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

MICHAEL J. QUILLING, ET AL.,	§	
	§	
Plaintiff,	§	
v.	§	3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, ET AL.,	§	
	§	
Defendants and Third-Party Plaintiffs,	§	
	§	
MILLS, POTOCZAK & COMPANY,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Third-Party Defendants DMH Stallard's and John William Stenning's ("DMH" and "Stenning" respectively) Motion to Dismiss the Third-Party Complaint Based on Lack of Jurisdiction, Forum Non Conveniens, and Failure to Add an Indispensable Party ("Mot."), filed on January 20, 2010. Defendants and Third-Party Plaintiffs Erwin & Johnson L.L.P. ("E&J") and Christopher R. Erwin ("Erwin"), filed a Response ("Resp.") on February 9, 2010. A Reply was filed on February 23, 2010. After reviewing the parties' briefing, the evidence, and the applicable law, the Court finds that the Motion to Dismiss should be DENIED.

I. Background and Procedural History

On November 17, 2006, the Securities and Exchange Commission ("SEC") filed suit alleging that ABC Viaticals, Inc. ("ABC") and other defendants fraudulently sold life settlement policies and made numerous misrepresentations to investors. ABC represented to investors that

their contributions would be tied to a particular insurance policy; however, according to Plaintiff, from the beginning, ABC commingled investor contributions in order to pay premiums and expenses on numerous policies. Additionally, the commingled accounts were allegedly underfunded, so that ABC had to solicit funds from additional investors in order to cover its obligation to the initial investors.

On November 17, 2006, this Court appointed Michael J. Quilling as Receiver ("Receiver" or "Plaintiff") for ABC, in order to protect the interests of those who had invested with ABC. In accordance with that Order, Plaintiff has examined the business records of ABC and determined that, as ABC was insolvent and required new investments to honor obligations made to earlier investors, it was operating as a *Ponzi* scheme.

Plaintiff then brought this action alleging that the scheme involved the services of independent trustees – one of which was E&J – that handled all investor funds. (*See generally* Am. Compl.) E&J allegedly conducted its services through Erwin. *Id.* Investors were instructed to send their funds directly to E&J, where those funds were held in the law firm's trust account and disbursed from the Erwin & Johnson ABC Premium Escrow Account (collectively "E&J escrow accounts") in accordance with the investor's purchase agreement with ABC. (*Id.* at ¶ 19.)

After being appointed, Receiver sought to recover the investors' funds from the E&J escrow accounts. The E&J escrow accounts, however, held far less money than the amount Receiver believed should be in the accounts. *Id.* The under-funding of these E&J escrow Accounts, and the representations that E&J made to investors about the funding of these accounts, are at the root of Plaintiff's claims against Defendants.

Defendants claim that if the E&J escrow accounts were underfunded, that it is, at least in part, due to their reliance on Third-Party Defendants to conduct due diligence on their behalf. (*See generally* Third-Party Compl.) Specifically, Defendants claim that they believed a bond, known as the "Albatross Bond," to be valid based on Third-Party Defendants' due diligence and opinion letter (the "Letter"). (Third-Party Compl. (p. 4).) According to Defendants, if the Albatross Bond had been valid then it would have significantly reduced the amount by which the E&J escrow accounts were allegedly underfunded. As a result, Defendants claim that Third-Party Defendants may be liable to E&J and Erwin for all or part of Plaintiff's claims against them. (Third-Party Compl. (p. 6-7).)

On January 20, 2010, DMH and Stenning filed this Motion to Dismiss alleging this Court lacks subject matter jurisdiction to resolve the Third-Party Complaint and that the Court lacks personal jurisdiction over the Third-Party Defendants. (Mot. (p. 1).) DMH and Stenning also allege that Third-Party Plaintiffs have failed to join an indispensable party and that the doctrine of forum non conveniens supports dismissal of this lawsuit. *Id.*

II. Analysis

A. Subject Matter Jurisdiction

E&J and Erwin have pled that, under 28 U.S.C. §1367(a), supplemental jurisdiction exists for this Court to hear the claims against DMH and Stenning. (Third-Party Compl. (p. 2).) Under §1367(a), a district court that has original jurisdiction over a civil action "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). As this Court stated in its previous Order

