UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BEECHWOOD RE LTD., B ASSET MANAGER, L.P., BEECHWOOD BERMUDA INTERNATIONAL, LTD., BEECHWOOD RE INVESTMENTS, LLC a/k/a BEECHWOOD RE INVESTORS, LLC, MOSHE M. FEUER a/k/a MARK FEUER, SCOTT A. TAYLOR, DAVID I. LEVY, and DHRUV NARAIN, Defendants.	:	Case No. 1:18-cv-6658 (JSR)

SHIP'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO AMEND

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PRELIMINARY STATEMENT

Plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP") respectfully requests pursuant to Rule 15(a)(2) that this Court grant leave for SHIP to amend its complaint. The Court's December 6, 2018 Opinion and Order on Defendants' Motion to Dismiss granted SHIP leave to amend to provide further factual support for the original complaint's claims by no later than December 14, 2018. SHIP filed its First Amended Complaint today in accordance with that order. Dkt. No. 76. SHIP concurrently seeks leave to amend the First Amended Complaint solely to assert additional causes of action that comport with the First Amended Complaint's allegations and not to allege any additional facts. First, SHIP requests leave to amend to add a claim for fraudulent inducement against defendant Dhruv Narain relating to his role in the inducement of SHIP to invest $50 million outside the Investment Management Agreements ("IMAs") in June 2016. Second, SHIP requests leave to amend to add a claim for civil conspiracy based on the additional evidence in the First Amended Complaint and the explanation set forth in this memorandum. For similar reasons, SHIP also seeks to add claims for aiding and abetting the breach of fiduciary duty and fraud claims set forth in the First Amended Complaint. Given that the First Amended Complaint states independent tort claims, a civil conspiracy claim may prove relevant and sustainable at trial if a jury were to find, for instance, that independent torts were committed by some, but not all, defendants and that those other defendants nevertheless intentionally participated in the corrupt agreement and thus conspired to commit those torts. The same holds true for SHIP's proposed aiding and abetting claims.

APPLICABLE LEGAL STANDARD

"Under Federal Rule of Civil Procedure 15(a), leave to amend shall be freely granted when justice so requires." *Abbatiello v. Monsanto Co.*, 571 F. Supp. 2d 548, 551 (S.D.N.Y. 2008) (internal quotation marks omitted); *see also Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) ("As we have explained, the permissive standard of Rule 15 is consistent with our strong preference for resolving disputes on the merits."). "Under this liberal standard, a motion to amend should be denied only if the moving party has unduly delayed or acted in bad faith, the opposing party will be unfairly prejudiced if leave is granted, or the proposed amendment is futile." *Agerbrink v. Model Serv. LLC*, 155 F. Supp. 3d 448, 452 (S.D.N.Y. 2016) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 229 (1962)).

A proposed amendment is futile only if it could not "withstand a motion to dismiss pursuant to [Federal Rule of Civil Procedure] 12(b)(6)." *Contrera v. Langer*, 314 F. Supp. 3d 562, 567 (S.D.N.Y. 2018) (quoting *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)). As to undue delay, a party cannot oppose a motion for leave to amend on that basis "[s]imply by alleging that the plaintiff could have moved to amend earlier than she did . . . ." *Id.*; *see also Dilworth v. Goldberg*, 914 F. Supp. 2d 433, 460 (S.D.N.Y. 2012) ("[T]he motion to amend will not be denied by reason of plaintiffs' delay in alleging facts that were previously within their knowledge."). Instead, any alleged undue delay in seeking amendment must be accompanied by "a showing of bad faith or undue prejudice" in order to justify denial of the plaintiff's right to amend. *Pasternack v. Shrader*, 863 F.3d 162, 174 (2d Cir. 2017) (district court abused its discretion in denying leave to amend "based solely on delay and litigation expense"). And to establish undue prejudice resulting from a proposed addition of new

claims, the defendant must show that "the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute . . . ." *Id.* (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)).

