UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT A. GRAY, ADMINISTRATOR, ET AL. Plaintiffs, v. JEFFREY DERDERIAN, ET AL., Defendants.	)	Civ. No. 04-312-L

ESSEX INSURANCE COMPANY'S OBJECTION TO
PLAINTIFFS' MOTION TO AMEND MASTER COMPLAINT

Pursuant to Fed. R. Civ. P. 15(a), Essex Insurance Company ("Essex") objects to Plaintiffs' Motion to Amend Master Complaint, as it relates to Essex, on grounds of futility. The grounds for objection are set forth in the Memorandum in Support of Essex Insurance Company's Objection to Motion to Amend, filed herewith.

Respectfully submitted,

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Dated: December 3, 2004

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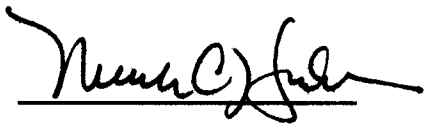
CERTIFICATION

I certify that on the 3rd day of December, 2004, I served a true copy of the within document, Objection to motion to amend, via first class mail, postage pre-paid, or by electronic mail to the parties listed below.



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MEMORANDUM IN SUPPORT OF ESSEX INSURANCE COMPANY'S
OBJECTION TO MOTION TO AMEND MASTER COMPLAINT

Pursuant to Fed. R. Civ. P. 15(a), Essex Insurance Company ("Essex") objects to Plaintiffs' Motion to Amend Master Complaint, as it relates to Essex, on grounds of futility. For the reasons set forth below, the Proposed Master Complaint, even as amended,[1] fails to state a claim upon which relief may be granted against Essex for "voluntary undertaking" under Restatement (Second) of Torts § 324A(c) ("Section 324A"). Thus, Plaintiffs' Motion to Amend should be denied.

Procedural Standard

Under Fed. R. Civ. P. 15(a), a party must seek leave of court to file an amended pleading after a responsive pleading has been filed or a prior amendment has been made as of right.

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1 The specific amendments that relate to Plaintiffs' claims against Essex consist of two new paragraphs:

657. Defendant[] Essex ... in undertaking to perform said inspections, recognized or should have recognized that the competent performance of the inspections was necessary for the protection of third persons, including Plaintiffs.

658. Essex' insured, Michael Derderian, relied upon the results and recommendations of said negligently performed inspections.

Harvey v. Snow, 281 F.Supp.2d 376, 379 (D.R.I. 2003). Although leave is to be freely granted when justice requires, "the Rule does not require that the Court carry a rubber stamp." *Fraioli v. Lemcke*, 328 F.Supp.2d 250, 262 (D.R.I. 2004) (*citing Almeida v. United Steelworkers*, 5 F.Supp.2d 115, 120 (D.R.I. 1999)). Thus, for example, a court may deny a motion to amend on grounds of futility when the complaint, even as amended, fails to state a claim upon which relief can be granted. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *see also Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir.1996) (standards for determining futility are the same as the standards for ruling on a motion to dismiss).

Here, Plaintiffs' Amended Master Complaint can be considered a second "amendment" of complaints previously filed by various plaintiffs in this action (the first "amendment" being the consolidation of those separate complaints and the creation of the Master Complaint). As a result, leave of court is required before Plaintiffs' proposed amendments may be allowed. Even if the Master Complaint were to be treated as the initial "pleading" against Essex in this action, this Court retains discretion to deny Plaintiffs' Motion to Amend, in whole or in part, so long as Plaintiffs' proposed amendment "fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss." *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991). To hold otherwise "would impose upon [Essex] and the courts the arduous task of responding to an obviously futile gesture on plaintiffs' part" – a result that Rule 15 does not require. *Id.*, *citing Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985).

Argument

In its Motion to Dismiss Master Complaint (hereinafter "Motion") and its Reply to Plaintiffs' Opposition to Motion to Dismiss ("Reply"), Essex set forth the numerous legal deficiencies that warranted dismissal of Plaintiffs' "negligent inspection" claims under Section

324A.[2] Specifically, Essex pointed out (1) that no court in Rhode Island had ever accepted Plaintiffs' theory of insurer liability for "negligent inspection" under Section 324A; (2) that each of the several Rhode Island federal cases that have considered this issue have come out *against* Plaintiffs' position, *see* Reply, pp. 3-6 (discussing *McAleer v. Smith*, 791 F. Supp. 923, 934-35 (D.R.I. 1992); *Mustapha v. Liberty Mut. Ins. Co.,* 268 F. Supp. 890, 895 (D. R.I. 1967), *aff'd,* 387 F.2d 631 (1st Cir. 1967)); (3) that sound public policy considerations, including the encouragement of safety-related inspections, support the rejection of Plaintiffs' theory, *see* Motion pp. 7-8; and (4) that allowing third parties to bring tort claims against insurers for negligent inspection, or on other grounds, "would constitute a radical departure from accepted principles of insurance law." Motion, pp. 6-7, 12-15 (citation omitted).

