

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____)	
GOVERNMENT OF BERMUDA)	
)	
Plaintiff,)	
)	C.A. No. 17-10242-IT
v.)	
)	
LAHEY CLINIC, INC. (a.k.a LAHEY)	
HOSPITAL & MEDICAL CENTER,)	
BURLINGTON), and LAHEY CLINIC)	
HOSPITAL, INC.,)	
)	
Defendants.)	
_____)	

**BRIEF OF AMICI CURIAE ELEVEN CURRENT AND FORMER LEGISLATORS
FROM BERMUDA IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

INTRODUCTION

The *Amici* respectfully file this brief in support of the Defendants Lahey Clinic, Inc. (a.k.a Lahey Hospital and Medical Center, Burlington) and Lahey Clinic Hospital, Inc.’s (together “Lahey’s”) motion to dismiss Plaintiff Government of Bermuda’s (“Plaintiff’s”) complaint. *Amici* are eleven current and former legislators of Bermuda, who include five former Ministers of Health, two former Premiers, three former Attorneys General, and the current leader and deputy leader of the Progressive Labour Party (“PLP”), Bermuda’s Opposition Party. Each *amicus curiae* is signing in his or her individual capacity. The names of the *Amici*, as well as their current and former positions within the Government of Bermuda, are provided in the attached Appendix. Several *Amici* served in these government positions between 1998 through 2010 and had knowledge at that time of Lahey’s commercial relationship with Dr. Ewart Brown (who is a

signatory to this brief) and two of Bermuda's largest medical healthcare clinics owned by Dr. Brown.

As some of the top government officials in Bermuda during the relevant time period, the *Amici* can offer the court their perspective in weighing some of the parties' arguments in support of and against the pending motion to dismiss. In particular, the *Amici* agree that Dr. Brown and Lahey's business relationship was common knowledge and highly-publicized from its inception, undercutting Plaintiff's portrayal of the relationship as surreptitious. As described more fully below and illustrated through articles published by the Bermuda media at the time, the Government of Bermuda, and indeed the public at large, had knowledge of the association between Lahey and Dr. Brown dating back as far as 1998. The Government's knowledge triggered the running of the civil Racketeer Influenced and Corrupt Organizations Act ("RICO") statute of limitations long before 2010. Therefore, the Plaintiff's complaint (which *Amici* believe is meritless in any event) should be dismissed for lack of jurisdiction due to expiry of the statute of limitations.

Moreover, the *Amici* have made longstanding commitments to public service in Bermuda and share the interest of safeguarding Bermuda and the integrity of its democratic process. They seek to provide the Court with the cultural, historical, and political context necessary for the just adjudication of this matter. Specifically, the *Amici* can shed light on the political motivations underlying this lawsuit. As discussed herein, the Attorney General of Bermuda's decision to bring this meritless lawsuit in the United States seven years after any relevant conduct is politically driven. With the general election in Bermuda scheduled to be called by March 2018 and held by May 2018, the Attorney General brought this high-profile suit in a foreign court and has promoted it in Bermuda and elsewhere through the use of a hired public relations firm. This suit targeted at a hospital that has provided much needed healthcare expertise in the country since the late 1990's,

and implicating Dr. Brown, a former Premier from a competing political party, is plainly politically inspired. It is an overreaching and inappropriate effort to introduce extraterritorial statutes, like the Foreign Corrupt Practices Act (“FCPA”) and RICO, into local political disagreements in order to influence what is expected to be a hotly-contested Bermudian general election.

Beyond the four corners of this particular lawsuit and beyond Bermuda, the *Amici* also have a global and diplomatic interest in ensuring that the United States’ courts are not improperly interjected into foreign and localized political disputes. Specifically, newly-elected government members, whether it be in Bermuda or elsewhere, should not have the ability to manipulate the civil RICO statute of limitations in order to attack conduct outside of the statute of limitations by claiming that the widely-known conduct is new to them personally.

ARGUMENT

I. The RICO Claim is Barred by the Statute of Limitations Because the Bermudian Government Had Knowledge of the Relationship Between Lahey and Dr. Brown.

