APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS, FOR THE ELEVENTH CIRCUIT.

John CLIFFORD, Plaintiff,

Craig Clifford, Scott Clifford, Paul Clifford, Stephen Dazzo, Jersey Cord Cutters, LLC, Kasolas Family & Friends Vg Investment, LLC, Christine C. Clifford, as administrator of the estate of John Clifford, Plaintiffs - Appellants,

v.

Richard FEDERMAN, Winston Johnson, Gotham Media Corporation, Gotham Media Services, Inc., Winsonic Digital Media Group, Ltd., Winsonic Digital Cable Systems Network, Ltd., Justin Su, Lori Poole, Robert Kostensky, Todd Guthrie, Tech CXO, LLC, Patrick Shaw, Rickshaw Productions, LLC, Daryl Arthur, Megatone Music, LLC, Kristy Thurman, KT Communications Consulting, Inc., 2251 Lake Park Investment Group LLC, DOC Maandi Movies LLC, DMM-Expendables 3 LLC, Maandi Media Productions Digital LLC, Maandi Entertainment LLC, Maandi Media Productions LLC, Maandi Park Ms LLC, Maandi Media Holdings International LLC, Kimberlyte Productions Services, Inc., 2496 Digital Distribution LLC, 1094 Digital Distribution LLC, SST Swiss Sterling, Inc., Heather Clippard, Robert Half International Inc., D.B.A. The Creative Group, D.B.A. Robert Half Technology, et al., Winsonic Digital Media Cable Systems Holdings, Inc., et al., Cascade Northwest, Inc., Defendants - Appellees.

No. 20-12294

Non-Argument Calendar

(May 5, 2021)

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:18-cv-01953-JPB

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Before WILSON, ROSENBAUM, and BLACK, Circuit Judges.

Opinion

PER CURIAM:

*1 Craig Clifford, Scott Clifford, Paul Clifford, Stephen Dazzo, Jersey Cord Cutters, LLC, Kasolas Family & Friends VG Investment, LLC, and Christine C. Clifford, as administrator of the estate of John Clifford (collectively, Appellants) appeal the district court's striking and dismissal of their Original and First Amended Complaints on shotgun pleading grounds and the district court's denial of their motion for reconsideration. After review,1 we affirm the district court.

I. BACKGROUND

On May 3, 2018, Appellants filed their 195-page, 50-count2 Original Complaint against 42 defendants. The Original Complaint alleged generally that the Appellees committed fraud when they solicited investments for a

"fictitious and non-existent" internet television service trademarked as "VIDGO" and later used those investments to fund personal projects unrelated to the purported business venture. Many of the Appellees moved to strike or dismiss the Original Complaint on shotgun pleading grounds. On March 22, 2019, after "engag[ing] in the painstaking task of wading through and deciphering [Appellants'] tangled mess of allegations to determine the merits of the [Appellees'] pending motions," Judge Amy Totenberg granted the Appellees' motions to strike the Appellants' Original Complaint based on shotgun pleading grounds and directed the Appellants to replead their complaint with certain parameters:

(1) [Appellants] may not incorporate all 312 factual paragraphs into each count. [Appellants] instead must indicate which of the factual paragraphs are alleged to support each individual count alleged.

(2) Each individual count may only be based on a single legal claim or legal basis for recovery (i.e. [Appellants] may not assert "Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability" together in the same count).

(3) [Appellants] are permitted to assert a single count against multiple defendants; however, [Appellants] must identify what precise conduct is attributable to each individual defendant separately in each count.

(4) As to Count 24 (Securities Fraud): [Appellants] must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (PSLRA).

(5) As to Counts 28 through 46 (Fraud) and Count 51 (Intentional Misrepresentation): [Appellants] must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).

Appellants filed their First Amended Complaint on April 23, 2019. The First Amended Complaint contained 258 pages and 52 counts against 36 defendants. As with the Original Complaint, many Appellees moved to dismiss the First Amended Complaint on shotgun pleading

grounds. The case was reassigned to Judge J.P. Boulee in June of 2019. On January 7, 2020, Judge Boulee found that the First Amended Complaint was a "quintessential shotgun pleading of the kind the Eleventh Circuit has condemned repeatedly." Judge Boulee stated it was "virtually impossible to know which allegations of fact are intended to support which claims of relief since each cause of action incorporates more than 200 paragraphs." He found that Appellants failed to correct the pleading deficiencies identified by Judge Totenberg—specifically identifying which facts support each individual count alleged and adequately identifying the precise conduct attributable to each defendant. He concluded that Appellants' method of pleading was no clearer than it was in the Original Complaint and remained an impermissible shotgun pleading.

*2 Judge Boulee also stated that Judge Totenberg had "thoroughly explained to [Appellants] why the Original Complaint violated the shotgun pleading rule," and provided notice of the defects. However, because the Appellants "did not meaningfully amend their Original Complaint," Judge Boulee determined they should not be afforded another opportunity to amend. Thus, the court granted the motions to dismiss based on shotgun pleading grounds and dismissed the case with prejudice.

Appellants filed a motion for reconsideration pursuant to Federal Rule of Civil Procedure 60. On June 15, 2020, the district court rejected Appellants' arguments and denied the motion for reconsideration.

II. DISCUSSION

A. Shotgun Pleading

Appellants assert that both district judges abused their discretion in striking Appellants' Original Complaint and dismissing Appellants' First Amended Complaint on shotgun pleading grounds. Shotgun pleadings violate Federal Rule of Civil Procedure 8(a)(2)'s "short and plain statement" requirement by "failing ... to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1294-95 (11th

Cir. 2018) (quotations and alteration omitted). Shotgun pleadings are characterized by: (1) multiple counts that each adopt the allegations of all preceding counts; (2) conclusory, vague, and immaterial facts that do not clearly connect to a particular cause of action; (3) failing to separate each cause of action or claim for relief into distinct counts; or (4) combining multiple claims against multiple defendants without specifying which defendant is responsible for which act. Weiland v. Palm Beach Cty. Sheriff's Ofc., 792 F.3d 1313, 1321-23 (11th Cir. 2015). Dismissal of a complaint as a shotgun pleading is warranted where "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief," where the failure to "more precisely parcel out and identify the facts relevant to each claim materially increase[s] the burden of understanding the factual allegations underlying each count," or where the complaint indiscriminately lumps together multiple defendants without specifying how each is responsible for acts or omissions that give rise to a claim for relief. Id. at 1323-25 (quotations and emphasis omitted).

In dismissing a shotgun complaint, a district court must give the plaintiffs one chance to remedy its deficiencies. Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1358 (11th Cir. 2018). "What matters is function, not form: the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them. If that chance is afforded and the plaintiff fails to remedy the defects, the district court does not abuse its discretion in dismissing the case with prejudice on shotgun pleading grounds." Id.

This Court, like the two district judges before us, has now "engaged in the painstaking task of wading through and deciphering [Appellants'] tangled mess of allegations." After that review, we conclude the district court did not abuse its discretion in striking Appellants' Original Complaint or dismissing Appellants' First Amended Complaint as shotgun pleadings. As to the Original Complaint, the district judge did not abuse her discretion in striking their complaint as (1) the Appellants incorporated by reference 312 paragraphs of factual allegations into each of their 50 enumerated causes of action, (2) each cause of action incorporated by

reference each and every prior cause of action, (3) many of the enumerated causes of action were actually comprised of multiple sub-causes of action, (4) each enumerated cause of action was asserted against multiple defendants, and (5) Appellants essentially accused all defendants of being responsible for all acts and omissions, so that no individual defendant could identify exactly what he or she did wrong. These deficiencies in the Original Complaint are the definition of a shotgun pleading, and the district court did not abuse its discretion in striking the complaint and giving the Appellants a chance to remedy the deficiencies. See Jackson, 898 F.3d at 1358.

*3 The district court also did not abuse its discretion in dismissing Appellants' First Amended Complaint as a shotgun pleading. Even after Judge Totenberg gave Appellants explicit instructions on how to remedy the deficiencies in the complaint, Appellants did not do so. While Appellants did not incorporate all 312 introductory paragraphs into each count, the majority of the 52 counts incorporated almost the entirety of the fact section of the complaint, consisting of 249 paragraphs and 104 pages. The complaint is cumbersome, requiring the reader to identify and sift through hundreds of paragraphs incorporated into each count, and then parse through numerous allegations to identify which of those hundreds of paragraphs have some relevance to a particular defendant or cause of action. It is virtually impossible to know which allegations of fact are intended to support which claims for relief when each cause of action incorporates more than 200 paragraphs. As Judge Boulee observed, "this method of pleading is in no manner any clearer than it was in the Original Complaint nor does it specifically identify the precise conduct attributable to each individual defendant." As Appellants had notice of the defects and a meaningful chance to fix them, it was not an abuse of discretion to dismiss the First Amended Complaint as a shotgun pleading. See id.

