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30 Appeal from a judgment of the United States District Court for the Southern District of
31 New York (Engelmayer, *J.*).

32 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
33 **DECREED** that the judgment of the district court is **AFFIRMED**.

34 Leon Black, founder and former CEO of Apollo Global Management, Inc., appeals from
35 the district court's dismissal with prejudice of Black's suit against: Josh Harris, Black's co-founder
36 at Apollo; Steven Rubenstein, Apollo's media consultant; Guziel Ganieva, Black's former
37 romantic partner who has accused Black of sexual assault and sued him in New York State court;

1 and Wigdor LLP, the law firm that represents Ganieva in her state court lawsuit against Black.
2 *Ganieva v. Black*, 155262/2021 (N.Y. Sup. Ct.). Black’s federal suit brings substantive and
3 conspiracy claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18
4 U.S.C. §§ 1961–1968, alleging that the defendants devised a fraudulent scheme to force Black to
5 resign from Apollo by leveraging allegations of Black’s sexual misconduct with Ganieva.

6 On appeal, Black argues that the district court (1) abused its discretion in denying Black’s
7 Fed. R. Civ. P. 15 motion for leave to file a Second Amended Complaint (“SAC”), and (2) abused
8 its discretion insofar as it dismissed—without considering the proposed SAC—Black’s First
9 Amended Complaint (“FAC”) with prejudice based on futility. Black does not challenge the merits
10 of the district court’s dismissal of the FAC for failure to state a claim. Nor does Black ask this
11 Court to determine whether the SAC states a claim. Instead, he requests that we vacate the district
12 court’s decisions and remand the case for the district court to consider the SAC’s sufficiency in
13 the first instance.

14 We conclude that the district court did not abuse its discretion in denying Black leave to
15 file the proposed SAC, nor did it abuse its discretion in dismissing the FAC with prejudice. We
16 assume the parties’ familiarity with the underlying facts, procedural history, and issues on appeal,
17 to which we refer only as necessary to explain our decision to affirm.

18 **I. Procedural History**

19 **A. Denial of Rule 15 Motion**

20 **1. *First Amended Complaint and Pretrial Conference***

21 Black filed the initial complaint in this action on October 28, 2021, bringing substantive
22 and conspiracy-based civil RICO claims, as well as state law defamation, breach of contract, and
23 unjust enrichment claims against Ganieva, Wigdor, and three “John Doe” defendants. Defendants

1 Wigdor and Ganieva filed motions to dismiss on January 7, 2022, asserting that Black had failed
2 to state a claim. On the same day, the district court issued an order directing Black to either file
3 an amended complaint or oppose the motion to dismiss by January 28, 2022, and indicated that no
4 further opportunity to amend would “ordinarily be granted.” Joint App’x at 403. In response,
5 Black filed the FAC on January 24, 2022. The FAC replaced the “John Doe” defendants from the
6 first complaint with Harris and Rubenstein and dropped Wigdor as a federal RICO defendant.¹ On
7 March 4, 2022, all defendants moved to dismiss the FAC for failure to state a claim.

8 The district court held its first pretrial conference on March 10, 2022. At that conference,
9 Black previewed the possibility of filing a second amended complaint as of right under Fed. R.
10 Civ. P. 15(a)(1) on the basis that the FAC added two new defendants not named in the initial
11 complaint, Harris and Rubenstein. After conceding that Harris and Rubenstein had replaced the
12 John Does in the initial complaint and agreeing with the court that, as a result, there was no further
13 entitlement to an amended complaint as of right as to any defendant, Black’s counsel requested a
14 brief extension in the briefing schedule for the motion to dismiss. In considering the extension
15 request, the district court explained to Black’s counsel that any response by Black to the motions
16 to dismiss would mean forgoing the decision to seek leave to file a second amended complaint
17 under Fed. R. Civ. P. 15(a)(2). In light of the requested extension, Black was given a deadline of
18 April 4, 2022, either to respond to the motions to dismiss *or* to request leave to amend for a second
19 time.

¹ As a result, only state law claims remained against Wigdor.

1 for failure to state a claim. The district court identified four major flaws with Black’s civil RICO
2 claims requiring dismissal: (1) failure to plead an association-in-fact as required for an enterprise;
3 (2) failure to plead the necessary predicate acts; (3) failure to plead continuity; and (4) failure to
4 plead an injury. The district court concluded that these four flaws rendered the FAC “glaringly
5 deficient in fundamental respects” and thus found “that it would be futile to allow repleading.”
6 Special App’x at 64 n.24. Given the dismissal of all federal claims, the district court declined to
7 exercise supplemental jurisdiction over the remaining state-law claims and dismissed those claims
8 without prejudice.

9 II. Discussion

10 A. Standard of Review

11 Denial of leave to amend is reviewed for abuse of discretion, except insofar as the denial
12 was based on a conclusion that the proposed amended pleading was futile, in which case we review
13 that legal conclusion *de novo*. *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015) (denial
14 of Rule 15 motion); *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164 (2d Cir. 2015) (motion to
15 dismiss with prejudice based on futility). We will not identify an abuse of discretion “absent an
16 error of law, a clearly erroneous assessment of the facts, or a decision outside the available range
17 of permitted choices.” *Knife Rights*, 802 F.3d at 389.

18 Because any error in denial of the Rule 15 motion would be harmless if the FAC was
19 properly dismissed, we address the dismissal with prejudice of the FAC first. *In re Agent Orange*
20 *Prod. Liab. Litig.*, 517 F.3d 76, 104 (2d Cir. 2008) (holding that any error in denying leave to
21 amend was harmless where the amended complaint would not have addressed defects with the
22 operative complaint).

1 B. Application

2 Black argues that the district court abused its discretion in dismissing the FAC with
3 prejudice because it reached that conclusion without any reference to the proposed SAC. Notably,
4 Black challenges the *process* by which the district court reached its futility determination, not the
5 legal conclusion that amendment was futile. And, as Black acknowledges, we review that process
6 only for abuse of discretion. *Balintulo*, 796 F.3d at 164. Finding none, we affirm.

7 Black argues that the district court’s failure to consider the proposed SAC in dismissing
8 the FAC with prejudice was an abuse of discretion because, in overlooking the SAC, the district
9 court “necessarily failed to consider whether there were any possible amendments that might
10 plausibly allege” a claim. Appellant’s Br. at 38–39 (internal quotation marks omitted). Though
11 Black is correct that courts commonly look to proposed amendments to determine futility, *see*
12 *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 235 (2d Cir. 2007) (remanding case to the
13 district court “to determine whether the proposed amendment or different amendments to the
14 complaint should be allowed”), there is no requirement in our case law that courts explicitly
15 *reconsider* proposed amendments *they have already denied* in dismissing an operative complaint
16 with prejudice.²

17 Black cites to no case directly on point for this purported requirement. Moreover, the
18 caselaw Black does cite is inapposite because, in those instances, the district court either denied a
19 proposed amended complaint on futility grounds without actually considering the proposed
20 amended complaint, *Bensch v. Est. of Umar*, 2 F.4th 70, 80 (2d Cir. 2021), erroneously imposed a

² Such a requirement would be in tension with the law of the case doctrine at least insofar as it would require courts to reconsider proposed amendments they have already denied as futile. *See In re Peters*, 642 F.3d 381, 386 (2d Cir. 2011) (“The law of the case doctrine, although not binding, counsels a court against revisiting its prior rulings in subsequent stages of the same case absent cogent and compelling reasons” (internal quotation marks omitted)).

1 procedural bar, *Williams v. Citigroup Inc.*, 659 F.3d 208, 214 (2d Cir. 2011), or dismissed an
2 operative complaint with prejudice without addressing the request for leave to amend or making a
3 determination of futility, *Brook v. Simon & Partners LLP*, 783 Fed. App'x 13, 16 (2d Cir. 2019).
4 None of these circumstances occurred in this case. Here, Black failed to follow the district court's
5 guidance that he would forgo further opportunity to amend by responding to the motions to
6 dismiss, and the district court had already denied the proposed SAC. *See Ritchie Capital Mgmt.,*
7 *L.L.C. v. General Elec. Capital Corp.*, 821 F.3d 349, 352 (2d Cir. 2016) (citing with approval to
8 Judge Engelmayer's Individual Rules and Practices in Civil Cases on leave to amend). Thus, in
9 ruling on the motions to dismiss, the court was only considering the sufficiency of the FAC—to
10 do so without explicitly readdressing the SAC was not an abuse of discretion.

11 We reject Black's implicit argument that, because the district judge did not expressly recite
12 consideration of the proposed SAC, we should assume he ignored it. The SAC was before the
13 judge; the defendants had already argued that the SAC was futile; and the judge then found in
14 dismissing the FAC that "it would be futile to allow repleading." Special App'x at 64 n.24. We
15 presume that the district judge was aware of the consequences of the futility ruling and had
16 reviewed the materials before him—it is not an abuse of discretion to omit saying so explicitly.

17 Moreover, Black's argument presumes that amendment of the FAC was not futile, *i.e.*, that
18 the SAC redressed the FAC's flaws. But Black's opening brief nowhere argues how the SAC
19 addresses those defects, and we are not required to consider arguments raised for the first time in
20 a reply brief. *ABKCO Music, Inc. v. Sagan*, 50 F.4th 309, 324 n.11 (2d Cir. 2022); *see also Cantor*
21 *Fitzgerald Inc. v. Lutnick*, 313 F.3d 704, 710 n.3 (2d Cir. 2002) ("Because th[e] claim was first
22 raised in plaintiffs' reply brief we need not consider it."). Furthermore, Black specifically requests
23 that this Court refrain from assessing the sufficiency of the SAC, but rather permit the district court

1 to assess the SAC in the first instance.

2 Finally, because the district court did not abuse its discretion in dismissing the FAC with
3 prejudice, we need not reach the question of whether it abused its discretion in denying the Rule
4 15 motion. For even assuming, *arguendo*, an abuse of discretion in denying leave to amend, any
5 such error was harmless. *See In re Agent Orange*, 517 F.3d at 104.

6 * * *

7 For the above reasons, we **AFFIRM** the judgment of the district court.

8 FOR THE COURT:
9 Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is circular. It features a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside this ring is a blue circle containing the words "SECOND CIRCUIT" in white, with two small white stars on either side.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: March 02, 2023
Docket #: 22-1524cv
Short Title: Black v. Ganieva

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 21-cv-8824
DC Court: SDNY (NEW YORK
CITY)
DC Judge: Engelmayer

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
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New York, NY 10007**

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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature