UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE HONORABLE OTTO J. REICH and OTTO REICH ASSOCIATES, LLC, Plaintiffs, v. LEOPOLDO ALEJANDRO BETANCOURT LOPEZ, PEDRO JOSE TREBBAU LOPEZ, and FRANCISCO D'AGOSTINO CASADO, Defendants.	Civ. No. 13 CV 5307 (JPO)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF DEFENDANT FRANCISCO D'AGOSTINO CASADO TO DISMISS AMENDED COMPLAINT

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Plaintiffs the Honorable Otto J. Reich ("Ambassador Reich") and Otto Reich Associates, LLC ("ORA" and, together with Ambassador Reich, "Plaintiffs"), respectfully submit this Memorandum of Law,[1] along with the Declaration of Mark W. Smith, sworn to May 7, 2014, with exhibits (the "Smith Decl.") in opposition to the Motion to Dismiss Plaintiffs' Amended Complaint (the "Motion") filed by defendants Leopoldo Alejandro Betancourt Lopez ("Betancourt"), Pedro Jose Trebbau Lopez ("Trebbau") and Francisco D'Agostino Casado ("D'Agostino"). This Memorandum of Law addresses arguments advanced by D'Agostino in the separate Memorandum of Law that he filed in support of the Motion.

PRELIMINARY STATEMENT

Since the commencement of this lawsuit, D'Agostino has taken the position that he is "not part of Derwick," and that Plaintiffs made a "mistake" in naming him as a party. Through his "supplemental" memorandum of law, he wrongfully attempts to raise – pre-discovery and through the unsworn testimony of his counsel – numerous factual issues not properly before this Court on Defendants' Rule 12(b)(6) motion.

In deciding a Rule 12(b)(6) motion, the court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. Here, Plaintiffs allege, among other things, that D'Agostino (i) admitted to being a key player and member of Derwick's inner circle;[2] (ii) procured the initial financing for Derwick; (iii) is a founder, owner, officer, director and/or operator of Derwick, and directs and manages its daily activities; (iv) is an agent and partner of Betancourt and Trebbau; (v) confessed that Derwick paid what he called "consulting fees" (kickbacks) to secure its energy contracts; (vi) took independent actions

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[1] Plaintiffs incorporate by reference the arguments raised in Plaintiffs' Memorandum of Law In Opposition to the Motion of Defendants Betancourt and Trebbau, which is being filed separately.

[2] Derwick is defined in the Amended Complaint as Derwick Associates USA LLC and Derwick Associates Corporation, together with these companies' predecessors, successors, assigns and affiliates. (AC ¶ 3.)

designed to conceal and perpetuate Defendants' unlawful activities; and (vii) in exchange for his dismissal from this lawsuit, offered to provide information to Ambassador Reich that would be damning to Betancourt and Trebbau. Plaintiffs' specific allegations against D'Agostino are sufficient to show, at this stage of the proceeding, that D'Agostino is an integral part of Derwick and, at a minimum, an agent of Betancourt, Trebbau and Derwick.

D'Agostino complains that Plaintiffs' state law claims against him are legally deficient because Plaintiffs do not allege that he uttered any of the false statements concerning Plaintiffs. D'Agostino ignores Plaintiffs' civil conspiracy claim. D'Agostino is chargeable with the tortious activity alleged in the Amended Complaint, insofar as he is alleged to be part of a civil conspiracy to commit those acts. That Plaintiffs sometime use the collective term "Defendants" does not undermine Plaintiffs' specific and detailed allegations against D'Agostino where Plaintiffs allege that Defendants acted in concert, and D'Agostino has sufficient notice of Plaintiffs' state law claims.

Finally, there is no merit to D'Agostino's assertion that Plaintiffs fail to state a RICO claim against him under 18 U.S.C. § 1962(c). Plaintiffs' allegations reflect that D'Agostino participated in the operation and management of one or more of the alleged enterprises. That certain of Plaintiffs' allegations are pled "upon information and belief" or refer to D'Agostino as one of the "Defendants" is acceptable where, as here, Plaintiffs have also alleged detailed, individualized, and particularized factual allegations against D'Agostino and additional facts are peculiarly within the possession and control of the Defendants.

The Court should deny Defendants' Motion.

ARGUMENT[3]

POINT I

PLAINTIFFS' STATE LAW CLAIMS AGAINST D'AGOSTINO ARE ADEQUATELY PLED

D'Agostino erroneously contends that the Amended Complaint "fails to identify any false or defamatory statement made by [him]" and, thus, purportedly fails to put him on notice of the substance of the state law claims against him. (*See* D'Agostino's Moving Memorandum of Law ("Mem.") at 4-6.) D'Agostino ignores the well-pled allegations in the Amended Complaint, which provide him with more than sufficient notice of the claims against him.

Plaintiffs' Seventh Claim for Relief is one for civil conspiracy.[4] (AC ¶¶ 320-324.) As alleged in the Amended Complaint, "[e]ach of the Defendants [including D'Agostino], together with the others, conspired with respect to Counts [III] through [VI][5] and acted in concert to commit unlawful acts, including acts of bribery, defamation and tortious interference." (AC ¶ 321.) Plaintiffs further allege that Defendants "conspired to engage" in a series of "wrongful and overt acts," including but not limited to "publishing and disseminating false statements about

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[3] The Court is respectfully referred to Plaintiffs' First Amended Complaint ("Amended Complaint" or "AC"), which is incorporated herein, for a full recitation of the facts relevant to Plaintiffs' claims.

