

**IN THE CHANCERY COURT OF JACKSON COUNTY, MISSISSIPPI**

CYNTHIA N. ALMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action: 2014-2653JB
	)	
SINGING RIVER HEALTH SYSTEM, a/k/a	)	
SINGING RIVER HOSPITAL SYSTEM, <i>et</i>	)	
<i>al.</i>	)	
	)	
Defendants.	)	

**THE SRHS DEFENDANTS' OPPOSITION TO  
MOTION FOR LEAVE TO AMEND COMPLAINT AND FIRST AMENDED  
COMPLAINT FOR DISCOVERY AND ACCOUNTING**

Defendants Singing River Health System (“SRHS”), Singing River Hospital System, Singing River Hospital System Foundation, Inc.; Singing River Health Services Foundation; Singing River Hospital System Employee Benefit Fund, Inc.; Michael Heidelberg; Allen Cronier; Tommy Leonard; Lawrence Cosper; Ira Polk; and Kevin Holland (collectively, “the SRHS Defendants”) respectfully file this Opposition to Plaintiff Cynthia Almond’s (“Almond”) Motion for Leave to Amend Complaint and First Amended Complaint for Discovery and Accounting. Almond’s Motion should be denied for the following reasons:

**I. INTRODUCTION**

SRHS is forced to oppose Almond’s Motion for Leave to Amend the Complaint based on, among other things, the complete lack of restraint shown by Almond in naming persons who had no involvement in the acts alleged in her proposed Amended Complaint. Almond’s far-fetched “conspiracy” theory, set forth in six new claims, is designed to harass and embarrass no less than 14 new parties, all of whom were well known to Almond’s counsel when she filed her original six

complaints<sup>1</sup> months ago. SRHS is well-aware of this Court's liberal amendment standard, and normally would not oppose a motion to amend a complaint, but this is not a normal case. Almond's proposed Amended Complaint is a reckless fishing expedition that does no more than name every individual who had any position of authority at SRHS- regardless of whether those individuals were ever involved in any administration or management decisions affecting the pension plan. This conduct is no service to the justice system or the plan participants not represented by Almond's counsel, who are nonetheless joined in this case through the Court's consolidation order. The addition of the meritless, distracting and harassing claims in Almond's proposed amended complaint will unnecessarily delay this Court's investigation into the pension plan accounting.

Indeed, Almond makes no effort in her proposed Amended Complaint to even sort through the various parties and allegations, instead she just lumps all defendants together into fiery claims such as fraud, conspiracy and racketeering. SRHS takes these allegations very seriously, particularly when such claims are asserted against its current Chief Financial Officer ("CFO"), who did not take his position until after nearly all allegations in the proposed Amended Complaint occurred, and one of SRHS' outside law firms.

Almond makes these very serious, and inflammatory allegations, without even citing one case or statute to support her request to add 14 new parties and six new claims. In adding these new claims and parties, the law requires Almond to: 1) plead legally cognizable claims that are not futile, 2) state facts with particularity (instead of bald accusations), 3) advise which claims are being pleaded against which parties, and 4) follow the procedural requirements of the Mississippi Tort Claims Act ("MTCA") in order to assert tort claims against a public entity, like SRHS.

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<sup>1</sup> Almond's counsel serves as counsel for five other actions pending before this Court, all with nearly identical Complaints: *Aguilar v. Singing River Health System, et al.* (Case No. 2014-2753); *Bosarge v. Singing River Health System, et al.* (Case No. 2014-2729); *Drury v. Singing River Health System, et al.* (Case No. 2015-0001); *Eiland v. Singing River Health System, et al.* (Case No. 2015-0030); and *Thompson v. Singing River Health System, et al.* (Case No. 2014-2695).

Almond fails to adhere to these most basic procedural obligations and, as such, her request to amend should be denied

## **II. ARGUMENT**

Almond does not cite the standard for deciding a motion to amend, let alone show how she meets the standard. On that basis alone, Almond's Motion for Leave to Amend should be denied. Even putting the vital omissions from Almond's Motion for Leave to Amend aside, the Court should deny Almond's Motion because justice does not require the Court to give Almond leave in this instance.

### **A. Legal Standard**

Under the Mississippi Rules of Civil Procedure, "a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires." Miss. R. Civ. P. 15(a). The Mississippi Supreme Court has explained that leave to amend should be freely given by the Court, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc...." *Meredith v. Meredith*, 987 So. 2d 477, 482 (Miss. Ct. App. 2008) (affirming trial court's denial of plaintiff's motion to amend based on futility of proposed amendment) (citations omitted).

