

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>FHF PARTNERS,</b>	:	
Plaintiff,	:	
	:	<b>CIVIL ACTION NO. 05-5309</b>
	:	
v.	:	
	:	
<b>KMA FINANCIAL GROUP, LLC, ET AL.,</b>	:	
Defendant.	:	

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<b>STEVEN LANDAU,</b>	:	
Plaintiff,	:	
	:	<b>CIVIL ACTION NO. 05-6013</b>
	:	
v.	:	
	:	
<b>KEVIN AUERBACH,</b>	:	
Defendants.	:	

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**MEMORANDUM AND ORDER**

**Tucker, J.**

**February \_\_, 2007**

Presently before this Court is Defendant Kevin Auerbach’s Motion for Leave to Join Steven Landau, Kenneth Henley, Buchanan Ingersoll, P.C., and Michael J. Flinn, Esquire as Third Party Defendants in the Action Styled FHF Partners v. Auerbach (“Joinder Motion” or “Motion”), (Doc. 36 of Case No. 05-5309). For the reasons set forth below, upon consideration of Defendant’s Motion, Plaintiff Steven Landau’s Response (Doc. 37), and Plaintiff FHF Partner’s Response (Doc. 39), this Court will grant in part and deny in part Defendant’s Motion.

## **BACKGROUND**

In May 2006, Plaintiff FHF Partners filed an Amended Complaint against Defendant Kevin Auerbach, alleging that Defendant violated federal and Pennsylvania securities laws and committed common law fraud by failing to disclose in a Private Placement Memorandum (“PPM”) that there had been a business divorce between Asher Resources, LLC (“Asher”) and 3PN, LLC (“3PN”).<sup>1</sup> Plaintiff states that it relied upon the allegedly fraudulent PPM to make its decision to invest monies in KASL Enterprises, L.P. (“KASL”). Plaintiff seeks to recover damages resulting from the alleged misrepresentations and omissions made by Defendant in the PPM.

Defendant Auerbach (“Auerbach”) and Plaintiff Landau (“Landau”)<sup>2</sup> each held 50% membership interest in Asher and provided consulting services to 3PN through a consulting agreement. In 2004, according to Auerbach, Auerbach and Landau formed KASL. In either June or July, 2004, Asher and 3PN entered into a separation agreement to terminate Asher’s consulting agreement with 3PN. Around this same time period, according to FHF Partners, Auerbach and Landau issued the PPM to raise funds for KASL. Auerbach alleges that, at the direction of Auerbach and Landau, Buchanan Ingersoll, P.C. (“Buchanan”) and attorney Michael J. Flinn (“Flinn”) drafted the PPM and generally advised KASL. According to FHF Partners, the PPM featured the fact that one of the three companies in which KASL had an investment was 3PN. Further, according to FHF Partners, the PPM repeatedly emphasized that the expertise and

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<sup>1</sup>Case Nos. 05-5309 (FHF Partners v. Auerbach) and 05-6013 (Landau v. Auerbach) have been consolidated for purposes of pretrial proceedings. The motion at bar, however, only relates to case No. 05-5309. Accordingly, this memorandum only addresses that case.

<sup>2</sup>Landau is plaintiff in case No. 05-6013.

integrity of Auerbach and Landau would be critical to the conceptualization and success of KASL.

FHF Partners alleges that Auerbach sent a copy of the PPM to FHF Partners in order to induce it to invest in KASL, which FHF Partners ultimately did invest in. The PPM did not include information about the separation agreement between Asher and 3PN. According to FHF Partners, it would not have invested in KASL had it known about the separation agreement between Asher and 3PN.

Defendant Auerbach also alleges that in early 2004, Kenneth Henley (“Henley”) entered into a consulting arrangement with Asher and worked closely with Auerbach and Landau on both 3PN and KASL endeavors. As such, Henley was privy to daily conversations with Auerbach and Landau regarding 3PN and KASL and had broad access to and knowledge of the business operations of both entities. Auerbach also alleges that Henley advised Auerbach and Landau about FHF Partners’s potential investment in KASL, and that Henley first contacted FHF Partners to pitch KASL and 3PN as potential investment opportunities. Auerbach further alleges that upon solicitation by Henley, FHF Partners executed an agreement for the purchase of interests in KASL.

Defendant Auerbach now seeks to join Landau, Henley, Buchanan and Flinn (collectively “Third Party Defendants”) as third-party defendants under the theory of contribution. Specifically, Auerbach argues that he is entitled to recover contribution from the Third Party Defendants, jointly and severally, for the full amount of any judgment that might be rendered against Auerbach in the suit by FHF Partners.