[4] Plaintiffs have properly pled several underlying torts, including tortious interference, trade libel/injurious falsehood and defamation, to support their conspiracy claim, which D'Agostino does not dispute. Thus, Plaintiffs' civil conspiracy may not be dismissed. *See Mori v. Saito,* 10 Civ. 6465 (KBF), 2013 U.S. Dist. LEXIS 58766, at *13 (S.D.N.Y. Apr. 19, 2013) (New York permits a "cause of action" for civil conspiracy to commit a tort; however, a claim alleging conspiracy to commit a tort stands or falls with the underlying tort). D'Agostino's citation to *LePorte v. Greenwich House*, 09 Civ. 6645 (NRB), 2010 U.S. Dist. LEXIS 42326 (S.D.N.Y. Apr. 26, 2010) does not compel a contrary conclusion. First, *LePorte* concerned a motion for summary judgment and not a Rule 12(b)(6) motion. Second, the court there dismissed plaintiff's claim that defendants were part of a civil conspiracy to defame because the allegedly false statements comprising plaintiff's underlying defamation claim were either time barred or protected by a qualified privilege. *Id.* at *23-24, 28. That is not the case here and has not been argued to be the case.

D'Agostino also relies on *LePorte* for his assertion that Plaintiffs' conspiracy claim fails to the extent it is based on D'Agostino being an owner of Derwick. (*See* Mem. at 6, n.1.) Again, his reliance is misplaced. Plaintiffs allege that Defendants conspired among themselves and/or with their agents and not – as D'Agostino suggests – with "a corporation and its agent."

[5] Paragraph 321 of the Amended Complaint contains a typographical error. It incorrectly references Counts II through V when it should reference Counts III through VI.

[Plaintiffs]" with the "unlawful objective" of "interfering with [Plaintiffs'] business relationships," "impugning Ambassador Reich's integrity, credibility and reputation" and causing damage to Plaintiffs, and that "[e]ach of the Defendants understood the objectives of the[ir unlawful] scheme, and accepted them, and was an active and knowing participant in the conspiracy." (*Id.*)

It is of no moment that the Amended Complaint fails to allege a specific defamatory statement *uttered* by D'Agostino. 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. *See Briarpatch Ltd., L.P. v. Pate*, 81 F. Supp. 2d 509, 516 (S.D.N.Y. 2000). D'Agostino is chargeable with the tortious activity alleged in the Amended Complaint, insofar as he is alleged to be part of a civil conspiracy to commit those acts. (AC ¶¶ 286, 296, 307, 317, 320-324.) Plaintiffs also allege that, at all relevant times, D'Agostino and the other two Defendants worked together and acted as each other's agents in the commission of the alleged state law claims. (*Id.* at ¶ 47.)

Plaintiffs' allegations give D'Agostino sufficient notice of the actions for which Plaintiffs seek to hold him liable under a civil conspiracy theory. The Amended Complaint pleads with particularity the details of the specific communications that Plaintiffs allege were defamatory, including the identities of the alleged speakers of the defamatory communications, the substance of the alleged defamatory statements, and the dates on which the defamatory statements are believed to have been made and the third parties to whom the statements were published.[6] (AC

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[6] *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. *Thai*, 726 F. Supp. 2d at 334 (defamatory statements must "target [the] individual"). There can be no dispute that the statement "Otto Reich is working for us" is "of and concerning" Plaintiffs. D'Agostino's reliance on *Navarra v. Marlborough Gallery, Inc.*, 820 F. Supp. 2d 477 (S.D.N.Y. 2011), is equally misplaced. There, the court dismissed plaintiff's defamation claims against the defendant because the plaintiff failed to allege any statements by the

¶¶ 147-49, 159-161.) *See Luce v. Edelstein,* 802 F.2d 49, 54 (2d Cir. 1986). The Amended Complaint affords D'Agostino full notice of the conduct alleged against him, and does so in accordance with applicable pleading standards. *See Caruso v. City of New York*, 06-cv-5997 (RA), 2013 U.S. Dist. LEXIS 13843, at *77 (S.D.N.Y. Sept. 26, 2013) (elements of defamation are (1) a false statement about the plaintiff; (2) published to a third party without authorization or privilege; (3) through fault amounting to at least negligence on the part of the publisher; (4) that either constitutes defamation per se or caused 'special damages).[7]

POINT II

PLAINTIFFS' AMENDED COMPLAINT CONTAINS SPECIFIC FACTUAL ALLEGATIONS AGAINST D'AGOSTINO, INCLUDING ALLEGATIONS LINKING D'AGOSTINO TO THE ACTIONS OF BETANCOURT AND TREBBAU

D'Agostino argues that Plaintiffs' "broad allegations" linking D'Agostino to the other Defendants are insufficient to survive a motion to dismiss. (*See* Mem. at 6-8.). To the contrary, Plaintiffs have alleged specific factual allegations against D'Agostino, which demonstrate his own culpable conduct, and that he acted in concert with Defendants Betancourt and Trebbau.

D'Agostino's reliance on *Schwartz v. Society of New York Hosp.*, 199 A.D.2d 129 (1st Dep't 1993), is misplaced. There, plaintiff, an anesthesiologist in private practice who maintained clinical privileges with defendant hospital, brought a cross-motion for leave to amend his second amended complaint to assert defamation claims against two individuals whom plaintiff alleged participated in a conspiracy to defame him. *Id.* at 129. The appellate court reversed the decision of the trial court, which granted plaintiffs' motion to amend, finding that:

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defendant that were false. To the contrary, all of the statements that the plaintiff there attempted to attribute to the defendant were either non-actionable expressions of opinion or privileged statements made in the contemplation of or during litigation. *Id.* at 489.

[7] Although New York state civil procedure law sets a heightened pleading standard for defamation claims, New York pleading requirements do not apply to a case in federal court. *See Pasqualini v. MortgageIT, Inc.*, 498 F. Supp. 2d 659, 671-72 (S.D.N.Y. 2007) (applying lower federal pleading requirements to defamation claims).

"[t]he *only* allegation linking [the two individual] defendants to the remarks is that [the defendant who uttered the statements] was acting on their behalf or 'in concert' with them when he made the remarks." *Id.* at 130 (emphasis added). In doing so, the court recognized that "[a]lthough tort liability may be imposed based on allegations of conspiracy which 'connect nonactors, who might otherwise escape liability, with the tortious acts of their co-conspirators,' *more than a conclusory allegation of conspiracy or common purpose is required to state a cause of action against such nonactor*." *Id.* (citations omitted) (emphasis added). The plaintiff's bare allegation that the defendants were acting in concert "*without any allegation of independent culpable behavior on their part*" was not sufficient to link them to the alleged defamatory remarks or to establish an agency relationship. *Id.* (emphasis added.)[8]

Unlike the deficient allegations in *Schwartz v. Society of New York Hosp.,* this is not a situation where Plaintiffs have alleged only that "Defendants agreed among themselves" to defame Plaintiffs.[9] To the contrary, Plaintiffs allegations against D'Agostino: (i) link him to the alleged defamatory statements, (ii) establish an agency relationship between him, Betancourt and Trebbau, and (iii) support Plaintiffs' civil conspiracy claim – especially where, as here, discovery has yet to take place, and Defendants have every incentive to keep their transactions secret so as to prevent criminal prosecution (and enable them to continue their profiteering).

To illustrate, Plaintiffs allege that:

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[8] The allegations of the plaintiff in *Treppel v. Biovail Corp.*, 03 Civ. 3002 (PKL), 2005 U.S. Dist. LEXIS 18511 (S.D.N.Y. Aug. 30, 2005), cited by D'Agostino (*see* Mem. at 7), suffer from the same fatal deficiencies as those in *Schwartz, supra*. In *Treppel*, plaintiff's amended complaint contained no specific allegations implicating the individual defendants who served as the company's general counsel and media contacts; plaintiff simply replaced the name of the corporate defendant with the term "defendants" in his amended complaint. *Id.* at *10.

[9] It is also worth noting that *Schwartz* did not involve a Rule 12(b)(6) motion; plaintiff there sought leave to amend, which is governed by a different standard than a Rule 12(b)(6) motion. In deciding a motion to dismiss under F. R. Civ. P. 12(b)(6), the court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *See Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (citation omitted).

- While Betancourt and Trebbau are the public faces of Derwick, *D'Agostino*, is a founder, owner and operator of the company, and directs and manages its daily activities. (AC ¶ 165.)
- Prior to this lawsuit, *D'Agostino* admitted to being a key player and member of Derwick's inner circle and procured the initial financing for Derwick. (*Id.* at ¶¶ 165, 166.)
- Defendants Betancourt, Trebbau, and *D'Agostino* worked together as each other's agents and partners, and were the owners and/or officers, directors, or operators of Derwick. (*Id.* at ¶47.)
- Defendants direct, control and coordinate virtually all aspects of global strategy, as well as the day-to-day activities of Derwick, from their offices and homes in New York and Florida, including from *D'Agostino's* office at 450 Park Avenue, New York, New York 10022. (*Id.* at ¶¶ 29, 48.)
- Betancourt, Trebbau, and *D'Agostino* agreed amongst themselves to attempt to entice and influence Venezuelan officials to award the contracts to Derwick by way of offering kickbacks to those officials and are presently attempting to obtain such contracts for Derwick, and intend to offer substantial illegal payments to government officials in exchange for contract awards. (*Id.* at ¶ 69.)
- In November, 2012, while in the United States, *D'Agostino* told a friend that "of course" Derwick paid kickbacks to secure its energy contracts; he noted that in Venezuela, "you always have to pay" what D'Agostino called "consulting fees," in order to secure the contracts.[10] (*Id.* at ¶ 97.)
- In late 2012, during Defendants' campaign to undermine Ambassador Reich's relationship with Banco Venezolano de Credito S.A. ("Banco Venezolano"), Betancourt, Trebbau, and *D'Agostino* learned that Eligio Cedeño ("Cedeño"), who himself has long been an enemy of the corrupt Chavez regime, was a client of ORA. Defendants agreed amongst themselves to (falsely) tell Cedeño that Ambassador Reich was working for Derwick. (*Id.* at ¶¶ 152, 157.)
- To effectuate the scheme, Betancourt placed a telephone call in November 2012 from New York to Cedeño, who was then in Miami. During that conversation, Betancourt told Cedeño that ORA had been retained by Derwick to offer consulting services. Betancourt further told Cedeño that Derwick had an ongoing arrangement with Ambassador Reich for a proposed business venture in Panama. Neither of those statements was true. (*Id.* at ¶¶ 159-60.)
- Eloy Montenegro ("Montenegro"), who is Trebbau's father-in-law, also made calls to Cedeño and/or his agents in which Montenegro stated, in essence, that "Otto Reich is working for Derwick." At the time that Montenegro

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[10] As noted in the Amended Complaint, the United States Department of Justice has declared that "consulting fees" are often euphemisms for bribes. (AC ¶ 97, citing U.S. Department of Justice, *FCPA: A Resource Guide to the Foreign Corrupt Practices Act*, *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (last accessed July 29, 2013) ("[b]ribes are often concealed under the guise of legitimate payments, such as commissions or consulting fees").)

communicated this false information, he was acting as an agent of not only Trebbau, but also the other Defendants. (*Id.* at ¶ 161.)

