UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:20-cv-24558-KMW

INSTITUTO MEXICANO DEL SEGURO SOCIAL,

Plaintiff,

v.

OLYMPUS LATIN AMERICA, INC.,

Defendant.

OLYMPUS LATIN AMERICA, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

I. Introduction

Plaintiff Instituto Mexicano del Seguro Social's ("IMSS") response to Olympus Latin America, Inc.'s ("OLA") Motion to Dismiss acknowledges the indisputable—that the Amended Complaint "tracks the statement of facts set out in the deferred prosecution agreement between the DOJ and Olympus." ECF No. 33, at 2. The OLA Deferred Prosecution Agreement ("DPA") was publicly filed on March 1, 2016, and was the subject of substantial media attention. IMSS did not commence its action against OLA until November 5, 2020. Despite having the opportunity to replead, IMSS has failed to plead facts explaining why it was unable to discover its claims notwithstanding the OLA DPA and the five lawsuits it filed against other IMSS vendors prior to the instant matter, or to otherwise plead with the specificity required under Rule 9(b).

In response to OLA's Motion pointing out these glaring deficiencies, IMSS makes the extraordinary, unfounded, and inappropriate accusation that OLA's arguments are based on "xenophobia." ECF No. 33, at 9. IMSS has now had two opportunities to plead its claim against OLA, and it has twice failed to do so as a matter of law. It knows that it cannot do so, and has thus

resorted to entirely baseless and improper allegations. IMSS' Amended Complaint should therefore be dismissed with prejudice.

II. Argument

A. The Amended Complaint Fails to Plausibly Plead Why IMSS Could Not File Within the Limitations Period.

The statute of limitations for fraud is four years. Fla. Stat. § 95.11(3)(j). The OLA DPA upon which IMSS rests its allegations was filed and became publicly available on March 1, 2016. ECF No. 32, Tanchyk Decl., Ex. B. But IMSS did not file its Original Complaint until four years and eight months later, on November 5, 2020—meaning IMSS filed, at a minimum, eight months too late. ECF No. 1.

IMSS argues that it could not have known it had a claim within the limitations period because: 1) the DPA does not identify IMSS by name; 2) OLA's corruption of IMSS officials allegedly extended past March 1, 2016; and 3) IMSS was prevented from learning of its claim because OLA "coopted" IMSS officials. ECF No. 31 ¶¶ 6, 46, 47. These arguments fail to salvage IMSS' untimely claims.

First, IMSS' argument that the Court should excuse its untimely filing because the OLA DPA does not specifically identify IMSS by name is entirely lacking in legal support, logic, and credibility. "An action founded upon fraud under § 95.11(3) . . . must be begun . . . with the period running from the time the facts giving rise to the cause of action were discovered ***or should have been discovered with the exercise of due diligence***[.]" Fl. Stat. Ann. § 95.031(2)(a) (emphasis added). Only a lack of diligence would explain IMSS' assertion that it was unaware of the relevant facts. *See The Bedtow Group II, LLC v. Ungerleider*, No. 15-cv-80255, 2015 WL 13310463 (S.D. Fla. Sept. 30, 2015) (granting defendant's motion to dismiss and dismissing plaintiffs' fraud claims for failure to exercise diligence and file within the limitations period); *see also Edward J.*

Goodman Life Income Tr. v. Jabil Cir., Inc., 595 F. Supp. 2d 1253, 1281 (M.D. Fla. 2009), *aff'd*, 594 F.3d 783 (11th Cir. 2010) (holding plaintiffs were on notice of claims by "the publication of [an] article" on which they based many of their allegations and from which they acquired "knowledge of facts that would lead a reasonable person to begin investigating the possibility that his legal rights [have] been infringed" (internal quotation and citation omitted)).

The OLA DPA was publicly available and the subject of significant media attention. ECF No. 32, Tanchyk Decl., Exs. B, C. It also followed five other Foreign Corrupt Practices Act ("FCPA") resolutions with medical device manufacturers—three of which, like the OLA DPA, contained only generalized references to Mexican government agencies. *Id.* at Exs. F, G, I (Stryker, Teva, and Zimmer Biomet resolution papers, none of which specifically identify "IMSS"). IMSS sued each of those manufacturers notwithstanding the lack of a specific reference to IMSS in their respective FCPA resolution papers.

