EXHIBIT 1E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN W. GRIFFITHS, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	Civil Action
v.	:	No. 15-cv-13022-NMG
AVIVA LONDON ASSIGNMENT CORPORATION, AVIVA LIFE INSURANCE COMPANY, AVIVA INTERNATIONAL INSURANCE LTD, f/k/a CGU INTERNATIONAL INSURANCE, plc, ATHENE HOLDING, LTD, ATHENE LONDON ASSIGNMENT CORPORATION and ATHENE ANNUITY AND LIFE COMPANY,	:	
Defendants.	:	

DEFENDANT AVIVA INTERNATIONAL INSURANCE LTD'S (FORMERLY CGU INTERNATIONAL INSURANCE, PLC) MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO A FILE SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendant Aviva International Insurance Ltd (formerly CGU International Insurance, plc) ("CGU") respectfully submits this opposition to Plaintiff's Motion For Leave To File A Second Amended Complaint (the "Motion").

Plaintiff John Griffiths, a resident of the State of Hawaii at all relevant times, brings this motion for leave to add a new claim under the Massachusetts General Laws Chapter 93A ("Chapter 93A") against all Defendants (i) almost three years after he learned the factual underpinnings of his proposed additional claim, (ii) more than two years after he commenced this putative class action, (iii) more than one year after CGU produced (in a 112-page document production) the documents that effected the corporate transaction about which Griffiths complains, (iv) more than three months after fact discovery closed (after having been extended twice), and (v) nearly one month after serving his motion for class certification. To say that Griffiths's proposed amendment comes at the eleventh hour would be an understatement.

Griffiths's Motion should be denied for the following three reasons, each of which is an independently sufficient basis to deny the requested relief.

First, Griffiths's claim is futile as a matter of law. This Court has expressly held that an out-of-state resident such as Griffiths cannot bring a claim under Massachusetts Chapter 93A. See S. States Police Benev. Ass'n, Inc. v. First Choice Armor & Equip., Inc., 241 F.R.D. 85, 93 (D. Mass. 2007) (Gorton, J.). If that alone was not dispositive -- and it is -- Griffiths's proposed Chapter 93A claim fails to allege any conduct by CGU in Massachusetts.

Second, Griffiths fails to provide any persuasive justification for why he waited more than three years to assert a claim based on knowledge and information in his possession since October 2014, and certainly no later than August 2016. Griffiths attempts to explain away this undue delay by arguing that certain June 2017 deposition testimony somehow enlightened

him to the fact that CGU believed it could terminate its obligations under the Capital Maintenance Agreement (the "CMA") at issue in this case. That excuse simply is not believable given the factual record. Griffiths alleges that he was informed that the CMA was terminated in October 2014. The actual documents underlying the amendment and termination of the CMA were produced to Griffiths in August 2016. Only two inferences can reasonably be drawn: either Griffiths was intentionally dilatory to obtain an unfair tactical advantage, or he failed to exercise the reasonable level of diligence expected of litigants, especially those attempting to serve as a class representative. In either case, his delay is not excused in these circumstances.

Third, CGU will suffer significant prejudice by the addition of a new Chapter 93A claim at this late date, which would add for the first time the potential for double or treble damages. As this and other courts have held, it is "highly prejudicial" to presume that CGU would have defended this case in the same manner given that elevated liability. See, e.g., Tele-Connections, Inc. v. Perception Tech. Corp., Civ. A. No. 88-2365-S, 1990 WL 180707, at *2-3 (D. Mass. Nov. 5, 1990).

In sum, the Court should deny Griffiths's Motion given the futility of the proposed new Chapter 93A claim, Griffiths's undue delay in seeking leave to amend, and the prejudice to CGU if this claim is allowed.

RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

More than two years ago, on July 27, 2015, Griffiths, a resident of the State of Hawaii, filed his initial complaint in this putative class action. (Dkt. No. 1 ¶ 9.) All Defendants subsequently filed motions to dismiss. (Dkt. Nos. 20, 29.)

On December 18, 2015 (more than 20 months ago), Griffiths filed his first Amended Class Action Complaint (the "Amended Complaint"). (Dkt. No. 28.) In the Amended Complaint, Griffiths asserts four claims against several corporate defendants, although in many

places Griffiths makes categorical and imprecise allegations against certain groups of those distinct corporate entities. (E.g., id. ¶¶ 71-100.)

The Amended Complaint generally alleges that certain defendants sold "structured settlement annuity policies" that were covered by the CMA between CGU and another defendant (Griffiths and the putative class members are not parties to that agreement). (See id. ¶¶ 2, 37-40. See also Dkt. No. 85-3.) The Amended Complaint alleges that the putative class members purportedly suffered damages because CGU's obligations under the CMA were terminated in connection with the sale of certain corporate entities to Athene Holding, Ltd. in 2013 (the "2013 Athene Transaction"). (E.g., Am. Compl. ¶¶ 4, 6, 42-50, 58.)

Although there are many types and variations of structured settlement annuities, they are generally used in connection with the settlement of a lawsuit (for example, a personal injury lawsuit) to create a tax-exempt stream of future payments. (See Dkt. No. 85-5, at 4.) At a high level, the structured settlement is effected through the purchase of an annuity from a life insurance company (often through a broker) and the subsequent assignment of the obligation to an assignment company. (See id.)[1] CGU is not a life insurance company, is not an assignment company, and is not alleged to have ever sold or purchased any of the structured settlement products at issue in this case.

During the first half of 2016, all Defendants filed answers to the Amended Complaint. (Dkt Nos. 32, 47.)

On August 1, 2016 (more than 13 months ago), CGU served its initial disclosures and simultaneously produced 112 pages of documents that included, among other things, (i) the CMA, (ii) the documents executed in connection with the 2013 Athene Transaction that effected

[1] Although the corporate entities had varying names at different times, all Defendants in this action other than CGU are today ultimately owned by Athene Holding, Ltd.

the amendment and termination of CGU's obligations under the CMA, and (iii) the replacement agreements that provide equivalent (or, indeed, stronger) protections by certain entities owned by defendant Athene Holding, Ltd. Thereafter, the parties conducted extensive discovery.

On May 31, 2017, fact discovery closed. (See Dkt. No. 69.)[2] After fact discovery closed, on June 30, 2017, Griffiths sent the Defendants demand letters pursuant to Chapter 93A. (See Memorandum In Support Of Motion For Leave To File A Second Amended Complaint at 4 (cited as "Br.").) On August 7, 2017, Griffiths served without filing his motion for class certification so that the parties could resolve any confidentiality issues. (Id.) That same day, the Defendants responded to Griffiths's Chapter 93A demand letters. (Id.) On August 11, 2017, Griffiths filed his class certification motion with the Court. (Dkt. No. 84.) Since that time, the Defendants have been working on their oppositions to Griffiths's class certification motion in advance of the October deadline to file oppositions. (See Dkt. No. 96.)

On September 1, 2017, Griffiths filed the instant Motion seeking leave to file a Proposed Second Amended Complaint ("Proposed SAC") to add a new Chapter 93A claim. (Dkt. Nos. 94, 95.) The proposed new Chapter 93A claim is included as Count V and seeks for the first time an award of "double or treble damages." (Dkt. No. 95-2, at 24-30.)

ARGUMENT

Although Federal Rule of Civil Procedure 15(a)(2) states that, as a general proposition, a court should "freely give" leave to amend a complaint before trial "when justice so requires," the First Circuit has expressly held that Rule 15(a)(2) "does not mean . . . that a trial court must mindlessly grant every request for leave to amend." Aponte-Torres v. Univ. of P.R., 445 F.3d 50, 58 (1st Cir. 2006) (affirming district court's denial of plaintiffs' motion for leave to

[2] For the convenience of the parties, two depositions were conducted on June 14 and 15, 2017.

file a second amended complaint reasoning that "busy trial courts, in the responsible exercise of their case management functions, may refuse to allow plaintiffs an endless number of trips to the well"). In particular, the First Circuit has held that leave to amend should be denied where there is "undue delay, bad faith, futility, [or] the absence of due diligence on the movant's part." Palmer v. Champion Mortg., 465 F.3d 24, 30-31 (1st Cir. 2006) (affirming district court's denial of plaintiff's motion for leave to file a second amended complaint).

Consistent with that binding authority, this Court has repeatedly denied motions for leave to file an amended complaint. See, e.g., Raposo v. Garelick Farms, LLC, 288 F.R.D. 8, 10 (D. Mass. 2012) (Gorton, J.) (denying putative class action plaintiffs' motion for leave to file a second amended complaint where "the proposed additional claims are based on information readily available to the plaintiffs at the time they filed their Original Complaint and their First Amended Complaint" and the "plaintiffs have provided no explanation for why they were unable to include those claims . . . or for their undue delay in moving to amend").[3] This Court should reach the same conclusion here and deny Griffiths's belated Motion.

I. GRIFFITHS'S MOTION SHOULD BE DENIED BECAUSE THE PROPOSED CHAPTER 93A CLAIM IS FUTILE, UNDULY DELAYED AND PREJUDICIAL

A. Griffiths's Proposed Chapter 93A Claim Is Futile As A Matter Of Law

Griffiths's proposed Chapter 93A claim is futile as a matter of law for at least two reasons: (1) Griffiths was and is a resident of the State of Hawaii and therefore cannot assert a claim under Massachusetts state law Chapter 93A and (2) the Proposed SAC does not contain

[3] See also Leeper v. Viola, Civ. A. No. 17-10185-NMG, 2017 WL 2837007, at *2 (D. Mass. June 30, 2017) (Gorton, J.) (denying as futile plaintiff's motion for leave to file an amended complaint to add additional claims); Lund v. Henderson, Civ. A. No. 11-11413-NMG, 2014 WL 4071696, at *2 (D. Mass. Aug. 12, 2014) (Gorton, J.) (denying as futile plaintiff's motion for leave to file an amended complaint and noting that plaintiff "offers no justification" for waiting several years to attempt to add a new claim), aff'd, 807 F.3d 6 (1st Cir. 2015).

any allegation that the purported wrongdoing by CGU occurred primarily and substantially within Massachusetts.

When assessing the futility of a motion to amend, the Court "applies the standard for a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)." House of Clean, Inc. v. St. Paul Fire & Marine Ins. Co., 775 F. Supp. 2d 296, 300 (D. Mass. 2011) (Gorton, J) (denying motion to amend complaint to add a Chapter 93A claim against an insurance company on futility grounds where there was "little evidence that [the defendant] engaged in unscrupulous behavior"). To survive a motion to dismiss, a plaintiff's allegations "must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The Court need not, however, accept legal conclusions as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Threadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action. Id. Applying that standard here confirms that Griffiths's proposed Chapter 93A claim is futile.[4]

1. Griffiths, A Hawaii Resident, Cannot Assert A Massachusetts State Law Chapter 93A Claim

Griffiths, a Hawaii resident at all relevant times, cannot as a matter of law bring a Massachusetts state law Chapter 93A claim, either in his individual capacity or on behalf of a proposed nationwide class.[5]

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[4] Griffiths cites seven cases in his Brief, none of which address whether and under what circumstances a court may grant a belated motion for leave to amend a complaint to add a Chapter 93A claim. As such, those cases are inapposite and irrelevant to this analysis.

[5] In a passing footnote, Griffiths conclusorily asserts, without citation to any legal authority, that "[t]here can be no question that Plaintiff, and all members of the class he proposes to represent, have standing to make this [Chapter 93A] claim." (Br. at 6 n.1.) Notwithstanding Griffiths's proclamation, there is, indeed, a question -- and this Court's precedent decidedly answers it against Griffiths. See S. States Police, 241 F.R.D. at 93.

This Court has previously addressed (and rejected) a non-resident putative class plaintiff's attempt to assert a Chapter 93A claim -- a fact undersigned counsel brought to Griffiths's attention prior to the filing of the Motion.[6] In Southern States Police, this Court rejected an attempt by putative class action plaintiffs to assert a Massachusetts state law Chapter 93A claim on behalf of residents of eight different states. 241 F.R.D. at 93. In that case, the plaintiff law enforcement officers and organizations moved to certify a class for alleged violations of Chapter 93A based on conduct related to the sale of body armor. Id. at 87, 93. Defendants opposed certification arguing that the consumer protection laws in those eight states varied considerably, and non-residents of Massachusetts could not assert claims under Chapter 93A. Id. at 93. In its analysis, this Court first stated that "the plaintiffs bear the burden of demonstrating that the laws of different states do not vary significantly." Id. After reviewing the different consumer protection laws, this Court concluded that "variances in the substantive prerequisites of such claims render . . . certification . . . unmanageable and contrary to the fair and efficient adjudication of this matter." Id. As such, this Court declined to certify the plaintiffs' proposed class including residents from eight states and held that (1) "the law of the state in which a plaintiff took action in reliance on a defendant's representations applies" and (2) "because state consumer protection laws are intended to protect consumers . . . the laws of the home states will govern here." Id.[7]