- At or about the same time as the call to Cedeño, *D'Agostino* telephoned and sent text messages to a human rights advocate and respected journalist (the "*Forbes* Writer"), who was preparing to publish a story about Derwick in *Forbes* magazine. *D'Agostino* spoke about the business of Derwick, inquired about the article that the *Forbes* Writer was working on about Derwick, and attempted to dissuade the *Forbes* Writer from publishing the piece. (*Id.* at ¶¶ 170-71.)

- In an attempt to convince the *Forbes* Writer that Derwick is a legitimate and law-abiding company, *D'Agostino* offered to share with the *Forbes* Writer, Derwick's contracts with the Venezuelan government, its contracts with ProEnergy Services, and Derwick's audited financial statements. (*Id.* at ¶ 172.)

- *D'Agostino's* text messages with the *Forbes* Writer would later be referenced in an Amended Complaint filed by Derwick, Betancourt, and Trebbau in *Derwick Associates Corp., et al. v. Venezolano de Credito, S.A., et al.*, No. 12-36297-CA-11 (Cir. Ct. 11th Dist. Miami-Dade Co.) (the "Florida Defamation Suit") – evidence that *D'Agostino* was working with Betancourt, Trebbau and Derwick in their legal efforts, and that *D'Agostino* had supplied the *Forbes* Writer's text messages to Derwick's New York legal counsel. (*Id.* at ¶ 176.)

- In August 2013, a former Venezuelan government official who claimed to be an *agent of D'Agostino*, and who had flown to the United States on the private jet of *D'Agostino's* father-in-law, met with Ambassador Reich in Washington, D.C. This former government official told Ambassador Reich that if he would dismiss *D'Agostino* from the lawsuit, *D'Agostino* would provide Ambassador Reich with information about Betancourt and Trebbau that would substantiate the allegations set forth in Plaintiffs' case. (*Id.* at ¶ 99.)[11] This further evidences D'Agostino's status as a key insider in Derwick.

As illustrated above, Plaintiffs allege that D'Agostino is an integral part of Derwick and, at a minimum, an agent of Betancourt, Trebbau and Derwick, having acted in concert with them and on their behalf on numerous occasions. Plaintiffs' defamation allegations cannot be viewed in a vacuum separate and apart from their allegations concerning D'Agostino's relationship with Betancourt and Trebbau and his involvement with Derwick. Plaintiffs' allegations against

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[11] D'Agostino's characterization of the August 2013 meeting as attempted "blackmail" (*see* Mem. at 13, n.2) is nothing more than a meritless *ad hominem* attack. That meeting was not at the request of Ambassador Reich; to the contrary, D'Agostino's agent sought out Ambassador Reich in an attempt to protect D'Agostino. If Plaintiffs are allowed to proceed to discovery, the evidence in this case will show that D'Agostino is not simply "a childhood friend" of Defendants Betancourt and Trebbau but, also, a "key player and member of Derwick Associates' inner circle." (AC ¶ 166.)

D'Agostino must be viewed as a collective whole. Plaintiffs' detailed and extensive allegations here bear no resemblance to the proposed amended complaint in *Schwartz v. Society of New York Hosp., supra,* where the *sole* conclusory allegation linking the two individual defendants to the defamatory statements was that the defendant who uttered them was purportedly "acting on [their] behalf" or "in concert" with them without *any specific allegations of independent conduct on their part. Schwartz,* 199 A.D.2d at 130.

Given the extensive and detailed allegations made against D'Agostino, his argument that Plaintiffs rely on "group pleading" by sometimes using the term "Defendants" is particularly misleading. (*See* Mem. at 8-10.) The use of the collective term "Defendants" does not undermine the specific and detailed allegations against D'Agostino, as described at length above. In fact, courts have rejected similar motions to dismiss premised on claims of "group pleading" where, as here, Plaintiffs allege that Defendants acted in concert. *See Umoh v. Marks*, 1:09-cv-838 (GLS\RFT), 2010 U.S. Dist. LEXIS 63812, at *9 n.2 (N.D.N.Y. June 25, 2010) (alleged "group pleading" not fatal where "there are only three defendants named, which [plaintiff] alleges were acting either together or interchangeably"); *QFL, Inc. v. Pivotal Payments, Inc.*, 702120/2012, 2013 N.Y. Misc. LEXIS 6175, at *2 (Queens Co. Mar. 19, 2013) (court rejected defendant's motion to dismiss on "group pleading"; defendant had sufficient notice of claim where plaintiff alleged that defendants acted in concert and did not allege that moving defendant alone committed acts giving rise to liability).

D'Agostino's reliance on *Targum v. Citrin Cooperman & Company*, 12 Civ. 6909 (SAS), 2013 U.S. Dist. LEXIS 164585 (S.D.N.Y. Nov. 19, 2013), is inapposite. (*See* Mem. at 8.) D'Agostino seems to imply that the dismissal of the plaintiff's complaint in *Targum* was due largely, if not entirely, to the fact that plaintiff's amended complaint treated the defendant

accounting firm and one of its partners as a unit. That is not the case. The *Targum* plaintiff's complaint alleged federal claims under RICO and the Computer Fraud and Abuse Act ("CFAA') and various state law claims. The federal claims were dismissed because plaintiff failed to allege the necessary statutory elements.[12] *Id.* at *30-32. The court declined to exercise jurisdiction over plaintiff's state law claims. *Id.* at 32.[13] Here, Plaintiffs have sufficiently alleged the elements of their RICO and state law claims.

