from E&J is certainly ripe for determination as an actual controversy.

Further, it cannot be made clearer that a decision on the enforceability of the Albatross bond is not a prerequisite to E&J's claims. Even assuming that the Albatross bond is found enforceable, that does not change this Court's determination that ABC was operated as a Ponzi scheme. Third-Party Defendants would still be subject to a trial of whether they were derelict in their legal duties to E&J in conducting their due diligence (in all of the ways set forth in the Third-Party Complaint, including failing to advise of conflicts of interest). Accordingly, the propriety of DMH Stallard's opinion letter, and E&J's reliance thereon and subsequent conduct, certainly shows a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *See Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d

488, 490 (5th Cir. 1986). E&J's subject matter jurisdiction allegations are taken as true, and Third-Party Defendants' Rule 12(b)(1) motion should be denied.

B. Rule 12(b)(3) Dismissal is Inappropriate

Forum non conveniens exists for the "rare circumstances" when federal courts "relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). The moving party – Third-Party Defendants – must put forth "unequivocal, substantiated evidence presented by affidavit testimony" sufficient to enable the court to balance the parties' interests. *Baris v. Sulpicio Line, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991). In resolving a *forum non conveniens* issue, "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster v. Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 527 (1947). The movant bears the burden. *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 793 (5th Cir. 2007). Four primary considerations exist in weighing whether that burden has been carried. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379 (5th Cir. 2002). First, the court must determine whether an alternative forum is available. *Id.* If there is an alternative forum, the second consideration asks whether the alternative forum is adequate. *Id.* An alternative forum is adequate if "the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Id.* If a forum is both available and adequate, the court should then consider various private factors. *Id.* at 380. Lastly, if the private factors counsel against dismissal, the court should consider public interest factors that might give weight to dismissing the case. *Id.*

1. *Factors 1 and 2: Mandatory Venue in this Court and Inadequate Remedy in England*

This factor requires a two-part inquiry: availability and adequacy. An alternative forum is "available" if "the entire case and all parties can come within the jurisdiction of that forum." *Gonzalez*, 301 F.3d at 379. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

England is not an "available" alternative forum because, by Court order, the entire case and all parties *cannot* come within the jurisdiction of that forum. E&J pleaded that venue is proper in the Northern District of Texas because this action involves receivership assets subject to this Court's order appointing Plaintiff as Receiver for ABC and because these claims arise out of the same transaction and/or occurrence as the claims asserted by Plaintiff against E&J and have a common nucleus of operative facts. Despite E&J's pleading the Order, Third-Party Defendants ignored it in their motion. As the Court is aware, the Order provides that all actions for the recovery of receivership estate assets *must* be brought in this Court:

> 14. The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds or proceeds traceable to investor monies. **All such actions shall be filed in this Court.**

(Order Appointing Receiver at 7). Nothing in that Order allows Receiver to bring suit in any foreign forum. In permitting impleader, the Court recognized that Third-Party Defendants might be liable to Plaintiff for a portion, at least, of the damages attributable to under-funding the premium reserve account. Logically, then, any action against Third-Party Defendants related to recovery of such receivership assets must be brought in this Court. Thus, the "entire case and all parties" cannot come within the jurisdiction of the courts in England.

The particular points made by Third-Party Defendants are also incorrect and certainly do not provide the Court with the requisite unequivocal, substantiated evidence. *See Baris*, 932 F.2d at 1551. The argument concerning consent to English jurisdiction is again predicated on the mistaken belief that this is a suit for enforcement of the Albatross bond, which it is not. Moreover, nothing indicates that ABC has consented to jurisdiction in England. While Plaintiff has suggested that he would file suit in England, he cannot do so pursuant to the Court's Order. He is, therefore, unlikely to be permitted to join in any lawsuit should E&J pursue one in England. And no showing is made as to whether E&J and Mills Potoczak and Company have likewise consented. Ordering that England is an available forum would unnecessarily duplicate litigation by requiring that E&J pursue its claims there in conjunction with the defense of such claims here, while DMH Stallard defends similar claims brought by Plaintiff (in a suit in which E&J may seek to intervene). Consequently, England is not an "available" forum. *See Gonzalez*, 301 F.3d at 379.

