

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In Re:

Orion HealthCorp, Inc., *et al.*,

Debtor.

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Howard M. Ehrenberg in his capacity as Liquidating  
Trustee of Orion Healthcorp, Inc., *et al.*,

Plaintiff,

- against -

Richard Ian Griffiths, VT Garraway Investment Fund  
Series IV (f/k/a City Financial Investment Fund  
Series IV), Legal & General UK Alpha Trust, Legal  
and General Assurance Society Limited, The Bankers  
Investment Trust PLC, Marlborough Fund Managers  
Limited, Marlborough UK Micro-Cap Growth Fund,  
Jarvis Investment Management Limited, JIM  
Nominees Limited, Herald Investment Trust PLC,  
Milkwood Capital Limited, The Milkwood Fund, Sir  
Rodney Malcolm Aldridge, Edale Capital LLP,  
Credit Suisse Client Nominees (UK) Limited,  
Goldman Sachs Group UK Limited, Miton UK  
MicroCap Trust PLC, Jefferies International Limited,  
Pershing Nominees Limited, Merrill Lynch  
International, JPMorgan Smaller Companies  
Investment Trust PLC, Skandinaviska Enskilda  
Banken AB (Publ), Brewin Dolphin Limited, AJ Bell  
Securities Limited, Pershing Securities Limited,  
Pershing Nominees Limited, JPMorgan Trust I, ABN  
AMRO Clearing Bank N.V., London Branch,  
THESIS Unit Trust Management Limited, Thesis  
Headway A Sub-Fund, Tilney Asset Management  
Services Limited (f/k/a Towry Asset Management  
Limited), Platform Securities Nominees Limited,

Chapter 11

Case No. 18-71748-67-ast

Case No. 18-71789-ast

Case No. 18-74545-ast

Adv. Proc. No. 18-08048-ast

Freedom Global Funds PCC Limited, Interactive Investor Services Limited, Interactive Investor Services Nominees Limited, Matthew Max Edward Royde, Montlake UCITS Platform ICAV, Elite Webb Capital Fund, Raymond James Investment Services Limited, Pershing Nominees Limited, Rathbone Investment Management Limited, Credo Capital Limited, Pershing Nominees Limited, UBS Private Banking Nominees Limited, Linear Investments Limited, Credit Suisse (Channel Islands) Limited, Stifel Nicolaus Europe Limited, Walker Crips Investment Management Limited (f/k/a Walker Crips Stockbrokers Limited), W.B. Nominees Limited, Gabelli Investor Funds, Inc. (a/k/a The Gabelli ABC Fund), Charles Stanley & Co. Limited, Rock (Nominees) Limited, finnCap Ltd, Megan Amelia Elizabeth Royde, John Joseph Johnston, Interactive Investor Limited, Investec Wealth & Investment Limited, Ferlim Nominees Limited, CFS Management Ltd (f/k/a CFS Portfolio Management Ltd), David Andrew Clark, Karin Johnston, and The United States of America, Department of Treasury, Internal Revenue Service,

Defendants.

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ORDER GRANTING PLAINTIFF’S MOTION FOR LEAVE TO AMEND COMPLAINT,  
AUTHORIZE ALTERNATIVE METHODS OF FOREIGN SERVICE,  
AND RELATED RELIEF

Pending before the Court in this international, multi-defendant, complicated action is Plaintiff’s<sup>1</sup> Motion For Leave To Amend Complaint, Authorize Alternative Methods Of Foreign Service, And Related Relief (the “Motion”) [dkt item 272], the sole objection thereto filed by Defendants Legal & General Assurance Society and UK Alpha Trust (collectively “Legal & General”) [dkt item 285], and Plaintiff’s Reply [dkt item 287]. The Motion seeks the following relief: (1) granting leave to Plaintiff to file an amended complaint pursuant to Rule 15(a)(2) of the

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<sup>1</sup> Plaintiff is currently Howard M. Ehrenberg in his capacity as Liquidating Trustee of Orion Healthcorp, Inc., et al..

Federal Rules of Civil Procedure, as incorporated by Rule 7015 of the Federal Rules of Bankruptcy Procedure; (2) authorizing alternative means of foreign service pursuant to Rule 4 and Rule 12 of the Federal Rules of Civil Procedure; and (3) granting further and related relief as this Court deems just and proper. For the reasons to follow, the Motion will be granted.