Similarly, D'Agostino's citation to a handful of allegations from the Amended Complaint, which concern Defendants' Florida Defamation Action, are hardly illustrative of "group pleading." (*See* Mem. at 9.) That D'Agostino was not a named plaintiff in that lawsuit is hardly probative of his role in Derwick and/or his relationship with Betancourt and Trebbau. Indeed, Plaintiffs allege that (i) D'Agostino, Betancourt and Trebbau "worked together as each other's agents and partners, and were the owners and/or officers, directors, or operators of Derwick" (AC ¶ 47); (ii) D'Agostino is "a founder, owner and operator of Derwick Associates, and directs and manages its daily activities" (*Id.* at ¶ 165); (iii) D'Agostino helped secure the initial financing for Derwick (*Id.* at ¶ 165); (iv) D'Agostino has admitted to being a key player and member of Derwick's inner circle (*Id.* at ¶ 166); (v) D'Agostino has admitted that

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[12] The RICO claim was dismissed because plaintiff failed to allege that the accounting firm committed any predicate act let alone a pattern of racketeering activity. *Id.* at * 30-32.

[13] D'Agostino also cites *Holmes v. Allstate Corp.*, 11 Civ. 1543 (LTS) (DF), 2012 U.S. Dist. LEXIS 24883 (S.D.N.Y. Jan. 27, 2012). (*See* Mem. at 8-9.) Plaintiff's amended complaint in that action was woefully deficient and suffered "significant pleading defects." *Id.* at *81. The court dismissed, without prejudice, plaintiffs' complaint where plaintiffs failed to give the "Harris Defendants" fair notice of plaintiffs' claims and the grounds upon which they rested. *Id.* at *78. Among other things, the court concluded that "it appears that Plaintiffs … may have simply conducted an online search for companies of which Harris was an officer … , and then named those companies as additional defendants without any knowledge or information as to what role, if any, each of them may have played in the transactions alleged." *Id.*

Watkins v. Smith, 12 Civ. 4635 (DLC), 2013 U.S. Dist. LEXIS 24712 (S.D.N.Y. Feb. 22, 2013), cited by D'Agostino, is also inapposite. (*See* Mem. at 14.) In *Watkins*, which concerned a motion for sanctions and not a Rule 12(b) motion, plaintiff conceded that his factual allegations had *no conceivable factual basis* against certain defendants. *Id.* at *27. Additionally, there was no reasonable prospect of plaintiff ever finding such support. *Id.* at *27-28.

Defendants paid illegal bribes to secure the energy-industry contracts (*Id.* at ¶ 97); (vi) D'Agostino offered to provide the *Forbes* Writer, who was writing an article about Derwick, with copies of Derwick's contracts with the Venezuelan government and ProEnergy Services, which are highly confidential company documents, along with Derwick's audited financials (*Id.* at ¶ 172); (vii) D'Agostino was actively working with Betancourt, Trebbau and Derwick and/or their New York-based legal counsel when information communicated to him by the *Forbes* Writer was later referenced in the amended complaint filed by Betancourt, Trebbau and Derwick in the Florida Defamation Action (*Id.* at 176); and (viii) following the commencement of this lawsuit, an individual claiming to be D'Agostino's agent approached Ambassador Reich and revealed that D'Agostino had access to top secret information concerning Derwick, which he claimed would be damning to Betancourt and Trebbau in this lawsuit (*Id.* at ¶ 99). For D'Agostino to argue now that Plaintiffs have alleged no facts linking D'Agostino to Plaintiffs' state law claims is preposterous and also ignores Plaintiffs' civil conspiracy claim. (*Id.* at ¶¶ 320-324.)

POINT III

D'AGOSTINO'S PRE-DISCOVERY "MOTION TO DISMISS"[14] ON FACTUAL GROUNDS IS PREMATURE AND WITHOUT MERIT

In a last ditch attempt to extricate himself from this lawsuit, D'Agostino asks this Court to make a factual determination – before there has been any discovery – that he is not an owner of Derwick.[15] (*See* Mem. at 10-13.) Such a finding would be entirely inappropriate and contrary

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[14] D'Agostino is listed as a movant on the notice of motion filed by Defendants Betancourt and Trebbau seeking relief under Fed. R. Civ. P. 12(b)(2) and (6). (*See* Docket No. 31.) The factual arguments that D'Agostino raises here ask the Court to resolve disputed evidentiary issues before there has even been any discovery in this case.

[15] D'Agostino attempts to dispute Plaintiffs' well-pled factual allegations through unsworn statements of counsel, which is procedurally improper. (*See* Mem. at 10-13, n.2). Regardless, Plaintiffs possess factual information to rebut D'Agostino's counsel's assertion here that "[D'Agostino] was not a part of Derwick" (*id.* at 13, n.2) as well as the factual statements he was supposedly prepared to make under oath in exchange for Plaintiffs'

to well established precedent that, on a motion to dismiss under Rule 12(b)(6), this Court must accept as true all facts alleged in the Amended Complaint and draw all reasonable inferences in favor of the Plaintiffs. *See, e.g., Kassner*, 496 F.3d at 237. Insofar as any aspect of D'Agostino's activities concerning Derwick remains obscured or unknown, that is not a basis to dismiss now. The law is clear that D'Agostino may not benefit from – especially at the pleading stage – his apparent success in hiding the details of his fraud. *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 that makes the inference of culpability plausible"). Discovery is the appropriate vehicle for determining, with precision, D'Agostino's role in the events alleged.

Regardless, Plaintiffs allegations linking D'Agostino to Derwick – as a founder, owner, operator, partner, officer, director or agent – are more than supported by sufficient factual allegations. (*See* Mem. at 10-11.) While D'Agostino tries to downplay his interactions with and admissions to the *Forbes* Writer, his protestations cannot obviate the facts as alleged. This was not simply "a dinner … between two of his childhood friends." *Id.* at 10. To the contrary, D'Agostino was pursuing a specific task (which entailed multiple calls and text messages) for the benefit of himself and his co-conspirators: prevent the publication of the *Forbes* article or, at the very least, stall long enough so that Derwick's New York-based legal counsel could threaten legal action against *Forbes* Magazine, which was consistent with Defendants' ongoing campaign

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agreement to dismiss him from this lawsuit. Specifically, D'Agostino has admitted to third parties that he is an owner in Derwick, that has knowledge of and participates in its business, and that he participated in the investigation, commencement and settlement of the Florida Defamation Action. The factual allegations contained in the Amended Complaint, which must be accepted as true, state RICO and state law claims against D'Agostino, and any factual issues must be investigated through discovery (where D'Agostino – not his counsel – will have to testify truthfully under oath and be subject to cross-examination).

of concealment. (AC ¶¶ 124-35, 174.) D'Agostino makes no mention of the fact that he hadn't spoken with the *Forbes* Writer in nearly a decade (*Id.* at ¶ 170), or that D'Agostino's decision to "rekindle" that friendship was prompted entirely by an email that the *Forbes* Writer *sent to ProEnergy Services* – and not Betancourt, Trebbau or Derwick – inquiring about "the role of Derwick and the cost of the [energy] project" and commenting that "[t]here are numerous published allegations in Venezuela regarding overbilling by Derwick as well as more sensational allegations of money laundering." (*Id.* at ¶ 168.) D'Agostino also does not explain how it is that he knew about Derwick's contracts with the Venezuelan government and its relationship with ProEnergy Services; how it is that he had access to those documents as well as Derwick's financial data (or, at a minimum, how he was in a position to offer to disclose these documents to the *Forbes* Writer) (*id.* at ¶ 172); or how it is that the *Forbes* Writer's private communications with D'Agostino were disclosed to Derwick's New York counsel. (*Id.* at ¶ 176.) The Amended Complaint, however, does explain these facts, and many others showing D'Agostino's role in "Defendants'" conspiracies and other unlawful activities.

D'Agostino also ignores two critical admissions by D'Agostino, which are *not* alleged upon information and belief. First, Plaintiffs allege that D'Agostino admitted to being a key player and member of Derwick's inner circle. (*Id.* at ¶ 166) Second, D'Agostino's statement to a friend that "of course" Derwick paid kickbacks to secure its energy contracts; noting that in Venezuela, "you always have to pay" what D'Agostino called "consulting fees," in order to secure the contracts. (*Id.* at ¶ 97.)[16] With respect to the latter, how would D'Agostino know this if he were not a founder, owner, operator, partner, officer, director or agent of Derwick? What

[16] D'Agostino's argument that this admission cannot support Plaintiffs' state law claims because the statement is not defamatory misses the point. D'Agostino's admission about the confidential and private way Defendants (and Derwick) "do business" supports Plaintiffs' allegation that D'Agostino is a "founder, owner and operator of [Derwick], and directs and manages its daily activities." (AC ¶ 165.)

would be the basis for him to make such a fatal admission? These statements alone are sufficient to support each of Plaintiffs' further allegations based upon information and belief linking D'Agostino to Derwick, Betancourt and Trebbau.

Also unavailing are D'Agostino's references to a select few publicly-filed Derwick documents and press releases. (*See* Mem. at 11-12.) That D'Agostino is not specifically identified on these documents as a founder, owner, director or employee of Derwick is of no moment. Documents that create a legal entity do not necessarily reflect all the owners of that entity (and certainly don't reflect transfers of an ownership interest post-filing). To illustrate, how many equity partners in New York City's biggest law firms are listed as "owners" in documents filed with the city, state and federal government? Certainly not all. Does this mean that those equity partners do not have an ownership interest in their firms? D'Agostino's assertions to the contrary are hardly probative of his relationship with Betancourt and Trebbau and his role in Derwick.

POINT IV

PLAINTIFFS SUFFICIENTLY ALLEGE A RICO CLAIM AGAINST D'AGOSTINO

As set forth more fully in Plaintiffs' Memorandum of Law in Opposition to Defendants' Betancourt and Trebbau's Motion to Dismiss, Plaintiffs' Amended Complaint sufficiently alleges a claim against D'Agostino under 18 U.S.C. § 1962(c).[17] None of D'Agostino's

[17] The RICO conspiracy statute (18 U.S.C. § 1962(d)) requires only that the plaintiff plead that the defendant "knew about and agreed to facilitate" the substantive RICO scheme (*Salinas v. United States*, 522 U.S. 52, 66 (1997)), and, in the civil context, have an injury flowing from some predicate act by the conspiracy. *See Beck v. Prupis*, 529 U.S. 494, 507 (2000); *United States v. Applins*, 637 F.3d 59, 73-74 (2d Cir. 2011). D'Agostino concedes that Plaintiffs' conspiracy claim has been properly pled; indeed, he advances no opposition to this claim other than to adopt the limited argument advanced by Betancourt and Trebbau that *if* Plaintiffs substantive RICO claim fails, *then* Plaintiffs' RICO conspiracy claim must fail. Under § 1962(d), D'Agostino can be held liable for agreeing to facilitate only some of the acts leading to the § 1962(c) violation committed by the *other* Defendants. *Salinas v. United States*, 522 U.S. 65. Moreover, a conspirator's agreement is a question of fact that must be inferred from the circumstantial evidence and is inappropriate for resolution on a Rule 12 dispositive motion. *See Environmental Servs. v. Recycle Green Servs.*, 13-cv-4568 (ADS) (WDW), 2014 U.S. Dist. LEXIS 40486, at *28-29 (E.D.N.Y. Mar. 25, 2014).

assertions to the contrary has merit.

