**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. THOMAS AND ST. JOHN**

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| JEFFREY EPSTEIN and L.S.J., LLC, | ) | |
| | ) | |
| Plaintiffs, | ) | CASE NO. ST-10-CV-443 |
| | ) | |
| -vs- | ) | ACTION FOR DAMAGES |
| | ) | |
| FANCELLI PANELING, INC., | ) | JURY TRIAL DEMANDED |
| | ) | |
| Defendant. | ) | |



**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER ENTERED MAY 24, 2011**

Plaintiffs Jeffrey Epstein and L.S.J., LLC (collectively "Plaintiffs") submit this memorandum in support of their motion for reconsideration of this Court's Order entered on May 24, 2011 requiring Plaintiffs to file a Second Amended Complaint adding J. P. Molyneux Studio, Ltd. as a party on the grounds that such a forced joinder will create manifest injustice. For the reasons set forth below, the Plaintiffs' motion for reconsideration should be granted.

## I. BRIEF STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY OF CASE

In 2005, Plaintiffs contracted with non-parties Juan Pablo Molyneux, a resident of the State of New York, and his company, [redacted]. Molyneux Studio, Ltd. (collectively "Molyneux"), a New York corporation, to design a residential project (the "Project") on Little St. James Island in St. Thomas, United States Virgin Islands (the "2005 Contract"). As part of the Project, Plaintiffs contracted with Molyneux to design the interior and exterior of a separate building on Little Saint James Island known as the Office Pavilion. Molyneux contracted with Fancelli Paneling, Inc. ("Fancelli" or "Defendant"), a New York corporation, to custom make the cabinetry, bookshelves, columns, and wood paneling for the library of the Office Pavilion (the "Library Cabinetry"). Under third party beneficiary status, Plaintiffs filed suit against Fancelli for breach

of contract and negligence because the Library Cabinetry is defective and installation was incomplete. Plaintiffs and Molyneux entered into a confidential settlement agreement and release (the "Confidential Agreement") which, among other things, prohibits Plaintiffs from disclosing certain facts about the Confidential Agreement or its terms without first giving five (5) business days advance written notice to Juan Pablo Molyneux and [redacted]. Molyneux Studio, Ltd. of Plaintiffs' intent to disclose facts about the Confidential Agreement[1]. Plaintiffs have given notice concurrently with the filing of this memorandum and motion for reconsideration.

Plaintiffs filed a First Amended Complaint against Defendant on August 3, 2010. Defendant filed a motion to dismiss on January 13, 2011, challenging sufficiency of the service of process, challenging this Court's personal jurisdiction over Defendant, challenging Plaintiffs' alleged failure to state a claim upon which relief can be granted, challenging venue as improper, and challenging the failure to join Molyneux as an allegedly indispensible party. By Order entered on May 24, 2011, this Court denied Defendant's motion to dismiss but did order Plaintiffs to file a Second Amended Complaint to include Molyneux as a party.

## II. LOCAL RULE OF CIVIL PROCEDURE 7.3 PERMITS THE FILING OF PLAINTIFFS' MOTION FOR RECONSIDERATION TO CORRECT CLEAR ERROR OR PREVENT MANIFEST INJUSTICE.

Local Rule of Civil Procedure 7.3(3) states, in pertinent part, that: "[a] party may file a motion asking the Court to reconsider its order or decision. [...] A motion to reconsider shall be based on: [...] 3. the need to correct clear error or prevent manifest injustice." The Court's

[1] Plaintiffs have filed a motion for enlargement of time to file this motion for reconsideration because, ***inter alia***, the Confidential Agreement requires that Plaintiffs give Molyneux advance notice of Plaintiffs' intent to disclose its terms under certain permitted conditions.

discretion under Local Rule of Civil Procedure 7.3 is not narrowly limited, and Local Rule of Civil Procedure 7.3 does not require an unequivocal finding of manifest injustice before the Court may alter or amend a prior order. See *Bostic v. AT&T of the Virgin Islands*, 45 V.I. 553, 312 F.Supp.2d 731 ([redacted]. 2004). "…[R]econsideration is the appropriate means of bringing to the court's attention manifest errors of fact or law." *Max's Seafood Café by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 648 (3d Cir. 1999). The purpose of such motions is to allow the Court to correct errors, sparing parties and appellate courts the burden of unnecessary proceedings. *Charles v. Daley,* 799 F.2d 343, 348 (7th Cir. 1986).

