UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-61907-CIV-SMITH

PLATINUM PROPERTIES INVESTOR NETWORK, INC., ET AL.,

Plaintiffs,

vs.

CHARLES SELLS, ET AL.,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' PARTIAL MOTION TO DISMISS

This matter is before the Court on Defendants' Partial Motion to Dismiss [DE 82] and Plaintiff's response [DE 87]. Defendants have not filed a reply. Defendants seek to dismiss ten of the twenty-three counts of Plaintiffs' Second Amended Complaint ("SAC") and all claims against Defendant Elena Cebotari Sells. This action arises out of competition between two rival real estate investors and their companies. Plaintiffs maintain that to gain the upper hand and grow their business, Defendants engaged in an internet and email campaign to harm Plaintiffs' reputation and steal their clients. For the reasons set forth below, Defendants' Motion is granted in part and denied in part.

I. SUMMARY OF THE AMENDED COMPLAINT[1]

Plaintiff Jason Hartman, directly or indirectly, owns Plaintiffs Platinum Properties Investor Network, Inc. ("Platinum Properties") and The Hartman Media Company, LLC ("HMC"). Hartman is a real estate investor and Platinum Properties helps others become real estate investors. Plaintiffs have two registered service marks: JASONHARTMAN.COM and Jason Hartman. Defendant Charles Sells ("Sells") and his company, Defendant The PIP-Group, LLC ("PIP"), are direct competitors of Plaintiffs. Defendants Elena Sells ("Lena") and Stephanie Putich hold positions with PIP.

Plaintiffs allege that Defendants conspired and developed a plan to debilitate Plaintiffs and their business. As part of the plan, Defendants obtained ownership or control over internet domain names that included Hartman's name, including JasonHartmanProperties.com, JasonHartmanInvestments.com, JasonHartmanRealEstateInvestments.com, and JasonHartmanMedia.com. All of the domain names directed traffic to the same website, which uses Plaintiffs' service marks and copyrighted materials and attempts to disparage Plaintiffs' business through false and misleading statements relating to Plaintiffs' business, financial history, litigation history, commercial dealings, credibility, and trustworthiness. By tracking the website's visitors, Defendants were able to contact Plaintiffs' clients and colleagues. Defendants also sent emails directly to Plaintiffs' clients and colleagues, which appeared to come from Plaintiffs. The emails raised concerns about Plaintiffs and directed readers to the Defendants' website to get more information. Defendants also created fake user names to post on industry forums about Plaintiffs.

[1] Plaintiffs' Second Amended Complaint is 112 pages long, contains twenty-three counts, and 460 numbered paragraphs. Therefore, what follows is only a brief summary of the SAC. As needed, the Court will discuss more specific allegations in the discussion section.

Plaintiffs have taken several steps to try to stop Defendants' actions, including sending cease and desist letters, attempting to shut down the email accounts from which Plaintiffs' clients and colleagues were being sent the disparaging emails, filing a report with the Palm Beach Sheriff's Office, and filing a Uniform Domain-Name Dispute Resolution Policy complaint with the World Intellectual Property Organization.

The SAC alleges twenty-three causes of action for: (1) federal service mark counterfeiting; (2) contributory service mark counterfeiting; (3) federal service mark infringement; (4) contributory service mark infringement; (5) cybersquatting; (6) federal unfair competition, false representation and false designation of origin; (7) federal false advertising; (8) Racketeer Influenced and Corrupt Organization Act (federal RICO), violation of 18 U.S.C. § 1962(c); (9) federal RICO conspiracy; (10) Florida Civil Remedies for Criminal Practices, violations of sections 772.102(3) and 772.103(3), Florida Statutes; (11) Florida Civil Remedies for Criminal Practices, violations of sections 772.103(4) and 772.104(1), Florida Statutes; (12) Florida statutory false advertising; (13) Florida civil conspiracy; (14) common law unfair competition; (15) common law tortious interference; (16) common law injurious falsehood; (17) defamation *per se*; (18) defamation; (19) defamation by implication; (20) common law fraud; (21) negligent misrepresentation; (22) common law invasion of privacy, commercial misappropriation of a person's likeness; and (23) Florida statutory invasion of privacy, commercial misappropriation of a person's likeness.