A trial court's denial of a motion to amend will only be reversed for abuse of discretion. *Id.* at 482. To determine whether a trial court abused its discretion in denying leave to amend, Mississippi courts generally consider "what the interests of justice would require." *Id.* (citations omitted). A trial court does not abuse its discretion when it denies the plaintiffs' motion to amend a complaint that seeks to add new causes of action "that would have changed the nature of their case from a case in equity to an action at law." See *Bailey Brake Farms, Inc. v. Trout*, 116 So. 3d 1064, 1070, (Miss. 2013) (affirming special chancellor's denial of plaintiffs' motion to amend to

add new causes of action, including breach of contract, breach of fiduciary duties, and breach of good faith and fair dealing seeking actual damages, punitive damages, prejudgment interest and attorneys' fees and costs where initial complaint filed with chancery court only requested equitable relief).

Not only does Almond fail to cite the standard for deciding a motion to amend in her half-page motion, she fails to make any effort to show how she meets the standard. On that basis alone, Almond's Motion for Leave to Amend should be denied. In any event, justice does not require the Court to give Almond leave in this instance because Almond's proposed amendments are futile and would change the nature of the case from a case in equity to an action at law. In addition, Plaintiffs have brought this motion in bad faith and Defendants would suffer undue prejudice if the Court allowed Almond's proposed Amended Complaint. Consequently, justice requires that Almond's Motion be denied.

**B. Almond's Proposed Amendment is Futile**

**i. Plaintiff Seeks Leave to Amend Complaint to Add Tort Claims without Compliance with MTCA**

It is apparent from the pleadings as well as the comments of Almond's counsel at the May 13 hearing that the true nature of their case is much more than a simple request for accounting. The Mississippi Tort Claims Act ("MTCA") provides the exclusive remedy against a governmental entity and its employees for acts or omissions which give rise to a suit. *McCoy v. City of Florence*, 949 So. 2d 69, 67 (Miss. Ct. App. 2006) (quoting *State of Williams v. City of Jackson*, 844 So. 2d 1161, 1164 (Miss. 2003). See also *Lang v. Bay St. Louis/Waveland School District*, 764 So. 2d 1234, 1236 (Miss. 1999). Claims against a governmental entity and its employees can be brought outside of the Act but those actions are limited to requests for declaratory relief. *Fordice v. Thomas*, 649 So. 2d 835 (Miss. 1995). However, those claims are not the ones that Almond attempts to assert in her Second Amended Complaint.

There is no question that each of the Singing River Defendants are either a political subdivision of the State, employees of a political subdivision, or public servants. *See Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199 (Miss. 1999). Although the proposed Amended Complaint includes the self-serving proclamation that no tort is alleged (PAC at ¶ 28), Almond's pronouncement is contradicted by her own pleading. The proposed Amended Complaint purports to include causes of action based upon fraud, conspiracy and breach of the duty of loyalty. Almond even goes so far as to cite the Restatement of Torts in the very pleading in which she contends no tort is alleged. (PAC at p. 30). The Mississippi Supreme Court has held that the MTCA applies not only to what might be considered traditional torts but, given the statutory language its intent, the Act grants immunity for breach of an implied term or condition of a contract as well. *City of Jackson v. Estate of Stewart, ex rel. Womack*, 908 So. 2d 703 (Miss. 2005) Miss. Code Ann. § 11-46-3 (Rev. 2002 and Supp. 2014), specifically provides that the State and its political subdivisions "are not now, have never been and shall not be liable, and are... immune from a suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any... contract..."

Under Section 11-46-9, a governmental entity and its employees acting within the course and scope of their employment shall not be liable for any claim based upon an act or omission enumerated in the statute. Subsection (d) provides that such governmental entity or employees shall not be liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function." Almond does not even allege that any of the actions by the individual defendants named or who they propose to name were committed other than in the course and scope of their employment and as a part of their duties. Section 11-46-5 (3) states that there shall be a rebuttable presumption under the Act that any act or omission of an employee committed within the time and at the place of their employment is within the course and scope of that employment.

The immunity granted to political subdivisions and their employees constitutes an “immunity from suit rather than a mere defense to liability.” *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (citing *Mitchell v. Forsight*, 472 US 511 (1985) (emphasis added)). In *McClendon* the Court explained that the defense is intended to give government officials a right not merely to avoid standing trial but also the right to avoid the burdens of pretrial matters such as discovery as inquiries of this kind can be particularly disruptive. 305 F.3d at 323 (citations omitted).

To the extent that Almond seeks leave of court to assert claims against the Singing River Defendants for conspiracy, fraud or breach of fiduciary duty, her motion should be denied on the grounds that the amendments would be futile.

As previously set forth, the proposed causes of action sound in tort not equity. Mississippi law is clear that a tort action against a political subdivision or its employees must be asserted under the MTCA. Miss. Code Ann. § 11-46-7(1). The MTCA requires compliance with the Act’s pre-suit notice requirements. Specifically, the MTCA provides that “at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.” Miss. Code Ann. § 11-46-11(1). Almond has fully failed to comply with Section 11-46-11(1), and therefore her proposed Amended Complaint, to the extent the additional claims would be considered claims governed by the MTCA, would be subject to immediate dismissal. *See e.g., Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 820 (Miss. 2006) (holding that failure to comply with ninety-day waiting period under the MTCA requires dismissal of complaint.)

Furthermore, a chancery court does not have subject matter jurisdiction over MTCA suits. *See City of Ridgeland v. Fowler*, 846 So. 2d 210 (Miss. 2003) (en banc); *Lawrence Cty. Sch. Dist. v. Brister*, 823 So. 2d 459 (Miss. 2001). Accordingly, the proposed amended claims are futile inasmuch as they would be subject to a motion for dismissal under Miss. R. Civ. P. 12(b)(1).

The Supreme Court's opinion in *City of Ridgeland* is particularly instructive. In *City of Ridgeland*, the plaintiffs filed suit in chancery court against the City following a collision with a motor vehicle that was being pursued by two Ridgeland police officers. The *Ridgeland* plaintiffs sought remedies both at law and in equity including damages, a temporary restraining order, an inventory and accounting, and injunctive relief. *City of Ridgeland*, 846 So. 2d at 211-212. The City sought dismissal of the lawsuit based upon lack of subject matter jurisdiction which was denied.

On appeal, the Supreme Court held that the chancery court lacked jurisdiction. Although the *Ridgeland* plaintiffs pled equitable remedies in their Complaint, the Supreme Court noted that the requests for a restraining order and injunction were abandoned early on. Turning to the *Ridgeland* plaintiff's assertion that an accounting was necessary, the Supreme Court stated that "any accounting which might be required is easily developed during discovery in circuit court." *Id.* at 214 Therefore, the Court ruled that "[c]ircuit court is the proper court for a tort claims act case," further stating that "not only is it proper, the [circuit court] is the only court of jurisdiction . . . ." *Id.* (emphasis in original).

Turning once again to the case at bar, Almond has chosen the same path traveled by the plaintiffs in *City of Ridgeland* by asserting various tort claims against the Singing River Defendants under the guise of an action in equity. However, these causes of action sound in tort. By disavowing monetary damages and instead requesting an accounting, the proposed Amended Complaint is truthfully nothing more than a guileful attempt to improperly expand chancery jurisdiction over claims that fall under the MTCA. The Supreme Court has made clear that such actions are impermissible and invariably subject to dismissal. Therefore the Court should deny Almond's proposed amendments as futile.

**ii. Plaintiff Seeks Leave to Amend Complaint to Add Claims Subject to Dismissal Under 12(b)(6)**

Even if Almond had followed the procedural proscriptions of Mississippi Rule of Civil Procedure 15 and the MTCA, her request to amend should be denied because her requested amendments are baseless and futile. The claims Almond seeks to add are all subject to dismissal under Mississippi Rule of Civil Procedure 12(b)(6), thus, adding them to this cause of action will only unnecessarily delay adjudication of Almond's claims, and the claims of other plan participants<sup>2</sup>.

Mississippi Rule of Civil Procedure 8 sets forth the standard for pleadings in Mississippi courts. As a notice pleading state, Mississippi courts require very little to set forth claims against defendants: all that is required is that the complaint include a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for the relief to which the plaintiff deems she is entitled. Miss. R. Civ. P. 8(a). The claim must be stated in a manner that is sufficient to provide notice to the defendant of the claim and the ground upon which it is based. *In re Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295 (Miss. 2000). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice [...]" at the pleading stage. *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427 (Miss. 2007).

Each of Almond's claims in the proposed Amended Complaint fail to meet these basic pleading standards. Thus, all are immediately subject to dismissal under Mississippi Rule of Civil Procedure 12(b)(6). Permitting Almond to amend her Complaint to add these claims would be futile.

**(a) Almond's proposed Civil Conspiracy claim is futile**

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<sup>2</sup> On May 12, 2015, the Court Ordered this case should continue to be consolidated for discovery purposes with seven other matters pending in this Court. Almond's proposed amendment will necessarily delay the progression of the other seven suits and hurt not only the System but this sideshow will delay a resolution for the retirees and Plan participants. Not only will the proposed claims be futile, granting this motion to amend will sanction the outrageous conduct and complete lack of diligence shown by Almond in filing these six specious claims. Almond's counsel's conduct is especially galling given it is directly contradictory to their representations to the Court. On May 13, 2015, Mr. Denham assured the Court that the amended pleading would only add new parties. (Exhibit A, May 13, 2015 Hearing Transcript 32:18-22) He did not mention that it would add six entirely new claims. (*Id.*). Mr. Denham assured the Court the proposed amendment "won't in any way affect discovery in this matter [...]" (*Id.* at 33:6-9).



