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.	§	

ERWIN & JOHNSON, LLP AND CHRISTOPHER R. ERWIN'S RESPONSE TO DMH STALLARD AND CHRISTOPHER STENNING'S MOTION TO DISMISS THE THIRD-PARTY COMPLAINT AND MOTION TO FILE AN AMENDED COMPLAINT

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Erwin & Johnson L.L.P. ("E&J") and Christopher R. Erwin ("Erwin") (jointly "E&J") respond as follows to DMH Stallard's and Christopher Stenning's ("Stenning") (jointly "DMH Stallard") Motion to Dismiss the Third-Party Complaint for failure to state and claim and move to file an amended complaint.

I. INTRODUCTION

In the Third-Party Complaint, E&J made specific factual allegations that assert a plausible claim on each of its causes of actions without regard to whether the laws of the United Kingdom, California or Texas are used to resolve this matter. Despite this, DMH Stallard urges the Court to dismiss E&J's claim in its entirety based on factual allegations in an extrinsic pleading filed in a foreign legal proceeding because DMH Stallard says the foreign pleading contradicts E&J's allegations and shows that E&J will not prevail. As this Court cannot make factual determinations when deciding a 12(b)(6) motion, DMH Stallard's motion must fail.

II. RELEVENT FACTUAL ALLEGATIONS

The Third-Party Complaint alleges that E&J became successor escrow agent in May 2005.[1] In November or December of 2005, E&J learned that Banca di Roma was claiming that the support letter purportedly backing the Albatross bond was fraudulent and that Albatross was in the process of obtaining a substitute support letter from Unicredit Xelion Banca S.p.A. ("Xelion").[2] This was a concern because if the bonds were not valid, then a higher premium reserve would be required.[3] Keith LaMonda, suggested that E&J retain an English solicitor to investigate the validity of the bonds.[4]

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[1] Third-Party Company ¶8
[2] Third-Party Complaint, ¶9
[3] Third-Party Complaint, ¶11
[4] Third-Party Complaint, ¶10

He also told E&J that Martin and Matthew Searles ("the Searles"), who had sold the bonds to ABC through their company, had recommend Stenning, a partner in DMH Stallard, as someone who could investigate the validity of the bonds.[5]

Subsequently, Erwin called Stenning to discuss the controversy regarding the Banca Di Roma letter and the substitution of the Xelion support letter.[6] Stenning assured Erwin that Stenning understood Erwin's desire to avoid any similar controversy with respect to the Xelion letter.[7] Stenning said that he had considerable experience in conducting the type of due diligence necessary to determine the validity and enforceability of the Xelion support letter.[8] He advised that DMH Stallard was a top 100 law firm with the resources to conduct a proper investigation.[9] Stenning did not advise Erwin that Stenning had an on-going relationship with the Searles.[10] He did not advise Erwin of any conflicts of interest that might arise as a result of that relationship.[11]

On January 23, 2006, Stenning executed an engagement letter, *between E&J and DMH Stallard, agreeing that DMH Stallard would act on E&J's behalf* in connection with an investigation of Xelion's support letter *and the relationship between Xelion and Albatross* and to deliver an opinion.[12] Subsequently, Stenning allegedly met with an Albatross administrator and with Dott. Raffaelle Tazza ("Tazza"), the agent for Xelion who executed the support letter.[13] Following the meeting at the Albatross offices, Stenning allegedly visited a Xelion branch office to establish that Tazza was in fact

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[5] Third-Party Complaint, ¶7, 10
[6] Third-Party Complaint, ¶11
[7] Third-Party Complaint, ¶11
[8] Third-Party Complaint, ¶10
[9] Third-Party Complaint, ¶11
[10] Third-Party Complaint, ¶12
[11] Third-Party Complaint, ¶13
[12] Third-Party Complaint, ¶11
[13] Third-Party Complaint, ¶13

authorized to act for Xelion. [14] On March 2, 2006, Stenning signed an opinion letter stating that the Albatross bond and the Xelion support letter were valid and legally binding obligations.[15] The opinion letter further stated that DMH Stallard had seen evidence that Tazza had authority to execute the support letter on behalf of Xelion.[16]

Upon information and belief, in February 2006, prior to the issuance of the opinion letter, Xelion had filed with the proper government authorities, a public notice that Tazza was not authorized to enter into agreements by or on behalf of Xelion.[17] Stenning either failed to properly investigate Tazza's authority to bind Xelion or intentionally concealed his lack of authority from E&J and Erwin.[18]

In the Amended Complaint, Plaintiff alleges that when ABC was placed into receivership, there should have been $20 million to pay premiums.[19] Although, Erwin and E&J aver that Plaintiff's allegation is meritless, it is undisputed that a valid and enforceable bond would reduce the necessary premium reserve.[20] Moreover, if the Xelion support letter is valid and enforceable, then the cash in the ABC accounts and assets controlled by ABC's principals were tens of millions of dollars in excess of any necessary premium reserve calculated using industry standards at the time ABC was placed in receivership.[21]

