

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for
Hammersmith Trust, LLC and
Microfund, LLC

Plaintiff,

V.

ANTHONY D. CUPINI and
CADET HOLDINGS, INC.,

Defendants.

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CA NO. 3:00-CV-2258-M

**RESPONSE TO PLAINTIFF'S MOTION TO CONSOLIDATE
COMBINED WITH BRIEF IN SUPPORT**

TO THE HONORABLE JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE:

COME NOW Defendants Anthony D. Cupini and Cadet Holdings, Inc., and file this Response to the Motion to Consolidate ("Motion") filed by the Plaintiff, Michael J. Quilling, Receiver for Hammersmith Trust, LLC and Microfund, LLC.

Background to Motion

1. Plaintiff seeks to consolidate this case with a case filed June 28, 2000 in Civil Action No. 3:00-CV-1405-M, styled as *Quilling v. Adam Shaw, et al.* The Plaintiff has attached a copy of the *Adam Shaw* Complaint to the Motion. In broad summary, the Plaintiff's contentions in the *Adam Shaw* case are as follows:

- a. That the defendants acted as agents to obtain investors in the Hammersmith Trust, LLC and Hammersmith Trust, Ltd. (collectively "Hammersmith");
- b. That the scheme involved the loan of funds to Hammersmith, which would be repaid by virtue of interest payments at the rate of 480% per annum (and higher) for 12 months, with the repayment of principal in month 13;

c. That David Gilliland, who Plaintiff alleges directed the scheme, engaged Bridgeport Alliance, L.L.C. ("Bridgeport") to screen potential lenders;

d. That Bridgeport engaged various entities and individuals to act as agents and brokers would locate and solicit potential investors. This included the 18 separate defendants who are named as defendants in the *Adam Shaw* case; and

e. That once the potential lender/investor was located, a Loan Agreement would be signed with Hammersmith and/or Microfund, then funds would be wired to an account designated by Gilliland. Each lender/investor would also sign a client agreement with Bridgeport.

2. Based on this, the Plaintiff asserts four counts as follows:

- Count One – constructive trust and disgorgement;
- Count Two – Aiding and abetting breach of fiduciary duty;
- Count Three – Aiding and abetting corporate waste;
- Count Four – Fees and expenses and costs.

These are essentially the same legal theories and claims asserted against Defendants Cupini and Cadet Holdings.

Summary of Argument

3. Plaintiff asserts claims against the *Adam Shaw* defendants based on essentially the same legal theories as the those asserted against the Defendants in this case. However, while the basic legal theories are the same, the facts which support the claims against each individual defendant are separate, discrete and unique. The underlying facts relating to these claims against the 18 *Adam Shaw* defendants are not the same as the facts asserted against the Defendants in this case. The claims arise from separate transactions and are factually separable and unique.

4. In addition, the Defendants will be greatly prejudiced if they are forced to stand trial with the 18 *Adam Shaw* defendants. The Plaintiff's basic claim appears to be that the *Adam Shaw* defendants were a bunch of crooks participating in a Ponzi scheme through Hammersmith and Bridgeport. While this may or may not be true, as established by the supporting Affidavit of Anthony Cupini¹, neither Mr. Cupini nor Cadet had any involvement with either of these entities. Consequently, requiring the Defendants to be tried with the others who may have been connected to Bridgeport or Hammersmith, will prejudice them and is highly likely to cause confusion with the jury.

5. This is especially true since the two investors related to Defendants were seeking to invest in Panther Fund via Microfund. There is no allegation of wrongdoing as to Panther Fund, or that Defendants knew or should have known of such.

Standard for Consolidation

6. Consolidation of one or more matters pending before a court may be proper under Federal Rule of Civil Procedure 42 for cases involving a common question of law or fact. FED. R. CIV. P. 42; *see also Enterprise Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994). However, the mere presence of a common question of law or fact does not require consolidation. *See Continental Bank & Trust Co. v. Platzer*, 304 F. Supp. 228, 299 (S.D. Tex. 1969). In making the determination of whether to consolidate cases, the court must consider whether consolidation would create specific risks of prejudice and possible confusion for the jury. *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993).

¹A copy of the Affidavit in the form which will be executed is attached as Exhibit "1". The original will be filed with this Court as soon as it is received, and copies of the same will be provided to opposing counsel.

What is a Common Issue?