Second, IMSS' bald allegation that OLA's conduct "continued" into the limitations period is wholly insufficient. ECF No. 31 ¶ 6. The Amended Complaint fails to allege a single instance of specific actionable conduct after November 5, 2016 (four years before IMSS commenced this action), or March 1, 2016. *See USA Ent. Grp., Inc. v. City of Pompano Beach*, No. 18-cv-62740, 2019 WL 1383246, at *4 (Mar. 27, 2019) (dismissing complaint on statute of limitations grounds and rejecting plaintiff's argument that conclusory allegation that the conduct "continued" into the limitations period was sufficient to preserve otherwise time-barred claims where the complaint alleged no instances of actionable conduct in the limitations period and plaintiff possessed all the facts needed to support its claims years before statute expired). Nor can there be any credible allegation of corrupt conduct or false representations past March 1, 2016. The DPA, upon which the Amended Complaint relies, reflects that OLA fully remediated its conduct and was placed

under the active supervision of a monitor. ECF No. 32, Tanchyk Decl. Ex. B ¶¶ 4, 11-16. IMSS' allegation of "continued" conduct is further undermined by the Amended Complaint's silence with regard to how and when IMSS finally discovered its claim.

Third, IMSS' argument that it was unable to file within the limitations period because OLA "coopted" its officials is undermined by its October 2014 lawsuit against Orthofix. *See* Complaint, *IMSS v. Orthofix Int'l N.V.*, No. 14-cv-0638 (E.D. Tex. Oct. 3, 2014), ECF No. 1.[1] To the extent that OLA had "coopted" IMSS officials, that coopting had ended by October 3, 2014, when IMSS was fully aware of, ***in IMSS' own words***, the effects of Orthofix's "violence" to "IMSS' contracting process and the healthcare provider's ability to impartially evaluate potential medical device providers," which had "reverberated throughout" IMSS. *Id.* IMSS' subsequent actions against Stryker, Zimmer Biomet, Teva, and Fresenius—all of which were filed before the Original Complaint against OLA—further demonstrate the implausibility of IMSS' claim that it could not have discovered its claim against OLA within the limitations period. *Id.*[2]

IMSS has absolutely no response to this, except to lodge a "xenophobia" epithet at OLA for pointing out the fact that IMSS has a long history of suing medical device manufacturers that it claims corrupted its own officials.

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[1] The Court may take judicial notice of IMSS' complaint against Orthofix, as well as its actions against Stryker, Zimmer Biomet, Teva, and Fresenius. *See Universal Express, Inc. v. SEC*, 177 F. App'x 52, 53 (11th Cir. 2006) ("Public records are among the permissible facts that a district court may consider."). Undersigned counsel notes that the citation to the *Orthofix* docket number in its opening brief on pages 1 and 2 is erroneous, and that the correct docket number for the matter is No. 4:14-cv-00638 (E.D. Tex.).

[2] The Court has already concluded that the adverse domination doctrine has no application here. Sept. 15, 2021 Hearing Transcript, 17:16-19. "Under the doctrine of adverse domination, a statute of limitations is tolled ***on an action against director/officer misconduct*** so long as a majority of the board is dominated by the alleged wrongdoers." *In re Southeast Banking Corp*., 855 F. Supp. 353, 357 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1539 (11th Cir. 1995) (emphasis added) (citations omitted).

B. IMSS' Fraud Claim Is Deficient Under Any Application of Rule 9(b).

IMSS' response to OLA's argument that the Amended Complaint fails to plead fraud with the required particularity is that "IMSS' allegations track Olympus' deferred prosecution agreement with the DOJ." ECF No. 33, at 15. Indeed, they do. But neither the DPA nor the Amended Complaint "set[] forth precisely what statements were made, the time and place of the statement, the person responsible for the statement, the content of the statement, and then what defendants obtained as a consequence of fraud." Sept. 15, 2021 Hearing Tr. 18:1-5; *see also Kerruish v. Essex Holdings, Inc.* No. 16-60877-civ, 2017 WL 10457076, at *3 (S.D. Fla. Aug. 9, 2017) (Williams, J.) (holding Rule 9(b) requires that a fraud claim plead the required "who, what, when, where, and how of the allegedly fraudulent statements" (quotation and citation omitted)). Nor does the Amended Complaint plead how IMSS was damaged.

