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,	§	Case No.: 3:07-CV-1153-P-BF
v.	§	ECF
ERWIN & JOHNSON, LLP and CHRISTOPHER R. ERWIN,	§	
Defendants Third-Party Plaintiffs,	§	
MILLS, POTOCZAK & COMPANY, DMH STALLARD and CHRISTOPHER JOHN WILLIAM STENNING,	§	
Third-Party Defendants.	§	

DMH STALLARD'S AND CHRISTOPHER JOHN WILLIAM STENNING'S REPLY 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

1. E&J Failed to Meet Its Substantial Burden to Establish Subject Matter Jurisdiction

E&J plays fast and loose with the facts.[1] It alleged that "E&J believes that ABC's assets would have been more than sufficient to fund the premiums if the Albatross Bond had been valid, …." Doc # 65, p. 5. Based, in part, on this allegation the Court granted E&J's Motion holding that "Defendants claim that if the E&J escrow accounts were under-funded it was due to the actions of Third-Party Defendants." Doc #101, p. 6. The hook E&J used for subject matter jurisdiction is that a purported failure of the Albatross Bond to pay out caused the escrow account to be underfunded. Doc #102 ¶¶ 14, 16. The Receiver's Response gives the lie to this argument. Of the 13 policies for which bonds had matured after the Receiver was appointed,

[1] E&J falsely states that DMHS settled a case filed by Neuma, Inc. ("Neuma"). Confronted with a similar motion to dismiss, Neuma prudently voluntarily dismissed its claims. (**Ex. 15** App. p. 60-62). DMHS never settled with Neuma and E&J's false statement to this Court should be retracted.

none were backed by Albatross Bonds. Doc #135, p. 4. Further, the Receiver admitted that all of the policies owned by ABC were sold prior to the point in time when payment under any of the Albatross Bonds came due. Doc #108, p. 7. Consequently, the purported underfunding caused by DMH and Stenning (collectively "DMHS") never materialized.

It is disingenuous for E&J to argue that the enforceability of the Bond and UniCredit Support Letter is not at issue. To prove that it was damaged by DMHS's opinion on the enforceability of the Bond and UniCredit Support Letter, E&J will absolutely have to prove that the Bond and UniCredit Support Letter are unenforceable under English law since that is the crux of the opinion. There are no other damages alleged in the TP Complaint with any connection whatsoever to the Receiver's case.[2] This Court will also be asked to speculate as to damages which might have been incurred had ABC kept the policies.

DMHS mounted a factual attack challenging the existence of subject matter jurisdiction based on the admissions and evidence submitted by the Receiver in its Motion to Reconsider the Order allowing the TP Complaint. Brief p. 7 and Doc 108. These facts were clearly outside of the four corners of the TP Complaint. E&J has the burden of proving by a preponderance of the evidence that this Court has subject matter jurisdiction. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); , *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cri. 1980) ("A 'factual attack,' …, challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, ….") The Receiver's motion established that any underfunding of the escrow account had absolutely nothing to do with the claims asserted against DMHS. E&J's burden of proof is significant and it utterly failed to meet it.

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[2] The alleged public notice about Mr. Tazza is only relevant to the opinion issued by Avv. Coluccio. **App. pp. 26-31**. Avv. Coluccio opined about Italian law, DMHS's opinion was expressly limited to English law.

E&J attempts to confuse the issue by arguing that this Court should consider an earlier determination that ABC was operated as a Ponzi scheme. This revelation is of no moment since there is no allegation that DMHS were in any way connected to this Ponzi scheme. DMHS were retained for a limited purpose and are not alleged to have any connection to the escrow account which ostensibly disclosed to E&J the existence of the Ponzi scheme. This consideration can only be relevant to E&J's conduct. Thus, even cases cited by E&J support dismissal of this claim. *See Merchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