7. While Rule 42 allows for consolidation based on common issues of law or fact, there is a clear distinction between claims involving common issues of law and fact and arising out of a common occurrence, and causes of action based on common legal theories arising from separate occurrences. For example, in a multi-vehicle crash, there may be multiple claims arising out of one occurrence. This occurrence may give rise to multiple claims for damages by a number of different plaintiffs. This would be a case of multiple claims, all based essentially on the same legal theory, arising from a single occurrence.

8. Multiple claims, all based on the same basic legal theory, may also arise out of separate transactions. For example, several investors might have securities fraud claims against a single brokerage house. While each individual claimant may assert claims based on essentially the same legal theories, each claim will be based on a separate transactions and different facts. This would be a case where the claims are based on the same legal theories, but arise out of separate transactions and different facts.

9. For example, consider the situation where a number of government employees are fired for their political association with a particular political party. Although this may give rise to a civil rights claim under 42 U.S.C. §1983 by each of the terminated employees, each claim would stand or fall on its specific facts. While each of the discharged employees would assert claims based on the same legal theory under §1983, there are no common issues of fact as each claim arises from a separate, distinct occurrence.

10. This was the conclusion in *Arroyo v. Chardon*, 90 F.R.D. 603 (D.P.R. 1981). Eight separate plaintiffs asserted §1983 claims. Each plaintiff asserted she was fired from the Puerto Rican Department of Education because of her association with the Popular Democratic Party. *Id.* at 605. The plaintiffs moved to consolidate the eight cases based on common issues

of law and fact. Denying the request for consolidation, the court noted that each of the plaintiff's claims would involve proof of different facts by each separate plaintiff. Although the plaintiffs each asserted the same §1983 civil rights claim, each claim rested on a separate set of unique facts. Consequently, consolidation was not proper. *Id.* at 605-06.

11. The same conclusion was reached in *Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623 (E.D. Wis. 1984). As implied by the style of the case, this was a securities case involving five complainants alleging claims for churning, fraudulent representations, breach of fiduciary duty, punitive damages, negligent handling of accounts, negligent misrepresentation, administration and supervision. The defendants' answers raised common defenses and issues. *Id.* at 674.

12. The court began by noting that there was a clear commonality of legal issues because the causes of actions were the same. *Id.* at 625. However, there were sufficient factual dissimilarities to render consolidation impractical, including the following:

- (a) the plaintiffs had varying degrees of sophistication;
- (b) their purposes in investing were different; and
- (c) the accounts held different sections, although there was some overlap.

Id. at 625. Consequently, although each plaintiff asserted the same causes of action, the factual basis for each was different.

Plaintiff's Cases Do Not Support Consolidation

13. In the argument portion of his Motion, Plaintiff cites four cases which purportedly provide factors which courts have considered in making a determination on a motion to consolidate. These cases do not support consolidation of the two cases before this Court. First, Plaintiff cites *Investors Research Co. v. U.S. District Court*, 877 F.2d 777 (9th Cir. 1989), stating that if the cases are pending before the same court consolidation is favored. In the

Investors Research case, the defendants were the same in two cases pending before two different judges in the same district. The judges in those cases refused to accept the transfer of one case to another court and one of the defendants petitioned the court of appeals for a writ of mandamus. The opinion is a two paragraph opinion, ordering the district courts to respond to the petition for writ of mandamus. It says nothing about consolidation when the cases are pending before the same or different courts.

14. The second case cited by Plaintiff is *Seguro de Servicio de Salud v. McAuto Systems Group, Inc.*, 878 F.2d 5 (1st Cir. 1989) which considers the factor of a common party being involved in multiple cases. In that case, the district court ordered the consolidation of two separate arbitration proceedings resulting from two distinct contracts with different arbitration provisions. *Id.* at 7. The court in that case ordered the consolidation of the arbitration proceedings because they featured a common party and interrelated issues. *Id.* One of the parties appealed this ruling based on its belief that the court's ruling set aside the arbitration provisions in one of the contracts which specifically provided for the arbitration to occur in another locale. The ruling of the court was reversed on appeal based on the ruling's forfeiture of the parties contract rights. *Id.* at 10. The appellate court held that consolidation resulting in demonstrable prejudice to one of the parties and therefore was an abuse of the district court's discretion. As discussed more fully below, Defendants in the case before this court argue that they will be prejudiced if the cases before this Court are consolidated.

