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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

PATH AMERICA, LLC; PATH AMERICA SNOCO
LLC; PATH AMERICA FARMER'S MARKET, LP;
PATH AMERICA KINGCO LLC; PATH
AMERICA TOWER, LP; PATH TOWER
SEATTLE, LP; POTALA TOWER SEATTLE, LLC;
and LOBSANG DARGEY,

Defendants, and

POTALA SHORELINE, LLC; POTALA VILLAGE
KIRKLAND, LLC; DARGEY DEVELOPMENT,
LLC; DARGEY ENTERPRISES, LLC; and PATH
OTHELLO, LLC.

Relief Defendants.

Civil Action No. C-15-1350-JLR

**SECURITIES AND EXCHANGE
COMMISSION'S MOTION FOR
LEAVE TO FILE SECOND
AMENDED COMPLAINT AND
TO MODIFY ORDER
APPOINTING RECEIVER TO
ADD ADDITIONAL RELIEF
DEFENDANTS**

**NOTE ON MOTION
CALENDAR: MARCH 25, 2016**

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1 The Securities and Exchange Commission (“SEC” or “Commission”) moves to
2 amend its October 2, 2015 First Amended Complaint to file a Second Amended Complaint
3 adding allegations regarding two additional Relief Defendants: Path Farmer’s Market, LLC,
4 and Dargey Holdings, LLC. The Commission also moves to modify the Court’s Order
5 Appointing Receiver (Dkt. No. 88) to add as “Receivership Relief Defendants” these two
6 entities, as well as two current Relief Defendants, Dargey Development, LLC, and Dargey
7 Enterprises, LLC.

8 The Commission’s motion to amend is brought pursuant to Federal Rule of Civil
9 Procedure 15(a)(2) and Local Civil Rule 15. Pursuant to Local Rule 15, attached as Exhibit A
10 is a proposed Second Amended Complaint that shows how it differs from the First Amended
11 Complaint by striking through text to be deleted and highlighting text to be added. Attached
12 as Exhibit B is the Second Amended Complaint in final form.

13 The Commission’s motion to modify the Order Appointing Receiver to add the four
14 entities identified above as “Receivership Relief Defendants” is brought pursuant to Section
15 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b), Section 21(d) of the Securities Act of
16 1934, 15 U.S.C. § 78u(d), and pursuant to the Court’s inherent equitable authority, which
17 empowers the Court to make ancillary orders to effect complete equitable relief in an SEC
18 enforcement matter. The motion is also made in conformity with Federal Rule of Civil
19 Procedure 66 and Local Civil Rule 66.

20 The Commission’s Motion for Leave to File Second Amended Complaint and To
21 Modify Order Appointing Receiver is supported by the attached brief and the accompanying
22 [Proposed] Order.

23 I. INTRODUCTION

24 Information obtained by the SEC from the Receiver, as well as statements by
25 Defendant Lobsang Dargey himself in a recent filing, have revealed additional Dargey-related
26 corporate entities that are implicated in Defendants’ scheme to defraud investors.
27 Accordingly, the Securities and Exchange Commission (“SEC” or “Commission”) is moving
28 to (1) amend the First Amended Complaint to add two more Dargey-related corporate entities

1 as Relief Defendants; and (2) modify the Order Appointing Receiver to add four more
2 Dargey-related entities to the Receivership.

3 On August 24, 2015, the SEC brought this action and sought a temporary restraining
4 order (“TRO”) against Defendant Lobsang Dargey (“Dargey”) and nine corporate entities he
5 controlled: Defendants (1) Path America, LLC; (2) Path America SnoCo, LLC; (3) Path
6 America Farmer’s Market, LP; (4) Path America KingCo, LLC; (5) Path America Tower, LP;
7 (6) Path Tower Seattle, LP; (7) Potala Tower Seattle, LLC; and Relief Defendants (8) Potala
8 Shoreline, LLC, and (9) Potala Village Kirkland, LLC. *See* Complaint (Dkt. No. 1) and Mot.
9 for TRO (Dkt. Nos. 2-7). The TRO against these ten Defendants and Relief Defendants was
10 granted on August 24, 2015. *See* Order (Dkt. No. 9). On August 29, the SEC moved for a
11 preliminary injunction against these same ten entities (*see* Motion for PI (Dkt. No. 10)), and
12 on October 6, 2015, the Court granted the motion and converted the TRO into a preliminary
13 injunction. *See* Order Granting Mot. for PI (Dkt. No. 68)).