England is also not an "adequate" forum. Third-Party Defendants acknowledge that England "may not be likely to recognize" claims for common-law indemnity and contribution – the only two derivative claims that support shifting liability to them for their comparative fault. Although reference is made to recognition of claims for negligence and breach of fiduciary duty, it is conspicuously apparent that "negligence" is substituted for "legal malpractice," which Third-Party Defendants claim to be the essence of E&J's claims. Moreover, their affidavit submitted in support indicates that the burden of proving legal malpractice is a "heavy one." (Br. at Ex. 14 at 3). There is also *no* analysis of whether gross negligence and exemplary damages are permitted in England. Third-Party Defendants have failed to assure the Court of the

adequacy of the alternative forum, but have certainly demonstrated how it will severely truncate E&J's liability and damages claims.

2. *Private Interest Factors do Not Support Dismissal*

Ordinarily a strong favorable presumption is applied to the plaintiff's choice of forum. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Third-Party Defendants present the incredible argument that E&J is "forum shopping" by filing this lawsuit in this forum. Nothing could be further from the truth. As the Court has reasoned, Plaintiff's suit against E&J must be in this forum. E&J's assertion of its rights to bring in a third-party defendant who, as the Court has recognized, might be liable, at least in part, for the claims asserted against them in this mandatory forum cannot possibly be further from forum shopping. As a result, this forum should be accorded the full measure of deference for the third-party claims asserted against DMH Stallard.

None of the other private interest or public interest factors support dismissal. The "private interest" factors include (1) the relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) possibility of view of the premises, if view would be appropriate to the action; (4) all other practical problems that make trial of a case easy, expeditious and inexpensive, the enforceability of judgment, and whether the plaintiff has sought to "vex," "harass," or "oppress" the defendant. *Gilbert*, 330 U.S. at 508.

a. Dismissal Not Supported by Locations of Sources of Proof or Difficulty of Service on Witnesses

Third-Party Defendants argue that *they*, who reside in England, would be at an "extreme disadvantage" in gaining access to sources of proof were the case to proceed in this Court. They contend that several sources of proof are either in England or Italy. Certainly, the sources of proof, witnesses, and parties are spread across countries: relevant documents, E&J, Plaintiff, and Mr. LaMonda are in the United States; other documents, Albatross, UniCredit, Xelion, Banca di Roma, Mr. Tazza, other witnesses are in Italy; and still other documents, the Searles, and DMH Stallard are in England. No one location outweighs another; collectively, they do not support choosing England as the best location of sources of proof and thereby dismissing this lawsuit. Indeed, by admitting that the English system has no equivalent to the discovery deposition (Br. at Ex. 14 at 6), Third-Party Plaintiffs all but admit that E&J's discovery would be severely curtailed should the case be dismissed and re-filed in England. The sources of proof matter not if the procedure for obtaining them is excluded. Certainly, E&J is not complaining about the additional work that it would be required to undertake to gain access to witnesses, parties, and sources of proof documentary currently in England or Italy. E&J understands that the procedures for conducting discovery are more limited and that certain witnesses (but not DMH Stallard) will be outside of the subpoena power of this Court. Still, E&J intends to take full advantage of the limits of discovery available to a foreign party in England and Italy.

Third-Party Defendants' emphasis on other potential claims against UniCredit and/or Albatross and the documents' purported selection of English and Welsh substantive law has no bearing on E&J's claims; thus, no bearing on access to sources of proof. As explained above, this is not a lawsuit seeking enforcement of the Albatross bond, so the discussions of potential

claims regarding such enforcement and any company "standing behind" the bond and letter of credit has nothing to do with the claims in this case. Further, whether or not the documents were expressly made enforceable under the laws of England and Wales, the United States, or Italy has nothing to do with where to site the *extra-contractual claims* for which E&J sues DMH Stallard.

b. Judgment Collection Does Not Support Dismissal

The collectability of a judgment issued against DMH Stallard by this Court presumably would have affected *E&J's* decision to pursue litigation here. It has no bearing, however, on DMH Stallard's request for dismissal for *forum non conveniens*. As explained at length above, E&J is not seeking to enforce the bond, so the enforcement of judgments against any other parties is likewise irrelevant to this analysis.

