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6                                IN THE UNITED STATES DISTRICT COURT  
7                                FOR THE DISTRICT OF ARIZONA

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9        Kingsley Capital Management, LLC, and  
10        Bruce Paine Kingsley MD IRA Rollover,

No. CV 10-02243-PHX-NVW

11                                Plaintiffs,

**ORDER**

12        vs.

13        Brian Nelson Sly, a married man; Brian Sly  
14        and Company, Inc., a California corporation  
15        and successor to Brian Sly and Company, a  
16        sole proprietorship; Wilbur Anthony Huff,  
17        an individual; Charles J. Antonucci, Sr., an  
18        individual; Thomas J. Bean, an individual;  
19        Thomas Cunningham and Jane Doe  
20        Cunningham, husband and wife,

21                                Defendants.

22                Before the Court is “Plaintiffs’ Motion to Strike Untimely Notices of Nonparty at  
23        Fault” (Doc. 173). For the reasons stated below, the motion will be granted.

24        **I.        BACKGROUND**

25                On August 1 and August 2, respectively, Defendants Cunningham and Sly filed  
26        notices of non-parties at fault, as generally permitted by A.R.S. § 12-2506(B). Both  
27        Cunningham’s notice and Sly’s notice named Bruce Kingsley (Plaintiff Kingsley Capital  
28        Management’s principal, and Plaintiff Bruce Paine Kingsley MD IRA Rollover’s  
29        trustee); and Paul Conant, one of Plaintiffs’ attorneys here who supposedly advised  
30        Kingsley about various issues relating to his investment.

31                Sly also names several other potential non-parties at fault. He accuses Kingsley’s  
32        wife, Jane Kingsley, of advising and participating in the investment decisions; and

1 another attorney (who has not appeared here), Rand Haddock, who likewise allegedly  
2 advised Kingsley and participated in Kingsley’s decision to enter into the investment. In  
3 addition, Sly names six former directors of the Park Avenue Bank whom Kingsley has  
4 sued in a separate lawsuit to recover his losses under indirect and control person liability  
5 theories. Finally, Sly has named River Falls Financial Services, LLC and River Falls  
6 Investments, LLC, which he accuses of failing to compensate Kingsley as provided for  
7 by contract.

8 **II. ANALYSIS**

9 Kingsley has moved to strike Cunningham’s and Sly’s notices as untimely.  
10 Kingsley argues that defendants had an obligation to file their notices within 150 days of  
11 answering the complaint, making Cunningham’s notice 110 days late and Sly’s notice 41  
12 days late. Neither Sly nor Cunningham dispute Kingsley’s calculations, but they  
13 challenge whether they were obligated to act within 150 days of answering. They  
14 alternatively move for leave to file late.

15 Under Arizona law,

16 [i]n assessing percentages of fault the trier of fact shall  
17 consider the fault of all persons who contributed to the  
18 alleged injury, death or damage to property, regardless of  
19 whether the person was, or could have been, named as a party  
20 to the suit. Negligence or fault of a nonparty may be  
21 considered . . . if the defending party gives notice before trial,  
in accordance with requirements established by court rule,  
that a nonparty was wholly or partially at fault.

22 A.R.S. § 12-2506(B). The “requirements established by court rule” can be found at  
23 Arizona Rule of Civil Procedure 26(b)(5), which establishes that a notice of non-parties  
24 at fault must be filed within 150 days of answering. If the defendant fails to timely file,  
25 “the trier of fact shall not be permitted to allocate or apportion any percentage of fault to  
26 any nonparty . . . except . . . upon motion establishing good cause, reasonable diligence,  
27 and lack of unfair prejudice to other parties.”

1           Sly and Cunningham argue that this Arizona rule does not apply in federal court.  
2 Although Arizona Rule 26(b)(5) does not apply of its own force, this Court has held that  
3 it should nonetheless be applied to prevent forum shopping and potential inequity.  
4 *Wester v. Crown Controls Corp.*, 974 F. Supp. 1284, 1286–87 (D. Ariz. 1996). Further,  
5 if the Arizona rule does not apply, there is no deadline for filing a notice of non-party at  
6 fault — an unacceptable circumstance given the effect that such notices have on  
7 discovery. Accordingly, Sly and Cunningham had an obligation to file notices of  
8 nonparties at fault within 150 days of answering the complaint, just as they would if this  
9 case had remained in state court. Neither disputes that he missed this deadline.  
10 Therefore, their notices must be stricken unless they can establish “good cause,  
11 reasonable diligence, and lack of unfair prejudice to other parties.”

12           Defendants have not met this standard. Their only argument for good cause is  
13 simply to further the policies of the comparative fault statute — but those policies depend  
14 on timely notice. As for reasonable diligence, the only non-parties defendants had not  
15 known about long before expiration of their filing deadline are the Park Avenue Bank  
16 directors named in Sly’s notice. Sly learned of these non-parties in March but still waited  
17 until August to file a notice. Thus, neither Sly nor Cunningham has demonstrated  
18 reasonable diligence. Finally, Kingsley would be prejudiced by excusing these notices’  
19 untimeliness. Discovery is already underway, and these notices would significantly  
20 expand it. They also raise complicated questions about the extent of non-party liability,  
21 which would certainly require additional litigation. For example, naming Kingsley  
22 personally evades the law of director liability and veil-piercing — Plaintiffs made no  
23 decisions except through Kingsley, and therefore any fault allocable to Kingsley is  
24 necessarily the fault of Plaintiffs. Naming Kingsley’s lawyers is potentially abusive, as it  
25 creates a weapon one could wield in many cases simply to create a conflict with the  
26 client. These factors weigh strongly against late attempts to further expand and delay this  
27 case. Defendants’ untimely filing will not be excused.  
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1 IT IS THEREFORE ORDERED that is “Plaintiffs’ Motion to Strike Untimely  
2 Notices of Nonparty at Fault” (Doc. 173) is GRANTED.

3 IT IS FURTHER ORDERED that Defendant Sly’s and Defendant Cunningham’s  
4 motions to excuse their untimely filing are DENIED.

5 IT IS FURTHER ORDERED that “Thomas Cunningham’s Notice of Non-Parties  
6 at Fault” (Doc. 170) and “Notice of Non-Parties at Fault by Defendants Brian Sly, Brian  
7 Sly and Company and Brian Sly and Company, Inc.” (Doc. 171) are STRICKEN.

8 Dated this 20<sup>th</sup> day of August, 2012.

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12 Neil V. Wake  
13 United States District Judge  
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