The allegations in Plaintiff’s complaint do not resonate with the purpose of the RICO statute. Congress enacted the RICO statute in 1970 as a “weapon[] of unprecedented scope for an assault upon organized crime and its economic roots.” Russello v. United States, 464 U.S. 16, 26 (1983). The purpose of the RICO statute is “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.” S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). One of the necessary limits on the RICO statute is that it is subject to a four-year statute of limitations. Rotella v. Wood, 528 U.S. 549, 553 (2000); Rodriquez v. Banco Cent., 917 F.2d 664, 665-66 (1st Cir. 1990). In the Court of Appeals for the First Circuit, the statute of limitations begins to accrue when the plaintiff “discovered or should have discovered his injury.” Rodriquez, 917 F.2d at 666 (quotations omitted); Lares Group, II v. Tobin, 221 F.3d 41, 44-45 (1st Cir. 2000) (adopting the “injury discovery” rule in the First Circuit).

The statute of limitations and its accrual are important components to the civil RICO statute. The Supreme Court has observed that the civil RICO statute of limitations serves the “basic policies of . . . repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.” Rotella, 528 U.S. at 555; see also Gabelli v. SEC, 133 S. Ct. 1216, 1221 (2013) (“Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” (citations and internal quotation marks omitted)). The civil RICO limitations provision is particularly significant in light of civil RICO’s objective of “encouraging prompt litigation to combat racketeering.” Rotella, 528 U.S. at 557 n.3. The organizational RICO plaintiff – like a government – cannot sidestep a statute of limitations and re-start the meter each time an entity or, as here, a government changes hands. Thus, the question is not when the newly elected officials of the currently prevailing political party in Bermuda knew of the alleged injury; rather, the question is when the Government of Bermuda – however politically constituted – was put on notice.

i. According to the Public Record, the Government of Bermuda had Notice of the Relationship between Lahey and Dr. Brown as Early as 1998.

Putting aside whether or not the complaint adequately pleads an “injury” under the civil RICO statute, there is no question that any purported injury resulting from the business relationship between Dr. Brown and Lahey was “known” or “should have been known” to the Government of Bermuda as early as 1998. In fact, Dr. Brown’s relationship with Lahey was covered by the Bermuda media over the years.¹ There are news articles published in the Royal Gazette,

¹ Reliance on these newspaper articles does not implicate hearsay concerns as the articles are not offered for the truth of the matter asserted, but for the fact that the content of the article was in the public sphere and sufficient to put the Government of Bermuda on notice of the purported injury in Plaintiff’s complaint. Furthermore, while the newspaper articles introduce evidence

Bermuda's largest newspaper, addressing Dr. Brown's relationship with Lahey, documenting the growth of Lahey's presence in Bermuda over time and even questioning Dr. Brown's "financial incentive" to promote Lahey's services. Three pertinent news articles are discussed below.

First, in 1997, twenty years before the filing of this suit and in the early years of Dr. Brown's relationship with Lahey, the Royal Gazette published a news article² that reported that Bermuda Healthcare Services, owned by Dr. Brown, was to offer free mammograms to women who could not afford to pay for them. The article publicly reported that the x-ray films would be read by Lahey – which it described as "an associate clinic of Dr. Brown's" – at a decreased rate. At the time, Dr. Brown was a member of parliament for the opposition and shadow Cabinet Minister.

Second, in 1998, nineteen years before the filing of this suit, the Royal Gazette published a news article entitled, "Brown, insurance association at odds."³ This article describes a letter sent by the Health Insurance Association of Bermuda ("HIAB") that "calls into question the necessity of having medical specialists from the U.S.-based Lahey Clinic visit the island to treat local

beyond the four corners of the complaint, it is indisputable that the articles establish that the Government of Bermuda was on notice of the purported "injury." The Court may take judicial notice of the newspaper articles. Cf. United States ex rel. Hagerty v. Cyberonics, Inc., No. 13-10214, 2015 U.S. Dist. LEXIS 42166, at *29 (D. Mass. Mar. 31, 2015) ("Defendant relies on news articles that can properly be considered when evaluating the FCA's public-disclosure bar because they are (at least in this context) susceptible to judicial notice") (citation omitted), *aff'd*, 844 F.3d 26 (1st Cir. 2016). The Court also has the discretion to convert Lahey's motion to dismiss into a motion to summary judgment and to grant the motion. See, e.g., Collier v. City of Chicopee, 158 F.3d 601, 603 n.3 (1st Cir. 1998).