3. *Public Interest Factors do Not Support Dismissal*

The "public interest" factors include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies resolved at home; (3) the interest in having a the trial of a diversity case in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *See Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 342 (5th Cir. 1999).

a. Purported Local Interests do Not Favor Dismissal

Although there is "a local interest in having local controversies decided at home," *id.*, this case can hardly be characterized as a local controversy. As described above, and in DMH Stallard's own affidavit, the factors leading up to the issuance of the opinion letter stretched from England to Italy and ultimately the United States. It is this Court, and the numerous investors harmed by ABC, who deserve to have their interests considered in weighing DMH Stallard's

actions in supporting the Albatross bond and, by extension, further permitting ABC's mode of business operations on an international basis. Accordingly, this forum has a greater interest in resolving this dispute than a court in England.

b. No Proof of Comparative Administrative Burdens

Third-Party Defendants bear the burden, but again fail to carry it. Again, this argument is copied almost exactly from the *Neuma* litigation, indicating no real effort to weigh the factors with specific reference to this case and Court. As a result, they fail to show information as to court congestion in this Court versus an English court. In fact, they fail to address this factor at all, but weave in other grounds to appear to argue this point (*e.g.*, application of foreign law, indispensible parties, adequacy of another forum). Those arguments are negated as explained above.

Further, several federal courts have held that "a more efficient use of judicial resources is possible if all parties are brought before the court in one action." *American Home Assurance Co. v. The Ins. Corp. of Ireland, Ltd.*, 603 F. Supp. 636, 642 (S.D. N.Y. 1984); *Jackson v. Texaco, Inc.*, No. C88-2337, 1990 U.S. Dist. LEXIS 18864, *7 (N.D. Ca. Nov. 21, 1990). In fact, federal courts have always encouraged, through the federal rules, the pragmatic practice of joining all parties and claims in a single forum. *Jackson*, 1990 U.S. Dist. LEXIS 18864, at *8. Especially where the underlying and third-party actions emanated from the same events, "the interest in having a single forum litigate both disputes [has been] deemed relevant to resolution of the *forum non conveniens* question." *Excel Shipping Corp. v. Seatrain Int'l S.A.*, 584 F. Supp. 734, 743-44 (E.D. N.Y. 1984). To dismiss a third-party complaint in ongoing litigation and require the defendant to pursue a remedy in another country would result in "piecemeal relitigation" of

many issues and would certainly not bring about judicial economy. *See Continental Graphics v. Hiller Indus.*, 614 F. Supp. 1125, 1131 (D. Utah 1985). This factor does not support dismissal.

c. Application of Foreign Law Does Not Support Dismissal

The simple fact that foreign law would govern a case is not in itself reason to apply the doctrine of *forum non conveniens* and grant a dismissal. *Schexnider v. McDermott, Int'l, Inc.*, 817 F.2d 1159, 1164 (5th Cir. 1987); *Blum v. General Electric Co.*, 547 F. Supp. 2d 717, 724 (W.D. Tex. 2008) ("[P]roof of foreign law may be a burden in this case, but it is not alone enough to push the balance of convenience strongly in favor of the defendants."); *Prevision Integral de Servicios Funerarios, S.A. v. Kraft*, 94 F. Supp. 2d 771, 779 (W.D. Tex. 2000) (holding that, while a trial involving foreign law is not ideal, the court was not hamstrung by the application of foreign laws and jurisprudence).

Here, the choice-of-law questions are circumspect, and this Court is quite capable of both deciding which law to apply and applying any foreign law. It is true that the engagement letter calls for the application of English law. Yet, claims for contribution and common law indemnity may be governed by Texas, English, or California law, whichever has the most significant relationship to the conduct at issue (namely, the delivery of and reliance on the opinion letter). This Court is already applying California law to similar claims against E&J. Its analysis of which law to apply to the third-party claims would not be out of the ordinary for cross-border actions commonly found in federal courts.

If the Court finds that English law applies, it is worth emphasizing that Third-Party Defendants *are a law firm and an English solicitor*. They are thus not unaware of the intricacies and applications of English law (nor, it seems, United States and Italian law). The affidavit from the top person in their litigation practice, Mr. James, portrays that they can sufficiently explain

the application of English law in this case, were the Court to decide that English law applied to any of the claims. Given the expected thorough briefing that would attend which law would apply and, then, the application of that law, there should be no "numerous issues" that the Court should have to "untangle." (Br. at 24). For these reasons, this factor does not support dismissal, either.

C. Albatross and UniCredit are Not Indispensible Under Rules 12(b)(7) and 19

"In ruling on a motion to dismiss for failure to join a necessary and indispensable party, a court must accept the complaint allegations as true." *United States v. Rutherford Oil Corp.*, No. G-08-0231, 2009 WL 1351794, at *2 (S.D. Tex. May 13, 2009). The burden of proof is on the moving defendant to demonstrate that an absent party is indispensable and that the action should be dismissed. *Nottingham v. General Am. Communications Corp.*, 811 F.2d 873, 880 (5th Cir. 1987) (rejecting defendant's argument to dismiss because the defendant failed to establish the necessary grounds).

