IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| PARAGON MOLDING, LTD., *et al*. | : |
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| Plaintiffs, | |
| | : Case No. 3:05cv422 |
| vs. | |
| | : JUDGE WALTER HERBERT RICE |
| SAFECO INSURANCE COMPANY, *et al*. | : |
| Defendants. | : |

ENTRY DIRECTING PARTIES TO BRIEF CERTAIN MATTERS

On January 22, 2005, Plaintiff Paragon Molding, Ltd. ("Paragon") had a fire at its facility, wherein it suffered damage to the real estate and the inventory for its molding and game calls business. Doc. #1. As a result, Paragon filed suit against American Economy Insurance Company ("AEIC") (misdenominated as Safeco Insurance Company), claiming that AEIC wrongfully withheld proceeds from a fire insurance policy from Paragon. Id.; Doc. #44. AEIC was prepared to remit said proceeds, but not before other parties came to the forefront claiming entitlement to the same, as a result of various alleged obligations due them from Paragon. After discussion with the Court, the parties filed a Motion to Deposit Funds and the Court filed an Entry to Require Deposit of Funds with the Court Clerk. Docs. #62, #63. On January 11, 2010, AEIC deposited $1,334,812.98 in fire insurance

proceeds with the Court. Not. Order dtd. May 28, 2010.

The following parties have intervened in this suit, alleging various claims, cross-claims and counter-claims with regard to the insurance proceeds, to wit:

- Miller Industries, L.L.C. ("Miller"): As owner of the real estate occupied by Paragon, Miller claims entitlement to that portion of the insurance proceeds that corresponds to the value of the damage to the real property, in the sum of $650,041. Doc. #43 (Miller Mot. Intervene); Doc. #122 (Miller Compl.). Like Paragon, Miller styles itself as a party-plaintiff in this litigation. Attorney Don Little represents both Paragon and Miller.

- Paragon/Miller: In a Motion for Summary Judgment (rather than a pleading), Paragon and Miller, together, assert a right to 15% of the insurance proceeds for attorney fees, pursuant to an agreement between the businesses and Attorney Little. Doc. #100 (Paragon/Miller Summ. J. Mot.).

- The Alex N. Sill Company ("Sill"): Sill entered into a Loss Consultants and Appraisers Agreement with Paragon, wherein Sill agreed to assist in the preparation of the fire insurance claim and Paragon assigned and conveyed to Sill 7.5% of the total proceeds related to that claim. Doc. #47 (Sill Mot. Intervene); Doc. #51 (Sill Am. Counter/Cross Claims); Doc. #51-1 (Agreement between Sill & Paragon). Paragon previously paid Sill an undisclosed sum, in accordance with a settlement agreement reached by those parties, but Sill claims that it is entitled to another unspecified sum to make it whole, in accordance with both the original and settlement agreement. Doc. #51.

- Roy Rhodes: Previous to the fire, Paragon purchased a business known as "Roy Rhodes Championship Calls." Doc. #40 (R. Rhodes Mot. Intervene); Doc. #42 (R. Rhodes Counter/Cross Claims) ¶ 3. Pursuant to the purchase agreement, Roy Rhodes maintained an interest in "35% of the value of the Roy Rhodes Championship Calls division" of Paragon. Id. ¶ 5; Doc. #42-1 (Contract) ¶ 6(c). Roy Rhodes alleges that the Roy Rhodes Championship Calls Division of Paragon constituted 98% of the non-realty assets that were destroyed or damaged by the fire and, thus, he is entitled to the corresponding portion of the insurance proceeds. Doc. #42 at

1-4. Further, Roy Rhodes is in possession of a state court judgment against Paragon for $258,125, as a result of a jury verdict in his favor, regarding a breach of employment contract claim, and also claims entitlement to such sum from the insurance proceeds.[1] Id. at 4-6.

- Jimmie Rhodes: Also intervening is Jimmie Rhodes. Doc. #66 (J. Rhodes Mot. Intervene). Jimmie Rhodes claims to be entitled to $50,000 plus interest, pursuant to a promissory note previously executed in his favor, in connection with the aforementioned purchase by Paragon of Roy Rhodes Championship Calls.[2] Doc. #67 (J. Rhodes Counter/Cross Claim) ¶¶ 7-11; Doc. #82 (J. Rhodes Summ. J. Mot.) at 5-6.