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[14] Third-Party Complaint, ¶13
[15] Third-Party Complaint, ¶13
[16] Third-Party Complaint, ¶13
[17] Third-Party Complaint, ¶15
[18] Third-Party Complaint, ¶15
[19] Third-Party Complaint, ¶16
[20] Third-Party Complaint, ¶16
[21] Third-Party Complaint, ¶16

III. ARGUMENT AND AUTHORITIES

A. DMH Stallard's Motion must be denied because the Third-Party Complaint states a plausible claim for relief.

To survive a Rule 12(b)(6) motion to dismiss, a complaint need only to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Hershey v. Energy Transfer Partners*, L.P. No. 09-20651, 2010 WL 2510122, at *4 (5th Cir. June 23, 2010) (quoting Federal Rule of Civil Procedure 8(a)(2)). For purposes of Rule 12(b)(6), "claim" means a set of facts that, if established, entitle the pleader to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007).

Detailed factual allegations are not required. *See Hershey,* 2010 WL 2510122 at *4 (citing *Ashcroft v. Iqbal*, _U.S._, 129 S. Ct. 1937, 1949 (2009)). However, the complaint must allege sufficient factual matter, accepted as true, to state a claim that is plausible on its face. *Id.* A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

In order to determine the plausibility of a complaint, the court first must identify which statements in the complaint are factual allegations and which are legal conclusions. A court does not have to accept as true allegations that are legal conclusions, even if they are cast in the form of factual allegations. *See Iqbal*, 129 S. Ct. at 1949. The court then draws on its judicial experience and common sense to decide in the specific context of the case whether the factual allegations, if true, allege a plausible claim. *Iqbal*, 129 S. Ct. at 1950.

B. The Court cannot make any factual determinations or consider extrinsic evidence contradicting the complaint.

The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, it is not to evaluate the plaintiff's likelihood of success. *See Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter*, 607 F. 3d 1029, 1032 (5th Cir. 2010). The ultimate question in a 12(b)(6) motion is whether the complaint states a valid claim when all well pleaded facts are assumed true and are viewed in the light most favorable to the plaintiff. *Id.*

Not only must the court accept as true all the factual allegations set out in the plaintiff's complaint, it must draw inferences from those allegations in the light most favorable to the plaintiff and construed the complaint liberally. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quoting *Lowrey v. Texas A&M Univ. Sys.*, 117 F3d 242, 247 (5th Cir. 1997)); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (*Twombly* and *Iqbal* did not change this fundamental tenant of Rule 12(b)(6) practice that inferences must be drawn in plaintiff's favor). *See also Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2nd Cir. 2009); *Scott v. Ambani*, 577 F. 3d 642, 646 (6th Cir. 2009).

Unless the court converts the Rule 12(b)(6) motion into a summary judgment motion, it must limit its inquiry to facts stated in the complaint and documents attached to or incorporated by reference into the complaint. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996). The only exception is that a court may consider publicly available documents to determine what statements are included in the

documents, but it may not consider other documents for the truth of the matter asserted in those documents. *Id.*

C. E&J has alleged factual allegations that, if true, establish an agency relationship between E&J and DMH Stallard and state a plausible claim for common-law indemnity.

The Third-Party Complaint alleges that Stenning executed an engagement letter in which he agreed that DMH Stallard would act on E&J's behalf in investigating the validity of the bond and the relationship between Xelion and Albatross. DMH Stallard failed to discover that Tazza did not have actual or ostensible authority to issue the bond. E&J claims that if the bonds had been valid, ABC's resources would have been sufficient to cover the premium reserve. The Plaintiff is seeking to recover the alleged deficiency from E&J.

Although it is black letter law that a principal is entitled to indemnity when the principal is vicariously liable for an agent's negligence *see e.g. Lister v. Romford Ice & Cold Storage Co.* [1957] AC 555, 564. (App. Tab 1), DMH Stallard says that the Court should dismiss E&J's cause of action for common law indemnity because E&J's allegations of an agency relationship are conclusory. This is without merit. E&J alleged DMH Stallard entered into a written agreement with E&J in which DMH Stallard agreed to act on E&J's behalf. An express agreement will create an agency relationship. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006); BOWSTEAD & REYNOLDS ON AGENCY § 2.01 (16th Ed.). (App. Tab 2)

In the alternative, DMH Stallard says that the cause of action for common law indemnity should be dismissed because a lawyer cannot be vicariously liable for another

lawyer unless they are associated with the same firm. Although that is a misstatement of the law, it is also irrelevant since in this case E&J was not acting as ABC's attorney. E&J was ABC's escrow agent. Moreover, Stenning's tasks were not limited to providing an opinion letter. He was asked to conduct an investigation as "a reasonable businessman." [22] Therefore, even if the law provided that one lawyer cannot act as an agent for another lawyer – which it does not – then that would have no effect on E&J's claim for common law indemnification.