Determining whether to dismiss a case for failure to join an indispensable party requires a two-step inquiry. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 628 (5th Cir. 2009). First, the court must determine whether the party should be added under the requirements of Rule 19(a). Rule 19(a)(1) requires that a person subject to process and whose joinder will not deprive the court of subject-matter jurisdiction be joined if: "(A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring

double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a). In making this determination, the court should consider:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). The Rule 19(b) inquiry is not necessary if the Rule 19(a) requirements are not satisfied.

E&J has explained at length that they are not seeking to enforce the Albatross bond. None of E&J's claims hinge on obtaining a finding that the Albatross bond is enforceable. Neither Albatross nor UniCredit are "central" to E&J's claims for common law indemnity, legal malpractice, gross negligence, breach of fiduciary duty, negligent infliction of emotional distress, and contribution. Let us be clear: even assuming that the UniCredit letter is enforceable, the fact remains that Third-Party Defendants' report failed to acknowledge: (1) the Searles' relationship with Mr. Stenning and concomitant conflict of interest; (2) Mr. Tazza's publicly-denounced lack of authority; and (3) any investigation into ABC's activities vis-à-vis bonding operations. The supposition that the UniCredit letter could potentially be found to be enforceable and somehow moot E&J's claims has no foundation in any facts at this point. Indeed, Plaintiff has already avowed that he intends to sue DMH Stallard for the very conduct alleged to be at issue here (albeit, in the wrong forum). Consequently, Albatross and UniCredit are not indispensible, and E&J's claims are not defective because they do not seek the involvement of fact witnesses as parties.

D. Receivership and Specific Personal Jurisdiction Exists; Alternatively, a Request to Conduct Limited Jurisdictional Discovery

The Court has specific personal jurisdiction over the Third-Party Defendants because this claim arises out of an opinion letter **issued by Third-Party Defendants and delivered in Texas**. Third-Party Defendants intentionally directed their actions to Texas, knowing that their actions would be relied upon with consequences flowing from such reliance. Unfortunately, their "deficient" (to use Plaintiff's characterization) due diligence report ultimately harmed numerous investors who conducted business with ABC in Texas, and for whose harm E&J (and other parties) are being sued in Texas.

E&J need only present prima facie evidence of personal jurisdiction over Third-Party Defendants. *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 625 (5th Cir. 1999). If conflicts exist between facts alleged by E&J and those shown in evidence presented by Third-Party Defendants, such conflicts must be resolved in E&J's favor. *Id.* at 626. The Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a foreign defendant when the defendant has purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with the forum state; and the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Sufficient minimum contacts will give rise to either specific or general jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994). Specific jurisdiction applies when "a controversy is related to or 'arises out of' a [nonresident] defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). A defendant who has directed activities at forum residents must

present a "compelling case" to render jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985). No compelling case is made here.

1. *No Waiver Because Not a Suit to Enforce Bond and Letter of Credit*

Third-Party raise the same argument again in this context: that enforceability of the bond and letter of credit is at issue; thus, jurisdiction was established solely in English courts. This is patently wrong and inapplicable. To reiterate: this not a suit seeking to enforce the bond and letter of credit per their terms. As such, this dispute does not "aris[e] under the Master certificate and the attendant Bond Declarations[.]" (Br. at 8). Absent from Third-Party Defendants' argument is any recognition that E&J was *not a signatory* to the bond or the letter of credit. There is thus a complete absence of evidence, argument, or authority demonstrating that E&J actually consented to the purported mandatory jurisdiction in England.

Even if the clause somehow did apply, it would still fail to show "waiver" and mandatory jurisdiction. The Fifth Circuit has made clear that a forum selection clause will not be enforced unless it is mandatory. *Caldas & Sons v. Willingham*, 17 F.3d 123, 127 (5th Cir. 1994). "Merely including the word 'shall' in a forum selection clause, however, does not necessarily make it mandatory or exclusive." *Astrum, Inc. v. Novell, Inc.*, No. 2:08-CV-201, 2008 WL 4415249, at *1 (E.D. Tex. Sept. 24, 2008) (citing *Caldas & Sons*). "For a forum selection clause to be mandatory, the clause must go further than just stating proceedings 'shall' be in a jurisdiction." *Id.* (citing *Costas v. Deposit Guar. Nat'l Bank*, 138 Fed. Appx. 605, 607 (5th Cir. 2005)). Third-Party Defendants' "waiver" argument is legally flawed and should be easily denied.

