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October 15, 2013

VIA ECF

Honorable J. Paul Oetken
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2101
New York, NY 10007

Re: *Reich, et al. v. Betancourt Lopez, et al.*, No. 13 Civ. 5307

Dear Judge Oetken:

We and Tew Cardenas LLP, on behalf of defendants Leopoldo Alejandro Betancourt Lopez and Pedro Jose Trebbau Lopez (the “Derwick Defendants”), write pursuant to Your Honor’s Individual Practice Rule 4.A to request a pre-motion conference to seek permission to move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b). Despite our notification to plaintiffs’ counsel, by letter dated October 4, 2013, of the fatal deficiencies in their complaint, plaintiffs have neither withdrawn nor amended it.

This case is nothing more than an effort by plaintiffs to transform legally insufficient state law tort claims, primarily sounding in defamation, into a claim under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Plaintiffs’ claims fail because:

- Plaintiffs lack standing to assert a RICO claim because they do not -- and cannot -- allege injury caused by any well-pleaded predicate acts;
- Plaintiffs fail to allege any “pattern” of racketeering activity as required under RICO;
- RICO is inapplicable to the extraterritorial Venezuelan scheme alleged by plaintiffs; and
- Plaintiffs have not pled the requisite elements for their state law tort claims.

Plaintiffs lack standing to bring a RICO claim because they have not alleged that they suffered injury resulting from either a pattern of racketeering activity or from individual RICO predicate acts. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990). Neither of the two alleged schemes -- a scheme to pay bribes in Venezuela to Venezuelan officials in connection with Venezuelan construction contracts and a scheme to “discredit” plaintiffs by tortious conduct -- provides plaintiffs with standing under RICO.

The alleged bribery scheme, which defendants deny, cannot provide plaintiffs with RICO standing because plaintiffs do not allege that the bribery caused them any injury. As Virginia-based third parties, they make no allegation that they were affected by the alleged bribery.

Honorable J. Paul Oetken
October 15, 2013
Page 2

Further, plaintiffs' tort claims cannot confer RICO standing because the tort claims are not RICO predicate acts. Although plaintiffs have attempted to cast these allegations as wire fraud, "they are -- at best -- thinly clothed defamation claims" of the sort Judge Baer dismissed in *Kimm v. Chang Hoon Lee*, No. 04 Civ. 5724, 2005 WL 89386, at *4-5 (S.D.N.Y. Jan. 13, 2005), *aff'd*, 196 F. App'x 14 (2d Cir. 2006), observing that "it is firmly established that defamation and many other similar allegations do not provide the requisite predicate for RICO violations."¹ As a matter of law, plaintiffs' tort claims do not constitute wire fraud because plaintiffs make no allegation that defendants "used the . . . wires as a means to obtain money or property by means of false or fraudulent pretenses, representations, or promises or for purposes of executing a scheme to defraud." *Boritzer v. Calloway*, No. 10 Civ. 6264, 2013 WL 311013 (S.D.N.Y. Jan. 24, 2013) (Oetken, J.) (alteration in original) (internal quotation marks and citation omitted). To the contrary, plaintiffs merely allege that defendants interfered with their business relationships.

In addition, even assuming plaintiffs had standing, the RICO claim fails because plaintiffs have not alleged a pattern of racketeering activity. The activities they allege are neither related nor continuous. They are not related because plaintiffs' bribery allegations concerning construction contracts in Venezuela have nothing to do with plaintiffs or the alleged defamation. Such disparate activities do not constitute a pattern of racketeering. *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 97 (2d Cir. 1997). "Given this lack of common elements," *de La Roche v. Calcagnini*, No. 95 Civ. 6322, 1997 WL 292108, at *9 (S.D.N.Y. June 3, 1997) (Sweet, J.), the bribery and defamation must be understood as "isolated events" which are not related. *Schlaifer*, 119 F.3d at 97.

Moreover, the absence of continuity is demonstrated by the alleged time periods: (a) the purported bribery scheme that plaintiffs allege lasted thirteen months with no occurrences after 2010, and (b) two allegedly tortious telephone calls -- one in November and one in December of 2012. Those alleged events are legally insufficient to establish either open- or closed-ended continuity. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184-86 (2d Cir. 2008).

Dismissal of the alleged RICO claim is also required because the central allegations relate to a Venezuelan-based scheme and it is well-established that RICO does not apply to extraterritorial schemes. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir.

¹ Cases rejecting such tort claims dressed in the "trendy garb," *Boritzer*, 2013 WL 311013, at * 5, of wire fraud are too numerous to cite here. *See, e.g., Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 169 n. 19 (E.D.N.Y. 2010) (Matsumoto, J.), *aff'd*, 443 F. App'x 582 (2d Cir. 2011); *see also Contes v. City of New York*, No. 99 Civ. 1597, 1999 WL 500140 (S.D.N.Y. July 14, 1999) (Scheidlin, J.) (defamation is not a predicate act for RICO); *Creed Taylor, Inc. v. CBS, Inc.*, 718 F. Supp. 1171, 1180 (S.D.N.Y. 1989) (Carter, J.) (same); *Tsipouras v. W & M Props., Inc.*, 9 F. Supp. 2d 365, 368 (S.D.N.Y. 1998) (Sprizzo, J.) ("[M]ere injury to character, business reputation, and/or the intentional infliction of emotional distress are not actionable under civil RICO.").

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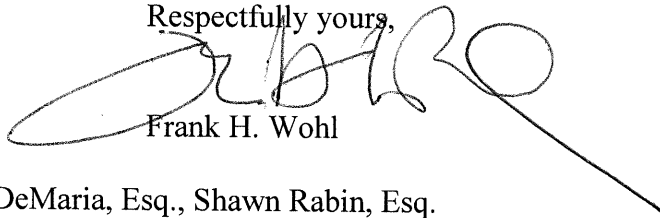
Honorable J. Paul Oetken
October 15, 2013
Page 3

2010). The central allegations in the complaint -- concerning acts in Venezuela, by actors who are Venezuelan citizens and residents, involving the Venezuelan government, in connection with foreign contracts for the construction of Venezuelan power plants -- cannot be transformed into a domestic scheme based on scant and conclusory allegations of some *de minimis* U.S. contacts. *Id.* at 33.

Equally deficient are plaintiffs' four alleged state law causes of action.² The defamation claims fail because the innocuous statement "Otto Reich is working for us," Compl. ¶ 105, does not portray plaintiffs as "odious, infamous, or ridiculous," as required for defamation. *Chapin v. Greve*, 787 F. Supp. 557, 562 (E.D. Va. 1992). Nor does the statement constitute disparagement of products as required for trade libel. *See Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587, 600 (E.D. Va. 2002). The claim for tortious interference with prospective economic advantage lacks any allegation that the business relationships at issue would have continued "but for" the Derwick Defendants' conduct. *See Glass v. Glass*, 321 S.E.2d 69, 77 (Va. 1984). Failure of the substantive claims requires dismissal of plaintiffs' civil conspiracy claim. *See Almy v. Grisham*, 639 S.E.2d 182, 188 (Va. 2007). Moreover, to the extent that personal jurisdiction is predicated on the RICO claims, the failure of those claims necessitates dismissal for lack of personal jurisdiction. *See Cont'l Petroleum Corp. v. Corp. Funding Partners, LLC*, No. 11 Civ. 7801, 2012 WL 1231775, at *8 (S.D.N.Y. Apr. 12, 2012) (Engelmayer, J.).

In addition, because of the above legal deficiencies in the complaint and numerous critical factual inaccuracies in the complaint, which the Derwick Defendants have pointed out to plaintiffs' counsel, by letters dated August 27, and October 4, 2013, the Derwick Defendants intend to seek Rule 11 sanctions for plaintiffs' filing of this clearly meritless complaint for the improper purpose of damaging defendants' reputations and injuring their existing and prospective business and banking relationships.

Respectfully yours,



Frank H. Wohl

cc: Mark W. Smith, Esq., Joseph A. DeMaria, Esq., Shawn Rabin, Esq.

² The complaint does not contain enough information to establish which law governs plaintiffs' tort claims. For the purposes of this letter, the Derwick Defendants have used the law of Virginia, the state of residence and organization for plaintiffs Otto Reich and Otto Reich Associates, respectively.