- JPMorgan Chase Bank, NA ("Chase"): Chase intervenes, claiming three different interests in the fire insurance proceeds. Doc. #86 (Chase Mot. Intervene). All of said claims have been reduced to judgment in state court proceedings, to wit: (1) $234,811.64, plus interest and attorney fees, owing as a result of a promissory note/mortgage executed by Miller and guaranteed by Paragon; (2) $205,332.72, plus interest and attorney fees, owing as a result of a promissory note executed by Paragon; (3) $89,527.55, plus interest and attorney fees, owing as a result of a promissory note executed by non-party Captiva Holdings, LLC ("Captiva") and guaranteed by Paragon. Doc. #91 (Chase Counter/Cross Claims).

The Court will now proceed with a discussion of the present posture of this litigation and will then identify the outstanding issues that must be resolved prior to its final resolution.

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[1]This judgment is now on appeal/cross-appeal to Ohio's Second Appellate District. Doc. #130-1 at 1.

[2]In his Counter/Cross Claim, Jimmie Rhodes also asserted a claim for $13,322.31 plus interest, in accordance with a state court judgment for the same. Doc. #67 (J. Rhodes Counter/Cross Claim) ¶¶ 2-6. Jimmie Rhodes is only pursuing the $50,000 claim, however. See Doc. #82.

I. Case in the Nature of Interpleader

Although the filings in this case have not strictly followed the procedural parameters of such, the parties have been progressing as if the suit is "in the nature of interpleader." As explained by the Second Circuit,

> Historically, a bill of interpleader was an equitable device whose purpose was "the avoidance of the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing." As "strict" interpleader evolved, it was available to a plaintiff when (1) the same debt or duty was demanded by all of the defendants, (2) all of the defendants' adverse titles or claims were derived from or dependent upon a common source, (3) the plaintiff was a neutral stakeholder, asserting no claim of its own to the fund or property against which the defendants made claims, and (4) the plaintiff had no independent liability to any of the defendants.
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> As "equity extended its jurisdiction," the third of these requirements was relaxed, and a bill "in the nature of interpleader" became available in order to "guard against the risks of loss from the prosecution in independent suits of rival claims where the plaintiff himself claimed an interest in the property or fund which was subjected to the risk." Whether "strict" or merely "in the nature of," however, in each instance the goal of interpleader was to protect the plaintiff from "the risk of multiple suits when the liability was single."

Bradley v. Kochenash, 44 F.3d 166, 168-69 (2d Cir. 1995) (quoting Texas v. Florida, 306 U.S. 398, 406-07, 412, 83 L. Ed. 817, 59 S. Ct. 563 (1939) and citing 3A Moore's Federal Practice ¶ 22.03, at 22-12 to 22-13 (2d ed. 1994); 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1701, at 484-85 (1986)). Also, "[i]nterpleader may be invoked in the federal courts via Rule 22 or via the Interpleader Act, 28 U.S.C. § 1335, . . . . but the [same] general principles

. . . apply to both rule and statutory interpleader."[3] United States v. High Tech. Prods., 497 F.3d 637, 641 (6th Cir. 2007). In an interpleader action, the plaintiff is the "stakeholder" that holds title to the fund in dispute and the defendants are the adverse claimants to the fund. See id. As explained above, when an action is "in the nature of interpleader," the stakeholder also claims an interest in the stake. Bradley, 44 F.3d at 168-69.

Under 28 U.S.C. § 1335, a district court has jurisdiction over a civil action that involves "adverse claims" to money or property worth $ 500 or more, if said action involves at least two adverse claimants of diverse citizenship. The "adversity" requirement generally demands that inconsistent claims be asserted against the specific property that comprises the fund, rather than that the inconsistent claims arise "solely from the limited size of the fund." Ashton v. Paul, 918 F.2d 1065, 1070 (2d Cir. 1990). "The function of interpleader is to resolve claims for designated assets based on mutually exclusive theories rather than to

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[3]A stakeholder may bring an interpleader action in federal court by two different, yet overlapping, means. "Statutory interpleader" is governed by 28 U.S.C. § 1335. Section 1335 pertains to situations where "[t]wo or more adverse claimants, of diverse citizenship, . . . are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument . . . ." 28 U.S.C. §§ 1335. "Rule interpleader" is governed by Federal Rule of Civil Procedure 22, which provides that "[p]ersons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead" and that the remedy provided by rule interpleader "is in addition to--and does not supersede or limit--the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. . . . [and that] [a]n action under those statutes must be conducted under these rules." Fed. R. Civ. Proc. 22.

adjudicate rival claims that are mutually exclusive only because of the limited size of the assets." Id. However, an interpleader action is governed by equitable principles. "Accordingly, in determining the manner in which interpleaded funds should be distributed, the district court sits as a court of equity, possessing the 'remedial flexibility' to 'do complete equity between the parties.'" Great Am. Ins. Co. v. Spraycraft, Inc., 844 F. Supp. 1188, 1191 (S.D. Ohio 1994) (quoting Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255, 1261 (5th Cir. 1982) (which cites Humble Oil & Refining Co. v. Copeland, 398 F.2d 364, 368 (4th Cir. 1968); Brantley v. Skeens, 105 U.S. App. D.C. 246, 266 F.2d 447, 452 (D.C. Cir. 1959); 48 C.J.S. Interpleader § 52 at 226 (1981)).

## II. Instructions to Parties

### A. In General, as to All Parties

During a conference call between the Court and the parties, on May 1, 2009, the Court suggested, at the request of various of the parties, that the subject insurance proceeds be deposited and all parties with a claim to those proceeds file the same, with the Court. In order to make a clear record, the Court seeks confirmation that all parties are in agreement that this suit should proceed in the nature of interpleader. Should any party have a disagreement as to the same, it must notify the Court as to the basis of its disagreement.

Assuming the parties are in agreement as to the nature of this case, the

Court sees no reason to retain AEIC in this litigation, since its original dispute with Paragon has now been resolved, in that it has now deposited the fire insurance proceeds with the Court. Should any party have reason to disagree with the Court's conclusion that AEIC should now be dismissed from this litigation, it must show cause as to its reasons therefor.

On another note and as previously explained, an interpleader plaintiff is the "stakeholder" that holds title to the fund in dispute. In this case, the stakeholder that holds title to the fund in dispute is Paragon. Paragon is, thus, the only proper Plaintiff.[4] All other parties are claimants to the stake or party-defendants. The Court foresees no problem with this except to the extent that Mr. Little represents both Paragon (the Plaintiff) and Miller (a Defendant). Thus, in order for Mr. Little to proceed in his dual role, all parties must waive the conflict of interest that presents itself in this situation. Therefore, each party must either waive said conflict or inform the Court as to the basis for its refusal to do the same.

In addition, it is this Court's understanding that priority of distribution in interpleader actions goes to those claimants who have a claim in the specific *res* held by the Court, rather than having general, unrelated claims against the stakeholder. United States v. Benitez, 779 F.2d 135, 140 (2d Cir. 1985) (concluding that claimant "has no rightful claim to the interpleader fund because he

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[4]Given that the stakeholder, Paragon, has also asserted a claim in the stake (attorney fees), the case is "in the nature of interpleader" rather than being a strict interpleader, as explained above.

obtained his judgment against [the stakeholder] long before the events pertinent to this case took place and is thus a general creditor with no prior right to the interpleader fund"). This approach seems especially apt in cases such as the present, where the Court has no information regarding other funds that may be available to the Plaintiff to satisfy general liabilities (such as state court judgments that are not specifically related to the stake in question (i.e., the fire insurance proceeds)). Therefore, the parties hereto must specify to what extent they have a claim in the specific *res* at issue or, if not, what, if anything, entitles each of them to priority of payment over other claimants, together with citations of relevant authority.