14 On September 22, 2015, the SEC moved to appoint a receiver over the nine Dargey-
15 related corporate entities named in the complaint. *See* Motion (Dkt. Nos. 38-41)). On
16 October 22, 2015, the Court granted the motion, appointing a Receiver and dividing these
17 nine Receivership entities into two groups: (1) the “Receivership Defendants,” consisting of
18 the seven corporate Defendants named in the complaint; and (2) the “Receivership Relief
19 Defendants,” consisting of the two corporate entities named as Relief Defendants in the
20 complaint. *See* Order Appointing Receiver (Dkt. No. 88) at 2.

21 In late September 2015, the SEC learned of additional facts that necessitated amending
22 the complaint. Specifically, the TRO required that Defendant Path America provide an
23 accounting (Dkt. No. 9 at 8-9), which was filed on September 21, 2015. Accounting (Dkt.
24 No. 31-32). On October 2, 2015, the SEC filed a First Amended Complaint adding three
25 additional Relief Defendants identified in the Accounting as having inappropriately received
26 investor funds: Dargey Development, LLC; Dargey Enterprises, LLC; and Path Othello, LLC.
27 Unfortunately, the September 21 accounting was far from complete. In particular, the
28 summary of legal entities contained in Exhibit A to the Accounting failed to mention Path

1 Farmer’s Market, LLC and Dargey Holdings, LLC, the two legal entities the SEC now seeks
2 to add as Relief Defendants.

3 The facts in the Receiver’s Initial Report (Dkt. No. 148), as well as Defendant’s own
4 statements in a recent filing described below, indicate the need to include in this case the two
5 additional Relief Defendants, as well as the need to modify the Order Appointing Receiver to
6 add these two entities, and two of the existing Relief Defendants, as “Receivership Relief
7 Defendants.” The SEC’s request is timely, necessary to ensure complete relief, non-
8 prejudicial to Defendants, and narrowly tailored given the Receiver’s identification of “over
9 thirty (30) different active Path America and Dargey Related Entities.” Dkt. No. 148 at 12.
10 Accordingly, the SEC’s motion should be granted.

11 **II. THE COMMISSION’S REQUEST FOR LEAVE TO AMEND IS**
12 **PROPER AND SHOULD BE GRANTED**

13 Under Federal Rule of Civil Procedure 15(a)(2), requests for leave to amend pleadings
14 should be “freely given” when justice requires. FED. R. CIV. PROC. 15(a)(2). As noted by the
15 Supreme Court,

16 If the underlying facts or circumstances relied upon by a
17 plaintiff may be a proper subject of relief, he ought to be
18 afforded an opportunity to test his claim on the merits. In the
19 absence of any apparent or declared reason – such as undue
20 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 amendment, etc.—the
leave sought should, as the rules require, be ‘freely given.’

21 *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quoting FED. R. CIV. PROC. 15(a)(2)).

22 The Ninth Circuit has thus held that “leave to amend, although within the discretion of
23 the trial court, ‘should be guided by the underlying purpose of Rule 15(a) ... which was to
24 facilitate decisions on the merits, rather than on technicalities or pleadings.’” *In re Morris*,
25 363 F.3d 891, 894 (9th Cir. 2004) (quoting *James v. Pfliler*, 269 F.3d 1124, 1126 (9th
26 Cir.2001)). In deciding whether to grant leave to amend, a district court may take into
27 consideration such factors as “bad faith, undue delay, prejudice to the opposing party, futility
28

1 of the amendment, and whether the party has previously amended his pleadings.” *In re*
2 *Morris*, 363 F.3d at 894 (quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)).

3 As set forth in the proposed Second Amended Complaint (attached as Exhibit A), the
4 Commission’s proposed amendments are very limited in scope. The amendments add two
5 Relief Defendants – Path Farmer’s Market, LLC, and Dargey Holdings, LLC. – identify facts
6 regarding those two defendants, and seek relief from these two new defendants under an
7 existing cause of action (the Fourth) applicable to the other Relief Defendants.