2. Factors Discussed by DMHS Support Dismissal Based on *Forum Non Conveniens*

As a starting point, E&J's reliance on *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), is misplaced as this case dealt with the abstention doctrine, not *forum non-conveniens*. While application of the doctrine has been described as rare, there is no "rarity" rule to be applied. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 249-250 (1981). Rather, the doctrine is based on the application of the factors. *Id.* E&J also unabashedly misrepresents DMHS's burden while misquoting *Baris* on page 8 of its Response. The *Baris* court held "that a moving defendant need not submit overly detailed affidavits to carry its burden, but it must provide enough information to enable the district court to balance the parties [sic] interests." *Baris v. Sulpicio Line, Inc.*, 932 F.2d 1540, 1549, 1551 (5th Cir. 1991); *Piper*, 454 U.S. at 258 ("Requiring extensive investigation would defeat the purpose of their motion.") In fact, the burden on DMHS is reduced significantly this is not E&J's home forum. *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 430 (2007). Finally, where the court has to grapple with issues of subject matter and personal jurisdiction, then the case becomes "a textbook case for immediate *forum non conveniens* dismissal." *Id.* 549 U.S. at 435.

E&J incorrectly argues that the England is not an available forum. The primary issue in *Baris v. Sulpicio Line, Inc.* was that the defendant had failed to establish that it was amenable to

jurisdiction in the foreign forum. *Baris v. Sulpicio Line, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991). That is clearly not the case here since DMHS have not only established they are subject to jurisdiction in England—they agreed to it. Br. at p. 18. Further, the fact that there may be a change in substantive law is irrelevant, E&J must establish "that they will be deprived of any remedy or treated unfairly." *Piper Aircraft*, 454 U.S. at 254-255; Br. p. 18. Since it is undisputed that E&J will have a remedy, the forum is adequate. *Id*.

Further, this Court's Order Appointing the Receiver is not a limitation on the Receiver's ability to take any action it deems necessary in another jurisdiction. Paragraph 13 of the Order allows the receiver to "institute, defend, compromise, or adjust such actions or proceedings … pending or hereinafter instituted … in his discretion … for the protection of the Receivership Assets …." Ex 16, **App**. pp. 68-9. Further, this Court "empowered and directed [Receiver] to apply to this Court, with notice to the Commission and Defendant for issuance of such orders as may be necessary and appropriate in order to carry out the mandate of this Court." **App**. p. 71. Paragraph 14 of the Order relates to the recovery of "assets" and the Receiver's claim against DMHS would not fall under this authorization. At any rate, the Receiver supports dismissal.

E&J does not dispute that the key witnesses relating to the work performed by DMHS are located in Europe. Further, unlike trial in the U.S., these key witnesses are all subject to the pre-trial and trial procedures of the European Union and would be required to produce evidence in advance of trial and give testimony at trial under English procedural rules. Br. p. 21, **App.** pp. 53-54, 57. E&J argues, without citation to any authority, that because the pretrial discovery procedure is different, somehow this weighs against dismissal. Resp. p. 12. U.S. Courts have, however, found English courts to provide a more than adequate and impartial forum. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S.1, 12 (1972); and cases cited in Br. p. 17. Finally, without explanation, E&J also concludes that the enforceability of any judgment entered is not

relevant to this Court's determination. However, if the courts in England refuse to enforce a judgment without first determining the issues of enforceability of the Albatross Bond or the UniCredit Support Letter, then the interests of the parties would not be served by tying up resources here.

3. Public Interest Factors Support Dismissal

E&J concedes that local controversies should be decided at home, but disagrees that claims against DMHS are localized in England. The relevant facts are undisputed. E&J and ABC reached out to DMHS in England and asked them to provide an opinion about an international transaction based on the laws of England. E&J asked English solicitors to engage in the practice of law in England. The Receiver, which represents the interests of the ABC investors, agrees that this action should proceed in England. The forum with the greatest interest is England since it clearly has an interest in the practice of law by English solicitors.

E&J's argument that its claims have nothing to do with the enforceability of the Bond and the UniCredit Support Letter is fallacious. As was established above, E&J asks this Court to determine that DMHS were negligent in the preparation of their opinion regarding the enforceability of the Bond and UniCredit Support Letter under English law. Each of E&J's claims are based on the work performed by Stenning and the question of whether the Bond and the UniCredit Support Letter are enforceable. Indeed, if the Bond and UniCredit Support Letter are enforceable, then E&J's claims against DMHS fail.

This Court will have to deal with these critical issues in a vacuum. The underlying policies were sold prior to the date when the Bond or the UniCredit Support Letter were called upon to pay out any monies. E&J will ask this Court to issue an advisory opinion about the enforceability of the Bond and UniCredit Support Letter. Further, since there are no actual damages based on underfunding from the Albatross Bond, this Court will be asked to speculate

as to what the damages might have been. The posture of this case, the lack of jurisdiction to decide central issues and the advisory nature of any opinion all favor dismissal of this claim.