First, liability under § 1962(c) will attach where an individual "employed by or associated with any enterprise . . . conduct[s] or participate[s], directly or indirectly, in the conduct of [the] enterprise's affairs." *Chevron Corp. v. Donziger*, 11 Civ. 0691 (LAK), 2014 U.S. Dist. LEXIS 28253, at *552-53 (S.D.N.Y. Mar. 4, 2014). Section 1962(c) liability, however, is not restricted "to those with *primary* responsibility for the enterprise's affairs," or to "those with a *formal position* in the enterprise, … [a defendant is liable if he plays] *some* part in directing the enterprise's affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis in original). The element of directing the enterprise is satisfied if 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." *Automated Teller Mach. Advantage LLC v. Moore*, 08 Civ. 3340 (RMB) (FM), 2009 U.S. Dist. LEXIS 68724, at *21 (S.D.N.Y. Aug. 6, 2009).

Here, Plaintiffs' allegations reflect that D'Agostino participated in the operation and management of one or more of the alleged enterprises. Plaintiffs allege that D'Agostino: admitted to being a key player and member of Derwick's inner circle (AC ¶ 166); is an agent and partner of Betancourt and Trebbau (*id.* at ¶ 147); is one of the owners and/or officers, directors, operators, or agents of Derwick (*id.*); directed, controlled and coordinated virtually all aspects of Derwick's global strategy, as well as the day-to-day activities of Derwick from the United States (*id.* ¶ 48); and used Derwick to unlawfully secure inflated public contracts in Venezuela, paying public officials large payments in exchange for an award of energy contracts. (*Id.* at ¶ 60.) Plaintiffs further allege that D'Agostino acknowledged his pivotal role in Derwick to a friend in November, 2012, when admitted that "of course" Derwick paid kickbacks to secure its energy

sector contracts. (*Id.* at ¶ 97.) D'Agostino is also alleged to have agreed to take actions to cover-up Defendants' unlawful conduct, including by attempting to dissuade the *Forbes* Writer from publishing an article about Derwick and, when that failed, by inducing the *Forbes* Writer to delay publication of his piece under false pretenses. (*Id.* at ¶¶ 170-73.)[18] To the extent Plaintiffs do not allege that D'Agostino personally took each action or was "involved" in each action set forth in the Amended Complaint, he is still liable for the injuries suffered by Plaintiffs because D'Agostino is alleged to have caused the wires to be used in violation of the wire fraud statute and/or participated, directly or indirectly, in the RICO enterprise's affairs through a pattern of racketeering – this makes him liable for all injuries caused by the pattern of racketeering. *See Pereira v. United States*, 347 U.S. 1, 8 (1954); s*ee, e.g., Crabhouse of Douglaston Inc. v. Newsday, Inc.*, 801 F. Supp. 2d 64, 88-89 (E.D.N.Y. 2011) (court sustained RICO claims against individual officers, where "a fair inference [could] be drawn" that individual defendants acted with knowledge that mailing false representations of circulation numbers to potential advertisers would follow in ordinary course of business); *In re Parmalat Sec. Litig.*, 412 F. Supp. 2d 392, 404 (S.D.N.Y. 2006) (RICO liability imposed on imposed on defendant who "played 'some part in directing the enterprise's affairs'").

Second, that certain of the allegations in the Amended Complaint are alleged upon "information and belief" is not fatal to Plaintiffs' RICO claim. Even for those allegations subject to Fed. R. Civ. P. 9(b), pleading upon "information and belief" is permissible when details of the allegations are peculiarly within the possession of the defendants (and their co-conspirators). *See, e.g., Eastman Chem. Co.*, 2012 U.S. Dist. LEXIS 141281 at *15 ("pleading facts alleged

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[18] D'Agostino's citation to *Ho Myung Moolson Co. v. Manitou Mineral Water, Inc.*, 665 F. Supp. 2d 239 (S.D.N.Y. 2009), is inapposite. (*See* Mem. at 13-14.) Plaintiffs' RICO claim there was deficient for a number of reasons not the least of which was a failure to plead with particularity (plaintiffs there alleged that "some defendants" committed the predicate acts of mail and wire fraud). *Id.* at 260. Plaintiffs also failed to plead an underlying fraud claim, and plaintiffs' alleged predicate acts spanned less than two years. *Id.* at 252-55, 260-61.