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[6] In his Brief, Griffiths states that he addressed the arguments set forth in CGU's pre-suit response letter "to the extent Plaintiff believes they require a response." (Br. at 4.) It is mysterious why Griffiths's counsel would not address this Court's prior analogous ruling.

[7] Unlike the present case, in Southern States Police, one of the named plaintiffs was a Massachusetts resident (the Lowell, Massachusetts Police Department). 241 F.R.D. at 86. Accordingly, in that case, this Court certified a narrow class limited to only those class members residing in Massachusetts. Id. at 87, 93. Such an approach is not possible here because Griffiths, the sole proposed class representative, is not a Massachusetts resident.

Other decisions by this Court similarly conclude that out-of-state putative class representatives cannot assert a Chapter 93A claim. In Aronstein v. Massachusetts Mutual Life Insurance Co., Civ. A. No. 15-12864-MGM, 2016 WL 1626835, at *5 (D. Mass. Apr. 22, 2016), this Court dismissed a New York resident's purported class action claim under Chapter 93A reasoning that "the balance of factors points to the application of New York consumer protection laws, with the most important fact being that Plaintiff is a consumer in New York." In that case, the New York plaintiff alleged that a Massachusetts insurance company violated Chapter 93A in selling annuity products. Id. at *1. Defendants moved to dismiss the Chapter 93A claim arguing that the substantive law of New York, not Massachusetts, applied. Id. at *5. After determining that the consumer protection laws of Massachusetts and New York are substantively different, this Court held that (i) the plaintiff's residence in New York, purchase of the annuity in New York, New York's regulation of the annuity, and New York's interest in protecting consumers within its borders outweighed (ii) the defendants' domicile in Massachusetts, the creation of the marketing materials in Massachusetts, and Massachusetts's interest in preventing fraud emanating from its borders. Id. at *5-6.[8] As such, this Court dismissed the Chapter 93A claim because "New York consumer protection law provides the more appropriate shield to protect the Plaintiff . . . [and] Chapter 93A does not apply." Id.[9]

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[8] The choice of law factors "that help determine which state's law to apply [are]: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Aronstein, 2016 WL 1626835, at *6.

[9] See also Feingold v. John Hancock Life Ins. Co. (USA), Civ. A. No. 13-10185-JLT, 2013 WL 4495126, at *3 (D. Mass. Aug. 19, 2013) (dismissing Illinois plaintiff's Chapter 93A claim putatively brought on behalf of a class because, among other things, the plaintiff resides in Illinois, the insurance policy was purchased in Illinois, the allegedly deceptive statements were made in Illinois, and therefore Illinois had the "most significant relationship" to the case

This Court should reach the same conclusion here. Griffiths is a Hawaii resident and has been at all relevant times. (Am. Compl. ¶ 9.) The annuity purchased on Griffiths's behalf was purchased in Hawaii. All alleged representations were made to Griffiths and/or his representatives in Hawaii. Any alleged actions taken in reliance on those alleged representations were made in Hawaii. Any alleged harm Griffiths claims he may have suffered occurred in Hawaii. Hawaii has a strong interest in protecting its citizens from alleged consumer protection violations.

In contrast, CGU has no connection to Massachusetts. CGU is a corporation formed under the laws of England and Wales. (Id. ¶ 12.) The CMA at issue was entered into in the United Kingdom and is controlled by English and Welsh law. (See Dkt. No. 85-3 ¶(h).) The Amended Complaint and Proposed SAC do not contain any allegations that CGU did anything in Massachusetts (nor could they in good faith).