Almond seeks to add a civil conspiracy claim against SRHS' Chief Executive Officer ("CEO"), Kevin Holland, unnamed members of SRHS' Board of Trustees, SRHS' former counsel, Roy Williams, Williams' entire law firm (Dogan & Wilkinson) and other unnamed defendants. (Proposed Amended Complaint ("PAC"), Count II, p. 29). Not only is suing opposing counsel a rare occurrence (and one clearly designed to manufacture a conflict of interest between SRHS and its counsel), Almond fails to plead any facts to support any alleged conspiracy among these defendants. In one factually devoid sentence, Almond merely states the civil conspiracy defendants "conspired to cease contributions to the Plan and later to terminate the Plan." (PAC at p. 29).

This bare allegation fails to set forth the basic elements of a civil conspiracy claim. The elements needed to prove conspiracy under Mississippi law are: "(1) two or more persons or corporations; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result." *Gallagher Bassett Servs. v. Jeffcoat*, 887 So. 2d 777, 786 (Miss. 2004) (finding trial court erred in denying defendants' motion for judgment notwithstanding the verdict on issue of civil conspiracy where there was no evidence of any combination, agreement or damages). In other words, to allege a civil conspiracy, a plaintiff must allege two or more persons conspired for the purpose of accomplishing an unlawful purpose. *Cook v. Wallot*, No. 2011-CA-01056-COA, 2013 WL 1883533, \*9-10 (affirming dismissal of civil conspiracy claim where plaintiff failed to allege any set of facts upon which any agreement of the defendant to accomplish an unlawful purpose may be found). Civil conspiracy allegations, like allegations of fraud, must be plead with specificity. *State Indus., Inc. v. Hodges*, 919 So. 2d 943, 946 (Miss. 2006).

Almond's proposed Amended Complaint simply alleges that certain defendants collectively determined SRHS would no longer contribute to the pension plan (PAC ¶ 30, 61) and that other defendants later voted to terminate the pension plan (PAC ¶ 34). These mere allegations

are not supported by any facts sufficient to provide a basis for an alleged conspiracy claim. Additionally, in pleading that there was a civil conspiracy to halt contributions to the Plan then terminate the Plan, Almond cites to sections of the Plan that actually permit such termination. (PAC ¶ 36). Thus, she has plead herself out of a claim of civil conspiracy by specifically negating element two - that the conspiracy was to commit an unlawful act.<sup>3</sup>

Because Almond has failed to adequately plead her civil conspiracy claim, it will be subject to immediate dismissal if the Court grants Almond's Motion to Amend. *See Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 432 (Miss. 2007) (a plaintiff must set forth factual allegations that support each element of a claim, otherwise the claim is subject to dismissal at the outset).<sup>4</sup> Consequently, Almond's proposed amendment to add this claim is futile.

**(b) Almond's fraud claim is futile**

Most egregiously, Almond pleads a fraud count but fails to specify even the most basic of information: the parties involved in the fraud. Almond merely states "the Defendants acted..." fraudulently but does not state specifically which defendants acted fraudulently, the fraudulent acts they committed, when such fraudulent acts occurred or any other specific nature of the fraud. (PAC at p. 30). This is wholly insufficient to plead a fraud claim under Mississippi law.

The elements of fraud under Mississippi law are lengthy, and must be plead with specificity. Miss. R. Civ. P. 9(b). The essential elements include: "(1) a representation, (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his

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<sup>3</sup> Termination by the Plan administrator is specifically allowed by the Plan. (Exhibit B, Article XI). Almond is left with, at best, a conspiracy to commit a lawful act.

<sup>4</sup> In addition, Almond fails to show why the conspiracy claim is not subject to immediate dismissal for failure to acknowledge that an entity (here SRHS) cannot as a matter of law conspire with its officers and agents (i.e. Defendant Kevin Holland and proposed defendants Lee Bond and Roy Williams). It takes two separate persons or entities to have a conspiracy under Mississippi law. *Gallagher Bassett Servs*, 887 So. 2d at 786. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Saucier v. Coldwell Banker JME Realty*, 644 F. Supp. 2d 769, 784 (S.D. Miss. 2007) (citations omitted).

consequent and proximate injury.” *In re Estate of Law*, 869 So. 2d 1027, 1029 (Miss. 2004).

Without doubt, Almond has not even come close to pleading these elements<sup>5</sup>.