II. MOTION TO DISMISS STANDARD

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. *Id*. It

should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pled allegations are true and view the pleadings in the light most favorable to the plaintiff. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "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." *Id*. at 678. A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id*. at 556.

III. DISCUSSION

Defendants seek to dismiss all claims against Lena Sells and Count VIII (federal RICO), Count IX (federal RICO conspiracy), Count X (Florida Civil Remedies for Criminal Practices), Count XI (Florida Civil Remedies for Criminal Practices conspiracy), Count XX (common law

fraud), Count XXI (negligent misrepresentation), Count XXII (common law invasion of privacy), Count XXIII (Florida statutory invasion of privacy), Count XV (common law tortious interference), and Count XVI (common law injurious falsehood). As discussed below, the Motion is granted as to Counts XX and XXI and denied in all other respects.

A. The Claims Against Lena Sells

Defendants seek to dismiss all claims against Lena Sells because the allegations against her primarily are allegations against "Sells or Lena" and do not satisfy the pleading requirements of Rule 9(b). Defendants maintain that Lena's role in the alleged misconduct is not defined. Thus, the claims should be dismissed.[2]

In response, Plaintiffs point to numerous allegations against Lena in the SAC. Those allegations include specific actions taken by Lena: she assisted with the development and execution of the plan to harm Plaintiffs and their businesses through the creation of counterfeit domain name and infringing websites (SAC ¶ 72); she directly assisted in the creation of the email distribution list that Defendants used to perpetrate their misconduct (SAC ¶ 124); and she created false identities for use on BiggerPockets, an online industry forum, and directed users to visit the counterfeit domain names (SAC ¶¶ 111-144). In addition, there are numerous allegations against Lena, as well as the other Defendants, about actions that they took jointly. Consequently, the Court finds that the allegations against Lena are sufficient to put her on notice as to the claims against her. Accordingly, the motion to dismiss all claims against Lena is denied.

[2] Defendants' entire argument in support of dismissing all claims against Lena is a single, six-sentence paragraph.

B. The RICO Claims[3]

Defendants argue that Plaintiff fails to allege with specificity the elements of a RICO claim. Under RICO, it is illegal "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." 18 U.S.C. § 1962(c). A plaintiff must plead four elements to establish a claim under § 1962(c): "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Lehman v. Lucom*, 727 F.3d 1326, 1330 (11th Cir. 2013). An "'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). "A pattern is established by at least two acts of racketeering activity the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." *Id.* (citation omitted); *see also* 18 U.S.C. § 1961(5).

Additionally, Defendants argue that because the RICO claims fail so must the federal RICO conspiracy claim and the Florida Civil Remedies for Criminal Practices Act conspiracy claim. However, for the reasons set forth below, the RICO and the Florida Civil Remedies for Criminal Practices Act claims do not fail. Therefore, neither do the conspiracy claims.

[3] Courts apply the same analysis to federal RICO claims and Florida's RICO analog, the Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.103, because Chapter 772 is patterned on the federal RICO statute and Florida courts often look to federal RICO decisions for guidance in interpreting and applying the act. *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1264 (11th Cir. 2004). Therefore, the following discussion applies to Plaintiffs' RICO claims and their claims under the Florida Civil Remedies for Criminal Practices Act.

i. A RICO Enterprise

Defendants contend that Plaintiffs are alleging an "association-in-fact" enterprise. "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009). Defendants argue that no "enterprise" exists because Plaintiffs' allegations do not satisfy the longevity requirement. In *Boyle*, the Supreme Court described the longevity requirement as "affairs of sufficient duration to permit an associate to participate in those affairs through a pattern of racketeering activity." *Boyle*, 556 U.S. at 946 (internal quotations omitted). Defendants argue that the "vast majority of courts" require the enterprise to last at least a few years to meet the longevity requirement. Because Plaintiffs have only alleged a period of approximately ten or fifteen months, Defendants maintain that Plaintiffs have not adequately pled an enterprise.