### *Procedural history*

By way of brief background, on March 29, 2018, prior to confirmation of their chapter 11 plans, the Debtors as Plaintiffs<sup>2</sup> commenced this adversary proceeding (the “Adversary Proceeding”). [dkt item 1] As alleged therein, Plaintiffs sought “to recover funds which are the proceeds of constructive or actual fraudulent transfers and to prevent the further transfer of such funds to the Shareholder Defendants, identified herein. Insofar as some portion of the monies to be recovered are in the possession, custody or control of the Defendant United States, Department of Treasury, Internal Revenue Service (“IRS”), Plaintiffs seek impression of a constructive trust as to those funds, and a permanent injunction preventing the IRS from distributing those funds to the Shareholder Defendants.”

The Complaint further alleges, *inter alia*, that as a result of a “go-private” merger transaction (the “Merger”), which itself was built upon a series of allegedly fraudulent mergers, acquisitions and other activities, the entity CHT Holdco, LLC (“CHT Holdco”) acquired the stock of Plaintiff Constellation Healthcare Technologies (“CHT”). The Complaint further alleges that a number of these sham acquisitions were funded with money raised in secondary rounds of equity offerings through the London Stock Exchange’s Alternative Investments

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<sup>2</sup> The original Plaintiffs were chapter 11 debtors Orion HealthCorp, Inc., Constellation Healthcare Technologies, Inc., NEMS Acquisition, LLC, Northeast Medical Solutions, LLC, NEMS West Virginia, LLC, Physicians Practice Plus, LLC, Physicians Practice Plus Holdings, LLC, Medical Billing Services, Inc., Rand Medical Billing, Inc., RMI Physician Services Corporation, Western Skies Practice Management, Inc., Integrated Physician Solutions, Inc., NYNM Acquisition, LLC, Northstar FHA, LLC, Northstar First Health, LLC, Vachette Business Services, LTD., MDRX Medical Billing, LLC, Vega Medical Professionals, LLC, Allegiance Consulting Associates, LLC, Allegiance Billing & Consulting, LLC, Phoenix Health, LLC

Market (the “AIM”), and that based at least in material part upon the Merger, numerous non-insider and non-insider related affiliate shareholders (the “Shareholders”) were paid substantial shareholder redemption payments (the “Shareholder Redemption Payments”). Plaintiffs, *inter alia*, sought recovery of the Shareholder Redemption Payments and turnover of any funds held by the IRS related to any Shareholder Redemption Payments.<sup>3</sup>

As the Adversary Proceeding advanced, it became apparent that many of the original defendants were not the beneficial owner of shares that were made the subject of this adversary and against whom relief was sought. As the result of confirmation of Debtors’/original Plaintiffs’ plan of reorganization, in early 2019, Howard M. Ehrenberg in his capacity as Liquidating Trustee substituted in as Plaintiff. [dkt item 647]

Following efforts of Plaintiff’s and many Defendants’ counsel to minimize the need for extensive and expensive motion practice, on August 23, 2018, the Court entered a Stipulation and Order Regarding Protocol for Initial Discovery and Dismissal of Conduits and Non-Transferees (the “Original Protocol”). [dkt item 61] The primary purpose of the Original Protocol was to enable Plaintiff to obtain the identity of the beneficial shareholders who received the Shareholder Redemption Payments, and, if appropriate, name such parties in an amended complaint. Pursuant to the Original Protocol, Plaintiff issued certain discovery requests to the original named defendants and received discovery responses and objections, with the primary purpose of working to ensure that the parties with an economic stake in the outcome of this adversary and against who relief might be awarded were before the Court. Given the large number of defendants, many of whom were overseas, this process was time consuming.

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<sup>3</sup> The Complaint also alleges that just over \$10.4 million was withheld from shareholders “under the Foreign Investment in Real Property Tax Act of 1980, 26 U.S.C. § 1445, which requires a percentage of consideration paid for certain transactions to be withheld and deposited with the IRS, to which foreign shareholders may then submit a US tax return and potentially receive a refund.”