Almond groups all 25 defendants together in her proposed Amended Complaint and asserts general allegations against them collectively to support her fraud claim. This is impermissible under Mississippi law. The plaintiffs in *Howard v. Estate of Harper ex rel. Harper*, asserted similar allegations, that the collective defendants made misrepresentations to the plaintiffs instead of identifying each defendant who participated in the fraud specifically. 947 So. 2d 854, 861 (Miss. 2006). In that case, the Mississippi Supreme Court determined the plaintiffs’ failure to specify the identity of each defendant who participated in the fraud and the date and locations of the allegedly fraudulent statements was fatal to their pleading under Rule 9(b)). *Id.* Likewise, Almond’s failure to specify details about the alleged fraud here, including which defendants participated in the alleged fraud, and what was actually misrepresented by whom, is fatal to her proposed Amended Complaint.

When multiple claims are asserted against multiple defendants, the complaint must include the name of the defendant against whom each claim is asserted so defense counsel may, at a minimum, identify each defendant the plaintiff claims to sue and the alleged harm committed by specific defendants. *3M Co. v. Glass*, 917 So. 2d 90, 92 (Miss. 2005). In other words, “[c]omplaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action.” *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 494 (Miss. 2004). That is precisely what Almond is doing here. Almond’s Motion for Leave to Amend should be denied without prejudice and discovery should go forward. If Almond later has evidence of any of these inflammatory allegations leveled against a group of 25

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<sup>5</sup> Almond also labels this claim as one for “fraudulent concealment” and one for conspiracy to conceal. Neither of those labels changes the futility of her proposed Count IV. Fraudulent concealment requires allegations that an affirmative act was done to prevent discovery of a claim, and that plaintiff could not discover the claim because of that affirmative act. *Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783, 790 (Miss. 2005). Likewise, the elements for conspiracy to conceal incorporate the elements for civil conspiracy, which Almond fails to properly allege.

defendants, Almond may seek to amend at that time. Consequently, the proposed amendment to add this claim is futile.

**(c) Almond's proposed RICO claim is futile**

The sum total of Almond's allegations in support of her Mississippi Racketeer Influenced and Corrupt Organizations ("RICO") claim is that some unnamed defendants acted in concert to engage in racketeering activities to divert pension funds from the plan. (PAC, Count VI, p. 31). Almond alleges no specific facts in support of this claim. She does not even allege which defendants allegedly acted in concert with one another, or state which defendants are the target of this claim. (Though, SRHS presumes that the count is not asserted against all defendants since she specifically pleads that only some defendants engaged in such nefarious activities). Just as Almond fails to allege specific facts in support of her conspiracy claim, she likewise provides no factual basis to support a RICO claim based on that alleged conspiracy.

To plead a RICO claim, Almond must, at a minimum, allege: (1) a person engaged; (2) in a pattern of racketeering activity; (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Brown v. Prot. Life Ins. Co.*, 353 F.3d 405, 407 (5th Cir. 2003) (stating the elements for a federal RICO claim, cited here as persuasive authority because no Mississippi court has set forth the elements for a cause of action under the Mississippi RICO statute). A pattern of racketeering requires at least two racketeering acts, and a demonstration that the actions pose the threat of continued criminal activity. *Id.*

At no point in her proposed Amended Complaint does Almond allege that any action taken by any defendant is criminal; let alone that any defendant engaged in at least two criminal acts, and that those acts were sufficient to pose the threat of continued criminal activity. Thus, Almond fails to state a claim under RICO against any defendant upon which relief may be granted. Allowing Almond to amend her Complaint to add a RICO claim would be futile.

**(d) Almond's proposed Breach of Fiduciary Duty Claims are likewise futile**

Almond alleges all 25 proposed defendants breached certain, unnamed fiduciary duties to her. (PAC, Counts III and V). To plead this claim, Almond must, at a minimum, allege: (1) a defendant owed her a duty; (2) that defendant breached that duty; and (3) that defendant's breach of that duty was the cause of her damages. *Callicutt v. Prof. Servs. of Potts Camp, Inc.*, 974 So. 2d 216, 221 (Miss. 2007) (defendant did not owe any fiduciary duty to plaintiff, so no breach of duty alleged). *See also Victory Lane Prods., LLC v. Paul Hastings, Janofsky & Walker, LLP*, 409 F. Supp. 2d 773, 779 (S.D. Miss. 2006) (breach of fiduciary duty claim falls under duty of loyalty category).

Almond fails to allege how so many different defendants, each with different relationships (some with no relationship whatsoever) with Almond, owed her fiduciary duties. Thus, she has wholly failed to allege that any duty was owed to her, let alone that any such duty was breached.

These claims are particularly problematic as it applies to proposed Defendant Lee Bond ("Bond"). Bond became SRHS' CFO in approximately March 2014. Almond fails to plead information sufficient to demonstrate how Bond, as SRHS' CFO, may owe a fiduciary duty to Almond, a former SRHS employee, Almond also fails to demonstrate Bond's connection to the pension plan.