Plaintiffs respond that the Supreme Court in *Boyle* did not set any required duration to meet the longevity requirement. Additionally, contrary to Defendants' assertion, courts have not required some minimum duration to meet the longevity requirement.[4] Courts have found that a plaintiff sufficiently pled an enterprise with durations of less than one year. *See, e.g., Caro-Bonet v. Lotus Mgmt., LLC*, 195 F. Supp. 3d 428, 432 (D.P.R. 2016) (finding that a seven-month relationship had sufficient longevity for an enterprise). As set out above, all that the Supreme Court requires is that the duration be "sufficient to permit these associates to pursue the enterprise's purpose." Plaintiffs have pled that Defendants pursued their purpose by, among other

[4] While Defendants cite to several cases that found durations of two or more years sufficient to establish longevity, none of those cases indicate that there is some minimum length of time necessary to satisfy the longevity requirement.

things, acquiring and establishing counterfeit website domains, using unauthorized copies of Plaintiffs' service marks and copyrighted works to disparage Plaintiffs, publishing false statements about Plaintiffs, and sending numerous deceptive and false emails about Plaintiffs. Thus, Plaintiffs have adequately pled that Defendants association-in-fact had sufficient duration to pursue its purpose.

Plaintiffs also point out that they allege both a legal entity enterprise and an association-in-fact enterprise. The SAC alleges that PIP operated as a legal entity, distinct from the individual Defendants, and, therefore, that is sufficient to meet the enterprise element of RICO. Defendants' motion does not address the allegations regarding PIP as a legal entity enterprise under RICO. Consequently, Plaintiffs have adequately alleged the existence of both a legal entity enterprise and an association-in-fact enterprise and, therefore, the Motion to Dismiss is denied based on Plaintiffs' alleged failure to plead an enterprise.

ii. A Pattern of Racketeering Activities

Defendants also seek to dismiss the RICO claims because Plaintiffs have not alleged a pattern of racketeering activity. The Supreme Court has stated that "[t]o establish a RICO pattern it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). The Court explained: "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Defendants argue that Plaintiffs have not alleged either closed-ended continuity or open-ended continuity. Plaintiffs respond that the SAC alleges only open-ended continuity. Therefore, the Court will address only whether Plaintiffs have adequately alleged open-ended continuity.

Open-ended continuity is demonstrated if there is a "*threat* of continuity." *Id.* (emphasis in original). To state a claim based on open-ended continuity a plaintiff must "allege either that the alleged acts were part of the defendants' 'regular way of doing business,' or that the illegal acts threatened repetition in the future." *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1267 (11th Cir. 2004) (citing *H.J. Inc.*, 492 U.S. at 242–43).

Defendants argue that Plaintiffs have not alleged open-ended continuity because Plaintiffs have failed to allege any facts to support the claim that the acts were part of Defendants' regular way of doing business and the SAC makes clear that the Defendants' conduct has ceased. Plaintiffs maintain that they have pled that Defendants are engaged in an ongoing legitimate business and that, in the course of running their legitimate business, Defendants engaged in a scheme to defraud Plaintiffs of property, money, clients, and intellectual property by infringing on Plaintiffs' intellectual property, sending false emails, impersonating Plaintiffs, harassing Plaintiffs' clients, publishing false internet posts disparaging Plaintiffs, and making false statements to law enforcement officers. Plaintiffs, however, have not alleged that these actions were part of Defendants' regular way of doing business. Further, in their response, Plaintiffs only argue that the SAC alleges an implicit threat of continuing criminal conduct.

While Plaintiffs concede that Defendants' conduct has ceased, Plaintiffs argue that it is only because Plaintiffs forced the cessation; the cessation was not voluntary. At least one circuit has held that "in the context of an open-ended period of racketeering activity, the threat of continuity must be viewed at the time the racketeering activity occurred." *U.S. v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991). Therefore, "[t]he lack of a threat of continuity of racketeering activity cannot be asserted merely by showing a fortuitous interruption of that activity." *Id.*; *see also Lugo v. State*, 845 So. 2d 74, 100 & n.50 (Fla. 2003). The SAC alleges that Plaintiffs' actively

fought to stop Defendants' actions, including sending cease and desist letters and the institution of this action. Thus, Plaintiffs have alleged the threat of repetition in the future. Accordingly, Plaintiffs have adequately alleged open-ended continuity and the motion to dismiss Plaintiffs' RICO and Florida Civil Remedies for Criminal Practices Act claims, Counts VIII, IX, X, and XI, is denied.[5]

C. Common Law Fraud and Negligent Misrepresentation

Defendants seek to dismiss Plaintiffs' fraud and negligent misrepresentation claims because (1) Plaintiffs did not justifiably rely on the alleged misrepresentations and (2) the damages sought by Plaintiffs are not the type of damages recoverable for such claims. Plaintiffs' fraud claim alleges that that Defendants misrepresented who they were online and that they were part of an enterprise larger than just Defendants. Plaintiffs' plead their negligent misrepresentation claim in the alternative, if they cannot establish the requisite intent for fraud.