'upon information and belief' where the facts are peculiarly within the possession and control of the defendant … is perfectly sufficient" to survive dismissal); *In re Ahead By a Length, Inc.*, 100 B.R. 157, 167 (Bankr. S.D.N.Y. 1989) (amended complaint sufficiently pled fraud elements of RICO claim even though majority of allegations were based upon information and belief); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 50 (S.D.N.Y. 1982) (pleading on information and belief is permissible where facts are peculiarly within knowledge of defendant).[19]

Third, D'Agostino's objections to the particularity of Plaintiffs' wire fraud allegations focus exclusively on Rule 9(b), while ignoring Rule 8's notice pleading standard. (*See* Mem. at 13-14.) The particularity requirement of Rule 9 is not intended to abrogate or mute Rule 8's notice pleading standard, and the two Rules must be read in harmony. *Boritzer v. Calloway*, 10 Civ. 6264 (JPO), 2013 U.S. Dist. LEXIS 11119, at *28 (S.D.N.Y. Jan. 24, 2013) (Oetken, J.) A defendant cannot use Rule 9(b) as a sword to cut down a plaintiff's complaint when the defendant has exclusive possession of the specific information that it claims is lacking and is already on sufficient notice to defend against the action. *See Jim Forno's Continental Motors, Inc. v. Subaru Distributors Corp.*, 649 F. Supp. 746, 753 (N.D.N.Y. 1986) (Rule 9(b) does not exalt form over substance where information is most likely in hands of the movants themselves).

A complaint may permissibly plead the activities of defendants collectively when an individual defendant acts in concert with others in directing fraudulent activity, especially when the defendants have taken pains to conceal their behavior, as D'Agostino (and the other Defendants) are alleged to have done here. *See Watts v. Mosquera,* 579 F. Supp. 2d 334, 353

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[19] *In re Platinum and Palladium Commodities Litig.*, 828 F. Supp. 2d 588 (S.D.N.Y. 2011), cited by D'Agostino (*see* Mem. at 14), plaintiffs' predicate act allegations were based heavily on allegations that had been stricken from the complaint when the motion to dismiss was decided. *Id.* at 601-02. Further, and unlike here, plaintiffs' allegations made no attempt to distinguish between the various defendants. *Id.* at 602. D'Agostino also cites *Gross v. Waywell*, 628 F. Supp. 2d 475 (S.D.N.Y. 2009), but the issue there was whether the more than 100 acts of mail and/or wire fraud alleged by plaintiff constituted a sufficiently continuous pattern of racketeering. *Id.* at 495-96. The continuity of Plaintiffs' pattern is not challenged by Defendants.

(E.D.N.Y. 2008) (complaint satisfied Rule 9(b) where plaintiff alleged defendants acted jointly to perpetrate alleged fraud); *Asdourian v. Konstantin,* 77 F. Supp. 2d 349, 354-55, 356-57 (E.D.N.Y. Dec. 21, 1999) (plaintiff's amended complaint satisfied Rule 9(b) without specifying which member of group was responsible for alleged fraudulent activity where moving defendant was alleged to have acted in concert with other members of group).

Where, as here, Plaintiffs allege that D'Agostino acted in concert with the other Defendants, "it is appropriate to plead the actions of the group and leave development of individual liability questions until some discovery has been undertaken, rather than to dismiss the plaintiff because he does not have what may be concealed information." *Phillip Morris Inc. v. Heinrich,* No. 95-0328, 1997 U.S. Dist. LEXIS 20199, at *30-31 (S.D.N.Y. Dec. 18, 1997). It is thus entirely permissible for Plaintiffs here to make allegations against the "Defendants," which, in any event, are in addition to Plaintiffs' detailed, individualized, and particularized factual allegations against D'Agostino. *See, e.g., Waltree Ltd. v. ING Furman Selz LLC,* 97 F. Supp. 2d 464, 469 n.6 (S.D.N.Y. May 11, 2000) ("group pleading" permissible where facts are exclusively within defendants' possession); *Szulik v. Colleary*, 12 Civ. 1827 (PKC), 2013 U.S. Dist. LEXIS 119608, at *39-41 (S.D.N.Y. Aug. 21, 2013) (fraud allegations pled on information and belief permissible where facts peculiarly within opposing party's knowledge).

Plaintiffs' Amended Complaint provides sufficient detail concerning the acts of racketeering alleged, including the acts of wire fraud. Plaintiffs allege the identities of those involved, the content of the false representations, the time and place of the false representations, and a description of the alleged scheme to defraud sufficient to put D'Agostino on fair notice of the nature of the conduct underlying the alleged wire fraud. (AC ¶¶ 147-49, 159-161.) This is especially true when the sufficiency of the Amended Complaint is being considered before

discovery has taken place, and when the information is exclusively in the possession of those participating in the fraud.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion in its entirety, and grant Plaintiffs such other and further relief as the Court deems just and proper.[20]

Dated: New York, New York
May 7, 2014

Respectfully submitted,

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[20] Plaintiffs believe that they have adequately alleged each element of their causes of action and sufficient facts supporting each claim. Should the Court feel that additional factual allegations are necessary, Plaintiffs respectfully request leave to amend their Amended Complaint to include, among other things, additional information concerning Defendants' bribery and criminal acts; D'Agostino's involvement with Derwick, the other Defendants, and the Florida Defamation Action; and additional facts relevant to extraterritoriality. Where, as here, the granular details of Defendants' illegal and tortious conduct cannot be known to Plaintiffs prior to discovery, the interests of justice require that leave to amend be granted.

CERTIFICATE OF SERVICE

I hereby certify this 7th day of May, 2014, that I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification to the following attorneys of record, and is available for viewing and downloading:

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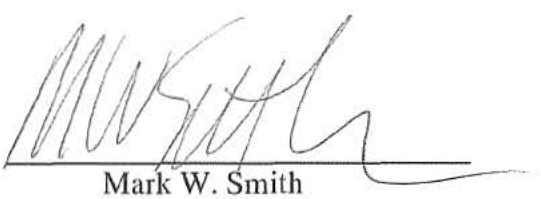

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