SMITH VALLIERE PLLC
75 ROCKEFELLER PLAZA 21ST FLOOR NEW YORK NEW YORK 10019
TELEPHONE 212 755 5200
FACSIMILE 212 755 5203
WWW.SVLAW.COM

Mark W. Smith
(212) 755-5220
msmith@svlaw.com

October 18, 2013

VIA ECF

Honorable J. Paul Oetken
United States District Court, Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: ***The Honorable Otto J. Reich, et al. v. Betancourt Lopez, et al.*, No. 13-cv-5307**

Dear Judge Oetken:

We represent the Honorable Otto Reich and Otto Reich Associates, LLC (together, "Plaintiffs"), and write in response to defendant Francisco D'Agostino Casado's ("D'Agostino") pre-motion letter of October 15, 2013 (hereinafter, the "Pre-Motion Letter").[1] Because there is no basis to dismiss Plaintiffs' claims against D'Agostino under Fed. R. Civ. P. 12(b), this Court should deny his requested relief.

Plaintiffs allege in their Complaint that D'Agostino is an agent and partner of defendants Betancourt and Trebbau and one of the owners and/or officers, directors, operators, or agents of Derwick Associates USA, LLC and Derwick Associates Corporation, and these entities' predecessors, successors, assigns and affiliates ("Derwick Associates"). (Compl. ¶¶ 28, 32.) Plaintiffs further allege that (i) D'Agostino, along with the other two defendants, directed, controlled and coordinated virtually all aspects of global strategy, as well as the day-to-day activities of Derwick Associates, and (ii) defendants use Derwick Associates to secure inflated public contracts in Venezuela, paying public officials large payments in exchange for awarding them contracts, and unjustly enriching themselves in the process. (Compl. ¶¶ 28, 41.)

D'Agostino wrongfully contends that the Complaint "fails to identify any fraudulent statements or acts ... specifically attributed to [him]" in connection with Plaintiffs' claims under 18 U.S.C. § 1961, *et seq.*, or in connection with Plaintiffs' claims for defamation. (Pre-Motion Letter at 1.) D'Agostino argues that he has been "lump[ed]" in with the other defendants, such that his role in the enterprise is "obfuscate[d]." *Id.* D'Agostino mischaracterizes the allegations in the Complaint and misstates the law.

First, the Complaint alleges that D'Agostino directed the activities of Derwick Associates from the United States and agreed to offer millions of dollars in kickbacks to Venezuelan government officials. (*See, e.g.*, Compl. ¶¶ 49, 59, 70.) D'Agostino is alleged to have

[1] This letter incorporates by reference the arguments set forth in Plaintiffs' response to defendants Leopoldo Alejandro Betancourt Lopez and Pedro Jose Trebbau Lopez's October 15, 2013 pre-motion letter.

acknowledged his pivotal role in Derwick Associates to a friend in November, 2012, when he bragged that "of course" Derwick Associates paid kickbacks to secure its energy sector contracts, because in Venezuela, "you always have to pay" what he euphemistically referred to as "consulting fees" to secure government contracts. (Compl. ¶¶ 50, 60, 71.) D'Agostino is also specifically alleged to have agreed to take actions to cover up defendants' illicit scheme. (Compl. ¶¶ 113, 165.)

Second, to the extent D'Agostino is not specifically alleged to have taken each action alleged in the Complaint, he is still liable for the injuries suffered by Plaintiffs on the ground that D'Agostino is alleged to have directed and participated in the unlawful RICO scheme, which makes him chargeable with all of its predicate acts, including those predicate acts that injured Plaintiffs. *See, e.g., United States v. Zichettello*, 208 F.3d 72, 98-99 (2d Cir. 2000) (defendant adequately alleged to be part of RICO conspiracy if he "knew what the other conspirators were up to [or] whether the situation would logically lead an alleged conspirator to suspect he was part of a larger enterprise") (internal citations omitted); *Allstate Ins. Co. v. Smirnov*, No. 12-1246, 2013 U.S. Dist. LEXIS 138180, at *21 (E.D.N.Y. Aug. 21, 2013) (element of directing enterprise "is satisfied if the defendant participated in the operation or management of the enterprise, which the Second Circuit has described as a relatively low hurdle for plaintiffs to clear, especially at the pleading stage") (internal citations omitted); *Phillip Morris Inc. v. Heinrich, et al.*, No. 95-0328, 1997 U.S. Dist. LEXIS 20199, at *30 (S.D.N.Y. Dec. 18, 1997) (defendants' actions may be pleaded collectively when individual defendant acts in concert with others in directing fraudulent activity). Similarly, D'Agostino is chargeable with the tortious activity alleged in the Complaint, insofar as he is alleged to be part of a civil conspiracy to commit those acts.[2] (Compl. ¶¶ 188-192; *see Lewis v. Rosenfeld*, 138 F. Supp. 2d 466, 479 (S.D.N.Y. 2001) (under New York law, "a plaintiff may plead the existence of a conspiracy in order to connect someone to an otherwise actionable tort committed by another and establish that those actions were part of a common scheme").)

Third, insofar as any aspect of D'Agostino's activities concerning Derwick Associates remains obscured or unknown, that is not a basis to dismiss at this time.[3] The law is clear that D'Agostino may not benefit from – especially at the pleading stage – his apparent success in hiding the details of defendants' unlawful activities. *See, e.g., Eastman Chem. Co. v. Nestlé Waters Mgmt. & Tech.*, No. 11-2589, 2012 U.S. Dist. LEXIS 141281, at *15 (S.D.N.Y. Sept. 28, 2012) (Oetken, J.) (dismissal is inappropriate "where the facts are peculiarly within the possession and control of the defendant … or where the belief is based on factual information

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[2] *Thai v. Cayre Grp., Ltd.*, 726 F. Supp. 2d 323, 329 (S.D.N.Y. 2010), cited by D'Agostino, is inapposite. There, the issue was whether the statement alleged to be defamatory was "of and concerning" the plaintiff in that case. *Thai*, 726 F. Supp. 2d at 334 (defamatory statements must "target [the] individual"). There can be no legitimate dispute that, for example, the statement "Otto Reich is working for us" is "of and concerning" Otto Reich.

[3] *Watkins v. Smith*, No. 12-4635, 2013 U.S. Dist. LEXIS 24712 (S.D.N.Y. Feb. 22, 2013), cited by D'Agostino, is also inapposite. In *Watkins*, which concerned a motion for sanctions and not a Rule 12(b) motion, plaintiff conceded that his factual allegations in an amended complaint had no conceivable factual basis against certain defendants. *Watkins*, 2013 U.S. Dist. LEXIS 24712, at *27. Additionally, there was no reasonable prospect of plaintiff ever finding such support. *Id.*

that makes the inference of culpability plausible"). Discovery is the appropriate vehicle for determining, with precision, D'Agostino's role in the events alleged.[4]

D'Agostino's arguments in support of his proposed motion to dismiss are without merit. For this reason, Plaintiffs respectfully request that the Court deny D'Agostino's request for permission to move to dismiss, instruct D'Agostino to file his answer, and allow this case to move forward in the normal course.

Respectfully submitted,

Mark W. Smith

cc: Shawn Rabin, Esq. (Counsel for Francisco D'Agostino Casado)
Frank H. Wohl, Esq. (Counsel for Leopoldo Alejandro Betancourt Lopez)
Joseph A. DeMaria, Esq. (Counsel for Pedro Jose Trebbau Lopez)

[4] D'Agostino implies that Plaintiffs' RICO claims are subject to a heightened pleading standard. That is incorrect. At most, only the wire fraud allegations are subject to Fed. R. Civ. P. 9(b), which the Complaint sufficiently satisfies. The remaining allegations (including the allegations regarding the composition and operation of the enterprise, and its predicate activity in violation of the Travel Act and Foreign Corrupt Practices Act) are only subject to Fed. R. Civ. P. 8. *See Chevron Corp. v. Donziger*, No. 11-0691, 2012 U.S. Dist. LEXIS 74749, at *3, n.6 (S.D.N.Y. May 24, 2012) (RICO predicate acts that "do not sound in fraud need not be pled with Rule 9(b) particularity").