(denying Plaintiff's Motion to Reconsider the Order Granting Leave to Bring in Third-Party Defendants) dated December 15, 2009:

> First, Plaintiff is seeking damages from Defendants for E&J's underfunding of the escrow accounts. And Second, Defendants claim that Third-Party Defendants are liable to E&J for all or part of the alleged underfunding of the same escrow accounts . . . . At this stage of the proceedings, Defendants have made sufficient allegations to permit bringing the third party into the case. As can be seen from the two indisputable factors above, Defendants claim that Third-Party Defendants are liable to them for the exact same underfunding for which Plaintiff claims Defendants are liable. The claims are therefore directly related . . . .

(Docket Entry 125 (p. 4).) Accordingly, the Court finds that supplemental jurisdiction of the Third-Party claims is proper under §1367(a).

B. Personal Jurisdiction

A plaintiff bears the burden of establishing a district court's personal jurisdiction over a nonresident defendant who moves for dismissal. *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The Court may exercise personal jurisdiction over a nonresident defendant only if: (1) a defendant is subject to service of process under the forum state's long-arm statute, and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment of the United States Constitution. *See Colwell Realty Inves., Inc. v. Triple T Inns, Inc.*, 785 F.2d 1330, 1333 (5th Cir. 1986). Because the Texas long-arm statute, Texas Civil Practice & Remedies Code § 17.042 (Vernon 1986), "reaches as far as the federal constitutional requirements of due process will permit," the Court need only determine whether the exercise of personal jurisdiction satisfies the United States Constitution's due process requirements. *See Kawasaki Steel Corp. v. Middleton*, 669 S.W.2d 199, 200 (Tex. 1985); *U-Anchor Adver. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977).

The Supreme Court has held that a due process inquiry in this context requires two determinations: (1) whether the nonresident defendant purposely established "minimum contacts" with the forum state and, if so, (2) whether the assertion of personal jurisdiction would comport with traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). If a defendant's contact with the forum state is too limited to convey general jurisdiction, the Court may still obtain specific personal jurisdiction over a defendant, if the nonresident defendant (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal Ind. Co. v. Super. Ct. of Calif.*, 480 U.S. 102, 110 (1987); *Burger King*, 471 U.S. at 472, and (2) the plaintiff's claims arise out of a defendant's purposeful contact with the forum. *Burger King*, 471 U.S. at 472; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

In a dispute over personal jurisdiction, "the party who seeks to invoke the jurisdiction of the district court bears the burden of establishing contacts by the nonresident defendant sufficient to invoke the jurisdiction of the court." *Bullion v. Gillespie*, 895 F.2d 213, 216–17 (5th Cir. 1990). "Proof by a preponderance of the evidence is not required." *Id.* Furthermore, "[w]hen a court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, it must accept as true the uncontroverted allegations in the complaint and resolve in favor of the plaintiff any factual conflicts posed by the affidavits." *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999).

"The 'minimum contacts' prong, for specific jurisdiction purposes, is satisfied by actions, or even just a single act, by which the non-resident defendant 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and

protections of its laws.'" *Ruston Gas Turbines v. Donaldson Co.*, 9 F.3d 415, 418-19 (5th Cir. 1993) (quoting *Burger King*, 471 U.S. at 475). "The non-resident's 'purposeful availment' must be such that a defendant 'should reasonably anticipate being haled into court' in the forum state." *Id.* at 419 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Third-Party Plaintiffs claim that specific jurisdiction arises here because DMH & Stenning purposefully availed themselves of doing business in Texas when they delivered the Letter to Texas. (Third-Party Compl. (p. 2)); (Resp. (p. 20-22).) Third-Party Defendants claim that their contacts with Texas do not give rise to specific personal jurisdiction in Texas, arguing "that it was Keith LaMonda of ABC and E&J which reached out to Stenning, in England, to request a legal opinion." (Reply (p. 6).)