This Court ordered Plaintiffs to amend the Complaint to add Molyneux as a party for three reasons. The first is that without Molyneux in the case it will be difficult for the trier of fact to resolve the evidentiary issues that will arise. The second is that this Court lacks jurisdiction to compel the production of documents or deposition outside the Territory, requiring subpoenas to be localized in other jurisdictions, making it more difficult to obtain necessary discovery from Molyneux if it were not a party to the action. Third, courts interpreting contracts generally require that all parties to the contract join the action.

Plaintiffs seek this Court to reconsider its order because: (a) Molyneux is not an indispensable party to the instant litigation, and like other off island witnesses who routinely provide discovery in civil litigation in the Virgin Islands, Molyneux would be amenable to discovery to address any evidentiary issues that may arise in this case; (b) Plaintiffs and Molyneux entered into the Confidential Agreement to resolve certain disputed claims among them regarding the 2005 Contract, including, but not limited to, claims among them arising out of facts alleged in the First Amended Complaint, and requiring Plaintiffs, who are contractually prohibited from doing so, to join Molyneux as a party to this litigation would be manifestly

unjust, particularly where the Defendant is free to address any evidentiary burdens or extra-jurisdictional complications it perceives to exist through third-party claims and similar action in this litigation; and (c) to the extent that this Court finds that Molyneux is at fault, then with respect to the cause of action sounding in Contract, this Court can fashion any relief awarded to Plaintiffs to avoid double recovery or inadequate remedy; and with respect to the cause of action sounding in tort, fault can be apportioned among Fancelli and Molyneux.

## III. MOLYNEUX IS NOT AN INDISPENSIBLE PARTY AND THIS COURT CAN AFFORD COMPLETE RELIEF AMONG PLAINTIFFS AND FANCELLI

In order to determine if a party is necessary this Court must determine first if complete relief can be accorded between plaintiffs and the defendant without the non-party Molyneux. "The term complete relief refers only to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985). "As one district court explained, '[c]ourts are most likely to rule that complete relief may not be accorded among the parties present in circumstances where the absent party plays a significant role in the provision of some form of injunctive relief.' *Rose v. Simms*, No. 95 Civ. 1466, 1995 WL 702307, at *3 ([redacted]. Nov. 29, 1995) (finding that claim for money damages could be adjudicated without presence of nonparty)." *Trustees of the 1199 National Benefit Fund for Health and Human Service Employees v. United Presbyterian Home at Syosset, Inc.*, No. 01 CIV. 10910(LMM), 2002 WL 1492133, at *5 ([redacted]. July 11, 2002). Second, the Court must determine if the non-party has sought to intervene. *Id.*

Here Plaintiffs do not seek performance of the breached contract. Plaintiffs limit their cause of action to monetary damages. This Court can grant Plaintiffs the relief sought from

Defendant without adding Molyneux as a defendant. Molyneux has not sought to intervene. Plaintiffs do not seek recovery from Molyneux, and, as such, requiring Plaintiffs to add Molyneux as a party is not proper.

## IV. THE FACT THAT MOLYNEUX MAY BE CALLED UPON TO PROVIDE EVIDENCE DOES NOT MAKE IT AN INDISPENSIBLE PARTY.

The second issue raised by the Court as grounds for the forced joinder of Molyneux is that this Court lacks jurisdiction to compel the production of documents or deposition outside the Territory, requiring subpoenas to be localized in other jurisdictions, making it more difficult to obtain necessary discovery from Molyneux if it were not a party to the action. The need for evidence from a non-party is not sufficient to make the non-party an indispensable party. In considering discovery issues, other courts have not required joinder under Fed. R. Civ. P. 19(a)(1)(A):

> And, the fact that Rosario "may be called upon to provide evidence is not sufficient to make [him a] necessary part[y]" under Rule 19(a)(1)(A). *Gibbs Wire & Steel Co. v. Johnson*, 255 [redacted]. 326, 330 (D. Conn. 2009); see *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 188-89 (2d Cir. 1999) ("Rule 19 does not list the need to obtain evidence from an entity or individual as a factor bearing upon whether or not a party is necessary or indispensable to a just adjudication." (citations and alterations omitted)).