8 The SEC’s proposed amendments are necessary to ensure complete relief. Although
9 EB-5 investor funds were the means by which the underlying real estate in both projects was
10 purchased, Dargey arranged for title or ownership to be held in the name of entities that did
11 not pay for the property. Thus, Path Farmer’s Market, LLC is the entity that holds title to the
12 underlying real property for the Farmer’s Market investment project. *See* Report (Dkt. No.
13 148-1) at Ex. C. That property was purchased with funds from defrauded Farmer’s Market
14 EB-5 investors. *See* SEC’s Opp’n to Def’s. Mot. to Modify TRO (Dkt. No. 44) at 4-5. It is
15 important to add as a Relief Defendant the entity that holds title to that property but does not
16 have a bona fide claim to the asset – Path Farmer’s Market, LLC – to ensure complete relief.
17 *See SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (“the lack of a legitimate claim to the
18 funds is the defining element of a nominal defendant”).

19 Similarly, Defendant’s claim that “Dargey Holdings, LLC owns 80% percent of the
20 equity in the Tower Project.” *See* Defs’. Opp. To Receiver’s Mot. For Auth. to Mkt. and Sell
21 Receivership Assets (Dkt. No. 215) at 5. This purported ownership interest is apparently
22 through Dargey Holdings’ ostensible 80% interest in the entity that holds title to the
23 underlying real property for the Potala Tower Project – Potala Tower Seattle, LLC. *See*
24 Report (Dkt. No. 148-1), Ex. C. In any event, the real property for the Potala Tower was
25 purchased with funds from defrauded EB-5 investors. *See* SEC’s Opp’n to Def’s. Mot. to
26 Modify TRO (Dkt. No. 44) at 4-5. It is therefore important to add as a Relief Defendant
27 Dargey Holdings, LLC as it did not provide anything of value in exchange for any “equity” or
28 other interest in the Tower Project. *See SEC v. Colello*, 139 F.3d at 677. Indeed, Defendant

1 Potala Tower Seattle, LLC also maintained bank accounts into which funds from EB-5
2 investors were deposited and then funneled for unauthorized expenditures. *See generally*
3 SEC’s Mot. For Prelim. Inj. (Dkt. No. 10) at 4-7. Adding its purported eighty-percent owner,
4 Dargey Holdings, LLC, as a Relief Defendant will help ensure complete relief.

5 None of the five possible factors outlined by the Ninth Circuit for denial of leave
6 apply. First, the Commission’s request is not made for any bad faith purpose, but rather is
7 generated by the legitimate need to add as Relief Defendants two entities that may have or
8 control assets subject to disgorgement. Second, there is no undue delay. As indicated above,
9 Defendants originally failed to disclose the very existence of these two Dargey-related entities
10 in their court-ordered Accounting. Moreover, Defendant Dargey’s recent filing in which he
11 suggested Dargey Holdings, LLC owns a significant stake in the Potala Tower Project has
12 brought this issue to the fore.¹ The Commission is timely moving to add these two parties
13 prior to the Court’s recently ordered March 11, 2016 deadline for joinder of additional parties,
14 and far in advance of the October 12, 2016 deadline for amending pleadings. *See* Order (Dkt.
15 No. 233) at 1. The SEC’s actions stand in direct contrast to circumstances concerning undue
16 delay. *See, e.g., Troupe v. Loomis*, 2015 WL 7571954 at *2 (W.D. Wash. Nov. 23, 2015)
17 (finding undue delay and denying leave to amend where plaintiff filed motion to amend
18 shortly before discovery deadline after eight months of discovery with no explanation for
19 delay); *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991) (finding
20 undue delay where motion to amend was filed two and a half years after the litigation
21 commenced with no justification for delay).

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24 ¹ Indeed, Dargey has suggested that he will propose a plan to the Court that includes the sale
25 by Dargey Holdings of its purported eighty percent interest to a third-party developer. *See*
26 Dkt No. 215 at 5-6 (“Under the Proposal, Dargey Holdings would turn over its entire
27 ownership interest to Binjiang and Molasky ...,” but Dargey himself would then be given a
28 15% interest in any profits derived from the Tower). The Commission disagrees that Dargey
has any such interest to alienate; in any event, to the extent it exists his interest is subject to
the asset freeze in the Court’s Order Granting Preliminary Injunction. Dkt. No. 68.