In their Proposed Amended Master Complaint, Plaintiffs now seek to "add[] more specific Restatement § 324A language to [their] negligent inspection count[]" against Essex. *See* Mem. Supp. Plaintiffs' Mot. for Leave to File First Amended Master Cmplt., p. 5. But the mere addition of "more specific language" will not cure the fundamental deficiency of Plaintiffs' legal theory. However "specifically" it may be pled, the fact remains that no Rhode Island court has ever recognized a cause of action against an insurer for "negligent inspection" under Section 324A. Because Plaintiffs' proposed amendments will not cure this fundamental deficiency, Plaintiffs' Motion to Amend, as it relates to Essex, should be denied.

Finally, even if this Court were to accept Plaintiffs' novel theory of insurer liability for "negligent inspection" under Section 324A, Plaintiffs' proposed amendments to the Master

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[2] To minimize redundancy, and for the convenience of the Court, Essex's Motion and Reply, and Plaintiffs' Opposition to the Essex Motion to Dismiss (hereinafter "Opposition," or "Opp.") are incorporated by reference in the present motion, as if fully set forth herein.

Complaint would fail for a second, and independent, reason. It is well-established that a plaintiff who seeks to assert a claim for "negligent undertaking" must have some credible basis to assert a duty on the defendant's part, running to potentially injured parties; and some reliance by the person on whose behalf the "undertaking" allegedly was made. *Zabala Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1978). Thus, for example, in *Zabala*, a case brought by the widow of baseball star Roberto Clemente against employees of the Federal Aviation Administration for their alleged negligence in inspecting the airplane in which Clemente died, the First Circuit considered the analogous example of

> a corporate employer who has hired a safety director to insure that the firm's business environment is free from accidents and health hazards. Acting entirely within his authority, the safety director orders his staff to check that other firms in the vicinity are meeting fire regulation standards. If one such employee fails to inspect a nearby firm's building, and if it burns to the ground thereafter because of unsafe conditions which would have been rectified had the employee carried out his assigned task, is either the employee or the employer liable for this failing? We think not.

567 F.2d at 1145.

Here, Plaintiffs' Amended Master Complaint does not plead, and cannot credibly plead, that Essex, in carrying out an inspection to determine the insurability of its policyholder's premises, undertook a "duty" to the patrons who attended The Station on February 20, 2003; or that those patrons chose to attend The Station in "reliance" on any such alleged "undertaking" by Essex. *See* Rep., pp. 7-8. Indeed, as Plaintiffs appear to concede, the patrons of The Station were wholly unaware of Essex, the Essex policies, and the inspection on which Plaintiffs now base their theory of "voluntary undertaking." *See* Opp., p. 16. Plaintiffs' inability to plead any assumption of duty by Essex – or any reliance by those plaintiffs on the voluntary

assumption of such a duty – constitutes a separate, independently sufficient, basis for dismissal of Plaintiffs' proposed Amended Complaint.

In an apparent attempt to circumvent the reliance requirement of Section 324A, Plaintiffs argued in their Opposition – and now seek to amend the Master Complaint to assert – that *Michael Derderian*, the owner of The Station, was aware of the Essex inspections, and that he "relied" in some undisclosed fashion "upon the results and recommendations" thereof. *See* Proposed Amended Master Cmplt, ¶ 658. But Plaintiffs' assertion is directly contrary to the plain language of the Essex Policy ("Essex Policy Conditions"), which states unequivocally: (1) that any inspections or surveys conducted by Essex "relate *only* to insurability and the premiums to be charged;" (2) that Essex "do[es] not make safety inspections;" and (3) that Essex "*do[es] not undertake to perform the duty of any person or organization to provide for the health and safety of ... the public.*" *See* Essex Motion, Exh. 1 (emphasis supplied). At no point in their Opposition, and at no point in their Proposed Amended Master Complaint, do Plaintiffs explain how the unambiguous language of the insurance policy issued to Mr. Derderian can be reconciled with Plaintiffs' current, bald assertion that Mr. Derderian somehow "relied" on the inspection allegedly carried out by Essex. Plaintiffs' failure to account for the unambiguous language of the Essex Policy Conditions renders the Proposed Amended Master Complaint subject to dismissal, and renders futile Plaintiffs' current Motion to Amend. *Compare, e.g., Daratony v. Continental Assurance Co.*, 9 Fed.Appx. 724, 2001 WL 569265 (9th Cir. 2001) (denying motion to amend, where proposed amended complaint would be subject to dismissal in light of unambigous contract language); *Avatar v. Chevron*, 933 F.2d 314 (5th Cir. 1991) (denying motion to amend, where allegations of proposed amended complaint were contrary to unambiguous language of parties' earlier agreement).

CONCLUSION

Because Plaintiffs' proposed amended claims against Essex would be subject to dismissal under Rule 12(b)(6), this Court should deny Plaintiffs' Motion to Amend the Master Complaint, as against Essex, on grounds of futility.

Respectfully submitted,

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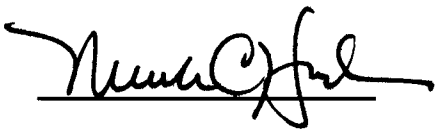
Dated: December 3, 2004

CERTIFICATION

I certify that on the 3rd day of December, 2004, I served a true copy of the within document, Memo in support of Objection to motion to amend, via first class mail, postage pre-paid, or by electronic mail to the parties listed below.



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