*Reit v. Post Properties, Inc.*, No. 09 Civ. 5455, 2010 WL 743533, at *3 ([redacted]. Feb 24, 2010). "Rule 19(a)(1) ordinarily does not compel joinder of a party solely because that party is an important source of evidence or because the dispute would be more completely resolved were the absent party joined." *Baltica-Skandinavia Ins. Co. Ltd. v. Booth, Porter, Sea l & Co.*, Civ. A. No. 86-1967, 1986 WL 10114, at *2 ([redacted] Sept 15, 1986).

Defendant offered no evidence that localizing any discovery request in the event of non-compliance by Molyneux will somehow prevent it from acquiring necessary documents or depositions. Defendant must prove that it lacks evidence or access to it, that the courts cannot afford complete relief as to its defense without the presence of the non-party. *Pettiford v. City of Greensboro*, 556 F.Supp.2d 512, 520 ([redacted]. 2008). As a practical matter Molyneux and Defendant both have offices in New York City and are incorporated in New York. Under Federal Rule of Civil Procedure 45(a)(2)(B) this Court can issue subpoenas for service in New York. Effecting discovery from Molyneux from a practical standpoint will not be unduly burdensome in New York. New York has adopted a uniform interstate depositions and discovery statute which also provides a simple process for a subpoena in the instant case to be submitted to the county clerk in which discovery is sought to be conducted. [redacted]. Sec. 3119(b)(2) outlines the following steps: "When a party submits an out-of-state subpoena to the county clerk, the clerk, in accordance with that court's procedure and subject to the provisions of article twenty three of this chapter, shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed."

## V. MOLYNEUX IS NOT A NECESSARY OR INDISPENSIBLE PARTY BECAUSE AS THIRD PARTY BENEFICIARIES, PLAINTIFFS STAND IN PLACE OF THE CONTRACTING PARTY.

The third reason given by the Court is that courts interpreting contracts generally require that all parties to the contract join the action. Plaintiffs have two claims against Defendant: a breach of contract claim and a negligence claim. As to the tort claim, "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7, 111 S.Ct. 315, 112 L.Ed.2d 263 (1990). As to the breach of contract claim

Molyneux has no interest if its contract with Defendant created a third party beneficiary interest in Plaintiffs, due to its settlement with Plaintiffs. Without an interest in the third party beneficiary status there is no designation as a necessary party. *Stanley Elec. Co., Inc. v. Crawford Equipment and Engineering Co.*, 249 [redacted]. 267, 275 -76 ([redacted]. Ohio 2008). As third party beneficiaries, Plaintiffs can stand in place of the contracting party, Molyneux, to enforce their rights under the contract. *Restatement (Second) of Contracts § 304*; *KMART Corp. v. Balfour Beatty, Inc.*, 994 F.Supp. 634, 637 ([redacted]. 1998). Molyneux is not a necessary party because Plaintiffs stand in Molyneux's place and by reason of the Confidential Settlement Agreement, Plaintiffs are not pursuing any claims against Molyneux. Therefore, the general desire to litigate all contract claims out of a contract in one suit does not exist.

## IV. MANIFEST INJUSTICE WILL RESULT IF PLAINTIFFS ARE FORCED TO FILE SUIT AGAINST MOLYNEUX.

There is an inherent manifest injustice if this Court were to force Plaintiffs to join Molyneux as a party to this case after Plaintiffs and Molyneux entered the Confidential Agreement. Plaintiffs should not be required to sue Molyneux and thereby expose themselves to a counterclaim for breach of the Confidential Agreement.

In order to determine if a party is necessary this Court must determine first if complete relief can be accorded between plaintiffs and the defendant without the non-party Molyneux. "The term complete relief refers only to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought." *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985). "As one district court explained, '[c]ourts are most likely to rule that complete relief may not be accorded among the parties

present in circumstances where the absent party plays a significant role in the provision of some form of injunctive relief." *Rose v. Simms*, No. 95 Civ. 1466, 1995 WL 702307, at *3 ([redacted]. Nov. 29, 1995) (finding that claim for money damages could be adjudicated without presence of nonparty). *Trustees of the 1199 National Benefit Fund for Health and Human Service Employees v. United Presbyterian Home at Syosset, Inc.*, No. 01 CIV. 10910(LMM), 2002 WL 1492133, at *5 ([redacted]. July 11, 2002). Second, the Court must determine if the non-party has sought to intervene. *Id.*