15. The final two cases cited by Plaintiff are two asbestos cases which do state and apply the factors directly from Rule 42; where common issues of fact or law or involved the cases may be consolidated. See *Cantrell v. GAF Corp.*, 999 F.2d 1007 (6th Cir. 1993); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985). Defendants agree that most asbestos case are and perhaps should be consolidated because the issues presented in those

cases are likely the same for the hundreds or thousands of plaintiffs involved. While each person who suffers from asbestosis may have been injured at different times or locations and each person may suffer from slightly different symptoms or injuries, the cause of injuries is purportedly the same and judicial economy requires consolidation. As shown more fully below, even though the Plaintiff's complaints in the two cases are virtually identical the facts involved are different.

16. Finally, Plaintiff again cites the *Hendrix* case in support of the court's consideration of risk of prejudice or possible confusion which might result from consolidation. *Hendrix*, 776 F.2d at 1495. As shown below, these factors support Defendants' argument that these cases should not be consolidated because the fact finders will be required to understand two distinct fact situations and keep those facts separate as to the Defendants in this case and the defendants in the *Adam Shaw* case. Further, consolidation of the cases will result in high risk of prejudice to Defendants based on the "guilt by association" which may be imputed to them based on the alleged bad acts of the *Adam Shaw* defendants and the former principals at Hammersmith and Bridgeport.

The Facts of This Case

17. This Response is supported by the Affidavit of Anthony D. Cupini. Mr. Cupini's Affidavit establishes the following:

- a. Defendants' only involvement was with two investors who sought to invest in Panther Fund via Microfund. These investors did not seek to invest in Hammersmith, and had no involvement with or through Bridgeport;
- b. The Defendants, and the two investors related to Panther Fund, had no dealings with Hammersmith or Bridgeport;
- c. The *Adam Shaw* Complaint discusses an investment involving a guaranteed

480% return. Defendants' two Panther Fund investors were not involved in this investment; and

d. The Defendants have had transactions with only two of the 18 *Adam Shaw* defendants. One of these involved transactions in unrelated investments. The other involved the investment in Panther Fund via Microfund.

The Facts Underlying The Claims Are Distinct and Separate

18. The facts have established that there is not sufficient commonality of facts for consolidation. This includes the following:

(a) *No Transactions with Hammersmith.* Defendants dealt solely with investments in Panther Fund through Microfund. Defendants had no dealings of any kind with Hammersmith.

(b) *No Transactions with Bridgeport.* Plaintiff alleges that the Ponzi scheme employed Bridgeport to market securities in furtherance of the scheme. Defendants have had no dealings with Bridgeport. The two Panther Fund investors related to Defendant had no dealings with Bridgeport.

(c) *Different Investments involved.* Plaintiff alleges that the Ponzi scheme involved alleged loans with a guaranteed 480% return. Defendants' two Panther Fund investors were not involved with any such investments. The two lawsuits therefore involve different investments.

(d) *Different Investors Involved.* Defendants were only involved with two investors who sought to invest in Panther Fund via Microfund. Thus, the investors involved in the *Adam Shaw* case and the two involved in this case are different.

(e) *Different Fiduciary Duties.* Plaintiff alleges that Hammersmith, Bridgeport, Microfund and Gilliland owed fiduciary duties to the investor/lenders which were breached. (See paragraph 32 of *Adam Shaw* Complaint). Assuming arguendo the existence of any fiduciary duties, this would run to different investors arising out of different transactions.

(f) *Different Investment Objectives.* The two investors related to Defendants were seeking to invest in Panther Fund through Microfund. These investors were not seeking to invest in Hammersmith. There is no allegation that Panther Fund was in any way involved in any improper practices, or that Defendants had any reason to know or believe that Panther Fund was involved in any wrongdoing.

(g) *No Involvement of Bridgeport in Screening of Investors.* Plaintiff alleges that Bridgeport would be used to screen potential lender/investors. Neither Defendants nor their related investors had any dealings with Bridgeport.

(h) *No Loan Agreement Executed.* Plaintiff alleges that a loan agreement would be signed. No such loan agreement was signed by the two investors related to the Defendants.

(i) *No Client Agreement With Bridgeport.* There was no client agreement executed by the two investors related to Defendants with Bridgeport.

(j) *Separate Payments.* The payments made to the Defendants, and which Plaintiff seeks to recover, were separate and distinct from those made to the *Adam Shaw* defendants.