ARGUMENT

I. THE PROPOSED SECOND AMENDED COMPLAINT STATES A CLAIM FOR FRAUDULENT INDUCEMENT AGAINST DHRUV NARAIN

Fraudulent inducement requires allegations of a material misrepresentation or omission on which the plaintiff relied that induced it to enter an agreement. *See In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 316 (S.D.N.Y. 2010). The initial complaint and motion to dismiss, as well as this Court's Opinion and Order, focused on inducement to enter the IMAs. In the Opinion and Order, the Court granted SHIP leave to amend "to adequately plead reliance and injury with respect to the misrepresentations [inducing SHIP to enter into the IMAs], or to satisfy Rule 9(b)'s pleading requirements with respect to other misrepresentations that are 'collateral to the [IMAs].'" Opinion and Order at 25. Though the Court dismissed with prejudice the fraudulent inducement claim as to Narain, the Court's ruling as to the fraud claim indicates that SHIP may plead its reliance and injury in connection with not just its entry into the IMAs, but also Narain's fraudulent misrepresentations that induced SHIP's $50 million investment outside of the IMAs.

The First Amended Complaint and the Proposed Second Amended Complaint address in detail Narain's key role in fraudulently inducing SHIP to invest $50 million outside the IMAs on June 9, 2016. A copy of the Proposed Second Amended Complaint is attached hereto as Exhibit

1.[1] The orchestration of the Agera transaction by Narain and other Defendants included misrepresentations to SHIP intended to induce SHIP to invest additional money with Beechwood apart from the IMA structure. These misrepresentations are distinct in time and focus from the misrepresentations made by Feuer, Taylor, Levy, and the entity Defendants in connection with their initial efforts to induce SHIP to invest $270 million through the IMAs in 2014 and 2015.

Narain orchestrated SHIP's continued participation in the Agera Energy and AGH Parent scheme, including serving as the primary actor to induce SHIP, through CEO Brian Wegner and CFO Paul Lorentz, to invest $50 million in fresh money outside the IMAs in transactions that closed on June 8 and 9, 2016. Murray Huberfeld of Platinum (and, as SHIP later learned, of Beechwood) was arrested on June 8, 2016, and this was a time of Platinum's and Beechwood's most desperate search for fresh cash to fuel the scheme's continuation.

There accordingly is ample basis to grant leave to amend to assert this additional cause of action, particularly since SHIP has not previously been given an opportunity to do so. *Cf. 380544 Canada, Inc. v. Aspen Tech., Inc.*, 633 F. Supp. 2d 15, 36 (S.D.N.Y. 2009) ("Where leave to replead is denied, plaintiffs have usually already had one opportunity to plead fraud with greater specificity." (internal quotation marks omitted)); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint could not be saved by amendment."). The First Amended Complaint's new factual allegations clarify and sharpen the fraudulent inducement allegations against Narain to a substantial degree and establish an independent factual basis for a fraudulent inducement claim against Narain separate and apart

[1] The factual allegations in the First Amended Complaint and the Proposed Second Amended Complaint are identical. The Proposed Second Amended Complaint, however, includes the claims discussed in the instant motion, which are not set forth in the First Amended Complaint.

from the fraudulent inducement claim asserted against the other individual defendants. *See* First Amended Compl. ¶¶ 231-64. SHIP accordingly should be granted leave to assert this additional claim.