E&J concedes that this Court will have to engage in complex conflict of law analysis and that it will also have to apply English law. The question is not whether this or any other court is capable of applying the law of a foreign jurisdiction. Rather, these simple facts favor dismissal of this suit. *Piper Aircraft*, 454 U.S. at 251 ("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.'") No more needs to be said here, the public interest factors support dismissal.

4. There Are Insufficient Minimum Contacts to Confer Jurisdiction

The sole basis for specific jurisdiction alleged in the TP Complaint is an opinion letter addressed to ABC, not E&J. Erwin attend a closing on the Albatross Bond and received the Opinion in England. E&J does not support jurisdiction with any evidence. In contrast, DMHS submitted an affidavit authenticating documentary evidence showing that it was Keith LaMonda of ABC and E&J which reached out to Stenning, in England, to request a legal opinion. *See* **App** pp. 15-17. LaMonda then instructed that further instructions would come from E&J. **App** p. 15. LaMonda also instructed Stenning to work with E&J in California, Mathew Searle in England, Martin Searle in England, and Darren Thomas in connection with the opinion. **App**. p. 16. Finally, LaMonda instructed E&J to provide Stenning the information requested by him on November 2, 2005 in order to provide any representation in connection with the opinion letter. **App**. p. 17. Even without an evidentiary hearing, the evidence submitted through affidavit and the pleadings shows that DMHS did not reach out to California or to Texas to create sufficient contacts.

E&J entered into a retention agreement with DMHS and the agreement was executed in both California and England. **App**. p. 18-25. None of the work to be performed had any

connection to Texas, it was based out of England and Italy and subject to English law. **App**. pp. 18-25, 32-46. This undisputed evidence does not show that DMHS availed themselves of the "of the privilege of conducting activities within [Texas], thus invoking the benefits and protections of its laws." *Bearry v. Beech Aircraft Corporation*, 818 F.2d 370, 374 (5th Cir. 1987). To the extent that there was any contact with Texas, it was because of the unilateral actions of both ABC and E&J in seeking out the opinion. As such the due process minimum contacts are not satisfied. *Id*.; *Bullion v. Gillespie, M.D.*, 895 F.2d 213, 216 (5th Cir. 1990) ("Jurisdiction is improper if grounded in the unilateral activity of the plaintiff."), *citing World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 298 (1980); *see also Hanson v. Denckla*, 357 U.S. 235, 252 (1958). None of the cases relied upon by E&J address the undisputed facts at issue in this case.

The court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), held there was general jurisdiction because the defendant had continuous and systematic contacts with the jurisdiction over a number of years. *See also Burger King v. Rudzewicz*, 471 U.S. 462, 479-80 (1985) (sufficient contacts established where defendant "'reach[ed] out beyond' Michigan" to purchase a franchise and carefully structured 20-year agreement involving wide-reaching and continuous contacts with headquarters in a foreign forum). No such facts are alleged in this case.

The court in *Wilson v. Belin*, 20 F.3d 644 (1994), dismissed the complaint based on lack of jurisdiction based on many of the same arguments raised by DMHS. The defendant in *Wilson*, like DMHS here, did not initiate any communication with Texas aimed at a Texas resident. *Id*., 20 F.3d at 649. The court in *Wilson* also held that it was not enough that the tort occurred in whole or in part in Texas to exercise personal jurisdiction. *Id*. at 648. *Wilson* supports the DMHS's request for dismissal.

Similarly, in *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1983), the minimum contacts necessary for specific jurisdiction did not exist. The petitioner's contacts with

the State of Texas consisted of one personal visit by the chief executive to negotiate a transportation service contract, acceptance of checks drawn on a Texas bank, purchases from a Texas manufacturer of helicopters and equipment and related training trips. These contacts were held to be insufficient to exercise specific jurisdiction over the petitioner for a wrongful death occurring in Peru.

