**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand twenty.

PRESENT: DENNIS JACOBS,
GUIDO CALABRESI,
DENNY CHIN,
Circuit Judges.

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INSPIRED CAPITAL, LLC, and ERICA GARY, derivatively on behalf of Inspired Food Solutions, LLC,

Plaintiffs-Appellants,

-v- 19-2057-cv

CONDÉ NAST, an unincorporated division of Advance Magazine Publishers, Inc., and FREMANTLEMEDIA NORTH AMERICA, INC., a foreign corporation,

Defendants-Appellees.

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FOR PLAINTIFFS-APPELLANTS: Jermaine A. Lee, Hernandez Lee Martinez, LLC, Miami Shores, Florida; Scott Zarin, Zarin & Associates, P.C., New York, New York.

FOR DEFENDANTS-APPELLEES: Cynthia E. Neidl, Greenberg Traurig, LLP, Albany, New York, *for* Condé Nast.

Sean Riley, Glaser Weil Fink Howard Avchen & Shapiro LLP, Los Angeles, California; Judith A. Lockhart, Carter Ledyard & Milburn LLP, New York, New York, *for* FremantleMedia North America, Inc.

Appeal from the United States District Court for the Southern District of New York (Keenan, *J*.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED.**

Plaintiffs-appellants Inspired Capital, LLC and Erica Gary ("plaintiffs") appeal from the November 26, 2018 judgment of the district court granting the motion of defendants-appellees Condé Nast and FremantleMedia North America, Inc. ("defendants") to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and the June 5, 2019 judgment denying plaintiffs' motion for leave to amend. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

The following facts are drawn from the complaint and presumed true for purposes of this appeal. Plaintiffs are minority shareholders of a Florida corporation, Inspired Food Solutions, LLC ("IFS"). IFS was created by Chef Calvin Harris, who was its majority shareholder and Chief Executive Officer.

In 2013, defendants entered into a licensing agreement with IFS pursuant to which defendants granted IFS a license to use defendants' intellectual property to develop and market health food products. In 2014, however, when IFS could no longer pay its debts, Harris left IFS and, with a new investor, created a new entity, Benevida Foods, LLC ("Benevida"). When IFS failed to make a required payment, defendants terminated their license agreement with IFS and entered into a new license agreement with Benevida.

Plaintiffs sued Harris, Benevida, and their investor in Florida and eventually amended their complaint in Florida to add claims against defendants. The Florida court dismissed the claims against defendants based on a New York forum selection clause. Plaintiffs then brought this action below asserting claims against defendants for: (1) breach of contract; (2) aiding and abetting breach of fiduciary duty; (3) fraudulent concealment/omission; (4) aiding and abetting fraud; (5) conspiracy to commit fraud; and (5) misappropriation of trade secrets.

On May 23, 2018, defendants moved to dismiss the complaint. In an Opinion and Order issued November 26, 2018, the district court granted the motion, holding that the complaint failed to allege plausible claims for breach of contract, fraudulent concealment, aiding and abetting fraud, conspiracy to commit fraud, and misappropriation, and that the aiding and abetting breach of fiduciary duty claim was time-barred. Plaintiffs moved for leave to amend the complaint and submitted a proposed amended complaint (the "PAC"), which they alleged cured any identified deficiencies. In an Opinion and Order issued May 21, 2019, the district court denied plaintiffs' motion to amend on the grounds that amendment would be futile.

This appeal followed. The sole issues on this appeal are whether the district court erred in dismissing plaintiffs' claims for (1) aiding and abetting breach of fiduciary duty, (2) misappropriation of trade secrets, (3) and aiding and abetting and conspiracy to commit fraud.[1]

DISCUSSION

I. *Standard of Review*

We review *de novo* both the granting of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and the denial of a motion for leave to amend the complaint premised on futility. *See Edwards v. Sequoia Fund, Inc.*, 938 F.3d 8, 12 (2d Cir. 2019); *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 107-08 (2d Cir. 2019) (per curiam). In evaluating whether a complaint states a claim, "we accept as true all factual allegations

[1] Although plaintiffs appeal the district court's dismissal of their "fraud claims," they dispute only the district court's holding that the fraud claims were not pled with particularity. Plaintiffs' fraudulent concealment claim, however, was dismissed for a failure to plead a benefit obtained by defendants, a required element of a cause of action. *See Inspired Capital, LLC v. Condé Nast*, No. 18 CIV. 0712 (JFK), 2018 WL 6173712, at *5 (S.D.N.Y. Nov. 26, 2018). Plaintiffs do not address this claim in their brief. To the extent plaintiffs' appeal also challenges dismissal of their fraudulent concealment claim, we affirm for the reasons set forth by the district court. *See id.*

and draw from them all reasonable inferences; but we are not required to credit conclusory allegations or legal conclusions couched as factual . . . allegations." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (internal quotation marks omitted). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

II. Aiding and Abetting Breach of Fiduciary Duty

Although the district court dismissed plaintiffs' aiding and abetting breach of fiduciary claim as time-barred, we affirm on the alternative ground that the complaint and PAC failed to allege a plausible claim.[2] To state an aiding and abetting breach of fiduciary claim under New York law, a plaintiff must allege (1) a "breach by a fiduciary of obligations to another" of which the defendant "had actual knowledge;" (2) "that the defendant knowingly induced or participated in the breach"; and (3) "that [the] plaintiff suffered damage as a result of the breach." *See In re Sharp Int'l Corp.*, 403 F.3d 43, 49-50 (2d Cir. 2005).[3]

The PAC alleged that Harris violated his fiduciary duty to IFS when he transferred his recipes and food products to Benevida and reinitiated a business relationship with defendants through the new corporate entity. Even assuming Harris breached a fiduciary duty he owed to plaintiffs -- which we do not decide here --

[2] "We may affirm on any ground that finds support in the record." *Dettelis v. Sharbaugh*, 919 F.3d 161, 163 (2d Cir. 2019) (per curiam).

[3] The parties agree that New York law applies to the claims at issue in this appeal.

plaintiffs' claim fails because the facts alleged do not give rise to an inference that defendants knew or should have known of this breach. The complaint and PAC alleged that defendants dealt exclusively with Harris and that Harris executed all contracts with them on behalf of IFS. Plaintiffs have not identified any plausible reason why defendants would have had reason to know the specifics of Harris's arrangement with IFS regarding his recipes and products, or that Harris was not authorized to continue doing business with them through Benevida after IFS's dissolution.[4]

Amendment would also have been futile. Plaintiffs' added allegation that defendants received and reviewed IFS's internal Limited Liability Company Agreement -- presumably for defendants' own liability purposes -- before granting a license to IFS in 2013, does not give rise to the inference that defendants knew Harris was breaching his duties under that agreement a year later. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) (holding that an aiding and abetting claim under New York law requires "an allegation that such defendant had actual knowledge of the breach of duty").

[4] Plaintiffs' allegations that defendants "knew that IFS developed and owned the food recipes and food products" and "knew that Harris developed and owed and was breaching his fiduciary duties," App'x at 231-32, are conclusory and cannot save their aiding and abetting breach of a fiduciary duty claim. *See Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003) (affirming the dismissal of a claim where "plaintiffs ha[d] not alleged, except in the most conclusory fashion . . . any . . . meeting of the minds occurred among any or all of the defendants.").

III. Misappropriation of Trade Secrets

"A plaintiff claiming misappropriation of a trade secret must prove: (1) it possessed a trade secret, and (2) defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means." *Integrated Cash Mgmt. Servs., Inc. v. Dig. Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990) (internal quotation marks omitted). The district court dismissed plaintiffs' misappropriation of trade secrets claim for a failure to allege the existence of a trade secret and denied leave to amend on the grounds that the claim was time-barred.

We need not decide either issue reached by the district court. Even assuming the claim was timely and a trade secret sufficiently alleged, dismissal was warranted because the complaint did not allege a single instance of defendants -- as opposed to Harris -- "using" IFS's intellectual property. *Id*. Defendants granted IFS, and subsequently Benevida, the right to use *defendants'* intellectual property in connection with the sale of Harris's food products, not the inverse. To the extent that defendants continued to authorize use of their own intellectual property in connection with the marketing and sale of the health food products with Benevida after terminating their license agreement with IFS, such conduct would not constitute misappropriation of IFS's trade secrets. And even if, as plaintiffs allege, defendants provided "support" to Benevida in marketing its healthy food line, App'x at 236, that is not misappropriation. Accordingly, dismissal of plaintiffs' misappropriation of trade secrets claim is affirmed.

IV. Fraud Claims

The district court also did not err in dismissing plaintiffs' aiding and abetting fraud and conspiracy fraud claims because neither the complaint nor the proposed amendments in the PAC satisfied the heightened pleadings standard for fraud claims under Federal Rule of Civil Procedure 9(b). Plaintiffs first argued a fraudulent omission -- that Harris "conceal[ed] that he had formed Benevida with an objective directly antagonistic to IFS." Dist. Ct. Dkt. No. 31 at 19. In the PAC, plaintiffs altered their theory of fraud to a misstatement, alleging that in March 2013 and "periodically thereafter," Harris told IFS that its investment would be used "strictly for the benefit of IFS." App'x at 219. This statement was misleading, according to plaintiffs, because it "fail[ed] to disclose that [Harris's] efforts would be, and were instead aimed at securing for himself a relationship with [defendants] contrary to the terms of" their operating contract with IFS. App'x at 219.

We have repeatedly explained that Rule 9(b)'s heightened pleading requirement "serves to provide a defendant with fair notice of a plaintiff's claim, safeguard his reputation from improvident charges of wrongdoing, and protect him against strike suits." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). Allegations of fraud under Rule 9(b), therefore, must be pled with particularity and "specify the time, place, speaker, and content of the alleged misrepresentations." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001). Plaintiffs' allegation that Harris made an alleged misstatement, at an unidentified location, on an unidentified date in March 2013 and "periodically thereafter," App'x at 219, clearly does not satisfy this standard.

Because the PAC failed to allege fraud, it could not state a claim for either aiding and abetting fraud or fraud conspiracy, as both causes of action require an underlying fraud to be alleged. *See Lerner*, 459 F.3d at 292 ("To establish liability for aiding and abetting fraud, the plaintiffs must show . . . the existence of a fraud" (internal quotation marks omitted)); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.4 (2d Cir. 1990) (noting that stating a civil fraud conspiracy claim requires pleading "underlying acts of fraud" with particularity). Accordingly, the district court's dismissal of plaintiffs' fraud claims and subsequent denial of leave to amend is affirmed.

* * *

We have considered plaintiffs' remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk