

LexisNexis® Total Research System

[Switch Client](#) | [Preferences](#) | [Sign Out](#) | [?](#) Help[Search](#) [Research Tasks](#) [Get a Document](#) [Shepard's®](#) [Alerts](#) [Total Litigator](#) [Transactional Advisor](#) [Cour](#)

FOCUS™ Terms

Search Within

Original Results (1 - 1)

Go →

Advanced...

Service: **Get by LEXSEE®**Citation: **2009 U.S. Dist. LEXIS 51246***2009 U.S. Dist. LEXIS 51246, **

UBS INTERNATIONAL INC., et ano., Plaintiffs, -against- ITETE BRASIL INSTALACOES
TELEFONICAS LTD., et ano., Defendants.

09 Civ. 4286 (LAK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 51246

June 4, 2009, Decided

June 4, 2009, Filed

CORE TERMS: interpleader, deposit, claimants, belated, conflicting claims, citizenship, diversity, prosecuting, answering, deposited, matter jurisdiction, double liability, expose, account numbers, attorney's fees, reply papers, competing claims, declaration, liquidated, commencing, discharged, ownership, incorrect, asserting, notice, alien

COUNSEL: **[*1]** For Itete Brasil Instalacoes Telefonicas Ltd., Defendant, Cross Defendant: Martin Frederik Gusy, LEAD ATTORNEY, King & Spalding LLP (TX), Houston, TX.

For Instalaciones De Telefonos, S.A., Defendant, Cross Claimant: John Dellaportas, LEAD ATTORNEY, Javier Chavez, Jr, Duane Morris, LLP (NYC), New York, NY.

For UBS International Inc., UBS Financial Services Inc., Interpleader Plaintiffs: Jonathan P. Vuotto, Julian W. Wells, LEAD ATTORNEYS, Riker Danzig Scherer Hyland Perretti LLP (Morristown), New York, NY.

JUDGES: Lewis A. Kaplan ▼, United States District Judge.

OPINION BY: Lewis A. Kaplan ▼

OPINION

MEMORANDUM AND ORDER

LEWIS A. KAPLAN ▼, District Judge.

This interpleader action is brought by plaintiffs UBS International Inc. and UBS Financial Services Inc. ▼(collectively "UBS") against Itete Brasil Instalacoes Telefonicas Ltd. ("Itete Brasil") and Instalaciones de Tendidos Telefonicos, S.A. (sued herein as

"Instalaciones de Telefonos, S.A.) ("Itete Spain"). The matter now is before the Court on UBS's motion for an order (1) directing it to deposit the liquidated value of two accounts maintained with it in the name of Itete Brasil with the Court, (2) dismissing UBS from this action and enjoining defendants and any others who [*2] assert claims against UBS with respect to those accounts from commencing or prosecuting any other action or proceeding against UBS to recover any portion of the assets in the accounts, (3) discharging UBS, upon the deposit into Court, from all liabilities to plaintiffs arising out of the matters set forth herein, and (4) awarding UBS the costs and attorney's fees of this action.

Facts

The Conflicting Claims

Itete Brasil, at the time and perhaps still a subsidiary of Itete Spain, opened the two accounts in question in 2005 and 2007, respectively, with UBS. The sole signatory pursuant to a corporate resolution executed in 2007 is Marcelino Albuquerque Galindo. The balance in the accounts as of April 28, 2009 was in excess of \$ 2.3 million.

In November 2008, UBS received notice from Itete Spain purporting to rescind Albuquerque's managerial powers and power of attorney in connection with Itete Brasil and its accounts at UBS. At about the same time, Itete Brasil demanded funds from the accounts and asserted that (1) Albuquerque had been authorized to sell, and had sold, Itete Spain's controlling interest in Itete Brasil, and (2) he was authorized by the new ownership of Itete Brasil to act [*3] on its behalf. The parties then engaged for several months in inconclusive correspondence notable, for present purposes, only for the fact that Itete Spain responded to a suggestion by UBS that Itete Spain was not making any claim against the Itete Brasil accounts by stating that the suggestion was incorrect. I.TBS, faced with what appeared to be conflicting claims to the same funds, then commenced this action.

The Motion

The complaint seeks interpleader pursuant to both Fed. R. Civ. P. 22 and 28 U.S.C. § 1335, referred to as rule and statutory interpleader, respectively. It seeks to premise subject matter jurisdiction on diversity of citizenship and on Section 1335. As the jurisdictional requisites for statutory interpleader plainly are not satisfied, ¹ however, I will treat the matter solely in terms of rule interpleader to whatever extent the distinction between rule and statutory interpleader matters

FOOTNOTES

¹ Statutory interpleader jurisdiction exists only if two or more of the claimants are of diverse citizenship. (The citizenship of the plaintiff is immaterial.) 7 CHARLES ALLAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1703, at 538 (2001). As Itete Brasil and Itete Spain [*4] both are aliens, diversity between the claimants does not exist. The complete diversity as between plaintiffs, on the one hand, and the alien defendants, on the other, affords subject matter jurisdiction with respect to rule interpleaders.

On May 6, 2009, UBS obtained an order to show cause bringing on this motion. The order, as modified, required the filing of answering papers by June 1 and reply papers by 1 p.m. on June 3, 2009. Itete Brasil filed timely answering papers. Itete Spain timely filed a notice of appearance and an affidavit. Then, following the filing of UBS's reply papers, Itete Spain filed extensive additional answering papers, including a memorandum and declarations. Itete Brasil objects strenuously to this late filing, demanding that the untimely papers either not be

considered on the motion or that the matter be adjourned and that it be given an opportunity to respond.

This *contretemps* is no occasion for delay. Both Itete Brasil's papers and Itete Spain's belated filings go almost entirely to the merits of the respective claims of these two companies with respect to the UBS accounts. But that is not an appropriate subject for resolution on this motion, which instead [*5] addresses the preliminary questions whether UBS should be directed to deposit the disputed funds into Court, discharged from liability with respect thereto, and awarded counsel fees and expenses and whether the competing claimants should be forced to litigate their dispute in this Court. Accordingly, I will not consider Itete Spain's belated papers on this motion insofar as they relate to the respective rights of Itete Spain and Itete Brasil. On the other hand, as UBS has not objected to the belated filing, which does not materially affect its position on this motion, I am free to consider Itete Spain's papers vis-a-vis UBS.

Discussion

Rule 22(1) provides as follows:

"Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants."

In this case, Itete Brasil insists that it owns the contents of the UBS accounts and demands that [*6] UBS follow its directions with respect thereto. Itete Spain, even disregarding the papers only belated filed, asserted a claim to the same property by virtue of its letter stating that UBS's suggestion that it was not asserting such a claim was "incorrect."

In these circumstances, Itete Brasil and Itete Spain are asserting claims that might expose UBS to double liability. If it pays the proceeds of the accounts to or otherwise follows Itete Brasil's directions, it would risk liability to Itete Spain and *vice versa*.

Itete Brasil nevertheless resists interpleader on the theory that Itete Spain does not claim ownership of the property in the UBS accounts, which are in the name of Itete Brasil. Rather, it merely "threatens to hold UBS liable for damages if such funds are transferred or released to Itete Brasil or third parties, as requested by Itete Brasil." ² But there are at least two gaping holes in that argument, for which Itete Brasil, it might be noted, has cited no legal authority.

FOOTNOTES

² Itete Brasil Mem. 5.

First, it ignores the fact that Itete Spain has asserted a claim to the property in the UBS accounts, not least by its rejection of UBS's contrary suggestion. Thus, even if competing

[*7] claims to the same property were a necessary condition to interpleader relief, that condition would have been satisfied here.

Second, the existence of competing claims to the same property is not a prerequisite to the relief UBS seeks. All that is required is "a good faith concern about duplicitous [sic] litigation and multiple liability if [the interpleader] plaintiff responds to the requests of certain plaintiffs and not to others." ³ That concern patently exists here. UBS is entitled to the relief it seeks.

FOOTNOTES

³ *Sotheby's Inc. v. Garcia*, 802 F. Supp. 1058, 1065 (S.D.N.Y. 1992); accord, *Washington Elec. Co-Op v. Paterson, Walke & Pratt, P.C.*, 985 F.2d 677, 679 (2d Cir. 1993) ("[w]hat triggers interpleader is 'a real and reasonable fear of double liability or vexatious, conflicting claims.'" (citation omitted)).

Conclusion

Plaintiffs' motion for a preliminary injunction and other relief is granted as follows:

1. UBS shall deposit the liquidated value, as of the date of the deposit, of the entire contents of *UBS Financial Services Inc.* ("UBS FS") account numbers R2 62862 and R2 66230 with the Clerk of the Court; who shall invest the proceeds in an interest bearing CRIS account, there to abide **[*8]** the further order of the Court.

2. Upon the making of the deposit and the filing by *UBS Financial Services Inc.* of an affidavit or declaration stating that it has deposited the entire contents of UBS FS account numbers R2 62862 and R2 66230 with the Clerk of the Court:

(a) Defendants and all other persons or entities that may assert claims against plaintiffs with respect to the property in those accounts as of the date of the deposit are enjoined and restrained from commencing or prosecuting any action or proceeding against plaintiffs to recover all or any portion of that property.

(b) Plaintiffs are discharged from all liabilities to defendants with respect to the property thus deposited, provided, however, that nothing herein discharges plaintiffs with respect to any claims arising out of events prior to the deposit.

(c) Plaintiffs are entitled to recover from the funds thus deposited the reasonable attorneys' fees and costs incurred by them in bringing and prosecuting this action to the date of this order. Any motion seeking such recovery shall be served and file no later than two weeks from the date of this order.

SO ORDERED.

Dated: June 4, 2009

Issued at: 10:30 a.m.,

/s/ *Lewis A. Kaplan*

Lewis **[*9]** A. Kaplan

United States District Judge

Service: **Get by LEXSEE®**

Citation: **2009 U.S. Dist. LEXIS 51246**

View: Full

Date/Time: Monday, July 6, 2009 - 1:01 PM EDT

[Search](#) | [Research Tasks](#) | [Get a Document](#) | [Shepard's®](#) | [Alerts](#) | [Total Litigator](#) | [Transactional Advisor](#) |
[Counsel Selector](#)
[History](#) | [Delivery Manager](#) | [Dossier](#) | [Switch Client](#) | [Preferences](#) | [Sign Out](#) | [Help](#)



LexisNexis®

[About LexisNexis](#) | [Terms & Conditions](#) | [Contact Us](#)

[Copyright ©](#) 2009 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.