Based in part upon information discovered through the Original Protocol, on June 24, 2019, Plaintiff filed his First Amended Complaint (the “Amended Complaint”). [dkt item 117]

On September 6, 2019, again following efforts of Plaintiff’s and many Defendants’ counsel to minimize the need for extensive and expensive motion practice, the Court entered a Stipulation and Order Regarding Supplemental Protocol For Discovery and Dismissal of Certain Conduits and Non-Transferees (the “Supplemental Conduit Protocol”) [dkt item 187], and pursuant to which certain Defendants alleged to be conduits or non-transferees have provided Plaintiff with declarations and certain redacted discovery. As with the Original Protocol, the primary purpose of the Supplemental Conduit Protocol was to enable Plaintiff to obtain the identity of the beneficial shareholders who received the Shareholder Redemption Payments, and, if appropriate, name such parties in a second amended complaint.

On October 18, 2019, in on-going efforts to stream line this sprawling adversary, the Court entered a scheduling order (the “Scheduling Order”) [dkt item 207], which provided, *inter alia*, that Defendants who had not entered the Supplemental Conduit Protocol were required to file motions to dismiss on or before November 1, 2019, and were permitted to file motions on the sole issue of personal jurisdiction without waiving additional initial motions.

On October 22, 2019, in furtherance of the Supplemental Conduit Protocol, the Court entered its Order Granting Request for International Judicial Assistance (the “Letters Rogatory”). [dkt item 209]

On November 1, 2019, certain defendants moved to dismiss the First Amended Complaint for lack of personal jurisdiction (collectively, the “Motions to Dismiss”). [dkt items 215-217]

On November 15, 2019, Plaintiff filed Requests for Clerk's Entry of Default against certain Defendants. [dkt items 235-245]

On November 25, 2019, Master Cook of the High Court of Justice in the United Kingdom entered an order pursuant to the Letters Rogatory directing certain Defendants, who were parties to the Supplemental Conduit Protocol, to disclose certain redacted information within thirty (30) days. [dkt item 261]

On December 2, 2019, pursuant to the Supplemental Conduit Protocol, Plaintiff dismissed eight Defendants from this Adversary Proceeding. [dkt items 250-257]

On December 23, 2019, pursuant to the Supplemental Conduit Protocol, Plaintiff dismissed an additional Defendant from this Adversary Proceeding. [dkt item 266]

On January 8, 2020, Plaintiff filed his Second Status Report pursuant to the Scheduling Order. As detailed in the Second Status Report, there are currently four main categories of Defendants named in the First Amended Complaint; the first category are Defendants who have entered the Supplemental Conduit Protocol, but who have not yet been dismissed; the second category are the defendants who have filed a motion to dismiss (collectively, the "Motion to Dismiss Defendants"); the third category are the defendants who are currently in default (collectively, the "Defaulting Defendants"); and the final category are Defendants who have received an extension to respond to the First Amended Complaint. [dkt item 267]

On January 17, 2020 Legal & General filed its motion to dismiss the First Amended Complaint ("LG Motion to Dismiss"), which asserts several arguments in support of dismissing this action in its entirety. Notably, Legal & General did not file a personal jurisdiction motion and is not a "conduit defendant". Rather, Legal & General argues that this action is in the wrong forum, that at the very least, English law should control the claims asserted in the First Amended

Complaint and asks the Court to dismiss this case based on the doctrine of forum non conveniens. That LG Motion to Dismiss and the personal jurisdiction Motions to Dismiss remain pending.<sup>4</sup> [dkt item 268]

In the sole objection to the Motion to amend, filed less than a month after filing its Motion to Dismiss, Legal & General asserts that amending the First Amended Complaint would be futile, cause delays, and lead to misjoinder of newly added defendants. [dkt item 285]

The Court conducted a conference concerning this Adversary Proceeding on February 25, 2020 (the “Hearing”). At the Hearing, Legal & General acknowledged that the proposed Second Amended Complaint does not seek to add any new claims against them.