(k) *Constructive Trust.* The imposition of a constructive trust in Texas requires tracing the funds into an identifiable fund or asset. *See, e.g., Sheldon Petroleum Co. v. Peirce*, 546 S.W.2d 954, 958 (Tex. Civ. App.–Dallas 1977, no writ). Obviously, this will require a separate tracing as to each individual defendant. The facts underlying each constructive trust claim will be separate and discreet.

(l) *Lack of Connection to Adam Shaw Defendants.* There are 18 separate defendants in the *Adam Shaw* case. The Defendants in this case have had dealings with only two of them. Defendants had no dealings with the other 16. Only one of them, Chris Carlson, had any dealings with Defendants which related to Microfund. This related to an investment in Panther Fund through Microfund, and, again, had nothing to do with Hammersmith or

Bridgeport.

(m) *Aiding and Abetting Breach of Fiduciary Duty.* This appears to involve alleged breaches of fiduciary duties to the lender/investors. Defendants were only involved with two investors, neither of which acquired the alleged 480% loan investments. The facts underlying this alleged breach of fiduciary duty will obviously be different and unique from investor to investor.

(n) *Aiding and Abetting Corporate Waste.* This will involve separate proof as to each separate defendant. Defendants in this case did not act in concert with the *Adam Shaw* defendants.

(o) *Tracing.* The Plaintiff's tracing allegations will involve separate facts and issues as to each defendant.

(p) *Fees and Expenses.* This likewise will involve separate issues to each Defendant.

19. Plaintiff's claims in both cases are based upon essentially the same legal theories. However, these legal theories are based upon separate transactions, each involving a separate, distinct set of facts.

20. Indeed, even the remedies sought are separate and distinct. For example, tracing funds to impose a constructive trust will involve a separate, distinct undertaking as to each defendant. To the extent Plaintiff seeks to penetrate the corporate veil, this will also involve separate proof as to each defendant.

Likelihood of Confusion and Prejudice to the Defendants

21. Consolidation with the *Adam Shaw* case creates a huge potential for prejudice and confusion as to Defendants Cupini and Cadet Holdings. This includes at least four basic issues.

22. *Point One:* Defendants here were only involved with two investors who sought to invest in Panther Fund via Microfund. These investors did not seek to invest, and did not invest, in Hammersmith. There is no mention of Panther Fund in the Complaint. Plaintiff makes no allegations that Panther Fund was involved in any improprieties or wrong doing.

23. Hammersmith may or may not have been a Ponzi scheme. However, Plaintiff's obvious tactic is to attempt to try Defendants Cupini and Cadet Holdings along with individuals associated with Hammersmith, thereby creating an argument of guilt by association. It will be extremely difficult, if not impossible, for the jury to keep the multiple defendants straight, and to distinguish these defendants from the others who did in fact deal with Hammersmith, and who were related to investors who invested in Hammersmith.

24. *Point Two.* Defendants had no dealings with Bridgeport. There is a huge likelihood of prejudice and confusion if the Defendants are required to stand trial with 18 others who in fact dealt or were screened by Bridgeport.

25. *Point Three.* Defendants have had dealings with only two of the 18 *Adam Shaw* defendants. One of these, Rick Shirrell, related to totally separate investments. The only one which had any dealings germane to this issue was Chris Carlson. The transactions with Mr. Carlson dealt with Panther Fund, and not Hammersmith or Bridgeport.

26. *Point Four.* The *Adam Shaw* Complaint relates to an investment yielding a guaranteed 480% return, defendants Cupini and Cadet Holdings had no involvement with such investments. There is a huge likelihood that this distinction will be lost if the defendants are forced to stand trial with 18 others who were in fact involved with such investments.

27. Guilt by association has always been a powerful jury argument. Whether couched in terms of where there's smoke there's fire, that birds of a feather flock together, or that anyone associated with Hammersmith or Bridgeport must be a crook, Plaintiff will obviously

argue that Defendants Cupini and Cadet Holdings are guilty by association. The possibility for confusion by the jury, and prejudice to the Defendants, is huge.

Further Prejudice to Defendants

28. Defendants will be further prejudiced, and put to great expense, by the potential of having to attend the depositions of each of the *Adam Shaw* defendants. This would greatly enhance the cost and burden to the Defendants in defending this lawsuit.


