UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:21-CV-20431-RNS

DIEGO DAMIAN VERDEJO, ETERTIN, S.A., and IVEO LATINAMERICAN TRADING LLC,

Plaintiffs,

v.

HP INC., GONZALO GIAZITZIAN, JUAN MANUEL CAMPOS, CARLOS HUERGO, JAVIER ALBERTO MAZZEO, ERNESTO BLANCO, and SERGIO VENIER,

Defendants.

_____/

DEFENDANTS' JOINT MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(6), defendants Juan Manuel Campos, Ernesto Blanco, Carlos Huergo (together, the "Individual Defendants"), and HP Inc. ("HP," and together with the Individual Defendants, the "Defendants"), jointly move to dismiss Plaintiffs' claims against them.

I. PRELIMINARY STATEMENT

Plaintiff Diego Verdejo ("Verdejo") filed this civil RICO action on behalf of himself and his two companies; one of them, Etertin S.A. ("Etertin"), was a distributor of HP products in Argentina, and the other, IVEO Latinamerican Trading LLC ("IVEO"), was not. Mr. Verdejo complains about the fallout from a six-year-long kickback scheme, dating back to 2010, in which he and his companies were involved and which he claims turned extortionate. Per the complaint, the primary player in the scheme was Gonzalo Giazitzian, who arranged for Etertin to receive a disproportionate amount of credit notes to purchase HP products at discounted prices on an ongoing basis. In exchange, Verdejo paid Giazitzian a percentage of the value of the credit notes as kickbacks, sometimes using IVEO's bank account. According to the complaint, Verdejo believed Giazitzian was sharing the payments with Sergio Venier, Javier Mazzeo,[1] and the Individual Defendants.

Verdejo failed to report the scheme to HP for seven years, until July 2017 - after Giazitzian had left HP, after the amount of credit notes Etertin received had dwindled to a third of its former volume, and after Verdejo stopped making payoffs to Giazitzian. Upon learning of the scheme, HP acted immediately to investigate the allegations and refused Verdejo's demands that Etertin's credit notes be restored to the levels it enjoyed while participating in the scheme. Verdejo now complains that this refusal constitutes "retaliation."

[1] Giazitzian, Venier, and Mazzeo were defaulted on May 5, 2021 [D.E. 41].

Even assuming Plaintiffs' allegations are all true, their claims must still be dismissed for the following reasons:

First, Plaintiffs lack standing to bring their claims against the Defendants. Verdejo fails to allege that he personally suffered any injury-in-fact, and conceded this fact in previous filings with this Court. Plaintiff IVEO alleges an injury-in-fact, in the form of seven wire transfers made between February and June of 2017; however, it fails to allege, and cannot allege, that such injuries were proximately caused by Defendants' alleged extortion, which was directed at Etertin and Verdejo, not IVEO. Plaintiff Etertin lacks standing because it does not, and cannot, allege that it suffered the requisite domestic injuries necessary to bring a civil RICO claim.

Second, Plaintiffs' RICO claims are barred by the applicable four-year statute of limitations. The kickback scheme that forms the basis of Plaintiffs' RICO claims began over ten years ago, in 2010. Plaintiffs were fully aware of the scheme, and any resulting injuries, since the first extortionate demand and payment in 2011. Therefore, the limitations period had long since run by the time they filed this action ten years later in February of 2021.

Third, Plaintiffs have failed to adequately plead the most basic elements of a civil RICO claim, i.e., (1) a distinct RICO enterprise; and (2) the Defendants' participation in the enterprise through a pattern of racketeering activity. Absent these elements, Plaintiffs' substantive RICO claim fails, as do the dependent claims for RICO conspiracy and aiding and abetting RICO.

Finally, Plaintiffs' Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") claim against HP fails because none of the purportedly unfair trade practices attributed to HP occurred in Florida.

For these reasons, as further discussed below, Plaintiffs' Complaint must be dismissed.

II. ALLEGATIONS RELEVANT TO THE MOTION

Verdejo, an Argentine citizen, was part owner and Chief Executive Officer of Etertin. Cmplt. ¶ 22. Etertin is an Argentine company engaged in the sale of wholesale office supplies in Argentina. *Id.* ¶ 23. Starting in 1995, Etertin became a distributor of HP products. *Id.* at ¶ 34. In 2005, HP began providing Etertin and other Argentine distributors "credit notes" to be used to reduce the price distributors paid for HP Products. *Id.* at ¶ 38. HP policy requires that credit notes be offered to similarly situated resellers on equal terms. *Id.* ¶ 99.

Plaintiffs allege that in October 2010, Verdejo met with Giazitzian (a former Supplies Partner Manager for non-party HP Argentina), Huergo (former general manager for HP Argentina[2]) and Mazzeo (former marketing director for HP Argentina). Verdejo claims they demanded that he pay them a portion of the value of the credit notes Etertin received, or Etertin would lose its ability to distribute HP products in Argentina. *Id.* at ¶¶ 28, 46. Verdejo refused. *Id.* at ¶¶ 46.