For these reasons, even if the allegations were considered under the less stringent 9(b) standard that IMSS asks the Court to apply, they would fail. However, a less stringent standard is not appropriate here, where the Amended Complaint alleges the active participation of IMSS officials in the bribery scheme, (*see, e.g.,* ECF No. 31 ¶ 35), and IMSS' five previously filed actions against other medical device manufacturers reflect just how widespread IMSS believes the scheme involving its own officials was. Therefore, *Hill v. Morehouse Medical Associates, Inc.*, No. 02-14429, 2003 WL 22019936 (11th Cir. Aug. 15, 2003)), which involved "a corporate 'outsider'" who would not be able to have access to all the facts surrounding the fraud, does not apply. *Id.* at *3-4. IMSS cannot claim it was an "outsider" to the workings of its own agency—particularly when it has represented in another action that it was aware, at least as early as October 2014, that its procurement process had been corrupted.[3]

[3] IMSS' reliance on *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988), is also misplaced. The holding in that case was limited to whether the plaintiffs needed to know the

C. IMSS Officials' Active Participation in the Alleged Fraud Warrants Dismissal Under the *In Pari Delicto* Doctrine.

The Amended Complaint's allegations of the active participation of the IMSS officials in the alleged bribery scheme, coupled with IMSS' failure to plead any injury to IMSS, renders dismissal based upon the *in pari delicto* doctrine appropriate.

The Amended Complaint does not allege that any "coopted" IMSS official acted for his or her own personal benefit. Rather, the Amended Complaint alleges that multiple unidentified agency officials engaged in the scheme. ECF No. 31 ¶ 35. And in IMSS' pleadings filed in other matters, IMSS has essentially represented that the scheme was widespread and included other companies conducting business with IMSS in Mexico. *See IMSS v. Zimmer Biomet Holdings, Inc.*, No. 3:20-cv-0099 (N.D. Ind.); *IMSS v. Teva Pharm. Indus. Ltd.*, No. 1:20-cv-21548 (S.D. Fla.); *IMSS v. Fresenius Med. Care AG & Co. KGAA, et al*, No. 1:20-cv-11927 (D. Mass.). The Amended Complaint's absence of any factual allegations concerning how IMSS was injured by the alleged scheme undermines any assertion that the IMSS officials' actions were against IMSS' interests. There are no allegations that IMSS overpaid for OLA product, that the product was defective, or that the product was of a lesser quality than expected.

This distinguishes IMSS' allegations from those in *In re Rollaguard Security LLC*, 570 B.R. 859 (Bankr. S.D. Fla. 2017), and *City of New York v. Corwen*, 565 N.Y.S.2d 457 (N.Y. App. Div. 1990), upon which IMSS relies. In *Rollaguard*, the bankruptcy trustee alleged that the debtor's agent "misappropriated [company funds] ***for his personal use***[.]" 570 B.R. at 883

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identities of all borrowers who received subprime loans—information that was only available to the defendant banks. IMSS' reliance on *State Farm Fire & Casualty Co. v. Bishai, Samy F., M.D., P.C.,* No. 6:04-cv-1882-ORL-22DAB, 2005 WL 8159948 (M.D. Fla. June 17, 2005), is also unavailing because the complaint in *State Farm* contained sufficient details where plaintiff specified "as to each claim submitted, . . . the claim number, the named insured, the 'reporting party/patient,' and the amount either paid or unpaid." *Id.* at *1.

(emphasis added). In *Corwen*, the lower New York state court rejected *in pari delicto* doctrine where ***a single city official*** orchestrated the entirety of the alleged bribery scheme. 565 N.Y.S.2d at 459.[4]

D. Mexico Is the Appropriate Forum.

Finally, even if IMSS could overcome the statute of limitations, the requirements of Rule 9(b), and the *in pari delicto* doctrine, its Amended Complaint should be dismissed because Mexico, not Florida, is the proper forum for this litigation. The vast majority of the acts and actors relevant to IMSS' fraud claims—the conduct of the Mexican distributor, the Mexico JV, the Mexico Agent, and IMSS officials—occurred and are in Mexico. Any U.S. interest was satisfied through the DOJ's investigation and the DPA.[5] The *forum non conveniens* doctrine thus warrants dismissal.