B. Motion for Reconsideration

Appellants contend the district court abused its discretion in denying their motion for reconsideration.

Appellants bring several points of error, which we address in turn.

I. Dismissal of State Law Claims with Prejudice

Appellants contend the district court's dismissal of their state law claims with prejudice rather than without prejudice required reconsideration. They rely on our decision in Vibe Micro, where we remanded for the limited purpose of dismissing without prejudice as to refiling in state court any state law claims. Vibe Micro, 878 F.3d at 1296-97. "Although it is possible for the district court to continue to exercise supplemental jurisdiction over these pendant claims ... if the district court instead chooses to dismiss the state law claims, it usually should do so without prejudice as to refiling in state court." Id. at 1296 (citations omitted).

Vibe Micro is distinguishable from this case, however. This case is in federal court both on the basis of original federal question jurisdiction and diversity jurisdiction. Thus, any state law claims would be in federal court on the basis of diversity jurisdiction with or without federal questions. The reasoning for remanding in Vibe Micro was because the state law claims there were in federal court on the basis of supplemental jurisdiction, rather than diversity jurisdiction. Id. Thus, the district court did not abuse its discretion in denying reconsideration on this basis.

2. Grounds for Dismissal with Prejudice

Appellants contend that no grounds exist for the extreme sanction of dismissal with prejudice. They rely on our decision in Betty K., Ltd. v. M/V Monada, et al., 432 F.3d 1333, 1337-38 (11th Cir. 2005), providing that a dismissal with prejudice should be imposed only if a party engages in a clear pattern of delay or willful contempt and the district court specifically finds lesser sanctions would not suffice.

The district court did not abuse its discretion in dismissing Appellants' First Amended Complaint with prejudice. Specific to the shotgun pleading issue, we have held "[w]hen a litigant files a shotgun pleading, is

represented by counsel, and fails to request leave to amend, a district court must sua sponte give him one chance to replead before dismissing his case with prejudice on non-merits shotgun pleading grounds." Vibe Micro, 878 F.3d at 1296. Here, the district court followed the holding in Vibe Micro. When the Original Complaint was stricken, Appellants were given another chance to replead and remedy their shotgun pleading issues, but Appellants filed an equally unclear First Amended Complaint. The district court was not required to give Appellants any additional chances to remedy the pleading violations. See id. Therefore, the district court did not abuse its discretion in denying reconsideration on this basis.

3. Rule 8 and Rule 9(b)

Appellants also contend the district court abused its discretion by applying Rule 8 to the portion of the Amended Complaint asserting fraud-based claims, since Rule 9(b) governs fraud-based claims. While Rule 8 requires a "short and plain statement of the claim," Rule 9(b) requires "the circumstances constituting fraud or mistake shall be stated with particularity." Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1066-67 (11th Cir. 2007) (citing Fed. R. Civ P. 8 and 9(b)).

*4 Although Appellants assert the district court should have evaluated their fraud claims solely under Rule 9(b), the requirement to plead with particularity does not allow them to evade Rule 8's requirements. See Ashcroft v. Iqbal, 556 U.S. 662, 686-87, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The district court did not abuse its discretion in denying reconsideration on this basis.3

III. CONCLUSION

We affirm the district court's dismissal of Appellants' case and denial of Appellants' motion for reconsideration.

AFFIRMED.

Footnotes

1 We review a district court's dismissal of a complaint on shotgun pleading grounds for an abuse of discretion. Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1294 (11th Cir. 2018). We also review a district court's denial of a motion for reconsideration for an abuse of discretion. Corley v. Long-Lewis, Inc., 965 F.3d 1222, 1234 (11th Cir. 2020).

2 The Original Complaint purports to contain 51 counts, but it does not contain a count 45.

3 We reject Appellants' arguments that certain defendants could not oppose reconsideration on shotgun pleading grounds because they did not file motions to dismiss based on shotgun pleading arguments.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.: 1:18-CV-01953-AT

JOHN CLIFFORD, et al, Plaintiffs,

v.