Three months later, Giazitzian approached Verdejo and offered to "fix" Etertin's dire financial issues if Verdejo agreed to pay him a portion of Etertin's credit notes and make Giazitzian a 33% beneficial owner of Etertin. *Id.* at 48. To avoid financial ruin, Verdejo agreed. *Id.*

Beginning in April 2011, Etertin and Verdejo began making payments to Giazitzian, as a percentage of the increasing amount of credit notes Etertin received. *Id.* at ¶ 49. Between April 2011 and June of 2017, Verdejo alleges he paid Giazitzian $14 million. *Id.* at 77. Verdejo claims that, based on conversations, text messages, and emails, he understood Giazitzian to be sharing those payments with Campos, Huergo, Blanco, Mazzeo, and Venier. *Id.* at 58.

[2] Mr. Huergo was not the general manager of HP Argentina. He was the country manager for the print division of HP Argentina.

While Verdejo paid kickbacks to Giazitzian, Etertin became a successful Argentine distributor, selling tens of millions of dollars of HP products. *Id.* at ¶ 45. Etertin won awards for being a top distributor in Argentina, and in 2015, won an award for "best distributor overall." *Id.*

Giazitzian left HP Argentina in April 2016, yet Plaintiffs insist that he continued collecting payments from Verdejo and sharing them with unspecified Individual Defendants. *Id.* at 28, 74.[3]

In February of 2017, for reasons not explained in the Complaint, Verdejo used IVEO's bank account to wire transfer payments to Giazitzian.[4] *Id.* No extortionate demands were made to IVEO, and no reason is given for why IVEO would make payments on Verdejo's behalf.

Despite Verdejo's continuing payments after Giazitzian's departure from HP Argentina, Etertin's complement of credit notes fell in the second quarter of 2017 from an average of $960,718 to $279,632. *Id.* at ¶ 96. At the end of the second quarter, in June 2017, apparently in response to Etertin's declining credit notes, Verdejo notified Campos that he would no longer make payments, and demanded that Etertin's credit note level be restored to earlier levels. *See id.* at ¶¶ 17-18. When Etertin's credit notes did not increase, Verdejo went to HP directly. *Id.* at 18.

Thus, in July 2017, after six years and an alleged $14 million in direct payments to Giazitzian, Verdejo finally notified HP about the alleged "extortion" and demanded that HP restore Etertin's credit notes to the levels it enjoyed in previous quarters. *Id.* at ¶ 18, 82. In response, HP launched an investigation. *Id.* ¶ 82. As for Verdejo's credit note demands, HP declined, stating,

---

[3] This despite the fact that, according to Plaintiffs, Huergo left HP in July 2012 and Mazzeo in April 2013. *Id.* ¶¶ 30, 31.

[4] Plaintiffs claim that the exhibits to the complaint support their contentions that they were being extorted by Giazitzian. To the contrary, the exhibits actually show that Verdejo was a willing participant in the scheme in which Giazitzian arranged for Etertin to receive credit notes while Verdejo shared the profits with him. Indeed, in one of the emails (Exhibit C), a competitor of Etertin appears to be complaining to Giazitzian that Etertin was receiving more advantageous treatment than the competitor, and Verdejo was boasting about it.

in writing, that "HP policy requires that promotional rebate programs are offered to similarly situated resellers on equal terms," and denied that Etertin was "being offered less favorable commercial terms by HP Argentina than similarly situated resellers in Argentina." *Id.* at ¶ 99.

Plaintiffs do not, and cannot, allege any facts showing that Etertin was treated less favorably than similarly situated Argentine distributors, that it was entitled to receive a particular amount of rebates/discounts, or that it was denied participation in any program it was eligible for.

As a result of HP's refusal to give Etertin more credit notes, Etertin complains it paid more for HP products, which, over time, resulted in Etertin's bankruptcy. *Id.* at ¶ 18.

III. MOTION TO DISMISS STANDARD

Under Fed. R. Civ. P. 8, a plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *MasTec Renewables P.R. LLC v. Mammoth Energy*, 494 F. Supp. 3d 1233, 1238 (S.D. Fla. 2020). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *MasTec*, 494 F.Supp. 3d at 1238 (quoting *Iqbal*, 556 U.S. at 678). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A claim will not survive "if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

On a motion to dismiss, a court construes the complaint in the light most favorable to the plaintiff and accepts its factual allegations as true. *Cisneros v. Petland*, 972 F.3d 1204, 1210 (11th Cir. 2020) (citing *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1066 (11th Cir. 2017)); *Scanz Technologies, Inc. v. JewMon Enterprises, LLC*, No. 20-22957, 2021 WL 65466, at *2 (S.D. Fla. Jan. 1, 2021). "Unsupported allegations and conclusions of law, however, will not benefit from this favorable reading." *GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, No. 16-24431, 2018 WL

1393790, at *8 (S.D. Fla. Jan. 26, 2018) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations") (citing *Iqbal*, 556 U.S. at 679).