## DISCUSSION

The present motion to implead the Third Party Defendants is governed by Rule 14 of the Federal Rules of Civil Procedure. The purpose of Rule 14 is to avoid “circuitry of action” and to settle related matters in one litigation. Tiesler v. Martin Paint Stores, Inc., 76 F.R.D. 640, 642 (E.D. Pa. 1977); Stiber v. United States, 60 F.R.D. 668, 670 (E.D.Pa. 1973). Under that Rule, “a direct line of liability must be alleged to exist between the third party plaintiff and the third party defendant independent of that between the first party plaintiff and defendant.” Id. Thus, under Rule 14, a third party may be joined only on the theory that he is or may be liable to the original defendant for all or part of the plaintiff’s claim against him. The original defendant cannot join a third party claimed to be solely liable to plaintiff. Millard v. Mun. Sewer Auth. of Twp. of Lower Makefield, 442 F.2d 539, 541 (3d Cir. 1971); see also Tesch v. United States, 546 F.Supp. 526, 529 (E.D. Pa. 1982) (“A third party defendant cannot be joined simply because that party may be solely liable to the plaintiff.”).

Further, “a third-party action is proper only when a right to relief exists under the applicable substantive law.” Foulke v. Dugan, 212 F.R.D. 265, 269-70 (E.D.Pa. 2002). Here, Defendant Auerbach alleges that Third Party Defendants are liable to him by way of contribution. (Joinder Motion at 10, 13-16). Plaintiff FHF Partners, on behalf of Kenneth Henley, and Plaintiff Landau argue that Defendant Auerbach has failed to state a claim under this theory.<sup>3</sup>

Even if a right to relief exists under a claim of contribution, however, the Court also will

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<sup>3</sup>Plaintiffs Landau and FHF Partners also argue that Defendant’s joinder motion is untimely. The Court’s Scheduling Order dated October 6, 2006, however, grants the parties sixty (60) days from the date of the Order to join additional defendants. Defendant’s joinder motion was filed on September 28, 2006, prior to the Scheduling Order and certainly within the time frame set out for such a motion.

consider whether filing of the third-party suit would introduce an unrelated controversy or unduly complicate the case at trial. If impleading the Third Party Defendants here introduces unrelated controversies or will complicate the case at trial, this Court has discretion to deny the motion.

Scott v. Walter Kidde Portable Equip, Inc., No. 02-1460, 2002 WL 1880521 \*1 (E.D. Pa. Aug. 12, 2002).

#### **A. Contribution**

Pennsylvania's Uniform Contribution Among Tortfeasors Act (UCATA) provides that "[t]he right of contribution exists among joint tort-feasors." 42 Pa. Cons. Stat. § 8324. Contribution, therefore, is available only among joint tortfeasors. Kemper Nat'l P&C Co. v. Smith, 615 A.2d 372, 380 (Pa. Super. Ct. 1992); Morris v. Lenihan, 192 F.R.D. 484, 490 (E.D. Pa. 2000). The UCATA further provides that "joint tort-feasors" means "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 Pa. Cons. Stat. § 8322. Further, "[t]wo persons are not acting jointly for the purposes of committing a joint tort if 'the acts of the original wrongdoer and joint tortfeasor are severable as to time, neither having the opportunity to guard against the other's acts, and each breaching a different duty owed to the injured plaintiff.'" Foulke v. Dugan, 212 F.R.D. 265, 270 (E.D. Pa. 2002) (quoting Lasprogata v. Qualls, 397 A.2d 803, 806 n.4 (Pa. Super. Ct. 1979)).

Accordingly, in order to permit Defendant Auerbach's claim for contribution, the Court must decide whether Auerbach and the Third Party Defendants could be found to be jointly and

severally liable in tort for the same alleged injury to Plaintiff FHF Partners.<sup>4</sup>

**B. Landau and Henley**

Defendant Auerbach alleges that Landau was a “direct and active participant” in the dissemination of information to FHF Partners regarding Asher, KASL and the PPM. (Joinder Motion at 2). Auerbach also alleges that Henley “directly orchestrated the investment transaction at issue between [FHF Partners] and KASL.” Id. Accordingly, Auerbach argues that Landau and Henley may be liable to the him for all or part of the FHF Partners’ claims against Auerbach.

Because Defendant Auerbach alleges that Landau and Henley jointly and severally contributed to the same alleged injury – failing to disclose to FHF Partners in the PPM that there had been a business divorce between Asher and 3PN – Auerbach has alleged enough to make Landau and Henley potential joint-tortfeasors. Further, Defendant Auerbach’s actions and Landau and Henley’s actions are not severable as to time. Each had the opportunity to guard against the other’s acts based on the facts as alleged by Defendant Auerbach.

Moreover, Plaintiffs Landau and FHF Partners have not shown that impleading Landau and Henley as third party defendants would introduce any unrelated controversy or unduly complicate the case for purposes of trial. To the contrary, the actions of Landau and Henley, as alleged by Auerbach, are directly related to and intertwined with the wrongdoing alleged by FHF Partners against Defendant Auerbach. Joinder of Landau and Henley does not introduce any unrelated controversy and would not complicate the case at trial.