2. *Receivership Jurisdiction*

Plaintiff argues that he intends to initiate suit in London. However, because he is limited by this Court's Order to initiating suit here, the Court should consider whether the scope of

receivership jurisdiction supplants the traditional minimum contacts analysis. Plaintiff argued (against Mr. Erwin) that personal jurisdiction extended to anyone holding property traceable to ABC's funds. (Dkt. # 15). He extolled the considerable reach of personal jurisdiction in the receivership context and contended that personal jurisdiction had been vested here over all "choses in action" that may be bought against recipients of the monies transferred by ABC before receivership. (*Id.* at 6).

Third-Party Defendants were paid by funds received from ABC, which they do not (and cannot) deny. Thus, if, as E&J alleges, Third-Party Defendants are liable for at least a portion of the damages asserted against them by Plaintiff, then they would share liability for monies due to the receivership estate. Accordingly, the same expansive reach of personal jurisdiction should apply to E&J's claims against Third-Party Defendants.

3. *Specific Jurisdiction Exists*

In addition to receivership jurisdiction, specific jurisdiction exists in Texas against Third-Party Defendants. The Fifth Circuit has reasoned that even a single contact with the forum state can be sufficient to support specific jurisdiction. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988). Moreover, when an intentional tort is directed at forum state, the Supreme Court established an "effects" test for jurisdiction. *See Calder v. Jones*. 465 U.S. 783 (1984). Under that test, a forum state may exercise its jurisdiction when a defendant "expressly aim[s]" allegedly tortious acts at the forum state such that the forum state serves as the "focal point" for the "effects" of the conduct. *Id.* at 789.

Third-Party Defendants certainly expressly aimed their opinion letter at Texas, and Texas (specifically, ABC's offices in Houston) served as a "focal point" for the "effects" of that conduct. Their actions directed at Texas were intentional, and cannot accurately be characterized

as random, fortuitous, or incidental. Moreover, an attorney may be subject to specific jurisdiction when, but for the attorney-client relationship, the attorney would not have owed the duty claimed to have been breached in that jurisdiction. *See Trinity Indus. v. Myers & Assocs.*, 41 F.3d 229, 231 (5th Cir. 1995) (finding that attorney was subject to specific jurisdiction in Texas in legal malpractice suit because, although the alleged malpractice occurred in another jurisdiction, the attorney-client relationship with the resident plaintiff was formed in Texas and, but for this relationship, the attorney would not have owed the duty allegedly breached). Third-Party Defendants deliberately availed themselves of the benefits of an ongoing relationship with E&J and thus ABC in Texas and reasonably should have anticipated the possibility of being haled into court in Texas for claims arising out of or related to that relationship. *See id.*; *cf. Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990) (specific jurisdiction over nonresident doctor exists where forum state patient had an ongoing relationship with the doctor and treatment in part occurred in the forum state); *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310 (9th Cir. 1987) (provision of ongoing accounting services to forum resident was sufficient to support specific jurisdiction over out-of-state accountant). As the Supreme Court observed in *Burger King*, "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp.*, 471 U.S. at 474. Yet, Third-Party Defendants are attempting to do just that: avoid any obligations for issuing the deficient due diligence letter.

Personal jurisdiction is also supported by the Fifth Circuit's decision in *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999). There, the court of appeals held that the district court did indeed have personal jurisdiction because the content of the communications between a foreign attorney and his clients formed the basis of the complaint. Similarly here, the opinion

letter issued by Third-Party Defendants was delivered in Texas and contained the assurances and representations that are at the heart of E&J's third-party claims. Third-Party Defendants clearly intended that their opinion were to be relied upon in Texas concerning business being conducted in Texas by Texas residents. It is only fair to ask that Third-Party Defendants now defend themselves in the jurisdiction where they directed their actions. *See Southmark Corp.*, 851 F.2d at 772.

4. *Fairness Requires Litigation in this Court*

The exercise of personal jurisdiction is "fair" in this Court. Analysis of the following factors underlie that conclusion: (1) the burden on the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental social policies. *Felch v. Transportes Lar-Mex SA De CV*, 92 F.3d 320, 324 (5th Cir. 1996).