1. The weight of authority holds that a lawyer can act as an agent for another lawyer.

A lawyer who delegates a task to another lawyer can be vicariously liable for wrongs by the employed attorney, as well as being directly liable for negligent hiring. *See e.g.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 58 cmt. e (2000); CORDERY ON SOLICITORS, Issue 51, Section 8.3(a) [42] (App. Tab 3); CORDERY'S LAW RELATING TO SOLICITORS Ch.14§1.4 (5th Ed.) (App. Tab 3). *See also* R. Mallen & S. Smith, LEGAL MALPRACTICE § 5.9 (2010 Ed.).

Comment e to Section 58 of the Restatement of the Law Governing Lawyers explains that while a lawyer is ordinarily not liable for the acts and omissions of a lawyer outside the firm, a firm can be liable to a client for the acts and omissions of an outside

[22] A plaintiff's briefing may always be used to clarify allegations in its complaint whose meaning is unclear. *See Pegram v. Herdrich*, 530 U.S. 211, 230, 120 S. Ct. 2143, 2155, n. 10 (2000). *See also Little Gem Life Sciences LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir. 2008) (court may consider public records that provide background facts and *do not contradict any allegations in the complaint*) (emphasis added). This is particularly appropriate it in this case, since DMH Stallard placed this in the record. *See* Docket 146-1, page 6, ¶ 23.

lawyer, if the firm assumes responsibility to a client for a matter or assigns work to a lawyer, who does not have a direct relationship to the client. It states:

> Such arrangements *make the outside lawyer the firm's subagent* (See to Restatement (Second) Agency §§ 5 & 406). *In such circumstances, the outside lawyer may be liable to the firm for contribution or indemnity.*"

Restatement § 58 cmt. e (emphasis added).

2. The law of agency is consistent with an attorney's ethical responsibility.

Contrary to DMH Stallard's representations in its brief, an agency relationship between E&J and DMH Stallard is not "antithetical" to the law governing lawyers. *See Kramer v. Nowak*, 908 F. Supp. 1281, 1292 (E.D. Pa. 1995). In *Kramer*, the district court considered whether a principal attorney could sue an associated attorney for negligence based on general agency law. *Id.* 1289. The district court noted that while there may be conflicting duties owed to employers and client, this did not lead to the conclusion that only a duty to clients should be recognized. *Id.* at 1292.

The court observed that under generally principles of agency law, an agent may have duties both to the principal and to third persons, such as customers. *Id.* (citations omitted). Employees in many fields, such as medicine, teaching and psychotherapy, owe strong and legally cognizable duties to those they serve. *Id.* Recognition of those duties, however, does not mean that employees in these fields owe no duties to anyone else. *Id.*

Indeed, to hold that any agent attorney owes a duty only to the client and is not subject to liability to a principal attorney would be to create an exception to the general principles of agency law that would apparently be unique to the legal profession. *Id.*[23]

3. English precedent holds that agency laws apply to solicitor relationships and that a vicariously liable principal is entitled to indemnity from its agent.

Similarly, English law holds that a solicitor can be the agent of another solicitor, and the principal agent will be liable to the client for the agent solicitor's negligence. *See* CORDERY ON SOLICITORS, Issue 51, Section 8.3(a) [42] (App. Tab 3), CORDERY'S LAW RELATING TO SOLICITORS Ch.14 §1.4 (5th Ed.) (App. Tab 3); *Simmons v. Rose [1862] 84 E.R. 1037, 1042* (solicitor liable even though representation made by his London agent) (App. Tab 4); *cf. Myers v. Elman [1940] A.C. 282, (solicitor liable for error of his clerk)* (App. Tab 5); *Lister v. Helsey Hall,* [2002] 1AC 215 (employer vicariously liable for its employee) (App. Tab 6). When a principal is held vicariously liable for the agent's tort, the agent must indemnify the principal. *See Lister v. Romford Ice & Cold Storage Co.* [1957] AC 555. (App. Tab 1)

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[23] *See also Tormo v. Yormark,* 398 F. Supp. 1159 (D.N.J.1975) (lawyer would be liable for lack of care in recommending another lawyer, who embezzled client funds; whether lawyer assumed supervisory responsibility was issue of fact); *Ortiz v. Barrett,* 278 S.E.2d 833, 838 (Va. 1981) (local counsel owed duty to principal attorney to exercise reasonable care, skill, diligence for tasks for which he was employed). *Scott v. Francis,* 838 P.2d 596 (Or. 1992) (when lawyer from other state arranged with local lawyer to bring suit and local lawyer assured foreign lawyer there was no statute-of-limitations problem, local lawyer must indemnify foreign lawyer for malpractice damages when foreign lawyer's delay led to dismissal of suit); *See generally J.M. Cleminshaw Co. v. City of Norwich,* 93 F.R.D. 338, 348, 348 n.5 (D. Conn. 1981) (stating that attorney retained responsibility for supervising all litigation even though he employed co-counsel to assist him, and therefore, attorney could be liable for duties neglected by co-counsel); *Sharratt v. London Central Bus Co. Ltd,* 2005 WL 4693225, 2006 4 Costs L.R. 584 Official Transcript (client is not directly liable to solicitor agent for his fees, rather the fees of the solicitor agent are part of the fees of the solicitor principal). (App. Tab 7)

4. California precedent holds that a vicariously liable principal attorney is entitled to indemnity from its agent attorney.

As candidly admitted by DMH Stallard, California allows indemnification between attorneys. *See Musser v. Provencher*, 48 P.3d 408 (Cal. 2002). The California Supreme Court said that whether indemnification is to be allowed is to be determined on a case by case basis – with the deciding factor being whether allowing indemnification in a particular instance will negatively impact a lawyer's fiduciary duty to the client or imperil attorney-client privilege. *Id.* at 413-14.

While California courts will not allow indemnification for successor attorneys, there is no blanket prohibition against indemnification for associated counsel. *Id.* at 413-14. *See also Pollack v. Lytle,* 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81, 85 (1981) (holding if counsel can be vicariously liable for associated counsel's actions, it would be manifestly unfair not to allow indemnification), *disproved in part, Beck v. Wecht*, 48 P.3d 417, 423 (Cal. 2002) (co-counsel have no fiduciary duty to protect one another's fees).

Despite the clear authority from California courts that indemnification between attorneys is permissible in circumstances such as these, DMH Stallard says that E&J's claim should be dismissed because California permits equitable indemnification, while E&J sought agency indemnification. The federal rules, however, are not so formalistic. *See* FED. R. CIV. P. 8(a)(2) (a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief.")

5. Texas precedent holds that a vicariously liable principal is entitled to indemnity from its agent.

While no Texas court has specifically held that an agent attorney has an obligation to indemnity a principal attorney, when a principal is held to be vicariously

liable for its agent's negligence, the principal is entitled to indemnity. *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.,* 127 S.W. 3d 134, 139-40 (Tex. App.—Houston [1st Dist.] 2003, no pet.). There is no reason to believe that a Texas court would treat attorney principals differently from other principals.

6. This Court cannot infer that ABC had a direct relationship with DMH Stallard and thus ABC was the principal.

DMH Stallard urges this Court to find that DMH Stallard's duty ran directly to ABC, because ABC knew that E&J had retained DMH Stallard. This Court cannot make that factual determination at this stage in the litigation, since it must draw all inferences in E&J's favor. *See Collins v. Morgan Stanley Dean Witter,* 224 F.3d at 498.

Finally, the specific allegation that the engagement letter provided that DMH Stallard would be acting on E&J's behalf raises a reasonable inference that E&J was continuing to have primary responsibility for the investigation. If this was not the intention, then logically the engagement letter would have been between ABC and DMH Stallard. Although DMH Stallard says that E&J could not have an obligation to supervise or control its work, since DMH Stallard are English solicitors and E&J would not have the expertise to direct its actions, this makes little sense in light of the case law. In most cases when a lawyer consults with or associates another lawyer in a case, it is because the agent lawyer has the expertise that is not possessed by the principal lawyer. Otherwise, there would be no reason to associate an agent lawyer.

In sum, E&J alleged that DMH specifically agreed to act on E&J's behalf in connection with the investigation of the relationship between Xelion and Albatross and in delivering an opinion letter. This allegation is sufficient to establish an agency relationship. DMH Stallard said that the bond was good. As it turned out, the bond was

uncollectible. If it had been good, then E&J asserts that the assets held by ABC and its principals would have been sufficient to satisfy the necessary premium reserve. E&J has alleged facts sufficient to assert a plausible claim for indemnity against DMH Stallard under the laws of England, Texas or California. DMH Stallard's contention that as a matter of law E&J cannot assert a claim for indemnity because E&J is a law firm and DMH Stallard is a law firm is both factually and legally incorrect. E&J was acting as an escrow agent when it retained DMH Stallard as its agent and the scope of DMH Stallard's agency encompassed non-legal tasks. Moreover, the weight of the precedent will allow common law indemnity between attorneys under the facts alleged.

D. E&J has alleged factual allegations that, if true, establish an attorney-client relationship between itself and DMH Stallard and state a plausible claim for legal malpractice/negligence.