However, in *Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999), the Fifth Circuit held that though an attorney client relationship was established in Germany, a single act directed toward Texas, giving rise to a cause of action, could support a finding of minimum contacts. *Id.* at 211.[1] Accordingly, it is immaterial if LaMonda initially reached out to England for the legal opinion. Once Third-Party Defendants delivered the Letter—which negligently failed to disclose that the support letter was fraudulent—it gave rise to claims of legal malpractice, gross negligence, breach of fiduciary duty, and a claim for indemnity.[2] Accordingly, as these claims arise out of the Third-Party Defendants contact with the Texas (via

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[1] The *Wein* Court supported this conclusion by citing *Calder v. Jones*, 465 U.S. 783, 104, S.Ct. 1482, 79 L.ED.2d 804 (1984), in which the Supreme Court found that minimum contacts existed in California "when a journalist wrote a defamatory article in Florida which he knew would affect the plaintiff's reputation in California." *Wein*, 195 F.3d at 211-212.

[2] At the Motion to Dismiss stage, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. **Error! Main Document Only.** *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n. 8 (5th Cir. 2002). Third-Party Plaintiffs would still bear the burden of proving these facts during later stages of litigation.

delivery of the Letter), the Court finds that sufficient contact exists to exercise personal jurisdiction.

Having established that minimum contacts exist, the Court must now determine whether the assertion of personal jurisdiction would comport with traditional notions of "fair play and substantial justice." *Burger King*, 471 U.S. at 476. To do this, the Court must evaluate "the burden on the defendant . . . the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (citations omitted).

Third-Party Defendants claim that the burden on them is substantial, and the interests of the forum state are slight, as they are domiciled in England, the work they performed was all done overseas, and the evidence and witnesses to the work performed in generating the Letter are in England and Italy. (Mot. (p. 13).) They also argue that the plaintiff's interest in securing relief is suspect and that "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." *Id.*

However, as Third-Party Plaintiffs correctly note in their Response, as the evidence and witnesses are spread across numerous countries, "[n]o one location outweighs another; [and] collectively, they do not support choosing England as the best location of sources of proof." (Resp. (p. 19).) Third-Party Plaintiffs also counter that the interests of the forum state are not slight, noting that 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." (Resp.

(p. 22).) (citing *Summit Mach. Tool Mg. Corp. v. Warren Transport, Inc.*, 920 F.Supp. 722, 726-27 (S.D.Tex. 1996). Accordingly, this factor weighs against dismissal.

Additionally, Third-Party Defendants' argument for judicial efficiency rests upon the theory that UniCredit and Albatross must be added in order to make a final determination as to the validity of the Albatross Bond. *Id.* at 6. However, as noted previously by this Court, the central claim before the Court is not the validity of the Albatross Bond, but rather, whether the alleged underfunding of the escrow accounts is due to E&J's reliance on Third-Party Defendants to conduct due diligence on their behalf. (Docket Entry 125 (p. 3-4).) Additionally, as this Court has already ruled that this alleged underfunding has resulted in a claim being brought against E&J, *Id.* at 4, judicial efficiency is actually served by maintaining and resolving all of the claims relating to the alleged underfunding in this one judicial forum. As this factor also weighs strongly against dismissal, this Court finds the assertion of personal jurisdiction over Third-Party Defendants comports with traditional notions of fair play and substantial justice.

C. Indispensable Party

Third-Party Defendants' request that the Court dismiss Third-Party Complaint for failure to join an indispensable party is governed by Rule 19. FED. R. CIV. P. 19; *HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003). Under Rule 19(a), the Court must first determine whether a person should join the lawsuit based on either of two conditions: (1) complete relief cannot be accorded among those already parties due to the absence of the person, or (2) the absent person claims an interest relating to the subject of the lawsuit, and the disposition of which will impair or impede the absentee's interests, or subject the parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. FED. R. CIV. P. 19(a). If a joinder of the absent person is warranted but such joinder would destroy the Court's diversity

jurisdiction, then the Court should consider the factors listed under Rule 19(b) before determining whether to proceed without the absent person or to dismiss the litigation. Fed. R. Civ. P. 19(b). There are four factors to be considered under Rule 19(b): "(1) prejudice to an absent party or others in the lawsuit from a judgment; (2) whether the shaping of relief can lessen prejudice to absent parties; (3) whether adequate relief can be given without participation of the party; and (4) whether the plaintiff has another effective forum if the suit is dismissed." FED. R. CIV. P. 19(b); *Wingate*, 327 F.3d at 439.

In this case, the Court's analysis need not reach beyond the Rule 19(a) factors. Despite Third-Party Defendants' protestations, it appears at this time that complete relief can be accorded in this matter without the participation of Albatross and UniCredit, for although a determination on the validity of the Albatross Bond may add support to E&J's claim, that determination would not be the sole support for the claims against Third-Party Defendants. (Resp. (p. 17).) Additionally, even if this Court makes a determination that the Albatross Bond is invalid, that ruling would not impair or impede the absentees' interests, as Albatross and UniCredit would not be bound by that finding, nor would such a ruling subject the parties to a substantial risk of incurring additional obligations. Accordingly, the Court finds that Albatross and UniCredit are not necessary parties under Rule 19(a).

D. Forum Non Conveniens

Third-Party Defendants assert that "[t]he 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." (Mot. (p. 16).) "The complaint of an American citizen, however, should not be dismissed unless trial in the chosen forum would be unjust and oppressive, and not merely inconvenient." *Lexington Ins. Co. v. Unionamerica Ins. Co.*, No. 85 Civ. 918, 11987 WL 11684,

at *3 (S.D.N.Y., May 28, 1987) (citing *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947) ("[A Plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.").

In a forum non conveniens inquiry, the district court must first assess whether an alternative forum is available, and then decide if the available alternative forum is adequate. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379-80 (5th Cir. 2002). If the court finds that an available alternative forum exists, it must then weigh various private interest factors. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir. 1993). If consideration of the private interest factors weights against dismissal, the court must then weigh numerous public interest factors. *Gonzalez*, 301 F.3d at 380.

Assuming arguendo that England is an adequate available forum, as Third-Party Defendants suggest, this Court turns to an examination of the following private interest factors: "(1) the ease of access to evidence; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) the possibility of a view of the premises, if appropriate; and (5) any other practical factors that make trial expeditious and inexpensive." *Saqui v. Pride Cent. America, LLC*, 595 F.3d 206, 213 (5th Cir. 2010) (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

Ease of Access to Evidence

As analyzed earlier in this Order, the evidence and witnesses are spread across numerous countries, to a degree that no one location outweighs another. Accordingly, this factor is neutral at best.

Difficulty of Service on Witnesses

Next, Third-Party Defendants claim that key witnesses "are outside of the subpoena power of this Court and can only be compelled if this case were pending in England." (Mot. (p. 21). However, a similar argument was put forth, and rejected, in *Burke v. Quartey*, 969 F.Supp. 921 (D.N.J., 1997). In that case, defendants alleged that one witness in Ghana and at least three witnesses in France were beyond the district court's power for compulsory service of process. Id. at 930. However, the *Burke* Court held that while "adjudication abroad might be more convenient for the defendant," defendant had not shown "that litigation in New Jersey will cause oppression and vexation to the defendant out of all proportion to the plaintiff's convenience." *Id.* at 931 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 258 (1984). Similarly, this Court finds that the inconvenience purported by Third-Party Defendants does not rise to a level of oppression that is out of proportion to Third-Party Plaintiffs' convenience.

Other Practical Problems

The only remaining factor that Third-Party Plaintiffs addressed was "the other practical factors that make trial expeditious and inexpensive." However, the essence of their argument merely rehashes the claim that this Court has no jurisdiction over "third parties which may have responsibility or underlying liability for some or all of the damages claimed by Plaintiff." (Mot. (p. 21).) As the Court has already stated that those parties are not necessary to this litigation, we find that this does rise to a level of oppression.

As an examination of the public factors, the Court finds that the while a trial in this forum may be inconvenient to Third-Party Defendants, it would not be unjust or oppressive. Accordingly, there is no need to address the public factors to find that the Court is not persuaded to dismiss the Third-Party Complaint.

III. CONCLUSION

For the foregoing reasons, the Court DENIES Third-Party Defendants' Motion to Dismiss.

IT IS SO ORDERED.

Signed this 30th day of June, 2010.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE