UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: KEURIG GREEN MOUNTAIN SINGLE-SERVE COFFEE ANTITRUST LITIGATION *This Document Relates to* *Case No. 1:14-cv-00905 (VSB) (SLC)*	MDL No. 2542 Master Docket No. 1:14-md-02542 (VSB) (SLC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KEURIG GREEN MOUNTAIN, INC.'S MOTION TO AMEND ITS ANSWER AND DEFENSES

INTRODUCTION

Keurig respectfully moves the Court for leave under Federal Rule of Civil Procedure 15(a)(2) to amend its initial answer to add the defense of "release and covenant not to sue." *See* Ex. 1, Amended Answer, at 58; Ex. 2, Answer Redline, at 58.[1] A prior settlement agreement between Keurig and TreeHouse releases part of this case. Due to an error during the process of finalizing the document for filing, this defense was inadvertently removed from Keurig's original pleading, although Keurig pled related defenses of waiver and estoppel.[2] There is no prejudice to TreeHouse, which has always been aware of its settlement agreement, and has had notice of Keurig's reliance on the settlement based on the reference to the settlement in Keurig's motion to dismiss and the related defenses pled in the original answer. Under the liberal standards of Rule 15, the Court should permit the amendment.

BACKGROUND

On February 19, 2013, Defendant Keurig Green Mountain, Inc. ("Keurig") and Plaintiffs TreeHouse Foods, Inc., Bay Valley Foods, LLC, and Sturm Foods, Inc. (collectively "TreeHouse") settled the non-patent portions of litigation in the United States District Court for the District of Delaware (the "Settlement Agreement"). *See* Mem. of Law in Support of Keurig's Motion to Dismiss, ECF No. 224 at 4, 24 (noting this settlement and citing Jt. Stip. to Dismiss Non-Patent Claims and Counterclaims, *Keurig, Inc. v. Sturm Foods, Inc.*, No. 1:10-cv-00841-SLR-MPT (D. Del. Feb. 26, 2013), ECF No. 430). The Settlement Agreement included a

[1] All Exhibits are attached to the accompanying declaration of C. Lawrence Malm, dated May 18, 2020.

[2] A near-final draft of the original answer contained the defense of release and covenant not to sue, but it was unintentionally not included in the filed version. This occurred as Keurig's counsel was preparing to simultaneously file three answers with over 1,000 paragraphs to overlapping complaints. *See* Keurig's Answer to DPP Am. Compl., ECF No. 407 (Jan. 16, 2018); Keurig's Answer to JBR Am. Compl., ECF No. 408 (Jan. 16, 2018); Keurig's Answer to TreeHouse Am. Compl., ECF No. 409 (Jan. 16, 2018).

release and covenant not to sue with respect to [redacted]. *See* Ex. 3, Settlement Agreement, ¶¶ 8-9.[3]

In this MDL, Keurig filed its Answer to Treehouse's Amended Complaint on January 16, 2018, ECF No. 409 (the "Original Answer"). Keurig's Original Answer includes a number of defenses, including waiver and estoppel. ECF No. 409 at 56-58. Keurig's counsel only realized the unintentional omission of the release defense last week when TreeHouse produced a document that in Keurig's view was subject to the confidentiality provisions of the Settlement Agreement. In re-reviewing the Settlement Agreement for confidentiality purposes, Keurig's counsel also re-reviewed the release provisions, which release and waive significant portions of TreeHouse's claims. Keurig's counsel then reviewed the Original Answer to see the wording of the affirmative defenses based on the settlement, only to discover that release was not pled alongside waiver and estoppel. Keurig's counsel, surprised to find that release was not included as a separate defense, investigated the omission and promptly filed this motion for leave to amend.[4]

[3] Pursuant to the confidentiality provisions in Paragraph 13 of the Settlement Agreement, Keurig has filed Exhibit 3 and limited portions of this brief under seal, with access under the Southern District's ECF system restricted to the Court and TreeHouse. Paragraph 13 of the Settlement Agreement permits Keurig and TreeHouse to disclose the fact of the settlement to the public.

[4] While waiver and estoppel are closely related to release, they are separately listed defenses under Rule 8. *See* Fed. R. Civ. P. 8(c)(1). Thus, Keurig moves to amend to ensure there is no confusion.

ARGUMENT

Federal Rule of Civil Procedure 15 provides that a court "should freely give leave" to amend a pleading "when justice so requires." Fed. R. Civ. P. 15(a)(2).[5] The Supreme Court has instructed that Rule 15's "mandate is to be heeded" and explained that litigants "ought to be afforded an opportunity to test [their] claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000) ("Rule [15] reflects two of the most important principles behind the Federal Rules: pleadings are to serve the limited role of providing the opposing party with notice of the claim or defense to be litigated, and 'mere technicalities' should not prevent cases from being decided on the merits.").[6] "The Supreme Court has emphasized that amendment should normally be permitted, and has stated that refusal to grant leave without justification is 'inconsistent with the spirit of the Federal Rules.'" *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman*, 371 U.S. at 182); *see also id.* at 235 ("In light of this preference that amendments be permitted, it is rare for an appellate court to disturb a district court's discretionary decision to allow amendment.").

Consistent with the Supreme Court's instruction, the Second Circuit has explained that "district courts should not deny leave unless there is a substantial reason to do so, such as excessive delay, prejudice to the opposing party, or futility." *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000) (reversing district court's denial of motion for leave to amend); *see also Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) ("A motion

[5] Under the Case Management Plan and Scheduling Order, Rule 15 governs this motion to amend. ECF No. 354-1 (Nov. 14, 2016), ¶ 5 ("Without leave of the Court, no additional causes of action or defenses may be asserted more than thirty (30) days after Defendant's answers have been served. Thereafter, the parties will act in accordance with Federal Rule of Civil Procedure 15.").

[6] Unless indicated otherwise, quotes omit internal citations, quotation marks, and alterations.

to amend should be denied only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party.").

As this Court has explained, "the nonmovant bears the burden of showing prejudice, bad faith and futility of the amendment." *Longhi v. Lombard Risk Sys., Inc.*, No. 18-CV-8077 (VSB), 2019 WL 4805735, at *4 (S.D.N.Y. Sept. 30, 2019) (Broderick, J.).

None of the limited reasons for denying leave to amend applies.

A. The Proposed Amendment Is Not Futile

The defense of release and covenant not to sue based on Keurig's Settlement Agreement with TreeHouse is a legal defense that could "take certain issues out of the case, so that the eventual trial could be conducted more efficiently, with the focus on those areas that remain genuinely in dispute." *See Glob. Crossing Bandwidth, Inc. v. Locus Telecomm., Inc.*, 632 F. Supp. 2d 224, 238 (W.D.N.Y. 2009).

Paragraph 8 of the Settlement Agreement provides:

[redacted]

Here, TreeHouse asserts claims that pre-date the Settlement Agreement, do not relate to its [redacted], and do "[redacted]

[redacted]

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