The Third Party Complaint alleges that there was an executed agreement between DMH Stallard and E&J providing that DMH Stallard would issue a legal opinion and that E&J is now being sued because the legal opinion was allegedly incorrect. Despite the specific allegations that, if true, establish "privity" of contract between DMH Stallard and E&J, DMH Stallard says that the claim for legal malpractice must be dismissed because ABC was the *real* client based on the complaint allegations that LaMonda suggested that E&J hire an English solicitor. DMH Stallard's reasoning is flawed. Undoubtedly, many clients initially retain a lawyer at the suggestion of someone else. At the 12(b)(6) stage, the Court must draw all inferences in favor of E&J.

Moreover, the analysis is flawed because it assumes that *either* ABC *or* E&J was the client. In fact, both ABC and E&J could have been DMH Stallard's client, since a

lawyer/solicitor may represent two clients in a transaction as long as there is no conflict of interest between them. There is nothing in the Third-Party Complaint that suggests that E&J would have been aware of any conflict between its interests and ABC at the time that E&J retained DMH Stallard, that would have prevented DMH Stallard from representing both ABC and E&J in connection with the investigation.

E. E&J has alleged facts that, if true, state a plausible claim for negligence even if E&J was not DMH Stallard's client.

Without regard to the issue of privity of contract, however, the Third-Party Complaint alleges a plausible negligence claim against ABC. The courts of the United Kingdom, California and Texas have held that a third party has a cause of action against an attorney under the alleged facts.

1. England recognizes that a third party can have a claim against a solicitor when the lawyer should realize that his advice is being relied upon by the third party.

The leading case in the United Kingdom is *Hedley Bryne & Co. Ltd. v. Heller & Partners, Ltd.*, [1963], 2 All E.R. 575;[1964] A.C. 465 H.L. (App. Tab 8) In *Hedley*, the court held that if there exist circumstances from which a reasonable man might know that he was being trusted or that his skill and judgment was being relied on by a third party and the professional gives information or opinion without any disqualification or disclaimer, then the professional will be liable, if damage, physical or pecuniary results to the person to whom the information is given. See generally William Flenley & Tom Leech, Solicitors' Negligence and Liability §§ 1:13-1:35 (Second Edition). (App. Tab 9) Significantly, a court will be particularly likely to impose liability on a solicitor for a breach of duty to a third party when there are direct discussions and communications

between the solicitor and the third party and the third party has informed the solicitor that the party is relying on the solicitor's advice and the solicitor has expressly or impliedly accepted this. See Solicitors' Negligence § 1.28. (App. Tab 9) The complaint allegations that the engagement letter, specifically stated that DMH Stallard would be acting on E&J's behalf are sufficient to raise a claim for breach of duty to a third party under English law.

2. California and Texas recognize a third-party claim for negligent misrepresentations against a lawyer.

Similarly, California and Texas courts have held that a third-party may sue a lawyer for negligent misrepresentation. *See Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, et al.,* 57 Cal. App. 3d 104, 110-11, 128 Cal. Rptr. 901, 906 (1976); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999). In order to allege a claim for negligent misrepresentation, a party must allege 1) that the defendant made the misrepresentation in the course of his business or in a transaction in which the defendant had an interest; 2) the defendant supplied false information for the guidance of others; 3) the defendant did not exercise reasonable care or competence in obtaining or communication the information; 4) the plaintiff justifiably relied on the information; 5) the defendant's negligent misrepresentation caused the defendant's injury. *See generally McCamish, Martin, Brown & Loeffler,* 991 S.W.2d at 791 (quoting Restatement (Second) of Torts § 552 (1977)). *See also Bily v. Arthur Young & Co.*, 834 P.2d 745, 768 (Cal. 1992) (when a defendant makes a false representation, honestly believed, but without a reasonable ground for that opinion he may be liable to the defendant if the defendant justifiably relied on that representation).

The factual allegations in the complaint state a plausible claim for negligent misrepresentation under either California or Texas law.

F. E&J alleged facts that, if true, establish that DMH Stallard was its agent and state a plausible claim for breach of fiduciary duty.

In the Third-Party Complaint, E&J alleged that DMH Stallard executed an engagement letter in which it agreed to act on E&J's behalf.[24] This created a principal/agent relationship, including potentially an attorney/client relationship.[25] Prior to entering into the agreement, Erwin spoke to Stenning regarding the requirements of the engagement.[26] During that conversation, Stenning did not disclose that he had an on-going relationship with the Searles, the brokers of the bond, whose validity Stenning was going to investigate[27].

1. Lawyer/Solicitor's fiduciary obligations are the same under English, Texas or California Law.

England, California and Texas each recognize a principal has a claim for breach of fiduciary duty when an agent has a conflict of interest and fails to make full disclosure of all material facts to the client/principal. BOWSTEAD & REYNOLDS ON AGENCY § 6-055 (An agent may not enter into a transaction in which his personal interest, or his duty to another principal, conflicts with his duty to his principal, unless his principal, with full knowledge of all material circumstances and of the nature and extent of the agent's interests, consents); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513-14 (Tex. 1942) (an agent has a duty not to conceal matters that might influence it to act to

[24] Third-Party Complaint, ¶13
[25] Third-Party Complaint, ¶22
[26] Third-Party Complaint, ¶11
[27] Third-Party Complaint, ¶12

its principal's detriment); *Sierra Pac. Indus. v. Carter*, 104 Cal. App. 3d 579, 581, 163 Cal. Rptr. 764, 766 (1980) (agent has a fiduciary relationship to its principal which requires disclosure of all information in the agent's possession relevant to the subject matter of the agency).

The three jurisdictions each recognize that a client can have a claim against his attorney for breach for breach of fiduciary duty. *See e.g. Hilton v. Barker Booth & Eastwood* [2005] UKHL8 (a solicitor is a fiduciary to his client and is liable to the client when he breaches his fiduciary duty of loyalty and candor); (App. Tab 10) *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988) (a fiduciary relationship exists between a lawyer and client, as a fiduciary an attorney is obligated to render a full and fair disclosure of facts relevant to the client's representation); *Betts v. Allstate Ins. Co.*, 154 Cal. App. 3d 688, 716, 201 Cal. Rptr. 528, 545 (1984) (lawyer is a fiduciary to client and must make full disclosure of any potential conflicts).

2. An English solicitor must disclose personal conflicts to a prospective client.

Despite this, DMH Stallard says that the Third-Party Complaint does not allege a breach of fiduciary duty because it does not include any allegations of the type of "conflict" that have to be disclosed under English law. According to DMH Stallard, the Solicitor's Code of Conduct 2007 ("Solicitor's Code") restricts "conflicts of interests" to conflicts between clients. Since E&J alleged that Stenning and the Searles had "an on-going relationship," instead of specifically alleging an attorney-client relationship, the allegations do not state a claim for breach of fiduciary duty under English law.

The Solicitor's Code, however, does not restrict "conflicts" to situations involving two clients. It provides that a solicitor may not act, "if there is a significant risk that [the engagement] may conflict with [the solicitor's] own interests to that or a related matter." See Rule 3.1 (a). (App. Tab 11) The Guidance to Rule 2 provides that a solicitor must refuse instructions or cease acting "*where there is a conflict of interest between you and your client*...." Rule 2 Guidance ¶ 6(a)(1) (emphasis added). (App Tab 11). Moreover, the Solicitor's Code provides that a lawyer must disclose to a client for whom he is personally acting on a matter, all information that is material to that client's matter, subject to certain specifically enumerated exceptions. If the solicitor cannot make the disclosure for some reason, then he cannot accept instructions from the client, unless he advises the client that the solicitor will have to withhold material information and the client agrees to those terms. See Rule 4.04-4.05. (App. Tab 11)[28]

An English solicitor, like an American lawyer, is not supposed to act if there is a potential that his personal interests will conflict with the client's interests, unless he makes full disclosure to the client. *See e.g. Moody v. Cox and Hatt* [1917] 2 CH. 71 (solicitor breached fiduciary duty because of conflict between his duty to his client and his duty as trustee to beneficiaries of trust); (App. Tab 12) *Nocton v. Lord Ashburton* [1914] AC 932 (solicitor breached his fiduciary duty to client by failing to disclose that he would personally profit from transaction); (App. Tab 13) *Spector v. Ageda* [1973] Ch. 30 (referring solicitor to law society for failure to make full disclosure to client regarding transaction with client). (App. Tab 14)

[28] The complete Solicitor's Code can be viewed at www.sra.org.uk.

G. E&J has alleged facts that, if true, assert a plausible claim for infliction of emotional distress.

England, Texas and California law provides that a client can have a claim for emotional distress damages against a lawyer/solicitor. *See e.g. Jones v. David & Snape*, [2004] 1 ALL ER 657; (App. Tab 15) *Betts*, 154 Cal. App. 3d at 717-18, 201 Cal. Rptr. at 546; *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 266-67 (Tex. App. – Corpus Christi 1991, writ denied).

While the Texas Supreme Court has said that mental anguish damages are not recoverable in a legal malpractice claim when the mental anguish is the result of economic losses, it did not preclude recovery when the client has sustained some other type of loss. *See Douglas v. Delp*, 987 S.W.2d 879, 884-85 (Tex. 1999). The Supreme Court left unanswered the question of whether such damages are recoverable when the mental anguish results from something other than attorney negligence, or when additional or other kinds of loss are involved or when heightened culpability is present. *Id. at 885.*

In *Kirk & Carrigan*, the Corpus Christi Court of Appeals reversed a summary judgment concerning a plaintiff's entitlement to mental anguish damages from an attorney. *Kirk & Carrigan*, 822 S.W.2d at 263. The plaintiff alleged that the defendant lawyers had obtained a statement from him while he was in the hospital following an accident, after telling him that they were his lawyers and everything that they said to him would be kept confidential. *Id.* In fact, the lawyers were representing his corporate employee. *Id.* Subsequently, the lawyers gave the plaintiff's statement to the district attorney leading to the plaintiff's indictment. *Id.* at 264.

The lawyers argued that their actions could not have caused emotional distress, since they did nothing more than provide the plaintiff's version of what happened. *Id.* at 266. The Court of Appeals rejected their argument stating that "[m]ental anguish consists of the emotional response of the plaintiff caused by the tortfeasor's conduct. It includes, among other things, the mental sensation of pain resulting from public humiliation. ... [Plaintiff] alleged that the publicity caused by his indictment, resulting from the revelations of the statement to the district attorney in breach of that confidentiality, caused him to suffer emotional distress and mental anguish. We hold that [plaintiff] has made a valid claim for such damages." *Kirk & Carrigan,* 822 S.W.2d at 266-67 (internal citations omitted). California has similarly awarded emotional distress damages when a client suffers a loss due to a lawyer's breach of fiduciary duty and conflict of interest, as opposed to mere legal malpractice. *Betts*, 154 Cal. App. 3d at 718, 201 Cal. Rpt. at 546.

In *Jones*, a British Court awarded the client damages for mental distress when due to her solicitor's negligence, her ex-husband was able to remove her children from England. The Court observed that a client is entitled to claim emotion distress damages from a solicitor when the object of the engagement is to provide the client, *inter alia*, with peace of mind and the distress suffered when the solicitor does not perform is foreseeable to the solicitor at the time of the engagement. When Ms. Jones had engaged the solicitors, she had advised them that she had grave concerns that her ex-husband was planning to take the children to Tunisia and she wanted the firm to take steps to prevent the removal. The court concluded that it was foreseeable to the firm that the client would sustain mental distress, if her children were taken from her. *Jones*, [2004] All ER 657 (App. Tab 15). *See also Rey v. Graham & Oldham* (a firm) 2000 BPIR 354 (client

receives emotional distress damages when wrongfully adjudged a bankrupt). (App. Tab 16)

Stenning knew that Erwin was a fiduciary and that he was relying on Stenning's investigation to determine the facts of the relationship between Albatross and Xelion. He knew that the purpose of this engagement was to give Erwin peace of mind regarding the enforceability of the bond as this affected the amount of the necessary premium reserve. He knew that there would be serious repercussions for Erwin if the bond was not enforceable. The most serious repercussions would be the embarrassment and distress if the premium reserves were inadequate. Upon information and belief, Stenning knew that the Tazza did not have the authority to execute Xelion letter of credit, but in order to gain financial advantage for himself, he did not disclose this information. This is extreme and outrageous behavior. Based on these alleged facts, E&J has asserted a claim for emotional distress under the laws of Texas, England and California.

H. E&J has alleged facts that, if true, assert a plausible claim for contribution.

1. This Court has already held in three orders that E&J has asserted a viable contribution claim.

DMH Stallard alleges that the claim for contribution should be dismissed because DMH Stallard's potential liability to ABC arises out of a different basis, than E&J's potential liability to ABC. This argument has already been rejected by this Court thrice. (Docket Entry 101, p.6, Docket Entry 125 p.4, Docket Entry 142 p.4.) DMH Stallard's argument does nothing more than reiterate the failed arguments Plaintiff asserted in its response to E&J's Motion to Implead DMH Stallard and in Plaintif's motion for

rehearing of the Court's order granting E&J's motion for impleader. As this Court has already observed:

> [A]s long as Plaintiff is seeking damages for the alleged under-funding of the E&J escrow accounts that Defendants claims against DMH Stallard and Stenning are directly related to Plaintiff's claims against Defendants. (Id.) The claims are directly related because Plaintiff claims that Defendants under-funded the E&J escrow accounts, and Defendants claim that if the E&J escrow accounts were under-funded it was due to the actions of Third-Party Defendants.

Docket Entry 125, P. 4.

2. Plaintiff alleges that E&J and DMH Stallard are liable to it for damages.

The laws of the United Kingdom, California and Texas provide contribution under the circumstances alleged. In England, *Royal Brompton Hosp. NHS Trust v Hammond (No.3)* [2002], 1 W.L.R. 1397, 1399 (App. Tab 17) is the leading decision on this point. In *Hammond*, the House of Lords succinctly summed up contribution as follows:

> When any claim for contribution falls to be decided the following questions in my opinion arise. (1) What damage has A suffered? (2) Is B liable to A in respect of that damage? (3) Is C also liable to A in respect of that damage or some of it?