IV. ARGUMENT

A. Plaintiffs' Claims Must be Dismissed for Lack of Standing

Article III standing is jurisdictional and, therefore, a threshold inquiry. *Marrero v. Benitez*, No. 1:17-cv-21026, 2017 WL 7796341, at *5 (S.D. Fla. Aug. 3, 2017) (quoting *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005). The question of standing asks whether a litigant is entitled to have the court decide the merits of the dispute. *Marrero,* 2017 WL 7796341, at *5. The standing requirement is derived from Article III of the Constitution, which provides that federal courts may only hear "cases or controversies." *Id.* (quoting *Amer. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1068 n.16 (11th Cir. 2007).

To establish that a "controversy" exists, a plaintiff must show that it suffered an "injury in fact," an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* In addition, the plaintiff must show causation, i.e., that the injury is fairly traceable to the alleged wrongdoing of the defendant. *Id.* In other words, Article III requires the party invoking the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action of the defendant." *Klayman v. Clinton*, No. 15-cv-80388, 2015 WL 10857500, at *5 (S.D. Fla. Aug. 11, 2015) (citations omitted).

In addition to establishing Article III standing, a plaintiff must also satisfy the applicable statutory standing requirements, which are narrower that Article III standing. *Id.* Under the civil RICO statute, a "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v.*

Imrex Co., Inc., 473 U.S. 479, 496 (1985); *see* 18 U.S.C. § 1964(c). The Eleventh Circuit has stated that "[t]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1291 (11th Cir. 2006) (citing *Bivens Garden Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998)); *Sedima*, 473 U.S. at 496 (holding that the plaintiff's damages must "flow from the commission of predicate acts."); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003) (plaintiffs must show a "direct relation between the injury asserted and the injurious conduct" and that a court asks "whether the alleged conduct was 'aimed primarily' at a third party").

In addition, the Supreme Court has held that the civil RICO statute does not allow for recovery for foreign injuries; therefore, a private RICO plaintiff must allege and prove a *domestic* injury to its business or property in order to have statutory standing. *See RJR Nabisco, Inc. v. Eur. Comm.*, 136 S. Ct. 2090, 2106 (2016) (emphasis added); *Worldspan Marine Inc. v. Comerica* Bank, No. 18-21924, 2020 WL 1238732, at *7 (S.D. Fla. Feb. 27, 2020), *aff'd,* 2020 WL 1538688 (S.D. Fla. Mar. 31, 2020) (appeal pending); *Yuanxiao Feng v. Walsh*, No. 19-24138, 2020 WL 5822420, at *10-11 (S.D. Fla. Sept. 14, 2020); *Lan Li v. Walsh*, No. 16-81871, 2017 WL 3130388, at *10 (S.D. Fla. Jul. 24, 2017).

Applying these standards, all three Plaintiffs lack standing, for the following reasons:

1. Verdejo Admits He Has Not Personally Suffered Any Injuries

Verdejo fails to allege that he personally suffered any injury-in-fact as a result of the Defendants' alleged actions. He conceded this fact in Plaintiffs' Response to HP Inc.'s Motion to Dismiss [D.E. 34], p. 13. Therefore, Verdejo's claims should be dismissed.

2. IVEO's Injuries Were Not Proximately Caused by Defendants' Alleged Conduct

IVEO claims it was injured as a result of seven wire transfers it made to Giazitzian's New York bank account between February and June of 2017. However, no extortionate demands are alleged to have been made upon IVEO; IVEO made the payments because Verdejo decided to use IVEO's bank account for payments demanded of him. Cmplt. 67-68. The law is clear that detrimental effects of racketeering activity directed toward a third party (in this case, Etertin) are not actionable under RICO, because of a lack of proximate cause. *See Beck v. Prupis*, 162 F.3d 1090, 1096 n. 12 (S.D. Fla. 1998) (citing *Bivens,* 140 F.3d at 906 (dismissing shareholders' civil RICO claims against the company because the shareholder-plaintiffs were not the targets of the company's alleged pattern of racketeering activity); *Green Leaf,* 341 F.3d at 1307 (in determining proximate cause, the "court asks whether the alleged conduct was 'aimed primarily' at a third party.") Therefore, IVEO lacks standing and its RICO claims must be dismissed.

3. Etertin Suffered No Domestic Injuries

As for Etertin, the complaint alleges that Defendants' conduct caused the demise of its business in Argentina. Under RICO however, Etertin must establish that the injuries it allegedly suffered because of defendants' conduct were "domestic injuries." To determine whether an injury is foreign or domestic, "[t]he focus of the … inquiry is the geographic location of the injury to Plaintiffs, not the location of the Defendants' alleged wrongful acts." *Worldspan*, 2020 WL 1238732, at *7 (citing *RJR Nabisco*, 136 S. Ct. at 2108); *Absolute Activist Value Master Fund Ltd. v. Devine*, 233 F. Supp. 3d 1297, 1326 (M.D. Fla. 2017). Etertin alleges that its business was put into bankruptcy because, without the credit notes it received while paying Giazitzian, it could not compete in the Argentine market. *Id.* ¶¶ 18, 101, 127. Thus, by Plaintiffs' admission, Etertin's

injuries were suffered in Argentina, not in the United States. *See RJR Nabisco*, 136 S. Ct. at 2108; *Yuanxiao Feng*, 2020 WL 5822420, at *10-11; *Lan Li,* 2017 WL 3130388, at *10.

Plaintiffs attempt to plead their way around RICO's "domestic injury" requirement by claiming that Etertin suffered domestic injuries in February of 2017, when Giazitzian demanded that Etertin make extortionate payments to his New York bank account. Cmplt. ¶ 17. That is unavailing. Courts have repeatedly held that the use of U.S. bank accounts to facilitate wrongdoing outside of the U.S. does not establish a domestic injury. *See, e.g., Bascuñán v. Elsaca*, 927 F.3d 108, 117 (2d Cir. 2019) ("the use of bank accounts located within the United States to facilitate or conceal the theft of property located outside of the United States does not, on its own, establish a domestic injury"); *Yanchukov v. Finskiy*, No. 15-cv-8128, 2017 WL 3491965, at *5 (S.D.N.Y. Aug. 14, 2017) ("The alleged wire transfers in the United States, including payments made through a bank in New York, are similarly insufficient to give rise to a domestic injury to [the plaintiff]."); *Exceed Industries, LLC v. Younis*, No. 15 C 14, 2016 WL 6599949, at *3 (N.D. Ill. Nov. 8, 2016) (in a case alleging a kickback scheme, "the fact that two of the wire transfers to [the defendants] were initiated from Chicago does not create a domestic injury. This U.S.-based conduct may be related to the central scheme but it is not integral or pervasive enough to overcome the fact that the bulk of the illegal racketeering activities are alleged to have occurred abroad); *see also RJR Nabisco,* 136 S. Ct. at 2101 ("If the conduct relevant to the statute's focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.")

For these reasons, all three Plaintiffs lack standing to bring their claims against the Defendants, and their Complaint must be dismissed.

B. Plaintiffs' RICO Claims Are Barred by the Statute of Limitations

The statute of limitations for civil RICO actions is four years. *Lehman v. Lucom*, 727 F.3d 1326, 1330 (11th Cir. 2013) (quoting *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 750 (11th Cir. 2000)). The limitations period begins to run "when the injury was or should have been discovered, regardless of whether or when the injury is discovered to be part of a pattern of racketeering." *Lehman*, 727 F.3d at 1330 (quoting *Maiz v. Virani,* 253 F.3d 641, 676 (11th Cir. 2001) (citing *Rotella v. Wood,* 528 U.S. 549, 555 (2000)).

Here, Plaintiffs' RICO claims are premised on predicate acts dating back to 2010. Cmplt. ¶ 119. Specifically, Plaintiffs allege that Defendants made extortionate demands, and that, beginning in April 2011 and lasting until June 2017, Plaintiffs acceded to those demands by making extortionate payments to Giazitzian. *Id.* at ¶¶ 49-72. Plaintiffs clearly knew, as early as April 2011, of the extortionate demands and the injuries suffered as a result of making payments to Giazitzian. RICO's four-year limitations period began to run then, and ended in April 2015. Plaintiffs waited until February 2021 to file their claims. Therefore, Plaintiffs' civil RICO claims are time-barred and must be dismissed.

C. Plaintiffs Fail to Adequately Plead the Elements of a Civil RICO Claim

"A private plaintiff suing under the civil provisions of RICO must plausibly allege six elements: that the defendants (1) operated or managed (2) an enterprise (3) through a pattern (4) of racketeering activity that included at least two predicate acts of racketeering, which (5) caused (6) injury to the business or property of the plaintiff." *Petland*, 972 F.3d at 1211 (citing *Ray v. Spirit Airlines*, 836 F.3d 1340, 1348 (11th Cir. 2016); *see Sedima,* 473 U.S. at 496. "If a plaintiff fails to adequately plead any one of these elements, it has failed to state a claim upon which relief may be granted, and the complaint must be dismissed." *Petland*, 972 F.3d at 1211 (citing Fed. R. Civ. P. 12(b)(6)).

1. Plaintiffs Fail to Allege that the Defendants Engaged in a Pattern of Racketeering Activity

In order to state a RICO claim, "a plaintiff must allege that each defendant participated in the affairs of the enterprise through a 'pattern of racketeering activity, which requires 'at least two acts of racketeering activity.'" *Petland*, 972 F.3d at 1215-17 (dismissing RICO claims against a franchisor because, *inter alia*, "the complaint could not allege [the franchisor's] participation in the predicate acts," and, even if it could, "could constitute only one predicate act."); *Kuber v. Berkshire Life Ins. Co. of Am.,* No. 19-80211, 2020 WL 646870, at *6 (S.D. Fla. Jan. 27, 2020) ("to be liable under RICO, an individual must have personally committed two predicate acts"); *see Sterling Nat'l Mortg. Co. v. Infinite Title Solutions, LLC,* No. 10-CV-22147, 2011 WL 13220625, at *5 (S.D. Fla. Mar. 3, 2011) (requiring each element be proven with respect to each defendant "without exception"); *Worldspan*, 2020 WL 1238732, at *4 ("Plaintiffs may not abrogate their duty to allege specific acts for which each Defendant is accountable by generically alleging that each Defendant participated in the conspiracy").