On these facts, and consistent with the reasoning in Southern States Police, Aronstein, and Feingold, the consumer protection law of Griffiths's home state, Hawaii, should apply.[10] See S. States Police, 241 F.R.D. at 93; Aronstein, 2016 WL 1626835, at *6; Feingold, 2013 WL 4495126, at *3. As such, Griffiths cannot assert a claim under Chapter 93A. Id.[11]

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requiring that Illinois law -- not Chapter 93A -- "govern[] any violation of consumer protection laws"), aff'd, 753 F.3d 55 (1st Cir. 2014).

[10] The consumer protection laws of Hawaii and Massachusetts are substantively different. See In re Relafen Antitrust Litig., 225 F.R.D. 14, 28 & n.10 (D. Mass. 2004) (excluding Hawaii residents from class action settlement because including them would waive "substantial statutory damages" available under Hawaii's consumer protection statute and noting that "the value of their statutory damages provisions distinguishes the laws of Hawaii . . . from the law of Massachusetts").

[11] If the Motion were allowed -- which it should not be -- the parties would be required to file additional briefing (including a motion to dismiss and revised class certification papers) addressing the new Chapter 93A claim, which almost certainly will require modification of the current pretrial schedule. Among other things, that additional briefing would address this Court's

2. Griffiths Cannot Allege Any Conduct By CGU In Massachusetts As Required To State A Chapter 93A Claim

In his Proposed SAC, Griffiths asserts a Chapter 93A claim under Section 11. (SAC ¶ 105.) This claim fails as a matter of law for several reasons. As a threshold matter, Section 11 applies only to "commercial disputes between business organizations" -- a basic principle of Massachusetts law stated in several of the legal authorities Griffiths cites in his brief. E.g., Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 151 (1979) (cited in Br. at 5). In addition, Griffiths altogether fails to plead facts establishing any conduct whatsoever by CGU in Massachusetts, much less conduct that is unfair and deceptive or that occurred "primarily and substantially within the commonwealth" as required. Chapter 93A, Section 11 states:

> No action shall be brought or maintained under this section unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth.

M.G.L. c. 93A § 11 (emphasis added); see Evergreen Partnering Grp., Inc. v. Pactiv Corp., Civ. A. No. 11-10807-RGS, 2014 WL 304070, at *4 (D. Mass. Jan. 28, 2014) (dismissing Chapter 93A claim where plaintiff's second amended complaint "in over thirty pages and seventy-five paragraphs, barely mentions Massachusetts, and when it does, fails to identify a single deceptive act or practice or 'dominant event' that is alleged to have occurred in Massachusetts").

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prior determination that a class action requiring adjudication of the different consumer protection laws of Arizona, California, Colorado, Florida, Massachusetts, New York, Texas and Washington is "unmanageable and contrary to the fair and efficient adjudication of this matter." See S. States Police, 241 F.R.D. at 87, 93. Here, putative class members reside or resided in many of those states, and many others. (See, e.g., ATH_00009368 (Alabama), ATH_00014667 (Arizona), ATH_00006104 (California), ATH_00013412 (Colorado), ATH_00013083 (Florida), ATH_00007086 (Georgia), ATH_00007016 (Illinois), ATH_00006258 (Kansas), ATH_00008743 (Maine), ATH_00008596 (Maryland), ATH_00016309 (Massachusetts), ATH_00007710 (Michigan), ATH_00011855 (Missouri), ATH_00009150 (Montana), ATH_00010630 (North Carolina), ATH_00008178 (North Dakota), ATH_00006441 (Oregon), ATH_00007498 (Pennsylvania), ATH_00007981(South Dakota), ATH_00019857 (Texas).) If requested by the Court, CGU will seek to submit these confidential policy files under seal.

Here, excluding citations to the Massachusetts General Laws, the Proposed SAC uses the word "Massachusetts" (or its abbreviations) a sum total of four times -- in a 31-page document with 129 paragraphs. (Proposed SAC ¶¶ 36, 39 and 128.) Consequently, it is hardly surprising that the Proposed SAC fails to allege any conduct by CGU in Massachusetts. The absence of such allegations spans the substantive spectrum:

- There is no allegation that there is a contract between CGU, on the one hand, and Griffiths or any putative class member, on the other hand -- in Massachusetts or elsewhere.

- There is no allegation that CGU made any representation to Griffiths or any putative class member in connection with the sale of an annuity -- in Massachusetts or elsewhere.

- There is no allegation that CGU provided marketing materials (or, for that matter, anything) to Griffiths or any putative class member in connection with the sale of an annuity -- in Massachusetts or elsewhere.

It is undisputed that CGU never sold annuities (in Massachusetts or elsewhere) and CGU never disseminated any marketing materials to annuitants or prospective annuitants (in Massachusetts or elsewhere). The limited actions CGU is alleged to have taken are in connection with terminating its obligations under the CMA and the alleged "approval" of marketing materials to be used by another entity occurred an ocean away in the United Kingdom.[12]

[12] Even if that alleged "approval" had occurred in Massachusetts, Griffiths fails to provide any legal authority to support his assertion that approving marketing materials to be used by a different legal entity can serve as the predicate for a Chapter 93A claim. Indeed, Massachusetts law is to the contrary. See Nei v. Bos. Survey Consultants, Inc., 446 N.E.2d 681, 683-84 (Mass. 1983) (affirming dismissal of Chapter 93A claim brought by purchasers of real estate against land surveyor employed by sellers where defendant "had no contractual or business relationship with the plaintiffs" and "made no misstatements to the plaintiffs or to anyone else").

In light of the absence of any allegations of unfair or deceptive conduct by CGU, and crucially no allegations of any conduct by CGU that occurred "primarily and substantially" in Massachusetts, Griffiths's proposed Chapter 93A claim is futile as a matter of law.[13]

B. Griffiths's Unexcused Delay And Lack Of Diligence Bar Him From Adding A New Chapter 93A Claim At This Late Date

It is well-established that "undue delay in moving to amend, even standing alone, may be . . . an adequate reason" to deny a motion for leave to amend. Perez v. Hosp. Damas, Inc., 769 F.3d 800, 802 (1st Cir. 2014) (emphasis added). See also Calderón-Serra v. Wilmington Trust Co., 715 F.3d 14, 20 (1st Cir. 2013) (affirming district court's denial of plaintiff's motion for leave to file a second amended complaint "nearly a year after the commencement of the action" reasoning that "[a]ppreciable delay alone, in the absence of a good reason for it, is enough to justify denying a motion for leave to amend").

Accordingly, courts in this Circuit have consistently held that when "considerable time has elapsed between the filing of the complaint and the motion to amend, the movant has [at the very least] the burden of showing some valid reason for his neglect and delay." Perez, 769 F.3d at 802 (alteration in original). Delays of seven months, fifteen months, and seventeen months between the first filing of the initial complaint and a plaintiff's motion to file an amended complaint -- much shorter time periods than the present case -- have been found to constitute such considerable time, warranting explanation. See Raposo, 288 F.R.D. at 10; Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 52 (1st Cir. 1998); In re Lombardo, 755 F.3d 1, 3

[13] Griffiths's citations to Chapter 176D and 940 Mass. Code Regs. 3.16 do not provide a basis for relief separate from his proposed Chapter 93A claim. See Bingham v. Supervalu, Inc., 806 F.3d 5, 8 n.2 (1st Cir. 2015) ("Chapter 93 provides an express cause of action for persons aggrieved by a violation of Chapter 176D"); Mulder v. Kohl's Dep't Stores, Inc., Civ. A. No. 15-11377-FDS, 2016 WL 393215, at *3 (D. Mass. Feb. 1, 2016) ("[T]here is no private right of action under the Code of Massachusetts Regulations."), aff'd, 865 F.3d 17 (1st Cir. 2017).

(1st Cir. 2014). In "assessing whether delay is undue, a court will take account of what the movant 'knew or should have known and what he did or should have done.'" In re Lombardo, 755 F.3d at 3-4.

Faced with this unambiguous First Circuit precedent, Griffiths anticipatorily attempts to justify his unexcused delay by asserting (incorrectly) that he only recently discovered certain facts at the deposition of a CGU representative, namely that CGU believed that it could amend or effect the termination of the CMA.[14] (See Br. at 2-5.) This assertion is simply not believable given the factual record in this case. Specifically, Griffiths alleges that he learned of the termination of the CMA in October 2014 in a letter he received from an Athene entity. (See Am. Compl. ¶¶ 4, 50.) Both his original complaint and his amended complaint contain allegations to that effect. (See Dkt. 1 ¶¶ 4, 27-29, 32, 36; Am. Compl. ¶¶ 4, 6-7, 49-51.) If that were not enough -- and it is -- the actual documentation effecting both the amendment of the CMA and the acknowledgement of termination of the CMA were produced to Griffiths more than one year ago in August 2016.

Here, Griffiths seeks leave to amend his Amended Complaint approximately one year after receiving the documentation effecting the termination of CGU's obligations under the CMA, more than two years after filing his initial complaint containing allegations concerning the termination of the CMA, and almost three years after learning that the parties had in fact terminated the CMA. It is clear from this record that Griffiths and his counsel were well aware that CGU believed it could -- and in fact did -- terminate its obligations under the CMA.

[14] Suffice it to say, CGU disputes the distorted presentation of that deposition testimony and the selective quotation of discovery materials taken entirely out of context in Griffiths's Brief. A point-by-point refutation of those statements is not, however, necessary for purposes of resolving the instant Motion.

As such, there is no valid reason for Griffiths's "neglect and delay" in seeking to amend his complaint again and no reason to credit his assertion that he only learned of the basis for the claim in a deposition this summer. See In re Lombardo, 755 F.3d at 3-4 (affirming denial of motion for leave to amend where plaintiff "had ample time to seek leave to amend and had no reasonable basis in fact or law for waiting until seventeen months" after filing his original complaint); Raposo, 288 F.R.D. at 10 (denying motion for leave to amend where the information was "readily available to the plaintiffs at the time they filed their Original Complaint and their First Amended Complaint" despite plaintiffs' claim that they learned the relevant information for first time at a recent deposition); Manganaro Corp. v. William A. Berry & Sons, Inc., Civ. A. No. 926714F, 1994 WL 879455, at *2 (Mass. Super. Ct. Jan. 7, 1994) (denying leave to add a Chapter 93A claim because the plaintiff "had sufficient information on which to base [a Chapter 93A claim] within the discovery period," but "waited until after the discovery period was over to seek to add the claim").

C. CGU Will Be Unfairly Prejudiced If The Court Allows Griffiths To Amend His Complaint At This Late Stage In The Litigation

Although the Court may deny the Motion without finding that CGU would suffer any prejudice, in this case CGU will be unfairly prejudiced if the Court were to grant the Motion. See United States ex rel. Hagerty v. Cyberonics, Inc., Civ. A. No. 13-10214-FDS, 2015 WL 7253675, at *4 (D. Mass. Nov. 17, 2015) (denying motion to amend on basis of undue delay and noting that "a separate showing of prejudice is not necessary for the Court to deny a motion to amend on the basis of undue delay, which is inherently prejudicial to the opposing party").

Griffiths's proposed new claim potentially would expose CGU and the other Defendants to treble damages and an award of attorneys' fees. Given the exorbitant damages sum Griffiths is claiming, this vastly increases CGU's potential exposure and prejudices CGU.

This Court has previously held in analogous circumstances that the belated addition of a Chapter 93A claim and its potential "dramatic change in liability" is "highly prejudicial." Tele-Connections, Inc., 1990 WL 180707, at *2-3. In Tele-Connections, this Court denied a motion for leave to add a Chapter 93A claim reasoning that it would be "highly prejudicial to presume that [the defendant] would have defended the case in the same manner, if liability were trebled." Id. See also Manganaro Corp., 1994 WL 879455, at *2 (finding that adding a Chapter 93A claim at a late stage would prejudice the defendant because "such a claim brings with it the potential for treble damages and attorneys' fees and rationally alters any risk assessment previously performed regarding the litigation"). The Court should reach the same conclusion here and deny Griffiths's Motion.

CONCLUSION

For the foregoing reasons, CGU respectfully requests that the Court deny Plaintiff's Motion For Leave To File Second Amended Complaint.

Dated: September 15, 2017
Boston, Massachusetts

Respectfully submitted,

/s/ Christopher G. Clark

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on September 15, 2017.

Dated: September 15, 2017 /s/ Christopher G. Clark
Christopher G. Clark