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(Cite as: 720 F.3d 115)

United States Court of Appeals,
Second Circuit.

Hugo CRUZ, on behalf of himself and all others
similarly situated, Plaintiff–Appellant,

v.

FXDIRECTDEALER, LLC (FXDD), Defendant–
Appellee.

Docket No. 12–1252–cv.
Submitted: Oct. 2, 2012.
Decided: June 19, 2013.

Before: [NEWMAN](#), [LYNCH](#), and [LOHIER](#), Circuit
Judges.

[LOHIER](#), Circuit Judge:

Hugo Cruz appeals from a judgment of the United States District Court for the Southern District of New York (Paul A. Crotty, *Judge*), dismissing his amended complaint. On appeal, Cruz argues that the amended complaint's allegations that FXDirect-Dealer, LLC (“FXDD”) engaged in dishonest and deceptive practices in managing its online foreign exchange trading platform are sufficient to state a claim for violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), [18 U.S.C. § 1962\(c\)](#), and [New York General Business Law §§ 349\(h\)](#) and [350](#), and also for breach of contract and of the implied covenant of good faith and fair dealing. For the following reasons, we affirm the District Court's dismissal of Cruz's RICO claim and his claim for breach of the implied covenant of good faith and fair dealing, but we vacate the judgment of the District Court with respect to Cruz's New York General Business Law and breach of contract claims.

BACKGROUND

The amended complaint alleges the following facts, which we assume to be true and construe in the light most favorable to the plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–80, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 708, 715 (2d Cir.2011).

Headquartered in New York City, FXDD provides online foreign currency exchange (“forex”) trading and related services to its customers. The forex market operates outside of a regulated exchange and without a central marketplace. Retail brokers such as FXDD help provide individual investors with access to the market and often operate online. As market makers, they create their own market and set the prices they offer to their customers. In addition to facilitating trading by customers, FXDD buys and sells currency for its own account, and may act as a counterparty in customer transactions.

To open an account with FXDD and trade on its online forex platforms, customers must sign the FXDD Customer Agreement (the “Agreement”). The Agreement warns that, “due to market conditions or other circumstances, FXDD may be unable to execute [a customer's] Order at the Market or specified level and the Customer agrees that FXDD will bear no liability for failure to execute such orders.” The Agreement also provides, however, that “all Market Orders and non-Market Orders ... are accepted by FXDD and undertaken on a ‘best-efforts basis,’ ” and when FXDD is unable to execute an order at the market or specified level, “orders will be executed on a ‘best-efforts basis...’ ” J.A. 67 (italics in original). In addition, the Agreement states, “FXDD makes no warranty expressed or implied; that *Bid and Ask Prices* shown represent prevailing bid and ask prices in the interbank market.”

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Several of FXDD's promotional, marketing, and advertising materials have represented FXDD's trading practices without disclosing the actual risks of participating in FXDD's forex market. For example, one 2005 advertisement on FXDD's website stated that FXDD “Does Not Trade Against Their Clients, but Facilitates Trade Via Transparent Real-Time Bid/Offer Pricing,” while a 2007 advertisement represented that “[m]arket orders are filled instantaneously at the rate you request, with no manual dealer intervention or slippage.”

Contrary to the representations in these materials and the Agreement, FXDD engages in several undisclosed practices that the amended complaint characterizes as dishonest or deceptive, including: (1) re-routing profitable customer trading activity to a “slow server,” which delays trades and allows FXDD to “hijack” customer profits by buying and selling in the time between a customer's order and trade execution; (2) refusing to execute profitable customer trade orders by generating false error messages; (3) creating false short-term price spikes to trigger a customer's stop order for a given trade; and (4) manipulating prices so that the change in price between the time the price is quoted and a market order is placed generally favors FXDD over its customers. FXDD undertakes these practices both manually and through automated functions.

Cruz, a Virginia resident, is a former FXDD customer who signed the Agreement in 2006 and lost \$281,170.24 during two years of trading on the FXDD platform. Cruz seeks to represent a proposed class of persons in the United States who, from January 1, 2005 to the present, contracted with FXDD to trade on its trading platforms and whose accounts were subject to FXDD's allegedly dishonest trade practices.

The District Court granted FXDD's motion to dismiss the amended complaint in toto. With respect to the RICO count, the court concluded that the

amended complaint failed to allege predicate acts of mail and wire fraud with the particularity required by [Rule 9\(b\) of the Federal Rules of Civil Procedure](#) because it did not explain why the Agreement and marketing materials were misleading. The District Court also determined that the complaint failed to allege a RICO enterprise distinct from both the alleged pattern of racketeering activity and the RICO “person” who engaged in deceptive conduct. * * * *

DISCUSSION

“We review a district court's dismissal of a complaint pursuant to [Rule 12\(b\)\(6\) de novo](#).” *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir.2010). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quotation marks omitted).

A. Civil RICO Claim

“To establish a RICO claim, a plaintiff must show: (1) a violation of the RICO statute, [18 U.S.C. § 1962](#); (2) an injury to business or property; and (3) that the injury was caused by the violation of [Section 1962](#).” ^{FN1} *DeFalco v. Bernas*, 244 F.3d 286, 305 (2d Cir.2001) (quotation marks omitted). To establish a violation of [§ 1962\(c\)](#), in turn, a plaintiff must show that a person engaged in “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Id.* at 306 (quotation marks omitted).

FN1. [18 U.S.C. § 1962\(c\)](#) makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.”

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“[U]nder the so-called ‘distinctness’ requirement, ... a plaintiff must ‘allege ... the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.’ ” *City of New York v. Smokes–Spirits.com, Inc.*, 541 F.3d 425, 438 n. 15 (2d Cir.2008) (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001)), *rev’d on other grounds sub nom. Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010). As we have long recognized, the plain language and purpose of the statute contemplate that a *person* violates the statute by conducting an *enterprise* through a pattern of criminality. It thus follows that a corporate person cannot violate the statute by corrupting itself. See *Bennett v. U.S. Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir.1985). “A ‘person’ is defined as ‘any individual or entity capable of holding a legal or beneficial interest in property,’ ” *id.* at 447 (quoting 18 U.S.C. § 1961(3)), while an “ ‘enterprise’ is defined as ‘any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,’ ” *id.* (quoting 18 U.S.C. § 1961(4)). “[F]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.” *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir.2004) (quotation marks omitted).

We agree with the District Court that Cruz’s RICO claim fails because the amended complaint does not allege a continuing RICO enterprise distinct from the RICO “person.” Accordingly, we do not address whether the amended complaint pleaded mail and wire fraud as predicate acts of racketeering activity with sufficient particularity^{FN2} or pleaded a RICO enterprise distinct from the alleged pattern of racketeering activity.

FN2. “On a motion to dismiss a RICO claim, [plaintiff’s] allegations must also satisfy the requirement that, ‘[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.’ ” *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir.2013) (quoting Fed.R.Civ.P. 9(b)).

The amended complaint alleges that FXDD is a RICO “person” that conducts the deceptive practices of an association of individuals dubbed the “FXDD Fraud Enterprise.” The FXDD Fraud Enterprise is alleged to consist of the following: FXDD itself; Tradition (North America) Inc. (“Tradition”), FXDD’s parent company; Advanced Technologies Group, Ltd. (“ATG”), a former equity stakeholder in FXDD; FXDD’s chief operating officer; FXDD’s managing director and corporate counsel; software companies that develop and sell FXDD’s software; software companies and programmers who assisted FXDD in the development of its trading platforms; and “introducing brokers” who receive commissions from FXDD for educating consumers about forex trading.

The amended complaint alleges merely that the members of the enterprise “associated together for the common purpose of employing the multiple deceptive, abusive and fraudulent acts described in” the amended complaint and that “[t]he overarching purpose of the FXDD Fraud Enterprise is for each of its members to profit from customers opening Live Accounts with Defendant.” As an initial matter, the amended complaint contains no specific factual allegation about the intent of ATG or of the software companies, and it affirmatively alleges that the introducing brokers generally were unaware of FXDD’s deceptive practices. Thus, ATG, the software companies, and the introducing brokers are not plausibly alleged to “share a common purpose to engage in a particular fraudulent course of conduct,” *First Capital Asset Mgmt.*, 385 F.3d at 174 (quotation marks

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omitted), and were properly excluded from the alleged RICO enterprise.

We turn, then, to the remaining members of the alleged enterprise—FXDD, Tradition, corporate counsel, and the chief operating officer. The amended complaint alleges that FXDD's corporate counsel and its chief operating officer carry on the regular affairs of FXDD, such as day-to-day financial operations, including the “implementation and supervision of deceptive trading practices.” We have long since rejected the idea that a RICO enterprise may consist “merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant,” *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994), and we see no reason to revisit that issue here. The requirement of distinctness cannot be evaded by alleging that a corporation has violated the statute by conducting an enterprise that consists of itself plus all or some of its officers or employees.

Excluding these officers leaves us with Tradition and FXDD. We have held that corporations that are legally separate but “operate within a unified corporate structure” and “guided by a single corporate consciousness” cannot be both the “enterprise” and the “person” under § 1962(c). *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir.1996), *vacated on other grounds*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998); *see Cullen v. Margiotta*, 811 F.2d 698, 729–30 (2d Cir.1987) (“[A] solitary entity cannot ... simultaneously constitute both the RICO ‘person’ whose conduct is prohibited and the entire RICO ‘enterprise,’ ” but may be “one of a number of members of the RICO ‘enterprise.’ ”), *overruled on other grounds*, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). FXDD and Tradition are alleged to operate as part of a single, unified corporate structure and are, as such, not sufficiently distinct to demonstrate the existence of a RICO enterprise. Finally

and obviously, neither Tradition nor FXDD standing alone can constitute an enterprise as an “association in fact.” Accordingly, the District Court did not err when it concluded that Cruz's amended complaint failed to allege a RICO enterprise distinct from FXDD. ^{FN3}

FN3. We need not—and do not—address whether the Supreme Court's decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), would permit a complaint naming FXDD as the “person” and Tradition alone as the “enterprise” to go forward. In contrast with *Cedric Kushner Promotions*, the amended complaint here does not allege a single corporate enterprise but rather the “less natural” scenario of “a corporation ... ‘associated with’ [an] oddly constructed entity” that includes the corporation. *Id.* at 164, 121 S.Ct. 2087. *See also* David B. Smith & Terrance G. Reed, *Civil RICO* ¶ 3.07 at 3–85 (2013) (“Most courts have recognized that the non-identity requirement would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with ... affiliated entities acting on its behalf.” (quotation marks omitted)).

* * * *

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the District Court as to the RICO claim and the claim for breach of the implied covenant of good faith and fair dealing, VACATE the judgment as to the breach of contract claim and the claims under *New York General Business Law* §§ 349 and 350, and REMAND the case for further proceedings.