**(e) Almond's proposed Breach of Contract Claim is futile**

Almond's proposed breach of contract claim is premised on the misguided notion that SRHS was legally required to fund its pension plan at specific levels. (PAC, Count I, pp. 28-29). This claim is based solely on the allegation that multiple unnamed defendants breached the Plan by not making the "mandated and contracted for matching payments into Plaintiff's retirement account and eventually stopped paying the mandated matching payments, which were required to be paid under contract and by law..." (PAC ¶ 31). The Plan has no such requirement and, in fact,

the employer contributions to the plan are voluntary and not “mandated” by law.<sup>6</sup> As such, and for other defects, Plaintiff’s Motion to Amend to add a breach of contract claim is futile.

**C. Almond’s Amendment should be denied because of bad faith and because all other parties would suffer undue prejudice if the Court allowed the amendment**

Notwithstanding its procedural deficiencies, Almond’s proposed amendment is prejudicial to SRHS, and all other parties in the consolidated cases. This Court has the discretion to deny Almond’s Motion to Amend if it finds, as is present here, Almond has failed to carry her burden of demonstrating that justice requires the amendment. Miss. R. Civ. P. 15(a). This Court can deny Almond’s Motion if it finds Almond seeks the amendment in bad faith, with a dilatory motive, or if Defendants will be prejudiced by the amendment. Justice clearly does not require an amendment made in bad faith, with dilatory motive, and with an aim to prejudice Defendants. Each of these bases support denial of Almond’s Motion to Amend.

The proposed Amended Complaint does not seek to add one claim or one party. Nor does it clarify factual allegations to aid in the Court’s resolution of this matter. Rather, it more than doubles the number of defendants in the case – raising the total from 11 to 25.

The timing of Almond’s amendment is, at best, suspect, and, at worst, dilatory. Almond’s counsel attended the hearing in this Court on May 12-13, 2015. During that hearing, Almond’s counsel watched SRHS agree to expedited discovery<sup>7</sup>. Knowing SRHS’ deadline to produce significant discovery, including written responses to Almond’s 92 document requests, Almond’s

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<sup>6</sup> The Plan requires SRHS to contribute an amount “from time to time [...] to provide the benefits of [the] Plan.” (Exhibit B, Plan § 9.03). The Plan language does not require SRHS to contribute a pre-determined amount, on a specified schedule, or with identifiable funds. SRHS’ obligation to contribute to the Plan “from time to time” did not create a contractual obligation between SRHS to contribute to the Plan. *See, e.g., Trustees of the Bricklayers & Allied Craftworkers Local 13 Defined Contrib. Pension Trust v. Granite Works, Inc.*, No. 2:10-cv-00767, 2011 WL 2158088, \*3 (D. Nev. July 26, 2011) (plan document that simply stated that employer would “contribute” to plan did not mean that unpaid employer contributions were trust assets).

<sup>7</sup> Almond avoids attempts to streamline the litigation by even agreeing to the most routine of requests – refusing to return phone calls seeking agreement on a standard protective order that every other party in the case acknowledges should be signed, so that documents from multiple parties can be produced as discovery. This type of conduct only slows down the cases and delays a resolution for the retirees and Plan participants.

counsel refused to meet and confer with SRHS' counsel regarding the scope of that discovery, then immediately sandbagged SRHS and the Court by filing a Motion to amend the Complaint, which must be opposed within the same timeframe as SRHS' expedited discovery.

After many weeks of thinly-veiled threats on Facebook and in other media, Almond's counsel unloaded the promised bombshell - a factually devoid smear campaign against two dozen individuals and entities, most of whom were not even associated with SRHS when the alleged bad acts occurred. For instance, Bond is lumped into several very serious claims for fraud, conspiracy and racketeering, without even one allegation of fact justifying his inclusion in this case. Giving new meaning to the adage "no good deed goes unpunished," since taking over as CFO, Bond has endeavored tirelessly to be transparent, collaborative and a part of the pension solution. You would never know this from the proposed Amended Complaint though, which (incorrectly) alleges Bond: decided not to fund the pension in 2009 (years before he arrived) (PAC ¶ 30), met with bond holders regarding the pension plan (PAC ¶ 33); terminated the pension plan (PAC ¶ 64), and failed to force third-parties to utilize generally accepted accounting and auditing standards (PAC ¶ 64).

Had Almond's counsel done some modicum of diligence, they would know that Bond did not join SRHS until March 2013, and did not become CFO at SRHS until April 2014. Thus, he could not have been involved in the auditors using alleged improper accounting principles (years before he arrived), or when the (unspecified) parties hatched the alleged conspiracy to not fund the pension plan. Rather than wait to amend the Complaint until discovery shows Bond (or others) had any involvement in the events leading up to the pension underfunding, Almond's counsel levels these serious charges against Bond in a "shoot first, ask questions later" fashion. Such conduct is an attempt to harass persons who had no involvement in the decisions related to the Plan. This Court has the authority and discretion to deny the far-fetched amendment and require Almond's counsel to come back and seek amendment when they actually have proof of these serious charges. *See, e.g., Harold's Auto Parts*, 889 So. 2d at 494 ("[c]omplaints should not be

filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action"). Almond carries the burden of showing that amendment is proper and the instant motion and proposed complaint woefully fails to meet the burden.

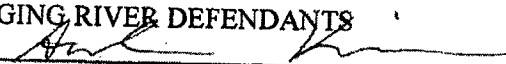
### III. CONCLUSION


Almond's Motion to Amend is procedurally deficient and should be denied on that basis alone. Even if it were not procedurally deficient, the amendment sought is without basis and futile, such that it should not be permitted. Furthermore, Almond's proposed amendment is prejudicial to all other parties in the consolidated actions and should be denied for this reason as well.

WHEREFORE, PREMISES CONSIDERED, SRHS respectfully requests the Court to deny Almond's Motion to Amend Complaint and enter such other and further relief as the Court deems appropriate. In the alternative, if the Court is inclined to permit an amended complaint, SRHS respectfully requests the Court direct Almond to file a new amended complaint that does not include inaccurate factual allegations against Lee Bond.

Respectfully submitted, this the 26th day of May, 2015.

SINGING RIVER DEFENDANTS

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## CERTIFICATE OF SERVICE

I, Fredrick B. Feeney, II, Counsel for Singing River Health System, do hereby certify that I have this day served via email and regular mail, postage prepaid, a true and correct copy of the above Response in Opposition to Motion for Leave to Amend Complaint and First Amended Complaint for Discovery and Accounting to the following:

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This the 26th day of May, 2015.



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# EXHIBIT A

1 IN THE CHANCERY COURT OF JACKSON COUNTY,  
MISSISSIPPI  
2  
3 CYNTHIA N. ALMOND COMPLAINANT  
4 VERSUS CIVIL ACTION NO. 2014-2653-NH  
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS  
A/K/A SINGING RIVER HOSPITAL SYSTEM;  
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;  
7 SINGING RIVER HEALTH SERVICES FOUNDATION;  
8 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT  
FUND, INC.;  
9 TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION;  
10 JOHN DOE ACTUARIES A, B, OR C; AND  
11 JOHN DOE ACCOUNTING FIRM A, B, OR C; and  
12 MICHAEL HEIDELBERG, Individually and as a  
Member of the Board of Trustees,  
13 MICHAEL TOLLESON, Individually and as a Member  
of the Board of Trustees,  
14 ALLEN CRONIER, Individually and as a Member of  
the Board of Trustees,  
15 TOMMY LEONARD, Individually and as a Member of  
the Board of Trustees,  
16 LAWRENCE COSPER, Individually and as a Member  
of the Board of Trustees,  
17 MORRIS STRICKLAND, Individually and as a Member  
of the Board of Trustees,  
18 IRA POLK, Individually and as a Member of the  
Board of Trustees,  
19 STEPHEN NUNENMACHER, M.D., Individually and as  
a Member of the Board of Trustees,  
20 HUGO QUINTANA, M.D., Individually and as a  
Member of the Board of Trustees,  
21 KEVIN HOLLAND, Individually and in his Official  
Capacity  
22  
23 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
24 Held before the Honorable L. Breland  
Hilburn on May 12, 2015 at Chancery Court  
Of Jackson County, Mississippi.  
25 REPORTED BY:  
CRYSTAL LYNN MORRIS, CSR #1704

CRYSTAL LYNN MORRIS, CSR

2  
IN THE CHANCERY COURT OF JACKSON COUNTY,  
MISSISSIPPI

3 MAURY THOMPSON COMPLAINANT  
4 VERSUS CIVIL ACTION NO. 2014-2695-NH  
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS  
A/K/A SINGING RIVER HOSPITAL SYSTEM;  
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;  
7 SINGING RIVER HEALTH SERVICES FOUNDATION;  
8 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT  
FUND, INC.;  
9 TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION;  
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11 JOHN DOE ACCOUNTING FIRM A, B, OR C; and  
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15 TOMMY LEONARD, Individually and as a Member of  
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16 LAWRENCE COSPER, Individually and as a Member  
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20 HUGO QUINTANA, M.D., Individually and as a  
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21 KEVIN HOLLAND, Individually and in his Official  
Capacity

CRYSTAL LYNN MORRIS, CSR

3  
1 IN THE CHANCERY COURT OF JACKSON COUNTY,  
MISSISSIPPI

2  
3 HOWARD BOSARGE COMPLAINANT  
4 VERSUS CIVIL ACTION NO. 2014-2729-NH  
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS  
A/K/A SINGING RIVER HOSPITAL SYSTEM;  
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;  
7 SINGING RIVER HEALTH SERVICES FOUNDATION;  
8 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT  
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CRYSTAL LYNN MORRIS, CSR