E&J and ABC were the ones to reach out to DMHS and the short-term relationship envisioned work to be performed in England and Italy. There was absolutely no contact with the State of Texas described in the retention agreement or the opinion. Indeed, the contract and attorney-client relationship alleged in the TP Complaint are not connected to Texas. Even if the contract were connected to Texas, entering into a contract alone would not be enough for purposes of minimum contacts. *Burger King*, 471 U.S. at 479. Thus, E&J is factually and legally incorrect when it concludes that DMHS have directed activities toward the State of Texas.

E&J trips up over its allegations of fact which are taken as true. In particular, E&J took ownership of the attorney-client relationship. TP Comp. ¶13 ("Stenning executed an engagement letter, between E&J and DMH Stallard, agreeing that DMH Stallard would act on E&J's behalf …."). E&J now concludes, without any citation to the record, that DMHS had an ongoing relationship with ABC. Resp. p. 21. Plaintiff has alleged facts and filed claims based on ***its*** purported attorney-client relationship, but now wishes to change direction. If, E&J concedes that the attorney-client relationship was with ABC, then it has no standing to bring the current TP Complaint and this Court should dismiss it *sua sponte*. However, if it stands on its alleged relationship, then it has no standing or factual support to assert ABC's relationship with DMHS as a basis for jurisdiction. E&J is playing fast and loose with the facts here and this Court should

not allow it to obtain jurisdiction by changing course and arguing that the relationship was in fact with ABC.

In *Trinity Industries, Inc. v. Myers & Associates, Ltd.*, 41 F.3d 229 (5th Cir. 1995) the court held that "[t]he bare existence of an attorney-client relationship is not sufficient[]" to confer jurisdiction. *Id.*, 41 F.3d at 230. Rather, the defendant represented a Texas company over eight years, communicated regularly with the company in Texas, held meetings with the company in Texas, appeared *pro-hac vice* for the company in the Northern District of Texas, and issued bills to and received payment from the company in Texas. *Id*. at 231. Thus, *Trinity Industries, Inc*. does not support jurisdiction because E&J has alleged an attorney-client relationship based in England, with a California resident, not a Texas resident. Further, there are no allegations of fact amounting to the continuous, systematic contacts with Texas through which DMHS would have availed themselves of the benefits an ongoing relationship with a Texas citizen. Similarly, *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), also involved an attorney-client relationship with a Texas citizen, regular communications with Texas, and travel to and meetings in Texas. Based on the litany of continuous contacts between the attorney and Texas, the *Wien Air Alaska* court found minimum contacts were satisfied.

In the present case the facts are quite different since E&J has alleged that it is the client based out of California, with the only Texas contact consisting of an opinion issued to a third party. It is telling that that third party, ABC, does not assert jurisdiction and instead agrees with DMHS's Motion.[3]

[3] E&J is no longer the trustee for ABC and it would be legally and ethically improper for E&J to continue to assert claims against DMHS if its relationship with them was only as the Trustee for ABC—a disclosed agent.

5. The Forum Selection Clauses Require Litigation in England

Despite aligning its interests with ABC regarding its purported attorney-client relationship with DMHS, E&J attempts to distinguish themselves from the effect of the mandatory forum selection clauses in both the Albatross Bond and UniCredit Support Letter. In any event, these agreements strongly and clearly provide that England is the only appropriate venue. A similar forum section clause was enforced. *See Phoenix Network Technologies (Europe) Limited v. Neon Systems, Inc.*, 177 S.W.3rd 605, 615-16 (Tex.App. 1st Dist. 2005) (use of the word "shall" in reference to both application of law and jurisdiction was sufficient to create a mandator forum selection clause). To the extent that this Court considers the alleged single contact with ABC in Texas as an extension of E&J's attorney-client relationship, then it must also take into account the mandatory forum selection clause arising out of the Albatross Bond and UniCredit Support Letter transaction. Even if this Court ruled that the forum selection clause was ultimately not mandatory, dismissal is still warranted. *See BBC Chartering & Logistic GMBH & Co. v. Siemens Wind Power A/S*, 546 F.Supp.2d 437, (S.D.Tex. 2008) (although forum selection clause was not mandatory, dismissal was still warranted on *forum non conveniens* grounds).

CONCLUSION

Since key witnesses, material evidence, forum selection clauses and all performance under the retention agreement took place in England, as opposed to the alleged single attenuated contact with Texas directed to ABC rather than E&J, this Court should dismiss the TP Complaint for all the reasons stated above and in the original Memorandum of Law.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the 23rd day of February 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:

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