RICHARD FEDERMAN, et al, Defendants.

ORDER

This matter is before the Court on Defendant Eric Spellman's Motion to Dismiss [Doc. 52]. On May 3, 2018, Plaintiffs John Clifford, Craig Clifford, Scott Clifford, Paul Clifford, Stephen Dazzo, Jersey Cord Cutters, and Kasolas Family and Friends VG Investment, LLC, all either residents of New Jersey or Florida1, filed their Complaint in this Court. In the 195-page Complaint, Plaintiffs assert 50 counts against 42 defendants including Defendant Eric Spellman, a New York resident. (See Complaint ("Compl."), Doc. 1 at 2-4, ¶ 3, 31.) Plaintiffs' Complaint centers on the allegation that Defendants committed fraud when they solicited investments for a "fictitious and non-existent" internet television service trademarked as "VIDGO" and later used those investments to fund personal projects unrelated to the purported business venture. (Compl. at 5.) For the reasons set forth below, the Court GRANTS Defendant's Motion to Dismiss.

I. BACKGROUND 2

Plaintiffs' Complaint centers on Defendants' alleged use of a fraudulent enterprise to steal over eleven million dollars, including approximately six million dollars of Plaintiffs' investments. (Compl. at 4-7, 9.) Plaintiffs allege the following:

At some point between 2007 and 2014, Defendants Richard Federman and Mark Arnold formed the corporation Gotham Media Services, Inc. ("GMS") to create digital technology cards that would make cable television programming content portable. (See Compl. ¶¶ 53, 61, 68.) GMS was unsuccessful, so in 2014, Federman began to explore opportunities in the internet cable television marketplace. (Compl. ¶¶ 67-68.) Specifically, Federman became interested in over-the-top ("OTT") content distribution, where consumers purchase cable programming on their computer devices for a "more flexible alternative" to traditional cable. (Compl. ¶ 69.) Hulu, DirectTV, DISH Network, and YouTube are examples of companies that currently offer OTT content distribution services. (Compl. ¶ 71.)

In 2015, Federman and Arnold joined with Robert Kostensky and Winston Johnson to solicit investors for a new company named Gotham Media Corporation ("GMC"); colloquially, "Gotham Media." 3 (Compl. ¶¶ 72-73, 77.) Federman, Arnold, Kostensky and Johnson used the GMC entity to fund their venture into the OTT marketplace with a content distribution service called VIDGO. (Compl. at 5-6, ¶¶ 72-73.) Federman announced the new venture to investors in his first company, GMS, as well as potential new investors such as Plaintiffs.4 (Compl. ¶ 76.) Federman, Arnold, Kostensky and Johnson described VIDGO as a service that would offer "a la carte programming," where consumers could create bespoke cable packages, paying only for their desired content. (Compl. at 5-6.) VIDGO would offer live broadcasting of popular channels, including local channels like CBS, NBC, ABC, and Fox, as well as "approximately 300. . . of the most popular and watched cable channels," including, ESPN, HGTV, Showtime, Starz, TNT, Discovery, and Nickelodeon. (Compl. at 6, ¶¶ 71, 84, 116, 126, 171.) VIDGO would also offer "cloud DVR capabilities, [and] video 3 3 on demand" with no

annual contracts or credit checks. (Compl. at 6.) Like other OTT services, VIDGO would be delivered "directly through the internet to a subscriber's mobile device/digital device/internet stick," without "a set top box or cable company subscription." (Compl. at 6, ¶ 69.)

Plaintiffs allege that Federman, Arnold, Kostensky and Johnson told potential investors that GMC had already developed the technology and procured the content licensing rights required to launch VIDGO. (Compl. at 5, ¶¶ 73-74.) Defendants also represented that they had "secured and executed agreements and implemented network and technology-based solutions" that would enable VIDGO to broadcast local content nationwide. (Compl. ¶¶ 73-74.) In January 2016, Federman, Arnold Kostensky and Johnson launched a marketing campaign for VIDGO. (Compl. ¶ 77.) Plaintiffs allege these Defendants then began to disseminate "knowingly false and misleading information to the public, the media, the television broadcast industry, plaintiffs and other prospective investors" to advertise the service's capabilities. (Compl. ¶ 77.) Defendants said that VIDGO would be launched in fifteen U.S. markets during the first half of 2016 and would be available "nationwide by the end of [2016]." (Compl. ¶ 79.)

