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Date: November 6, 2019

Honorable Jed S. Rakoff
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

BY ECF

Re: *Motion to sever claims against Ezra Beren in 18-cv-10936 (JSR) ("**Trott Case**") and 18-cv-06658 (JSR) ("**SHIP Case**")*

Dear Judge Rakoff:

Pursuant to the Court's direction in our conference call of November 4, 2019, defendant Ezra Beren respectfully submits this letter-motion in support of his application to sever the claims against him in the Trott Case and the SHIP Case pursuant to Fed. R. Civ. P. 21.

Mr. Beren is Not at Fault for Coming to this Case Late

Service of process is one of the few occasions in civil procedure when strict technical compliance is essential. Here, Mr. Beren's current home address was readily available *via* a simple Google search but the relevant plaintiffs failed to serve him properly. Instead, they served Mr. Beren's parents at an address he had not resided at for years, and, when told of their error did not attempt to correct it. This is not effective service under either Fed. R. Civ. P. 4(e)(2) or NY CPLR 308(2). *See S.*

Bay Sailing Ctr., Inc. v. Standard Fire Ins. Co., 15-CV 6183 (JMA)(SIL), 2017 U.S. Dist. LEXIS 7116, at *21 – 23 (E.D.N.Y. Jan. 17, 2017). At the request of the plaintiffs Mr. Beren has recently agreed to waive service in the two cases at issue, but he is now joining a case in the middle of discovery with no time to prepare.

Under Rule 21, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Fed. R. Civ. P. 21. Two of the key factors are relevant here: "(3) whether settlement of the claims or judicial economy would be facilitated [and] (4) whether prejudice would be avoided if severance were granted…." *Erausquin v. Notz, Stucki Mgmt. (Berm.)*, 806 F. Supp. 2d 720, 720 (S.D.N.Y. 2011), citing *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 214 F.R.D. 152, 154-55 (S.D.N.Y. 2003).

The pleadings demonstrate Mr. Beren's peripheral role in these actions. His personal resources would not amount even to a rounding error in the claimed damages, and he is not covered by insurance. It was reasonable for him to conclude that the plaintiffs had little interest in asserting jurisdiction over him. He would have been within his rights to permit judgment to be taken against him and then (successfully) assert bad service. He instead chose to appear in the hope that he would have a fair opportunity to litigate and be dismissed on the merits. This requires a meaningful opportunity to participate in discovery and understand and defend against the claims against him. That opportunity will be denied him if the claims against him are not severed.

Requiring Mr. Beren to Proceed on the Current Schedule would be Severely Prejudicial

Discovery has been ongoing with respect to the other defendants for many months. Many of the deadlines and depositions are already in the past. More depositions take place each day without any opportunity for Mr. Beren to meaningfully participate. It is unreasonable to expect Mr. Beren to play catch-up now. Based on a preliminary search, Mr. Beren's name appears in approximately 80,000 documents. Counsel cannot possibly timely review those documents, or any portion of the millions

more that have been produced. Going by the existing schedule, Mr. Beren will not even have an opportunity to serve discovery of his own and receive and review timely responses. His time to retain an expert has already passed. As a practical matter, counsel will be forced to attend depositions and defend Mr. Beren with a very incomplete understanding of the facts of the case and no basis for intelligent cross-examination. Severance of the cases against Mr. Beren would at least enable him to proceed on a fair footing.

Judicial Economy Would be Facilitated

Mr. Beren is actively pursuing negotiations to see if these actions can be settled due to the enormous cost of litigation. This will be much easier if Mr. Beren is not rapidly depleting his personal resources defending these actions while simultaneously trying to settle them. The possibility of resolution by settlement favors severance. *See Deajess Med. Imaging, P.C. v. Geico Gen. Ins. Co.*, 2005 U.S. Dist. LEXIS 5957, at *12 (S.D.N.Y. 2005). Even if the actions cannot be settled, however, motion practice alone with respect to Mr. Beren will surely extend beyond the dates set by the court and agreed by the parties for completion of discovery. While there is no reason to allow this process to disrupt trial of the other more significant claims, there is likewise no reason to cripple Mr. Beren's right to defend himself in a fair and just proceeding. Severance would in no way prejudice the plaintiffs given his peripheral involvement as alleged. They will still have to do the same work, just on a schedule that is fair to Mr. Beren.

Very truly yours,

S. Christopher Provenzano

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