² Raymond Hainey, Women unable to pay will get free mammograms, The Royal Gazette, Oct. 31, 1997, available at: <http://www.royalgazette.com/article/19971031/ISLAND/310319969> (last updated Feb. 8, 2011).

³ Kim Dismont Robinson, Brown, insurance association at odds, The Royal Gazette, Nov. 24, 1998, available at: <http://www.royalgazette.com/article/19981124/ISLAND/311249992>.

patients.” The article reports that the HIAB also questioned at that time whether the government was aware of any “financial incentive” to Dr. Brown’s clinic for the “promotion of foreign specialists.” In other words, the article disclosed that the HIAB letter, which was sent to the Government, directly questioned the link between Dr. Brown (who was then a member of parliament for the Opposition), his clinics, and Lahey. This article then reports that the then-Health Minister and *Amicus* Wayne Furbert responded to the letter by saying that he “had no problem with any business arrangement Dr. Brown might have with Lahey Clinic.” In other words, the sitting Minister of Health from the United Bermuda Party (“UBP”) (*i.e.*, the equivalent of the Secretary of Health & Human Services in the United States) stated publicly that he was aware of the business arrangement between Lahey and Dr. Brown (who was in the opposition at the time that Mr. Furbert was approached and a Member of Parliament when the article was released) and that he, as Minister of Health, had “no problem” with that arrangement. Mr. Wayne Furbert is an *amicus* and stands behind his statement that the government at time was aware of and had no issue with Dr. Brown’s relationship with Lahey.

Finally, in 2004, thirteen years before the filing of this suit, the Royal Gazette published a third news article entitled “Bermuda’s Second MRI Machine is Unveiled.”⁴ This article reports that “Deputy Premier Ewart Brown’s Bermuda Healthcare Services has acquired a state of the art open MRI.” The article reports that the images obtained from this MRI will be sent to the Lahey Clinic and interpreted there. Then-Premier and *Amicus* Alex Scott and the then-Health Minister, Patrice Minors, praised Dr. Brown and his acquisition of the machine.

⁴ Ayo Johnson, Bermuda’s Second MRI Machine is Unveiled, The Royal Gazette, Sept. 17, 2004, available at: <http://www.royalgazette.com/article/20040917/NEWS/309179944> (last updated February 4, 2011).

Taken together, these articles paint a clear and public picture. Dr. Brown – from 1997 onwards – was an active member of Parliament while openly and publicly engaging in a business relationship with Lahey as a physician.⁵ It is not unusual in Bermuda for politicians to continue to work in their chosen professions while holding political office. The plain import of these facts, which are readily ascertainable and verifiable, is that the Government of Bermuda, including the *Amici*, was aware of the business relationship underlying the purported “injury” from 1998 through to 2010.

ii. The Statute of Limitations Expired in 2014 at the Latest.

In addition, it bears noting that the Complaint itself pleads that Dr. Brown last served in the Bermuda government in October 2010. Compl. ¶ 21. Even assuming for the sake of the argument that the statute of limitations was triggered when the objectives of the so-called “conspiracy” were either abandoned or accomplished, see United States v. Torres Lopez, 851 F.2d 520 (1st Cir. 1988), rather than when the Government of Bermuda first learned of the potential of the alleged harm, the purported “conspiracy” necessarily ended in 2010 because that is the last possible date on which Dr. Brown could have engaged in official acts to benefit Lahey. Under this analysis, the statute of limitations expired in 2014 prior to entry into the alleged tolling agreement.

In sum, under any approach, Plaintiff Government of Bermuda’s claim is not timely and should be dismissed.⁶

⁵ See also Sam Strangeways, Concerns over Brown-Lahey ties raised in 1998, The Royal Gazette, Feb. 22, 2017, available at: <http://www.royalgazette.com/news/article/20170222/concerns-over-brown-lahey-ties-raised-in-1998>.

⁶ *Amici* agree with Lahey’s argument in its reply brief, that Plaintiff Bermuda’s fraudulent concealment argument is without merit, inadequately pleaded, and insufficient to toll the statute of limitations. See Reply at 5-7, Dkt. 30.

II. The Statute of Limitations Serves the Additional Purpose of Preventing Civil RICO and the U.S. Courts from Becoming a Political Tool Available Whenever a New Political Party Takes Control.

This case is a political dispute being played out in a court in a foreign jurisdiction. Despite years of investigation of the Lahey-Dr. Brown relationship, there are no pending civil or criminal lawsuits against either in Bermuda. To the extent the complaint raises issues that require resolution, those claims can and should be litigated in Bermuda, where the alleged harm occurred and where the evidence and witnesses are located, not in the United States. Litigating this case here – and targeting a U.S. company that provides much needed health care in Bermuda – provides no benefit to Bermudians, is a costly undertaking for Bermudian taxpayers, and serves only the interests of the ruling political party, which is facing an election that will take place by May 2018 at the latest.

Indeed, it is no coincidence that the Attorney General elected to bring this suit in 2017. To be certain, the reason has nothing to do whatsoever with whether or at what point the Government of Bermuda had knowledge of the alleged relationship between Dr. Brown and Lahey. The Plaintiff himself asserts that the key evidence on which he relies was contained on Dr. Brown’s “government email account,” see Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss at p. 3; that evidence did not suddenly just become available to the Bermudian government this year but has been in its possession since no later than 2010. There has thus been no recent “discovery” of some hidden relationship. The reason for the Plaintiff’s timing, instead, is that it is election season in Bermuda and the One Bermuda Alliance (“OBA”) – currently in control of the government – is up for re-election and falling behind in the polls.⁷ In order to

⁷ See Tim Smith, OBA under threat as PLP enjoys voter swing, The Royal Gazette, Jan. 20, 2017, available at: <http://www.royalgazette.com/politics/article/20170120/oba-under-threat-as-plp-enjoys-voter-swing> (last updated Jan. 21, 2017).

appreciate the political backdrop against which Bermuda decided to file this case, *Amici* believe that the Court would benefit from understanding the structure of the Bermudian government, as well as the historical and current relations between the two primary political parties in the country.

i. Bermuda's Political System

Bermuda has a parliamentary government. Currently, there are two primary political parties – the governing OBA and the PLP. In a general election in Bermuda, registered voters elect Members of Parliament to represent each constituency in the House of Assembly. The political party with the majority of “seats” or Members of Parliament is the governing party and the leader of the governing party leads the country as the Premier. The parties are permitted to nominate Senators who are appointed by the Governor. Together, the House of Assembly and the Senate constitute the Parliament.

The PLP, Bermuda's oldest political party was formed in February 1963 by black working class Bermudians. In 1964, the UBP was formed by predominantly white Bermudians of greater socioeconomic influence. The UBP won the 1968 general election and maintained control of the government for thirty years until 1998 when the PLP won its first general election. The PLP governed from 1998 through 2012 under Premier Jennifer M. Smith (1998 – 2003), Premier *Amicus* William Alexander Scott (2003-2006), Premier *Amicus* Dr. Brown (2006-2010) and Premier Paula Cox (2010-2012). In December 2012, the OBA, a party formed in May 2011 by the joinder of the UBP and the Bermudian Democratic Alliance, a third political party, was elected to lead the government. The current Premier of Bermuda is the Honorable Michael Dunkley.

While the particular subjects of disagreement may be different, relations between the OBA and the PLP may be likened by some to that of Democrats and Republicans, including historical rifts that date back decades. The racial and socioeconomic composition of the parties has evolved

over time but the deep wounds resulting from the historical differences in membership permeate political culture in Bermuda today. With this political history as the backdrop, this lawsuit appears to be an effort to execute a personal vendetta against the PLP and Dr. Brown as one of its former and influential leaders.