A large part of Federman, Arnold, Kostensky and Johnson's alleged scheme involves their illegal use of "internet protocol cable television (IPTV) temporary software licenses" to "demonstrate" VIDGO's capabilities for investors. (Compl. ¶ 82.) IPTV is a broadcasting technology "utilized primarily in hotels and multi- dwelling units in lieu of traditional cable distribution systems and signals." (Compl. ¶ 277.) Unlike OTT content distribution services, an "IPTV signal cannot legally be broadcast to OTT type devices such as tablets, cell phones, internet sticks" and other similar devices. (Compl. ¶ 277.) Plaintiffs allege that Federman and Johnson worked with Justin Su and his company Cascade and Kristy Thurman and her company KT Communications Consulting, Inc., to procure software licenses from "Minerva Networks and/or Vubiquity." (Compl. ¶ 82, see also ¶ 19, 29-30.) Plaintiffs allege that Federman, Johnson, Su, Cascade, Thurman, and KTC then illegally manipulated these licenses to demonstrate what appeared to be a "legitimate and

licensed OTT service" that offered live broadcasting of the most popular local and cable channels, under the guise that this broadcast was VIDGO. (Compl. ¶¶ 83, 84.) Plaintiffs allege that Defendants did not have "the capability, licensing and content rights" to broadcast any channels to the public because there was never a VIDGO network at all. (Compl. ¶¶ 86, 91.) These Defendants repeated similar "demonstrations" for Plaintiffs and other investors at least six times over the course of the alleged scheme. (See Compl. ¶¶ 82-89, 105-109, 115-118, 119-121, 124-128, and 155-162) (detailing alleged fraudulent beta demonstrations and Plaintiffs' subsequent investments in January 2016, February/March 2016, April/May 2016, July 2016, August/September 2016, and April 2017.)

Federman's email updates helped Plaintiffs maintain confidence in VIDGO's progress, and Plaintiffs describe Defendants' VIDGO demonstrations as an integral factor in soliciting and sustaining their financial support. (Compl. ¶ 5 3 108 (". . . as originally seen in the January 2016 'beta' demonstrations that originally induced plaintiffs' investments"); and ¶ 289 ("Had those illegal 'beta' demonstrations not been broadcast to plaintiffs, . . . plaintiffs would never have contributed their investments into GMC.")) After the initial VIDGO demonstration in January 2016, Plaintiffs "executed their own respective Common Stock Purchase Agreements between themselves and Kostensky as GMC's President," where they purchased an unspecified number of common stock shares in GMC at a "purchase price of $2.00 per share." (Compl. ¶¶ 89-90.) Plaintiffs allege that the GMC stocks they purchased were "unregistered securities" that were never registered under the Securities Act of 1933, and that GMC claimed that the "common shares being sold were exempt" from the Securities Act of 1933. (Compl. ¶ 89.) Further, Plaintiffs allege that "Federman, Kostensky and Arnold intentionally had plaintiffs wire their initial investment proceeds into the old GMS bank account," even though Plaintiffs were investing in GMC, a different business entity altogether. (Compl. ¶ 94.) Plaintiffs soon learned that "approximately $3,000,000 of common stock investor proceeds," comprised of both Plaintiffs' and other investors' contributions, had been wired into GMS rather than GMC. (Compl. ¶ 95.) At that point, "Federman, Guthrie and Arnold claimed to rectify the

situation by transferring those funds to GMC's bank account" and preparing legal documents to reflect the correction. (Compl. ¶ 97.) Plaintiffs ultimately purchased GMC stock on two more occasions, but "never received the corresponding stock certificates from any GMC officers or director[s] following any of their GMC common stock purchases" (Compl. ¶ 121- 122.) (See Compl. ¶ 144 (Plaintiffs "purchased. . . convertible note [interests]" in GMC), ¶ 172-173 (Plaintiffs purchased an additional convertible note interest in GMC" during GMC's Series B investments round.))