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<sup>4</sup>The federal and Pennsylvania securities laws, like Pennsylvania common law, also allow for contribution. Cent. Bank v. First Interstate Bank, 511 U.S. 164, 178 (1994); In re Jiffy Lube Sec. Litig., 927 F.2d 155, 160 (4th Cir. 1991); 70 Pa. Stat. § 1-503.

Accordingly, Defendant's motion to join Landau and Henley is granted.

**C. Buchanan Ingersoll, P.C. and Michael J. Flinn**

Defendant Auerbach alleges that Buchanan and Flinn drafted, promoted and distributed the PPM. (Joinder Motion at 2). Auerbach further argues that Buchanan and Flinn were "possibly negligent . . . with regards to their duties relevant to the PPM." (Joinder Motion at 15). In the Third-Party Complaint, which Defendant attaches to his joinder motion, Auerbach also states that he relied on the expertise of Buchanan and Flinn to assure that the PPM satisfied all federal and state securities laws requirements. In essence, Auerbach asserts a legal malpractice claim against Buchanan and Flinn.

For purposes of joinder, Auerbach argues that he is entitled to contribution from Buchanan and Flinn because they are each joint tortfeasors with him, whose combined conduct caused a single injury to FHF Partners. Auerbach, however, does not allege that Buchanan or Flinn took any direct action with regards to FHF Partners. For example, Auerbach does not allege that Buchanan and Flinn drafted the PPM specifically for use by FHF Partners or that Buchanan and Flinn were directly involved in soliciting the investment from FHF Partners. Here, Buchanan and Henley are not acting jointly with Auerbach for the purposes of committing a joint tort because Auerbach's actions and Buchanan and Flinn's actions are severable as to time. Neither Auerbach, Buchanan or Flinn had the opportunity to guard against the other's acts as described in Foulke, 212 F.R.D. at 270. Indeed, the legal malpractice claim alleged against Buchanan and Flinn in the Third Party Complaint is separate and distinct from the securities violations and common law fraud alleged by FHF Partners. The alleged misrepresentations and omissions made by Defendant Auerbach are severable from the alleged malpractice committed

by Buchanan and Flinn. Buchanan and Flinn, therefore, cannot be considered joint tortfeasors with Auerbach for purposes of joinder.

Further, adding a legal malpractice claim to this matter, although related to the original Amended Complaint, would unduly complicate the case for purposes of trial. The evidence and testimony to support Defendant Auerbach's legal malpractice claim against Buchanan and Flinn would differ from that required to support Plaintiff FHF Partners' securities and common law fraud case. It is not in the interest of justice to join Buchanan and Flinn as third party defendants.

Accordingly, Defendant's motion to join Buchanan and Flinn is denied.

An appropriate Order follows.

**BY THE COURT:**

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**Hon. Petrese B. Tucker, U.S.D.J.**

**IN THE UNITED STATES DISTRICT COURT  
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<b>FHF PARTNERS,</b>	:	
Plaintiff,	:	
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<b>KMA FINANCIAL GROUP, LLC, ET AL.,</b>	:	
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<b>STEVEN LANDAU,</b>	:	
Plaintiff,	:	
	:	<b>CIVIL ACTION NO. 05-6013</b>
	:	
v.	:	
	:	
<b>KEVIN AUERBACH,</b>	:	
Defendants.	:	

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**ORDER**

**AND NOW**, this \_\_\_\_ day of February 2007, upon consideration of Defendant’s Motion for Leave to Join Steven Landau, Kenneth Henley, Buchanan Ingersoll, P.C., and Michael J. Flinn, Esquire as Third Party Defendants in the Action Styled FHF Partners v. Auerbach (Doc. 36 of Case No. 05-5309)<sup>5</sup>, Plaintiff Steven Landau’s Response (Doc. 37), and Plaintiff FHF Partner’s Response (Doc. 39), **IT IS HEREBY ORDERED** and **DECREED** as follows:

1. Defendant’s Motion to join Steven Landau is **GRANTED**.

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<sup>5</sup>Case Nos. 05-5309 (FHF Partners v. Auerbach) and 05-6013 (Landau v. Auerbach) have been consolidated for purposes of pretrial proceedings. The Court’s Order, however, only relates to case No. 05-5309.

2. Defendant's Motion to join Kenneth Henley is **GRANTED**.
3. Defendant's Motion to join Buchanan Ingersoll, P.C. is **DENIED**.
4. Defendants's Motion to join Michael J. Flinn, Esquire is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff shall file the third-party complaint against Landau and Henley within five (5) days of this Court's Order.

**BY THE COURT:**

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**Hon. Petrese B. Tucker, U.S.D.J.**