a. Plaintiffs Fail to Allege Defendants Participated in Predicate Acts

"To plead a pattern of racketeering activity . . . a plaintiff must allege: (1) the defendants committed two or more predicate acts within a ten-year time span; (2) the predicate acts were related to one another; and (3) the predicate acts demonstrated criminal conduct of a continuing nature." *E.g.*, *MasTec*, 2020 WL 6059853, at *4; *see Kuber*, 2020 WL 646870, at * 6. An act of racketeering activity, commonly known as a "predicate act," includes any of a long list of state and federal crimes. *See* 18 U.S.C. § 1961(1). A plaintiff must put forward enough facts with respect to each predicate act to make it independently indictable as a crime. *See Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997).

In this case, Plaintiffs contend that the Defendants violated the Hobbs Act. "Hobbs Act extortion contains two elements: (1) extortion, and (2) interference with interstate commerce." *United States v. Kim*, 823 Fed. Appx. 804, 809 (11th Cir. 2020) (quoting *United States v. Harris*, 916 F.3d 948, 954 (11th Cir. 2019)). The statute defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). An offense occurs when a defendant exploits a victim's reasonable fear of either physical harm or economic loss. *See Harris*, 916 F.3d at 958; *United States v. Flynt*, 15 F.3d 1002, 1007 (11th Cir. 1994).

Plaintiffs' claims fall far short of meeting these pleading standards. While the Complaint is filled with repetitive allegations concerning Giazitzian's active efforts to force Etertin to pay kickbacks, precious little is alleged with respect to the participation of the Defendants. Those allegations essentially amount to Verdejo's "understanding" that Giazitzian was supposedly sharing direct payments with the Individual Defendants through 2017, even though at least two of the Defendants, Huergo and Mazzeo, had long since left HP. Cmplt. ¶¶ 30, 31 and 58. Such allegations are insufficient to be indictable as a crime, and therefore, cannot constitute a predicate act. *See Brooks*, 116 F.3d at 1381. Therefore, Plaintiffs' RICO allegations fail to state a claim and must be dismissed.

b. Plaintiffs Fail to Allege that Defendants "Operated or Managed" the Enterprises' Affairs

In addition to establishing that defendants participated in a pattern of racketeering activity, a private plaintiff suing under the civil provisions of RICO must plausibly allege that each defendant "operated or managed" the enterprise. *Petland*, 972 F.3d at 1211 (citing *Ray*, 836 F.3d at 1348); *Drummond v. Zimmerman*, 454 F. Supp. 3d 1210, 1219 (S.D. Fla. 2020) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 177); *see Sedima,* 473 U.S. at 496. The "operation or management

test" requires that to be held liable under the RICO statute, a defendant must have had some part in directing the enterprise's affairs. *See In re Managed Care Lit.*, 150 F. Supp. 2d 1330, 1342 (S.D. Fla. 2001) (citing *Reves*, 507 U.S. at 179); *U.S. v. Castro*, 89 F.3d 1443, 1452 (11th Cir. 1996). Specifically, a "defendant must knowingly implement and make decisions in order to be liable under the 'operation or management' test." *Leon v. Cont'l AG*, 301 F. Supp. 3d 1203, 1232 (S.D. Fla. 2017) (citing *United States v. Browne*, 505 F.3d 1229, 1277 (11th Cir. 2007)).

In the Complaint, there is no allegation that any of the Defendants had had any role in directing the RICO enterprise's affairs, or that they "knowingly implemented" or "made decisions" for the enterprise. The only person that is alleged to have been making decisions for the enterprise was Giazitzian. Absent such allegations as to the Defendants, Plaintiffs' RICO claims fail.

2. Plaintiffs Fail to Adequately Allege a RICO "Enterprise"

Plaintiffs' RICO claims fail for another reason: Plaintiffs' fail to properly plead the existence of a RICO enterprise. "To plead a plausible RICO claim, a plaintiff must allege the existence of two distinct entities; a person and 'an enterprise that is not simply the same person referred to by a different name.'" *D.J. Lincoln Enters. Inc. v. Google, LLC*, No. 2:20-cv-14159, 2021 WL 184527, at *2 (S.D. Fla. Jan. 19, 2021) (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001)). "Enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); *Ray*, 836 F.3d at 1352; *Zamora v. FIT Int'l Group Corp.*, 834 Fed. Appx. 622, 625 (2d. Cir. 2020). An enterprise must possess three structural features: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit those associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

a. Plaintiffs Fail to Allege a Distinct RICO Enterprise Because They Allege that All Defendants Are Both "Persons" and the Enterprise