Royal Brompton, 1 W.L.R. at 1399. Contrary to DMH Stallard's contention, English law does not require the same factual – or even legal – predicate. Instead, the right to contribution is expansive:

> The contribution is as to 'compensation' recoverable against a person in respect of 'any damage suffered by another' 'whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise'. It is difficult to imagine a broader formulation of an entitlement to contribution. It clearly spans a variety of causes of

> action, forms of damage in the sense of loss of some sort, and remedies, the last of which are gathered together under the umbrella of 'compensation'. The Act was clearly intended to be given a wide interpretation

Id. at 1409. This language from English authority tracks E&J's very reasons for seeking contribution, which have been previously recognized by this Court.

It is also important to note that, under English law, the time at which liability for the same damage is to be shown is the time at which contribution is claimed, not the time at which the damage occurred. *Cooperative Retail Servs. Ltd. v Taylor Young P'ship Ltd*, [2002] 1 W.L.R. 1419, 1435-37 (App. Tab 18) ("[T]he question is not whether liability could have been established in the past but whether it has been established or could be established as at the time when the contribution is being sought."). Here, contribution is claimed from the time of the filing of Plaintiff's lawsuit. It is of no moment that DMH Stallard direct the Court to differing time periods well preceding the filing of the lawsuit and claim that the damages from those periods are not supportive of the contribution claim.[29]

Similarly, Texas law contribution law is more expansive than implied by DMH Stallard. While contribution does arise when two defendants are liable to the plaintiff on the same claim, *see e.g. Equitable Recovery, L.P. v. Heath Ins. Brokers of Tex., L.P.*, 235 S.W.3d 376, 387 (Tex. App.—Dallas 2007, pet. dism'd), this does not require a third-party plaintiff to allege the same claim alleged by the plaintiff. *See J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 202-04 (Tex. App.—Houston [14th Dist.] 2006,

[29] Note that this temporal distinction also appears to further distinguish Plaintiff's pending direct cause of action against Third-Party Defendants in England – supposedly aimed at the ultimate unenforceability of the bond and its damage to Plaintiff – and the contribution cause of action here, which is based on the impact of Third-Party Defendants' actions and omissions on Defendant's actions and omissions claimed by Plaintiff to have been faulty.

no pet.) ("Gregg cites no authority for the proposition that the plaintiff and the third-party plaintiff must recite the same claim for a contribution claim to be effective, nor have we found any such authority."). Instead, it merely requires the third-party plaintiff to assert a plausible claim for joint liability. *Id.*

Finally, the California case cited by Plaintiff—which has been superseded by statute-- does not hold that the exact same injury must be at the heart of Plaintiff's claim and defendant's contribution claim. *See American Motorcycle Assn. v. Superior Court*, 578 P.2d 899, 904 (Cal. 1978), *superseded by statute*, as stated in *Henry v. Superior Court*, 72 Cal. Rptr. 3d 808, 812-13, 160 Cal. App. 4th 440, 449 (Cal. Ct. App. 2008). The California Code now provides that each defendant's share of a plaintiff's non-economic damages is strictly limited to that defendant's proportionate share of all fault. CAL. CIV. CODE § 1431.2(a). This eliminates the perceived unfairness of imposing "all the damage" on defendants who were "found to share [only] a fraction of the fault." *Id.* at § 1431.1(b).

I. E&J is entitled to file an amended complaint.

In the unlikely event, that this Court finds that E&J has failed to make factual allegations sufficient to state a plausible claim on any of its causes of action, then E&J requests leave to file an amended third party complaint. It is well-settled that when a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *See Great Plains Trust Co. v. Morgan Stanley Dean Whittier & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *United States Ex Rel. Adrian v. Regents of the Univ. of California*, 363 F.3d 398, 403 (5th Cir. 2004) ("leave to amend should be freely given,

and outright refusal to grant leave to amend without a justification...is considered an abuse of discretion").

IV. CONCLUSION

In its Third-Party Complaint, E&J made specific factual allegations that, if true, assert a plausible claim on each of its causes of action without regard to whether the laws of England, California or Texas apply to the dispute. For this reason, DMH Stallard's Motion to Dismiss should be denied.

WHEREFORE, THIRD-PARTY PLAINTIFFS ERWIN & JOHNSON L.L.P. and CHRISTOPHER R. ERWIN respectfully ask this Court to deny Third-Party Defendants DMH Stallard and Christopher Stenning's Motion to Dismiss the Third-Party Complaint or in the alternative to grant leave to Third-Party Plaintiffs to file an amended third-party complaint and to give Third-Party Plaintiffs whatever and further relief to which they are justly entitled at law or equity.

Respectfully submitted,

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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 10th day of August, 2010, to all known counsel of record as required by the Federal Rules of Civil Procedure.

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