Here Plaintiffs do not seek performance of the breached contract. Plaintiffs limit their cause of action to monetary damages. This Court can grant Plaintiffs the relief sought from Defendant without adding Molyneux as a defendant. Molyneux has not sought to intervene. Entering into a settlement agreement with plaintiffs shows that the non-party does not want to intervene in a suit. *Id.* Plaintiffs do not seek any recovery from Molyneux, and, as such, requiring Plaintiffs to add Molyneux as a party is not proper. This Court can fashion any relief awarded to Plaintiffs to avoid double recovery or inadequate remedy. *Ohio Valley Environmental Coalition, Inc. v. Hobet Min., LLC*, 717 F.Supp.2d 541, 571 ([redacted] 2010).

If a party by means of settlement cannot affect a plaintiff's potential recovery then the party is not a necessary party. *Hawthorne Land Co. v. Occidental Chemical Corp.*, 431 F.3d 221, 226 (5th Cir. 2005).

> We do not believe that a court should inquire into the propriety of a partial settlement merely upon a showing of factual injury to a non-settling party. Some disadvantage to the remaining defendants is bound to occur and may, in fact, be the motivation behind the settlement. But just as a court has no justification for interfering in the plaintiff's initial choice of the parties it will sue-absent considerations of necessary parties-the court should not intercede in the plaintiff's decision to settle with certain parties, unless a remaining party can demonstrate plain legal prejudice.

*Quad/Graphics Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983). Here, Plaintiffs' settlement with Molyneux prevents joinder of Molyneux as a defendant.

The Court listed three reasons, all relating to ease of litigation, for determining that Molyneux is a necessary party. The first issue is that it will be difficult for the trier of fact to resolve evidentiary issues. Although the Court did not explain what evidentiary issues it contemplated having difficulty resolving in Molyneux's absence, claims that a settlement will make it factually more difficult for a non-settling defendant to litigate, i.e. incur additional expense, expend additional effort, or suffer a tactical disadvantage does not rise to the level of cognizable prejudice to a legal relationship. *Georgine v. Amchem Products, Inc.*, 157 [redacted]. 246, 323 ([redacted] 1994). Courts accept that a settlement with less then all defendants will make litigation more difficult. However, given the nature of the contract between Molyneux and Fancelli, Plaintiffs do not anticipate Molyneux's absence to substantially increase the difficulty of litigation.

In the interest of full disclosure, Plaintiffs attempted to settle with both Fancelli and Molyneux in order to avoid litigation. Plaintiffs succeeded in settling their claims against Molyneux, including those relating to the Library Cabinetry, but were unable to do so with Fancelli and, as a result, filed suit against the non-settling party, Fancelli. In Defendant's Motion to Dismiss filed on January 13, 2011, Defendant stated in conclusory fashion that both Plaintiffs and Defendant could not get full relief without inclusion of Molyneux. Because of the Confidential Agreement, Plaintiffs are not pursuing any claims against Molyneux. Plaintiffs should not be required to add Molyneux as a party in order to protect Fancelli's claimed right to relief (if any such right exists) against Molyneux.

A forced joiner of Molyneux will essentially put Plaintiffs in the position of violating the Confidential Agreement, a manifestly unjust result. Moreover, Fancelli has the right and means to join Molyneux itself by filing a third party complaint against Molyneux, if it believes that Molyneux's presence in this case is so important. Moreover, this Court can fashion appropriate remedies and allocate liability between Fancelli and Molyneux.

## VI. CONCLUSION

Based on the forgoing Plaintiffs respectfully request that this Court grant their motion for reconsideration and revise the Order entered on May 24, 2011, to the extent that it requires Plaintiffs to add J. P. Molyneux Studio, Ltd. as a party to the above-captioned action.

Respectfully submitted,
HODGE AND FRANCOIS

Dated: 6/7/2011

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** THAT that I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ECONSIDERATION OF ORDER ENTERED MAY 24, 2011** to be served upon Treston E. Moore, Esquire, MOORE DODSON & RUSSELL, P. O. Box 310, St. Thomas, VI 00804 by first class U. S. Mail, postage prepaid on this 7th day of June, 2011.

Anoushka Anna McCoy