Plaintiffs' allegations fail to properly allege a RICO enterprise. First, Plaintiffs improperly allege that all seven Defendants are both "persons" liable under the Act and that they all collectively constitute the criminal "enterprise." Cmplt. ¶¶107-08. Such allegations are inadequate to plead an enterprise separate and distinct from the liable person as provided in the RICO statute and governing law. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *Fernau v. Enchante Beauty Prods., Inc.*, No. 18-CV-20866, 2019 WL 5269427, at *1 (S.D. Fla. Sept. 17, 2019), *aff'd* 2019 WL 5268541, (S.D. Fla. Oct. 17, 2019) (Scola, J.); *Viridis Corp. v. TCA Global Credit Master Fund, LP.*, 155 F.Supp.3d 1344, 1360 (S.D. Fla. 2015); *De Lage Landen Financial Services, Inc. v. Rasa Floors, LP*, No. 08-00533, 2009 WL 564627, at *10 (E.D. Pa. Mar. 5, 2009) (holding that where the alleged members of the enterprise are the exact same three entities alleged to be culpable persons, the distinctiveness rule is violated); *Zavala v. Wal-Mart Stores*, 447 F.Supp. 2d 379, 383 (D.N.J. 2006) ("[i]f the members of the enterprise are the same as the persons, the distinctness requirement has not been met, as the 'person' and the 'enterprise' must not be identical.")

The *Viridis* case is instructive. There, two corporate officers were named as "culpable persons" and, along with the company they worked for, part of the RICO enterprise. *Id.* at 1359. The defendants moved to dismiss, alleging that the distinctiveness requirement was not met because the defendants had undertaken the alleged conduct as corporate officers of the company defined as the enterprise. *Id.* at 1360. The court rejected this argument. *Id.*, citing *Cedric Kushner*, 533 U.S. at 161. However, the court still dismissed the claims because the individual defendants were alleged to be both "persons" and part of the enterprise. *Id.* Specifically, the court stated:

> Plaintiffs' allegations become murky, at best, when they define Press and Silverman as "members of the TCA Enterprise" and as the "liable persons"

> under this section. Under *Cedric*, it would be permissible for Plaintiffs to allege Press and Silverman as the "liable persons," with TCA alleged to be the "enterprise," but as the Amended Complaint reads, that is not what Plaintiffs have alleged. **Once Plaintiffs commingle the roles of Press and Silverman as both "persons" and as "members of the enterprise" in their allegations, the Court finds that Plaintiffs fail to meet the separate and distinctiveness requirement that must be established to impose RICO liability upon Press and Silverman in their individual capacities."**

Id. (emphasis added).

Plaintiffs attempt to satisfy the distinctiveness requirements by alleging, solely in conclusory terms, that the Defendants "are culpable persons distinct from the association-in-fact enterprise." Cmplt. at ¶113. However, such conclusory allegations do not suffice. *See Fernau*, 2019 WL 5269427, at *4 (noting that the plaintiffs' conclusory assertion that the enterprise was separate and distinct from its three members is insufficient to make the persons distinct from the enterprise). Plaintiffs must allege facts that show culpable persons distinct from the RICO enterprise. Plaintiffs here failed to do so. For this reason alone, Plaintiffs' RICO count must be dismissed.

b. <u>Plaintiffs Fail to Plausibly Allege that the Enterprise Members shared a Common Purpose</u>

Even if Plaintiffs had alleged a distinct enterprise, they still fail to adequately allege a RICO enterprise because they do not, and cannot, allege facts giving rise to a plausible inference that the enterprise members shared a common criminal purpose.

To satisfy the "purpose" requirement, a plaintiff must demonstrate that the members of an association "share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Zamora*, 834 Fed. Appx. at 625; *see Turkette*, 452 U.S. at 583, 101 S. Ct. 2524. An abstract common purpose, such as a generally shared interest in making money, will not suffice. *Petland*, 972 F.3d at 1211 (citing *Ray*, 836 F.3d at 1352-53, 1352

n.3). Rather, a RICO plaintiff must plausibly allege that the participants shared the purpose of enriching themselves through a particular criminal course of conduct. *Id.* at 1212.

Plaintiffs allege, in purely conclusory terms, that the enterprise, consisting of the six individual defendants and HP, was formed "for the common purpose of unlawfully obtaining money from Plaintiffs and other Argentine distributors of HP products with their consent induced by the wrongful use of threats that if Plaintiffs and other distributors did not pay, Plaintiffs or the other distributors would lose HP's business." (Cmplt. ¶108). Tellingly, the facts alleged by the Plaintiffs do not support such a conclusion. Plaintiffs' allegations focus almost exclusively on Giazitzian as the person who demanded payments and collected funds.[5] Plaintiffs state no facts that raise a plausible inference that HP shared a common purpose with other enterprise members to extort the Plaintiffs – in fact, Plaintiffs specifically allege that HP was not notified of the kickback scheme until after the payments had ended in June of 2017. Cmplt. ¶ 7. While Plaintiffs allege that HP "knowingly" allowed the Individual Defendants to use credit notes to exert control over the Plaintiffs (Cmplt. ¶ 108), any "knowledge" HP had of the credit note scheme was gained after-the-fact, by Plaintiffs' own admission. Such facts are insufficient to establish the requisite common purpose necessary to state a viable RICO claim.

The recent case of *Cisneros v. Petland* illustrates the point. In *Petland*, the buyer of a puppy sued the seller, its owners, a business consultant, and the franchisor (Petland, Inc.), after the puppy died a week after she bought it. 972 F.3d at 1209. The plaintiff alleged a nationwide RICO conspiracy between Petland, all of its franchisees, a business consultant, and a network of

[5] While Plaintiffs allege that, in 2010, Defendants Huergo and Mazzeo demanded direct payments, they also allege that Verdejo rejected such demands. Cmplt. ¶ 46. It was only when Giazitzian approached Verdejo and offered to "fix" his financial problems that Verdejo agreed to pay kickbacks to Giazitzian (and only to Giazitzian). *Id.* at 48-49.

veterinarians, to sell sick puppies for premium prices and engage in a campaign of obfuscation after the sale, to aid Petland in avoiding its warranties. *Id.* at 1209-10. The district court dismissed the case because the plaintiff failed to plausibly allege that the members of the alleged a RICO enterprise shared a common purpose. *Id.* at 1211. The Eleventh Circuit affirmed, stating:

> [Plaintiff] has alleged no facts that plausibly support the inference that the defendants were collectively trying to make money in pet sales by fraud, which is a common purpose sufficient to find a RICO enterprise, as opposed to the "obviously alternative explanation," that they were simply trying to make money in pet sales, which is not.

Id. (citations omitted).

This analysis is directly applicable to the instant case. The only facts alleged concerning HP are that it enforced company policy to treat similarly situated distributors equally as to allocation of credit notes. Cmplt. ¶ 99. Plaintiffs attempt to infer a criminal purpose to extort, but fail to allege facts that support that inference, as opposed to the obvious alternative explanation that they were enforcing company policy against preferential discounts. Plaintiffs allege no communications between HP and the Individual Defendants suggesting that HP encouraged, supported, or even knew about any kickback scheme during the seven years it was alleged to have occurred. Absent such facts, Plaintiffs fail to allege that the enterprise members shared a common purpose, and their RICO claim fails, and must be dismissed.

D. Plaintiffs Fail to State a Claim for RICO Conspiracy Against the Defendants

Because Plaintiffs' substantive RICO claim fails, for the reasons stated above, their RICO conspiracy claim fails as well. Section 1962(d) makes it illegal for anyone to conspire to violate one of the substantive provisions of RICO, including Section 1962(c). *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1293 (11th Cir. 2010). "To establish a RICO conspiracy, a plaintiff must show defendants either (1) agreed with the objective of the conspiracy, or (2) agreed to commit

two racketeering predicates." *GolTV,* 2018 WL 1393790, at *8 (citing *Rajput v. City Trading, LLC*, 476 Fed. Appx. 177, 180 (11th Cir. 2012)).

However, "a conspiracy itself furnishes no cause of action." *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1311 (11th Cir. 2000). "The gist of the action is not the conspiracy but the underlying wrong that was allegedly committed. If the underlying cause of action is not viable, the conspiracy claim must also fail." *Id.*; *Zamora*, 834 Fed. Appx. at 626 (citing *First Cap. Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 164 (2d Cir. 2004)); *see also Rogers v. Nacchio*, 241 Fed. Appx. 602, 609 (11th Cir. 2007) ("Thus, where a plaintiff fails to state a RICO claim and the conspiracy count does not contain additional allegations, the conspiracy claim necessarily fails.").

Here, for the reasons discussed above (failure to allege that the Defendants participated in any predicate acts, failure to allege a distinct enterprise, failure to allege that the members of the enterprise shared a common purpose), Plaintiffs have failed to allege a viable RICO claim, and therefore, their RICO conspiracy claim fails as well.[6]

---

[6] The failure of Plaintiffs' conspiracy claim creates a second and independent basis for dismissal of the claims against the Individual Defendants: Plaintiffs fail to allege sufficient facts to invoke conspiracy jurisdiction under Florida's Long Arm Statute, and therefore, this Court lacks personal jurisdiction over the Individual Defendants pursuant to Fed. R. Civ. P. 12(b)(2). In the Complaint, the only basis alleged for personal jurisdiction over Campos or Blanco is the following:

> While it is unknown at this time whether Juan Manuel Campos [or] Ernesto Blanco . . . have sufficient minimum contacts with the forum, this Court may exercise personal jurisdiction over them as co-conspirators.

See Cmplt. ¶20. Plaintiffs allege no basis for the exercise of personal jurisdiction over Carlos Huergo. Assuming, for the sake of argument, that Plaintiffs meant to invoke conspiracy jurisdiction for all Individual Defendants, such invocation still fails. It is axiomatic that to invoke conspiracy-imputed personal jurisdiction, a plaintiff must allege a viable conspiracy. *See, e.g., Auf v. Howard University*, No. 19-22065, 2020 WL 1452350, at *8 (S.D. Fla. Mar. 25, 2020) (finding that where plaintiff fails to plead a civil conspiracy, personal jurisdiction premised on the acts of

E. Plaintiffs' Aiding and Abetting Claim Fails to State a Claim

The aiding and abetting claim (asserted only against HP) also fails because Plaintiffs' allegations do not give rise to a plausible inference that HP was involved in the alleged extortion. Under 18 U.S.C. § 2, "[A] person is liable … for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* (quoting *Rosemond v. U.S.*, 572 U.S. 65, 71 (2014)). To establish liability as an aider and abettor of a Federal RICO violation, "a plaintiff must show for each predicate act that the defendant was associated with the wrongful conduct, participated in it with the intent to bring it about, and sought by his actions to make it succeed." *Cordero v. Transamerica Annuity Serv. Corp.*, 452 F. Supp. 3d 1292, 1304 (S.D. Fla. 2020) (citations omitted).

Plaintiffs fail to allege that HP was in any way involved in, associated with, or even knew about, the alleged extortion until after it had concluded. HP's only alleged involvement came after the kickback scheme ended, in July 2017, when Verdejo finally reported it – at which time HP investigated the allegations and refused to reinstate Etertin's credit note level to what it enjoyed during the kickback scheme. That is insufficient to support a claim for aiding and abetting a violation of the RICO statute against HP. Plaintiffs' aiding and abetting count against HP, therefore, must be dismissed for failure to state a claim.

F. Plaintiffs' FDUTPA Count Fails to State a Claim

Finally, Plaintiffs' FDUTPA count against HP also must be dismissed. In that count, Plaintiffs contend that HP's refusal to extend credit notes to Etertin after learning about the alleged

---

a co-conspirator fail); *Randall v. Offplan Millionaire AG*, No. 6:17-cv-2103, 2019 WL 5188368, at *7 (S.D. Fla. June 17, 2019) (holding that personal jurisdiction premised on conspiracy allegations fails when the conspiracy allegations themselves fail). Because Plaintiffs have failed to do so, the Court cannot exercise conspiracy-imputed personal jurisdiction.

kick-back scheme constitutes an unfair method of competition and an unfair trade practice, in violation of FDUTPA. Cmplt. ¶ 96, 97, 142.

However, "FDUTPA applies only to actions that occur within the state of Florida." *Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1355 (S.D. Fla. 2019) (emphasis added) (quoting *Carnival Corp. v. Rolls-Royce PLC*, No. 08-23318, 2009 WL 3861450, at *6 (S.D. Fla. Nov. 17, 2009); *see Hakim-Daccach v. Knauf Int'l GmbH*, No. 17-20495, 2017 WL 5634629, at *7 (S.D. Fla. Nov. 22, 2017); *W.W. Sports Import. Export. e Com. Ltda v. BPI Sports,* LLC, No. 0:16-cv-60147, 2016 WL 9375202, at *5 (S.D. Fla. Aug. 11, 2016); *Five for Ent. S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1330 (S.D. Fla. 2012).

Plaintiffs do not, and cannot, contend that HP committed unfair trade practices in Florida. Cmplt. ¶¶ 77-103. Plaintiffs concede that HP is based in California, and the communications between Verdejo and HP concerning credit notes occurred in Argentina and California. *Id.* at ¶¶ 77-99. When Verdejo met with HP to discuss the credit notes, that meeting occurred in California. Cmplt. ¶ 90. HP's refusal to reinstate Etertin's disproportionate amount of credit notes – the crux of Plaintiffs' claims against HP – certainly did not occur in Florida. Without such a nexus to Florida, FDUTPA does not apply, and Count IV must be dismissed.

V. CONCLUSION

For the reasons addressed above, Plaintiffs' claims against the Defendants must be dismissed, in their entirety, with prejudice. [7]

[7] Where, as here, a claim's failures are so material that no amendment is possible, dismissal with prejudice is appropriate, even on the first complaint. *See Wolf v. Pacific Nat. Bank*, No. 09-21531, 2010 WL 5888778, at *12 (S.D. Fla. Dec. 28, 2010) (citations omitted).

Date: June 3, 2021

Respectfully submitted,

By: */s/ Dianne O. Fischer*

Dianne O. Fischer
Florida Bar No. 994560
deedee.fischer@akerman.com
Francisco Rodriguez
Florida Bar No. 653446
francisco.rodriguez@akerman.com
Carmen M. Ortega-Rivero
Florida Bar No. 1025996
carmen.ortega-rivero@akerman.com

AKERMAN LLP
Three Brickell City Centre
98 Southeast Seventh Street, Suite 1100
Miami, FL 33131
Telephone: (305) 374-5600
Facsimile: (305) 349-4654

Attorneys for Defendants HP Inc., Ernesto Blanco and Juan Manuel Campos

Respectfully submitted,

By: */s/ Sean R. Santini*

Sean R. Santini
Florida Bar No. 832898
ssantini@santinilawfirm.com
Christian C. Kohlsaat
Florida Bar No. 117795
ckohlsaat@santinilawfirm.com

SANTINI LAW
1001 Brickell Bay Drive
Suite 2650
Miami, FL 33131
Telephone: (305) 372-7307

Attorneys for Defendant, Carlos Huergo