II. THE PROPOSED AMENDED COMPLAINT STATES CLAIMS FOR CONSPIRACY AND AIDING AND ABETTING

The Court's Opinion and Order noted that a cause of action for civil conspiracy may "connect nonactors, who otherwise might escape liability, with the acts of their co-conspirators." Opinion and Order at 30. The Court further notes that civil conspiracy requires 1) a corrupt agreement between two or more persons, 2) an overt act, 3) their intentional participation in the furtherance of a plan or purpose, and 4) the resulting damage. *Id.* The Court then dismissed the conspiracy claim "with prejudice" on the basis that, for the claims remaining in the original Complaint of fraudulent inducement and breach of fiduciary duty, there were no "nonactor" defendants remaining. *Id.* at 30-31 & n.6. The Court's Opinion and Order focuses on the remaining claims as pled after the motion to dismiss (i.e., without regard for the First Amended Complaint, which provides additional factual support and substantiates additional independent torts that were dismissed without prejudice by the Court with leave to amend) and on the nonactor defendants *at the pleading stage* in the original Complaint. A "non-actor" in a civil conspiracy is one "who otherwise might escape liability" of the tort in question, but who also "must have allegedly engaged in some 'independent culpable behavior.'" *IMG Fragrance Brands, LLC v. Houbigant, Inc.*, 759 F.Supp.2d 363, 386 (S.D.N.Y.2010); *Lipin v. Hunt*, 538 F. Supp. 2d 590, 602 (S.D.N.Y. 2008).

SHIP seeks leave to amend to add a claim for civil conspiracy based on the additional factual allegations pled in the First Amended Complaint. Those allegations establish numerous

actionable independent torts committed by Defendants. If those independent tort claims are properly pled, a conspiracy claim deserves fresh consideration and should be permitted in light of those viable claims. The conspiracy claim should be assessed not only at the pleading stage but also at the jury deliberation stage. While SHIP believes the most likely outcome would be that all Defendants would be found liable directly for committing independent torts, it remains possible that a jury may decide that an independent tort has been committed by some, but not by all, defendants. In that instance, the jury still could find the remaining defendants liable as "nonactors" for having conspired with those defendants for whom the elements of the independent tort were satisfied directly.

For example, a jury could find that certain defendants, but not all, fraudulently induced SHIP. Or a jury could find that certain defendants, but not all, defrauded SHIP. In such instances, it is possible that a jury could go on to conclude that other defendants, while not directly liable for the inducement or fraud, are liable through the elements of civil conspiracy. Were that not so, civil conspiracy would retain no vitality as a cause of action. *See Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 722-23 (S.D.N.Y. 2014) (stating that "plaintiff must establish facts which support an inference that defendants knowingly agreed to cooperate in a fraudulent scheme, or shared a perfidious purpose" and holding that civil conspiracy claim fails because its allegations were unrelated to the underlying independent tort, which related to a distinct time and factual basis). Put another way, "nonactor" status cannot be determined as a matter of law at this preliminary stage and should be properly considered by the jury.

SHIP respectfully submits that leave to amend is warranted as to all Defendants (both individual Defendants and entity Defendants) to allow full consideration of the allegations in the

First Amended Complaint. *Cf. Aspen Tech., Inc.*, 633 F. Supp. 2d at 36; *see also Eminence Capital, LLC*, 316 F.3d at 1052.

The case law cited in the Opinion and Order is not to the contrary. *Burns Jackson Miller Summit & Spitzer v. Lindner*, 452 N.Y.S. 2d 80, 93-94 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 314 (1983) states the legal proposition that a civil conspiracy claim may "connect nonactors, who otherwise might escape liability, with the acts of their co-conspirators." In that case, however, all other claims were dismissed on the motion to dismiss, such that no independent tort existed to sustain the conspiracy claim. This case is thus distinguishable, as actionable independent torts are stated in the Proposed Second Amended Complaint.