Under Florida law, the elements of fraud are: " (1) a false statement of fact; (2) known by the defendant to be false at the time that it was made; (3) made for the purpose of inducing the plaintiff to act in reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representation; and (5) resulting damage or injury." *Nat'l Ventures, Inc. v. Water Glades 300 Condo. Ass'n*, 847 So. 2d 1070, 1074 (Fla. 4th DCA 2003) (citation omitted). A claim for negligent misrepresentation requires a plaintiff to allege: " (1) a misrepresentation of material fact that the defendant believed to be true but which was in fact false; (2) that defendant should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely on

[5] Defendants make the additional argument that a pattern of racketeering activity does not exist when the predicate acts of racketeering are directed at one victim with a single objective. Plaintiffs, however, are not a single victim; they are two legal entities and an individual. Thus, this argument fails.

the misrepresentation; and (4) the plaintiff acted in justifiable reliance upon the misrepresentation, resulting in injury." *Arlington Pebble Creek, LLC v. Campus Edge Condo. Ass'n, Inc.*, 232 So. 3d 502, 505 (Fla. 1st DCA 2017). Thus, both fraud and negligent misrepresentation require reliance by the plaintiff.

Defendants argue that Plaintiffs have not pled reliance on the representations for two reasons: (1) Plaintiffs knew the postings were false and (2) Plaintiffs' actions of expending significant sums of money to determine the identity of the perpetrators does not constitute reliance. While Plaintiffs knew the contents of the emails and postings about them were false, there is nothing in the SAC indicating that, at the time, Plaintiffs knew that the identities of the posters were false or that the representations about being part of a larger enterprise were false. It is these latter things that Plaintiffs claim they relied on in instituting an investigation into who was behind the postings.

Black's Law Dictionary defines "reliance" as "dependence or trust by a person, esp[ecially] when combined with action based on that dependence or trust." *Black's Law Dictionary* (11th ed. 2019). Based on the definition of "reliance," there was no reliance here. Plaintiffs did not rely on Defendants' postings. In fact, they did the opposite – Plaintiffs did not trust the online postings of Defendants and did not trust that the persons posting them were who they said they were. Plaintiffs did not place any dependence or trust in Defendants. It is precisely because of their lack of dependence and lack of trust that Plaintiffs hired experts to help uncover who was actually behind the postings. Consequently, Plaintiffs have not pled reliance and their fraud claims, Counts XX and XXI, must be dismissed. Given that the fraud claims were previously dismissed[6] and given

[6] In the First Amended Complaint, Plaintiffs' fraud counts pled that Plaintiffs' clients and colleagues relied on the misrepresentations by Defendants, which caused damage to Plaintiffs.

that the allegations in the SAC undermine any claim of actual reliance, the claims are dismissed with prejudice.

D. Invasion of Privacy Claims

Defendants seek to dismiss Plaintiff Hartman's common law invasion of privacy claim and statutory invasion of privacy claim under section 540.08(1), Florida Statutes. Defendants argue that both claims require Plaintiffs to allege that Defendants used Hartman's name and likeness in the direct promotion of a commercial product or service and that Plaintiffs have failed to make such allegations. Plaintiffs respond that they have sufficiently pled their claims under both the statute and the common law. Because Hartman's common law invasion of privacy claim for misappropriation is substantially similar to his statutory claim, the same analysis applies to both. *See Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1320 n.1 (11th Cir. 2006) (noting that section 540.08, Florida Statutes, codifies the common law right of misappropriation but still permits a party to bring a common law claim; therefore, the claims are "substantially identical").