Finally, and as mentioned above, 28 U.S.C. § 1335 requires the participation of at least two adverse claimants of diverse citizenship in order for a court to have jurisdiction over an interpleader action. According to the pleadings in this case, Paragon is a citizen of the State of Ohio. Doc. #1-1 ¶ 1. The other parties to the action have not informed the Court of their citizenship, however. See Doc. #42 (Roy Rhodes Counter/Cross Claim); Doc. #51 (Sill Am. Counter/ Cross Claim; Doc. #67 (Jimmie Rhodes Counter/Cross Claim); Doc. #91 (Chase Counter/Cross Claim); Doc. #122 (Miller Complaint). Federal Rule of Civil Procedure 8 provides that a pleading that states a claim for relief must contain "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. Proc. 8(a). Thus, in order for the Court to confirm that it has jurisdiction over the present interpleader action, the

parties must file an amendment to their pleadings (not an amended pleading) to include a short and plain statement as to said jurisdiction (and NOTHING ELSE).

B. Specific Instructions to Paragon/Miller

Either the fire insurance policy at the heart of this litigation has not been filed or the parties have not directed the Court's attention to the same. Therefore, Paragon is instructed to either file an authenticated copy of the policy or otherwise specify where it has already been filed.

Further, it would be helpful to the equitable resolution of this case for the Court and other parties to have an understanding of why Paragon, as the tenant, insured the real property in question on behalf of Miller, as the owner of said property. Therefore, to the extent there exists a formal or informal business arrangement between the two businesses, on this topic, the Court directs one or the other of the parties to incorporate an abbreviated discussion of the same, with proper evidentiary support, into the required additional briefings.

C. Specific Instructions to Sill

In order for the Court to resolve the question of the equitable distribution of the fire insurance proceeds, Sill is directed to specify the amount to which it claims further entitlement, under the Loss Consultants and Appraisers Agreement. Further, Sill is directed either to inform the Court of the amount it previously

received from Paragon under said Agreement or to justify its reasons for failing to disclose the same.

## III. Conclusion[5]

Within fourteen (14) calendar days of the date of this Entry, each party to this litigation is instructed to submit a memorandum addressing the following:

- Confirmation of agreement that this suit should proceed in the nature of interpleader or an explanation of the basis of the party's disagreement as to the same.

- Confirmation of agreement that AEIC should be dismissed from this litigation or an explanation of the basis for the party's disagreement as to the same.

- Waiver of the conflict of interest Paragon and Miller may have as a result of Mr. Little representing both parties or an explanation of the basis for the party's disagreement as to the same.

- Explanation of the extent to which each party claims an interest in the specific *res* at issue (the fire insurance proceeds) or, if not, an explanation of what entitles the party to priority of payment over other claimants, if anything, with citations of relevant authority.

Within fourteen (14) calendar days of the date of this Entry, each party (except Paragon) is given leave to file, and instructed to file, an amendment to its prior pleading (not an amended pleading) that contains the following (and NOTHING ELSE):

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[5]The Court recognizes that some of the parties have already briefed certain of the issues discussed herein. To the extent that any party has already filed a memorandum that addresses the issues at hand, the party is instructed to incorporate the previous arguments into the new memorandum.

- A short and plain statement of the grounds for the court's jurisdiction, as required by Rule 8.

Within fourteen (14) calendar days of the date of this Entry, either Paragon or Miller is instructed as follows:

- To either file an authenticated copy of the fire insurance policy at issue in this litigation or otherwise specify where it has already been filed.

- To include in its memorandum (with proper evidentiary support) an abbreviated discussion of any formal or informal business arrangement between Paragon and Miller regarding why Paragon, as the tenant, insured the real property in question on behalf of Miller, as the owner of said property.

Within fourteen (14) calendar days of the date of this Entry, Sill is instructed to incorporate the following into the aforementioned memorandum:

- Designation of the amount to which it claims further entitlement under the Loss Consultants and Appraisers Agreement.

- Designation of the amount it previously received from Paragon under said Agreement or justification for its reasons for failing to disclose the same.

Given the volume of Motions for Summary Judgment already on file in this case, the Court will entertain NO MORE such Motions. It will, however, permit each party to file one responsive memorandum wherein it responds to each of the new memoranda filed by the other parties, as directed in the present Entry. Said responsive memoranda must be filed within twenty-eight (28) CALENDAR days of

the date of this Entry. The Court will grant no extensions to the times specified in this Entry.

June 10, 2010

/s/ Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
Counsel of record