1 As to the third factor, adding these entities as Relief Defendants will not prejudice
2 Defendants. The “prejudice” factor focuses on elements not present here, such as when the
3 amendment involves some new theory or allegation necessitating additional discovery or
4 otherwise extending the litigation. *See id.* (finding prejudice where proposed introduction of a
5 major new evidentiary issue at late stage of litigation would require extensive additional
6 discovery and would also extend time period of injunction, and collecting similar cases).
7 Here, in contrast, Defendants still have over nine months to conduct discovery, and adding
8 these two Relief Defendants will not extend the discovery period or lengthen the case. *See*
9 Order (Dkt. No. 233) at 2 (discovery must be completed by December 12, 2016).

10 As to the fourth factor, adding Dargey Holdings, LLC and Path Farmer’s Market, LLC
11 as Relief Defendants would not be “futile.” The “futility of the amendment” inquiry refers to
12 circumstances where the proposed amendment would not cure a defective pleading or
13 otherwise state a claim for relief, circumstances simply not present in this case. *See, e.g.,*
14 *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990) (leave to amend futile where
15 further amendment would still fail to state claim) *Outdoor Systems, Inc. v. City of Mesa*, 997
16 F.2d 602, 613-14 (9th Cir. 1993) (affirming denial of leave to amend where proposed
17 amendment would not state colorable claim).

18 The final factor, whether the party has previously amended his pleadings, is only
19 implicated as a grounds to deny leave to amend in circumstances involving multiple, repeated
20 requests for amendment. *See, e.g., Allen v. City of Beverly Hills*, 911 F.2d at 373 (denying
21 request to file fourth complaint, and collecting cases); *Western Shoshone Nat. Council v.*
22 *Molini*, 951 F.2d at 204 (“Finally, factor five is involved [in denying leave to amend] because
23 the Shoshone have already amended their complaint two times.”). The SEC has only
24 amended once as of right, and this first request to amend to add these two additional Dargey-
25 related corporate entities is reasonable and not cumulative.

26 Accordingly, none of the Ninth Circuit’s five factors for potentially denying leave to
27 amend are present, and the SEC’s request to file the Second Amended Complaint adding Path
28 Farmer’s Market, LLC, and Dargey Holdings, LLC as Relief Defendants should be granted.

1 **III. FOUR ADDITIONAL DARGEY-RELATED ENTITIES MUST**
2 **BE ADDED TO THE RECEIVERSHIP AS “RECEIVERSHIP**
3 **RELIEF DEFENDANTS”**

4 The SEC moved to appoint a receiver over nine Dargey-related corporate entities on
5 September 22, 2015 (*see* Motion (Dkt. Nos. 38-41), and the Court granted the motion on
6 October 22, 2015 (*see* Order Appointing Receiver (Dkt. No. 88)). Additional facts now
7 demonstrate the need to add four entities to the Receivership, including two existing Relief
8 Defendants, Dargey Development, LLC and Dargey Enterprises, LLC, and the two entities
9 the SEC seeks to add as Relief Defendants, Path Farmer’s Market, LLC, and Dargey
10 Holdings, LLC.

11 The Court has broad discretion to supervise and modify an equity receivership in
12 Commission enforcement actions. *See SEC v. Hardy*, 803 F.2d 1034, 1037-38 (9th Cir.
13 1986). As noted by the Ninth Circuit, “[t]he district court’s power to supervise an equity
14 receivership and to determine the appropriate action to be taken in the administration of the
15 receivership is extremely broad.” *Id.* at 1037. This “broad deference to the district court’s
16 supervisory role in equity receiverships arises out of the fact that most receiverships involve
17 multiple parties and complex transactions.” *Id.* Thus, decisions relating to supervision of
18 receiverships are upheld absent a clear abuse of discretion:

19 A district judge supervising an equity receivership faces a
20 myriad of complicated problems in dealing with the various
21 parties and issues involved in administering the receivership.
22 Reasonable administrative procedures, crafted to deal with the
23 complex circumstances of each case, will be upheld. A district
24 judge simply cannot effectively and successfully supervise a
25 receivership and protect the interests of its beneficiaries absent
26 broad discretionary power. We would be remiss were we to
27 interfere with a district court’s supervision of an equity
28 receivership absent a clear abuse of discretion.

29 *Id.* at 1038.

30 The existence of “multiple parties and complex transactions” here likewise warrants the
31 need to now add four additional parties to the receivership “to protect the interests of its
32 beneficiaries.” *Id.* at 1037-38. The Receiver’s investigation “revealed a complex ownership
33 and/or management structure for the Receivership Entities, along with other entities related to or

1 affiliated with Mr. Dargey,” consisting of “over thirty (30) different, active Path America or
2 Dargey related entities.” Report (Dkt. No. 148) at 12. However, only nine of the 30 entities are
3 currently part of the receivership, and some of the non-receivership entities are inextricably
4 involved. In particular, the Receiver’s Initial Report cites as an example of this issue Dargey
5 Development – one of the four entities the SEC seeks to add as a Receivership Relief Defendant:

6
7 For example, Dargey Development, a non-receivership entity,
8 provided management, bookkeeping, and other services for
9 virtually all affiliated real estate development projects, including
10 the Projects. The fact that Dargey Development is not a
11 Receivership Entity has therefore hampered the Receivership’s
12 complete understanding of the business and financial activities of
13 the Receivership Entities, in substantial part because he lacks
14 sufficient access to certain records by key employees.

11 *Id.*

12 The Receiver concluded by noting that it was impossible for him to identify all
13 receivership assets available for recovery unless the relevant Dargey-related entities, including
14 Dargey Development and Dargey Enterprises, LLC, were added to the Receivership:

15 In addition, the Receiver has confirmed that substantial funds
16 were transferred from the Receivership Entities to Dargey
17 Development, Dargey Enterprises, LLC, and other entities
18 affiliated with Mr. Dargey. The structure of the relationships
19 between Dargey controlled entities means that it is presently
20 impossible for the Receiver to determine the ultimate fate of these
21 funds after their initial transfers, meaning that the Receiver cannot
22 currently determine whether there are additional Receivership
23 Assets available for recovery associated with these transfers.

20 *Id.* at 12-13.

21 These reasons also apply to the other two entities the SEC seeks to add to the
22 Receivership: Path Farmer’s Market, LLC and Dargey Holdings, LLC. Path Farmer’s Market
23 holds title to the real property for the Potala Farmer’s Market, one of the key assets available for
24 recovery; the Receiver should thus control the entity that holds legal title to the property to
25 effectuate that recovery. *See* Report (Dkt. No. 148-1), Ex. C. Similarly, Dargey Holdings, LLC,
26 claims to own an eighty percent interest in the Potala Tower Project. The Receiver should
27 therefore control Dargey Holdings to eliminate any uncertainty as to his ability to make the
28 necessary decisions for the Tower Project.

1 Finally, the SEC’s request to add just four additional entities to the existing receivership
2 is patently reasonable. Granting the SEC’s motion would bring within the Receiver’s control a
3 total of just thirteen (13) of the thirty (30) Dargey entities uncovered by the Receiver’s
4 investigation. As indicated herein and in the SEC’s Motion to Appoint Receiver (Dkt. Nos. 38-
5 41), the assets of each of these thirteen entities – including the four the SEC now seeks to add –
6 are subject to recovery by the Receiver to satisfy a judgment of disgorgement.

7 **IV. CONCLUSION**

8 For all the forgoing reasons, the Court should grant the SEC’s request to file the
9 Second Amended Complaint attached as Exhibit B adding Path Farmer’s Market, LLC and
10 Dargey Holdings, LLC as Relief Defendants, and the SEC’s request to modify the Order
11 Appointing Receiver to add these two entities and two existing Relief Defendants, Dargey
12 Development, LLC and Dargey Enterprises, LLC, to the Receivership as “Receivership Relief
13 Defendants.” A proposed Order is attached.

14
15 Dated: March 10, 2015

Respectfully submitted,

16 /s/ Andrew J. Hefty
17 Susan F. LaMarca
18 Bernard B. Smyth
19 Andrew J. Hefty

20 Attorneys for Plaintiff
21 SECURITIES AND EXCHANGE
22 COMMISSION
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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

Dated: March 10, 2016

/s/ Andrew J. Hefty
Andrew J. Hefty