### *Discussion*

Legal & General asks this Court to apply the following legal standard:

In the case of a motion to amend, “the court should freely give leave when justice so requires.” Fed. R. Civ. P. Rule 15(a). “Only undue delay, bad faith, futility, or prejudice to the nonmoving party may serve as a basis for denying leave to amend.” See *Hampton Bays Connections, Inc. v. Duffy*, 212 F.R.D. 119, 122 (E.D.N.Y. 2003) citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). “[T]he grant or denial of an opportunity to amend is within the discretion of the District Court.” *Foman*, 371 U.S. at 182. Where a proposed amendment is “futile” then it “is not an abuse of discretion to deny leave to amend.” *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (holding the district court did not abuse its discretion in denying leave to amend). “Where . . . there is no merit in the proposed amendments, leave to amend should be denied.” *Health-Chem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir. 1990).

This Court will do so.

Legal & General does not cite any case holding that a defendant against whom no new claims are asserted can raise futility. This is also not a situation where futility is invoked after a Court has determined that a particular complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6). Given the extensive history of this adversary and the substantial work

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<sup>4</sup> Discovery disputes are now before the Court concerning certain of the defendants’ Motions to Dismiss.

put into attempting to bring the real parties in interest before this Court, as Rule 17 incorporated by Bankruptcy Rule 7017 requires, Legal & General's arguments of undue delay, bad faith, futility, or prejudice are simply unsupportable. In fact, Plaintiff asserts that certain additional defendants become known to him as the result of the Supplemental Conduit Protocol and the Letters Rogatory.

Bankruptcy Rule 1001 provides that the Bankruptcy Rules shall be construed, administered, and employed by the court to secure the just, speedy, and inexpensive determination of every case and proceeding. The LG Motion to Dismiss, as well as any other pending Motions to Dismiss, can be protected against incurring any additional cost or delay by simply preserving such motions intact as they stand at the date of entry of any Order granting the Motion and allowing the Second Amended Complaint to be filed. Plaintiff has suggested such procedure.

In addition, any potential argument of misjoinder of parties is expressly not a basis to dismiss an action under Rule 21, as incorporated by Bankruptcy Rule 7021. To the extent that this Court later determines that any defendants are misjoined, that can be remedied by severance. Moreover, Plaintiff asserts that the new defendants are director defendants who received Shareholder Redemption Payments that Legal & General asserted in its Motion to Dismiss that Plaintiff had failed to join in this very adversary. See LG Motion to Dismiss, at pp. 11-13. Now that Plaintiff seeks to add those alleged director defendants as defendants, Legal & General cannot be heard to complain of their joinder or the fact that Plaintiff seeks additional relief beyond the Shareholder Redemption Payments, such as by alleging breaches of fiduciary duties.

### *Conclusion*

After due deliberation and consideration, and on the complete record before the Court, it is hereby

ORDERED, that the Plaintiff's Motion is granted; and it is further



ORDERED, that Plaintiff is authorized pursuant to Federal Rule of Civil Procedure 15(a) and Bankruptcy Rule 7015 to file the Second Amended Complaint within fourteen (14) days of entry of this Order; and it is further

ORDERED, that Plaintiff is authorized pursuant to Federal Rule of Civil Procedure 4(f)(3) to serve the summons and Second Amended Complaint on all foreign Defendants through overnight courier (such as Federal Express) signature required and/or return receipt requested with a courtesy copy to be served via first class post from the Plaintiff's United Kingdom counsel on all Defendants located in England; and it is further

ORDERED, that the IRS, the Motion to Dismiss Defendants and Alleged Conduit Defendants, as well as any defendant who has a motion to dismiss pending as of the date of entry of this Order, are not required to respond to the Second Amended Complaint unless required to do so by the terms of the Supplemental Conduit Protocol and/or other Order of this Court; and it is further


ORDERED, that all other Defendants shall serve an answer or otherwise respond to the Second Amended Complaint within thirty (30) days after service of the summons, subject to other order of the Court or applicable rules; and it is further

ORDERED, that nothing in this order shall be deemed to amend the Scheduling Order or Supplemental Conduit Protocol; and it is further

ORDERED, that the motions to dismiss filed by the Motions to Dismiss Defendants and any other pending motion to dismiss shall be deemed to apply to the Second Amended Complaint, as filed.

**Dated: March 6, 2020**  
**Central Islip, New York**



  
**Alan S. Trust**  
**United States Bankruptcy Judge**