First, the Mexican courts are adequate and available. IMSS concedes that they are adequate, but it argues that they are not available because while "Olympus now stipulates to jurisdiction," it does not stipulate to "any of the other requirements of the normal case." ECF No. 33, at 22-23. OLA does not understand IMSS' argument, but respectfully submits that its representation that it will not contest jurisdiction in the Mexican courts satisfies the availability prong of the *forum non conveniens* doctrine. *See, e.g., Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001).

In support of its arguments that the private and public interest factors favor the United States, IMSS refers to an "Exhibit A-2" but does not attach any exhibits to its filing. *See* ECF No.

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[4] IMSS also relies on *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir. 1982), but the court in *Cenco* did not address the *in pari delicto* doctrine.

[5] The DPA's three-year term expired on March 1, 2019, and the U.S. District Court for the District of New Jersey entered an Order of Dismissal on March 12, 2019. *See* Case No. 2:16-mj-03525-MF-1, ECF No. 6. IMSS represented at the September 15, 2021, hearing that it did not seek restitution in that action. Sept. 15, 2021, Hearing Tr. at 13:6-15.

33, at 10-11, 14, 16, 18-20. To the extent that IMSS seeks to rely upon the declaration of Sergio Antonio Linares Perez, which it attached to its response to OLA's motion to dismiss the Original Complaint, the declaration does not support IMSS' position. That declaration was prepared for and submitted in the *Stryker* matter which, like IMSS' matter against OLA, was based upon Stryker's FCPA resolution. *See* No. 19-cv-0857 (ECF No. 29-1). However, the *Stryker* court, having considered Mr. Perez's declaration, dismissed IMSS' complaint on *forum non conveniens* grounds, finding, among other things, that both the public and private interest factors weighed in favor of dismissal. *See* Opinion & Order, *IMSS v. Stryker*, No. 19-0857 (W.D. Mich. Jan. 4, 2021), ECF No. 32 at 10, 13 (finding private interest factors weighed in favor of dismissal where, among other reasons, "the vast majority of potential witnesses identified in Plaintiff's Complaint are in Mexico," "litigating in Michigan would be more burdensome than litigating in Mexico," and "the alleged victims of this case are in Mexico and primarily include the Mexican citizens"). The same analysis applies here.

While IMSS accuses OLA of forum shopping, IMSS admits that the reason it commenced its action in the United States is because the Mexican court system does not provide for discovery and pursuing claims in Mexico allegedly would be inefficient. That is the essence of forum shopping. Moreover, the *Stryker* court considered these same arguments and nevertheless dismissed IMSS' claim. *Id*. at 9, 12 (considering IMSS' arguments that "'there are virtually no means of obtaining evidence not already in a party's possession,'" and that "trial in Mexico will take up to 15 years and be more burdensome"); *see also IMSS v. Zimmer Biomet Holdings*, 518 F. Supp. 3d 1258, 1267-68 (N.D. Ind. 2021) (finding "[a]rguments that the United States provides more extensive discovery than alternative forums have been rejected in the *forum non conveniens* analysis" and that the notion that it would take 15 years to litigate in Mexico was "soundly undercut

by other authorities" (citations omitted)). As the Eleventh Circuit put it in *Leon*, "[a]n adequate forum need not be a perfect forum." 251 F.3d at 1311 (quotation and citation omitted) (affirming district court's dismissal of action on *forum non conveniens* grounds where plaintiff argued the alternative forum was impartial and inefficient).

III. Conclusion

For the foregoing reasons, and those addressed in its opening brief, OLA respectfully requests that the Court grant its motion to dismiss IMSS' Amended Complaint. IMSS has already had an opportunity to replead, and OLA thus respectfully requests that this Court dismiss the Amended Complaint with prejudice.

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Respectfully submitted,

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