Section 540.08(1) prohibits a person from publishing, printing, displaying or otherwise publicly using "for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use." Fla. Stat. § 540.08(1). The Florida Supreme Court has held that "the purpose of section 540.08 is to prevent the use of a person's name or likeness to directly promote a product or service because of the way that the use associates the person's name or personality with something else." *Tyne v. Time Warner Entm't Co., L.P.*, 901 So. 2d 802, 808 (Fla. 2005). However, directly promoting a product or service does not necessarily mean that the unauthorized

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The Court dismissed those claims because Florida law does not support a fraud claim based on third-party reliance. *See* DE 62 at 5.

use is in an advertisement. *Id*. As an example of a non-advertising violation of section 540.08(1), the *Tyne* court cited *Ewing v. A–1 Management, Inc.*, 481 So. 2d 99 (Fla. 3d DCA 1986). *Tyne*, 901 So. 2d at 808. According to *Tyne*, the *Ewing* defendants violated section 540.08(1) when they published the names and addresses of the plaintiffs as parents of a fugitive from justice on a wanted poster distributed by the defendant surety company after the plaintiff's son fled while on bail. *Tyne*, 901 So. 2d at 808. Thus, despite not directly advertising a product or service, the *Ewing* plaintiffs' names were used in violation of section 540.08(1).

Defendants argue that Plaintiffs have not pled that Hartman's likeness was used for the direct promotion of goods or service. According to Defendants, Hartman alleges that Defendants used Hartman's likeness on their website to generate leads for themselves and to drive business away from Plaintiffs and this does not amount to a direct promotion or endorsing of their services. In response, Plaintiffs argue that the product being promoted by Defendants was their website and that Defendants used Hartman's name in the domain names to attract people to the website.

Plaintiffs have alleged that Defendants used Hartman's name to directly promote their website; his name was part of several domain names that redirected to the website. According to the SAC, Defendants then used the website for lead generation for themselves and to drive business away from Plaintiffs. Clearly, the use of Hartman's name was for a commercial purpose. The domain names associated Hartman's name with a website that he had nothing to do with and from which Defendants obtained business generation leads. Like in *Ewing*, Defendants here were not directly advertising a product or service but used Hartman's name for their own commercial benefit. Thus, Plaintiffs have adequately pled that Defendants used Hartman's name for purposes of trade or for commercial purposes. Accordingly, the motion to dismiss Counts XXII and XXIII are denied.

E. Tortious Interference and Injurious Falsehood Claims

Defendants maintain that Plaintiffs' tortious interference and injurious falsehood claims are barred by Florida's single action rule. This rule "precludes the recasting of defamation claims as additional, distinct causes of action in tort if all of the claims arise from same defamatory publication." *Int'l Sec. Mgmt. Grp., Inc. v. Rolland*, 271 So. 3d 33, 48 (Fla. 3d DCA 2018), *reh'g denied* (Feb. 28, 2019). The purpose of the rule is "to prevent plaintiffs from circumventing a valid defense to defamation by recasting essentially the same facts into several causes of action all meant to compensate for the same harm." *Callaway Land & Cattle Co. v. Banyon Lakes C. Corp.*, 831 So. 2d 204, 208 (Fla. 4th DCA 2002) (citation omitted). Defendants maintain that the defamation counts in the SAC are based on the same facts and events that give rise to the tortious interference and injurious falsehood counts and, therefore, are barred by the rule.

Plaintiffs respond that here there is no "failed" defamation claims because the defamation claims remain pending. Further, Plaintiffs point out that the defamation claims are brought by Hartman, individually, while the tortious interference and injurious falsehood claims are brought by Platinum Properties and HMC. It is the latter that saves the claims. Because the defamation claims and the tortious interference and injurious falsehood claims are not brought by the same parties, they cannot be seeking compensation for the same harm. The harm suffered by Hartman from the alleged defamation is different from the harm caused by the tortious interference and injurious falsehood to Platinum Properties and HMC. While the facts on which these claims are based may be virtually identical, the claims do not seek compensation for the same harm. Consequently, the motion to dismiss Count XV for tortious interference and Count XVI for injurious falsehood is denied.

Accordingly, it is

ORDERED that Defendants' Partial Motion to Dismiss [DE 82] is **GRANTED in part and DENIED in part:**

a) Counts XX and XXI are **DISMISSED with prejudice**.

b) The Motion is **DENIED** in all other respects.

c) Defendants shall file an answer to the Second Amended Complaint by **June 29, 2020.**

DONE and ORDERED in Fort Lauderdale, Florida, this 17th day of June, 2020.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record