CONCLUSION

While the complaints in the two cases allege common claims, the facts upon which those claims are based are not common. Consolidation of the cases would result in confusion in both cases, would not result in an appreciable saving of time or of this Court's resources and would prejudice Defendants' ability to defend themselves. Therefore, consolidation of this case with the *Adam Shaw* case is not proper. Defendants pray that the Motion be denied.

DATE: January 31, 2001.

OF COUNSEL:

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COUNSEL FOR DEFENDANTS ANTHONY D.
CUPINI AND CADET HOLDINGS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2001, a copy of the foregoing document was served upon the party reflected below:

Michael Quilling
Quilling, Selander, Cummiskey &
Lownds, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

Via Facsimile and Certified Mail
Return Receipt Requested

A handwritten signature in cursive script, appearing to read "Billy Flynn", is written over a horizontal line.

\\Reception\lg\BFORSHEY\cupini\pleadings\response - mot to consolidate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, Receiver for
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CA NO. 3:00-CV-2258-M

AFFIDAVIT OF ANTHONY D. CUPINI

Before me, the undersigned on this day personally Anthony D. Cupini who after being by me duly sworn stated on his oath as follows:

1. "My name is Anthony D. Cupini. I am over 21 years of age and am in all respects competent to make this Affidavit. I am one of the Defendants in the above cause.

2. Neither I nor Cadet Holdings, Inc. ("Cadet Holdings"), the other Defendant in this case, had any dealings or transactions with Hammersmith Trust, LLC or Hammersmith Trust, Ltd. (collectively "Hammersmith").

3. Neither I nor Cadet Holdings had any dealings or transactions with Bridgeport Alliance, L.L.C. ("Bridgeport").

4. Neither I nor Cadet Holdings had any dealings or transactions with any of the Defendants in Case No. 3:00-CV-1405-R, including Adam Shaw, Thomas R. Smith, Linda J. Smith, Michael Klein, Leon Hurst, Summit Marketing, Inc., Bancorp Mortgage, Inc., Caton & Associates, Inc., Simplified Communications, Inc., Chatham International, Inc., Thomas McCrimmon United Holdings Corp., Greg Skibbee, Rick Shirrell, Jeffrey A. Matz, Christopher J. Carlson, Murray Stucker and Larry K. Lewis, except as set forth in paragraph 5 below.

5. I have had some limited dealings with Rick Shirrell. However, these involved other investments unrelated to Hammersmith, Bridgeport or Microfund. The only defendant in the Adam Shaw case with which I have had any dealings relating to the Panther Fund or Microfund was Christopher Carlson. Mr. Carlson introduced us to the Panther Fund investment opportunity. However, my dealings with Mr. Carlson were limited to two Microfund investors, who were investing in Panther Fund via Microfund, and had nothing to do with either Hammersmith or Bridgeport.

6. The Original Complaint filed in Cause No. 3:00-CV-1405-M, and into which Plaintiff seeks consolidation with this case, refers to certain securities issued by Hammersmith or Bridgeport as a part of an alleged Ponzi scheme and involving alleged loans with a guaranteed 480% return. Neither I nor Cadet Holdings were involved in any transaction for the issuance, sale or distribution of such 480% guaranteed return securities through either Hammersmith or Bridgeport.

7. The only involvement which Cadet Holdings or I had was with two investors who used Microfund as a vehicle to invest in the Panther Fund. This had no relationship with any of the other transactions relating to Hammersmith, Bridgeport or the type of 480% return security specified in the Complaint.

8. To my knowledge, neither of the two investors who invested in Microfund as a vehicle to invest in Panther Fund signed a Client Agreement with Bridgeport or a Loan Agreement with either Hammersmith and/or Microfund.

9. The two investors with whom the Defendants were involved were seeking to use Microfund as a vehicle to invest in Panther Funding, not Hammersmith.

10. The foregoing is true and correct and within my personal knowledge."

ANTHONY D. CUPINI

SUBSCRIBED AND SWORN TO BEFORE ME on January __, 2001 by Anthony D. Cupini.

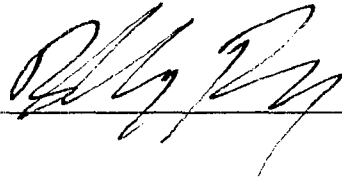
NOTARY PUBLIC, STATE OF MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2001 a copy of the foregoing document was served upon the party reflected below:

Michael Quilling
Quilling, Selander, Cumiskey &
Lownds, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

Certified Mail
Return Receipt Requested
Also Via Fax



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