Pope v. Rice, 2005 WL 613085, at *13 (S.D.N.Y. 2005), sets forth the elements of a civil conspiracy claim, and then applies those elements only to a fiduciary duty claim, where it holds that all members of a conspiracy must owe fiduciary duties to the plaintiff. This latter principle, however, does not apply to SHIP's other tort claims set forth in the First Amended Complaint. A defendant may conspire to defraud, for instance, without actually being the actor who commits the fraud so long as that "nonactor" is party to a corrupt agreement, some overt act is committed, the defendant intentionally participates in furtherance of the plan, and damage results. *See also Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 262 (S.D.N.Y. 2012) (noting that New York does not recognize an independent tort for civil conspiracy but that "[a civil conspiracy claim] does create vicarious liability for civil conspiracy on the part of defendants who conspire with tortfeasors to commit other actionable wrongs, including among others fraud . . ."); *In re Magnesium Corp. of Am.*, 399 B.R. 722, 775-76 (Bankr. S.D.N.Y. 2009) (finding that civil conspiracy claims may survive where they are not simply duplicative, conclusory statements

about other torts and the plaintiff sufficiently alleged independent overt acts by defendant in pursuit of the conspiracy).

For similar reasons, SHIP also requests leave to amend further to include against all Defendants for aiding and abetting the breach of fiduciary duty and fraud. To establish a claim for aiding and abetting, a plaintiff must adequately plead "(1) the existence of a violation by the primary wrongdoer; (2) knowledge of the violation by the aider and abettor; and (3) proof that the aider and abettor substantially assisted the primary wrongdoer." *See In re Refco Sec. Litig.*, 759 F. Supp. 2d at 333. The allegations in the First Amended Complaint satisfy these elements. Indeed, this Court has already sustained SHIP's direct claims for breach of fiduciary duty and fraudulent inducement in its December 6 Opinion and Order. The First Amended Complaint further establishes a direct claim for fraud, as well as a direct claim for fraudulent inducement against Narain. The First Amended Complaint further establishes that each of the Defendants had knowledge of the underlying unlawful scheme and that they each substantially assisted in furthering the scheme.

These claims do not alter the factual allegations in the First Amended Complaint and thus would not affect the scope of discovery. They simply address the possibility that a jury could find that Defendants knowingly participated in wrongdoing but that the specific elements of the underlying independent torts were not satisfied directly as to them.

III. SHIP'S PROPOSED AMENDMENTS ARE MADE IN GOOD FAITH AND WOULD NOT UNDULY PREJUDICE DEFENDANTS

As noted above, motions to amend "shall be freely granted," *Abbatiello*, 571 F. Supp. 2d at 551, and may be denied only upon a showing that "the moving party has unduly delayed or acted in bad faith, the opposing party will be unfairly prejudiced if leave is granted, or the

proposed amendment is futile," *Agerbrink*, 155 F. Supp. 3d at 452. The Proposed Second Amended Complaint meets this standard.

First, the Proposed Second Amended Complaint's amendments are not futile for the reasons stated above. The allegations in the First Amended Complaint are plainly adequate to support the additional claims for relief that SHIP seeks to assert in the Proposed Second Amended Complaint.

Second, SHIP has not acted in bad faith or unduly delayed these proceedings. In seeking to file the Proposed Second Amended Complaint, SHIP does not seek to amend the Court's scheduling order in any way, and by virtue of attempting to file the Proposed Second Amended Complaint directly on the heels of the First Amended Complaint, as directed by the Court, SHIP has demonstrated its commitment to moving forward with its claims as efficiently and expeditiously as possible.

Finally, Defendants cannot identify any undue prejudice that would result from allowing SHIP's proposed amendments to go forward. Discovery in this case is far from complete; document discovery remains ongoing, and no depositions have been taken. Furthermore, SHIP's proposed amendments will have no impact whatsoever on the scope of discovery, as they merely incorporate additional claims for relief and make no changes to the underlying factual allegations. As a result, the proposed amendments will neither cause any delay in the litigation of this case nor require Defendants to expend any additional resources. Defendants thus have no basis to claim undue prejudice.

CONCLUSION

For all these reasons, SHIP respectfully requests that leave be granted for it to amend its First Amended Complaint to include a fraudulent inducement claim against Narain relating to the 2016 investment of $50 million outside the IMAs and a civil conspiracy claim and aiding and abetting claims against all defendants (except Illumin).

Respectfully Submitted,

/S/ *R. Brian Seibert*

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