ii. The Role of the Attorney General

It is important for the Court to understand that the Attorney General of Bermuda is either a Member of Parliament or a Senator and functions, in all respects, as a politician. The Attorney-General is a member of Cabinet, the main legal advisor to the Government of Bermuda and provides public access to Bermuda's laws.⁸ The Bermuda Constitution is "unique amongst the [British] territory constitutions in the manner in which it deals with the appointment of the Attorney General." Ian Hendry & Susan Dickson, British Overseas Territories Law 129 (2011). In particular, the Bermuda constitution provides for a political Attorney General, who is a member of the House of Assembly. Bermuda Constitution (Amendment) (No 2) Order 1979 (SI 1979/1310). In other words, the Attorney General, since late 1998, "has always been a politician." Hendry & Dickson, supra. To account for the fact that the position of Attorney General has been a political one in Bermuda's recent history, the Government took criminal prosecutions out of the Attorney General's authority and made them the responsibility of the Director of Public Prosecutions ("DPP"), who is independent from political affiliation. While the Attorney General is administratively responsible for the DPP, this distinction in responsibilities, *i.e.* the carving out of criminal prosecutions from his portfolio, protects against the actual or apparent influence of politics in criminal affairs.⁹

⁸ Available at: <http://www.bermudalaws.bm/SitePages/Home.aspx>.

⁹ See, e.g., information available at: <https://www.gov.bm/history-attorney-generals-chambers>; <https://www.gov.bm/department/department-public-prosecutions>.

The current Attorney General of Bermuda Trevor Moniz, who has brought this lawsuit on behalf of the Government of Bermuda, has served as an elected member of the House of Assembly for the UBP and then the OBA collectively for over twenty years. He was first elected as a Member of Parliament in 1993 and currently serves as the Member of Parliament for the constituency known as Smith's West. Since the OBA took power, he has served in the roles of Minister of Public Works, Minister of Health, and now Attorney General. The outcome of the upcoming elections is of both personal and party-line significance to Mr. Moniz. His role as Attorney General himself, and ironically his authority to pursue this very lawsuit, is dependent upon the OBA winning the elections. While the Government of Bermuda attempts to protect against the political influence of the Attorney General on local criminal prosecutions, the Attorney General is unfortunately free to bring this politically-motivated civil lawsuit in a foreign court.

iii. This Lawsuit is a Political Dispute.

With a general election within the next year and in light of the political role of the Attorney General, it is clear that political impact must have been a consideration in the filing of this lawsuit in a foreign jurisdiction. The timing of the filing is not related to when the Government of the Bermuda was put on notice of a potential "injury" (as early as 1998) or even tied to when the OBA took over the Government from the PLP (2012). Simply put, the timing of the filing of the lawsuit is politically expedient for the governing party of Bermuda.

The Plaintiff cannot ignore, however, that the Government of Bermuda (the Plaintiff itself albeit of a different make up) was long aware of the relationship between Lahey and Dr. Brown and as such, the statute of limitations for the civil RICO claim expired as late as 2014 but probably earlier. The record here is clear: the statute of limitations has expired and the Court should grant the Defendants' Motion to Dismiss.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to grant the Defendants' Motion to Dismiss the Complaint.

May 15, 2017

Respectfully submitted,

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APPENDIX A

LIST OF AMICI CURIAE

William Alexander Scott,
Former Premier, Progressive Labour Party (“PLP”)

Wayne Furbert,
Current Member of Parliament (“MP”), PLP
Former United Bermuda Party (“UBP”) Leader
Former Minister of Health
Former Minister of Transport

Kim Swan,
Former UBP Leader
Candidate for PLP in the upcoming election

Michael Scott,
Current MP, PLP
Former Attorney General
Former Health Minister

Zane Desilva,
Current MP, PLP
Former Minister of Health

Kim Wilson,
Current MP, PLP
Former Attorney General and Minister of Justice
Former Minister of Economy, Trade and Industry

Mark Pettingill,
Current MP, Independent
Former Attorney General

Shawn Crockwell,
Current MP, Independent
Former Minister of Tourism, Development and Transport

Walter Roban,
Current MP, PLP
Deputy Opposition Leader
Former Minister of Health
Former Minister of Transport
Former Minister of Environment

David Burt

Current MP, PLP

Current Leader of the Opposition

Dr. Ewart Brown

Former Premier, PLP

Former Minister of Transport and Tourism