4  
1 IN THE CHANCERY COURT OF JACKSON COUNTY,  
MISSISSIPPI

2  
3 KITTY PATRICIA AGUILAR COMPLAINANT  
4 VERSUS CIVIL ACTION NO. 2014-2752-NH  
5 SINGING RIVER HEALTH SYSTEM, DEFENDANTS  
A/K/A SINGING RIVER HOSPITAL SYSTEM;  
6 SINGING RIVER HOSPITAL SYSTEM FOUNDATION, INC.;  
7 SINGING RIVER HEALTH SERVICES FOUNDATION;  
8 SINGING RIVER HOSPITAL SYSTEM EMPLOYEE BENEFIT  
FUND, INC.;  
9 TRANSAMERICA RETIREMENT SOLUTIONS CORPORATION;  
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11 JOHN DOE ACCOUNTING FIRM A, B, OR C; and  
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1 used them, but I want the documents. I  
2 can't stress to you how strongly I feel  
3 about this.

4 Again, the pot is being emptied  
5 and nothing is going back in it. And all  
6 this time they've fought since we filed  
7 the discovery in December they have not  
8 produced one single document. There is  
9 going to be a proposal in an agreed stay  
10 order that we have had no input into  
11 whatsoever, Harvey and I, in our lawsuit.  
12 It says "Nothing shall prohibit any party  
13 from interfering in implementing any  
14 settlement reached through mediation or  
15 supervising from litigating any  
16 settlement reached through mediation or  
17 negotiation including said federal  
18 litigation regarding the pension plan  
19 providing party and these suits are given  
20 notice in such mediation to participate".

21 We are not in federal court on  
22 purpose. We came to this court to a  
23 state judge to get justice for state  
24 people in a state matter and we were  
25 moved six times by these people to  
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1 federal court wrongfully.

2 So I just want to predicate by  
3 telling the Court we don't agree to that.  
4 We ought to be bound by mediation and we  
5 agree that you ought to and any attempt  
6 to settle this matter ought to have to  
7 come through you for settlement where  
8 this state matter is proceeding. So that  
9 is just to let you know the way things  
10 stand.

11 THE COURT: Yes, sir. I certainly  
12 would expect all the Plaintiffs' lawyers  
13 to agree to anything that is presented to  
14 the Court representing the Plaintiffs  
15 posturing in any of these issues.

16 MR. DENHAM: Yes, sir. They are  
17 talking about a mediation in federal  
18 court, which we were neither privy nor  
19 had any input nor are we interested in.  
20 We are here in state court.

21 THE COURT: That would be something  
22 you would need to take up with the  
23 federal judge.

24 MR. DENHAM: If I do I would be  
25 entering an appearance and he just let us  
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1 out of 6 cases over there and I don't  
2 want to go running back in.

3 MR. REEVES: Just a point of  
4 clarification, I don't care about what  
5 was entered but all it says it invites  
6 everyone to participate if they want to.  
7 Nobody has to.

8 THE COURT: Well, in 10 days we are  
9 going to produce those documents to the  
10 Plaintiffs.

11 MS. DUVALL: Correct, Your Honor. We  
12 will produce within 10 days and we  
13 anticipate there may be further  
14 discovery.

15 THE COURT: And I think it would be a  
16 good idea for us to set a date for us to  
17 reconvene and for the Court to take up  
18 what additional issues would be generated  
19 by after you got a chance to review those  
20 documents and/or if for no other reason  
21 just have a meeting for a status report  
22 for the Court.

23 So I would like for us to have  
24 an agreed date for us to reconvene here  
25 before we leave today. I would say  
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1 within 30 days would be good.

2 MR. REEVES: Your Honor, we in the  
3 draft scheduling order we have found it  
4 helpful in other cases where you have a  
5 lot of lawyers and parties to keep the  
6 case moving we laid out specific dates.  
7 I don't know if they are clear on my  
8 calendar or anybody else's, but it is  
9 productive to by every 30 days to have a  
10 status conference where the Court is here  
11 if anybody wants to bring a motion they  
12 can. If they don't have a motion or  
13 don't want to attend they don't have to.

14 THE COURT: Tell me that.

15 MR. REEVES: I encourage the Court to  
16 set them 30 days apart and they don't lay  
17 out for 30, 60, 90 days or more.

18 MR. DENHAM: Your Honor, I want to go  
19 on the record so you will know, I am  
20 going to file today a motion to allow us  
21 to amend our pleadings to add other  
22 parties. There won't be any question  
23 then of whether agreements between  
24 parties that have any sort of  
25 significance because they are all  
CRYSTAL LYNN MORRIS, CSR

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