As to the first factor, Third-Party Defendants incorporate their complaints concerning ease of access to proof in their arguments for dismissal under *forum non conveniens*. E&J likewise incorporates the reasons showing why the burdens, if any, on Third-Party Defendants do not compel denial of personal jurisdiction. Any such burdens do not render Texas an unfair jurisdiction for this lawsuit, as multiple factors far support holding the trial here. The interests of the forum state – the second factor – are not "slight," as Third-Party Defendants contend. Both Plaintiff and E&J believe that Third-Party Defendants must answer for their conduct, which affected numerous investors, in Texas and abroad. Texas has an interest in ensuring that those whose negligence, gross negligence, or other misconduct assists a Ponzi scheme are brought to justice in Texas. *Summit Mach. Tool Mfg. Corp. v. Warren Transport, Inc.*, 920 F. Supp. 722,

726-27 (S.D. Tex. 1996) (recognizing "Texas' strong interest in adjudicating disputes arising from conduct and contracts performed at least partly in the state"). The third and fourth factor, in the context of this suit, both support the efficient and judicial economical adjudication of a receivership proceeding. It is abundantly clear that Plaintiff's scope of authority does not permit suit in England. Moreover, as stated above, to decline to exercise personal jurisdiction as to Third-Party Defendants would inevitably result in piecemeal and duplicative litigation possibly resulting in conflicting judgments, as largely the same claims would be litigated in two separate courts. The position offered by Third-Party Defendants would thus complicate and duplicate the process, rather than simplify it.

5. *Alternatively, E&J Requests an Opportunity to Conduct Jurisdictional Discovery*

To the extent that the Court does not deny Third-Party Defendants' Rule 12(b)(2) motion, E&J requests an opportunity to conduct discovery limited to the issue of DMH Stallard's amenability to personal jurisdiction in Texas. The Fifth Circuit generally requires an opportunity to conduct discovery. *See Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147, n.4 (5th Cir. 1985); *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981).

E. <u>Plaintiff's "Response" Adds Nothing that the Court has Not Already Considered and Rejected</u>

Plaintiff's "response" is a rehashing of his opposition to the motion to implead DMH Stallard and his motion for reconsideration of the Court's Order allowing such impleader. Plaintiff's positions have already been briefed to the Court, and the Court has already considered and **squarely rejected them**. Fashioning a Rule 12(b)(6) motion as a "response" does not alter the content of the arguments, **which the Court has <u>previously rejected</u> on two separate occasions**. This motion should be rejected again for the third (and hopefully final) time.

Further, as explained above, the only forum for Plaintiff's lawsuit against DMH Stallard is in this Court. Plaintiff should thus be supporting these third-party claims – and asserting his own – not opposing them and attempting some suit in England, far beyond the scope of authority granted to him by this Court.

F. Motion to Stay Briefing Should be Denied

Pursuant to Rule 12(g) (2), "a party that makes a motion under this rule *must* not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." FED. R. CIV. P. 12(g)(2) (emphasis added). Rule 12(h) mandates that "a party waives any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2)." FED. R. CIV. P. 12(h)(1)(A). Despite the clarity of Rule 12(g) and (h), Third-Party Defendants seek to fracture their motions into two stages, with the Rule 12(b)(6) motion following *only if necessary* after the Court denies the Rule 12(b)(1), (2), (3), and (7) and Rule 19 motions. Why Third-Party Defendants singled that motion out as the one to hold back is unclear.[4]

As the Court is aware, E&J timely presented all of its claims under Rule 12(b) at one time. The Court decided those claims under the applicable substantive law. Like Plaintiff argued then, Third-Party Defendants now argue that the choice of law "may not be ripe for a final decision[.]" (Mot. at 3). The Court rejected that argument when offered by Plaintiff and should reject it now; it should not carve out an exception to the clarity of Rule 12(g) and (h). *See Quicksilver Resources, Inc. v. Eagle Drilling, LLC*, No. Civ: H-08-868, 2008 WL 3165745, at *6 (S.D. Tex. Aug. 4, 2008) (denying Rule 12(b)(3) motion on grounds of waiver).

[4] The Court should note the lack of a Local Rule 7 certificate of conference on this motion. Nonetheless, E&J would have been opposed due to the clear requirements of Rule 12.

WHEREFORE, DEFENDANTS ERWIN & JOHNSON L.L.P AND CHRISTOPHER R. ERWIN respectfully ask this Court to deny the motions to dismiss asserted by Third-Party Defendants' and to give Third-Party Plaintiffs whatever and further relief to which they may be entitled.

Respectfully submitted,

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By: *___/s/ Cathlynn H. Cannon__*

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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 9th day of February, 2010, to all known counsel of record as required by the Federal Rules of Civil Procedure.

___/s/ Cathlynn H. Cannon__
Cathlynn H. Cannon