By July 2017, VIDGO still had not launched. (Compl. ¶ 186.) After receiving lengthy email updates from Federman explaining the months of missed deadlines and delayed launches, Plaintiffs began to suspect that VIDGO was not the product Defendants had advertised. (See Compl. ¶¶ 93, 139, 141, 150, 186- 188.) To address mounting concerns about VIDGO's integrity, Plaintiffs demanded that another third-party investor be appointed to GMC's Board of Directors. (Compl. ¶ 189.) An unnamed "independent third-party GMC shareholder and convertible note holder" was appointed to the Board. (Compl. ¶¶ 190-191.) This individual, who is never identified in Plaintiffs' Complaint, "immediately" uncovered that "GMC's entire purported business operations and alleged VIDGO service was a fraudulent scheme to defraud investors." (Compl. ¶¶ 190-191.) Through this individual's due diligence and access to GMC's financial books and other business records, Plaintiffs learned that Federman had made "intentional misrepresentations" regarding VIDGO's content and licensing rights. (Compl. ¶¶ 188, 191.) Plaintiffs also learned that VIDGO had no "functioning 'front end' system," and that Defendants had spent Plaintiffs' investments on "unnecessary and unexplained" purchases, including "improper advances . . . to themselves and their non-related defendant companies." (Compl. ¶ 188.) Ultimately, Plaintiffs allege that GMC was a "completely fictitious business enterprise," and VIDGO a fictional service. (Compl. at 4, ¶ 104). Instead of developing an OTT service, Defendants spent "over $11,000,000" of GMC investment contributions, including $6,000,000 of Plaintiffs' investments, on their "own personal side projects and unrelated businesses," many of which are named as codefendants in this action. (Compl. at 5-7, 9.)

While asserting claims against 42 Defendants, Plaintiffs acknowledge that just four individuals "primarily orchestrated and perpetrated" this fraudulent scheme. (Compl. at 4.) These Defendants are Richard Federman, Mark Arnold, Robert Kostensky, and Winston Johnson.

Plaintiffs' Complaint separates the remaining 38 defendants into different "silos" depending on their level of involvement in the alleged scheme. (Compl. at 4-5.) Plaintiffs name defendants at multiple levels of the scheme, from Robert Half International, the publicly-traded staffing company used to staff GMC's Georgia campus, and its temporary employees,[5] to a number of entertainment business ventures that Plaintiffs allege Defendants financed illegally using investments.[6] (Compl. at 9-10, ¶¶ 110-111.) Plaintiffs also assert claims against various GMC consultants and others who did business with GMC,[7] including its accountants and accounting firms. [8] (Compl. ¶¶ 19, 51-52, 246(f), 286, 306, 310312.) Finally, Plaintiffs assert claims against GMC's predecessor organization,[9] Federman's roommate,[10] and Johnson's wife.[11] (Compl. ¶¶ 14, 20, 25.)

Plaintiffs' allegations against Defendant Spellman are based primarily on Spellman's alleged role as an officer or director of three entertainment companies used to perpetuate the fraudulent scheme at the center of this Complaint. (Compl. at 10.) Plaintiffs allege that Defendants stole $6,000,000 of their investments to fund their own "unrelated businesses." (Compl. at 5-7, 9.) Spellman's entertainment companies are three of those alleged "unrelated businesses." (Compl. at 5-7, 9.) These companies, known as the "Winsonic" companies, include Winsonic Digital Medial Cable Systems Holdings, Inc. ("Winsonic Holdings"), Winsonic Digital Media Group, Ltd. ("WDMG"), and Winsonic Digital Cable Systems Network, Ltd. ("WDCSN"). (Compl. at 2, ¶ 290.) Plaintiffs allege the following as to Defendant Spellman:

According to Plaintiffs' Complaint, Spellman sits as Chairman of the Board for each of the Winsonic companies and serves alongside Winston Johnson as a co-CEO of all three Winsonic companies. (Compl. ¶¶ 15-17, 290, 291.) Spellman is also shareholder in each of the Winsonic companies through his investor group, the

"Spellman Group." (Compl. ¶ 162.) Spellman never disclosed his financial interest in the Winsonic companies to Plaintiffs. (Compl. ¶ 162.)

Spellman "travelled to the annual [National Association of Broadcasters] show in Las Vegas to meet with GMC officers and investors . . . including certain plaintiffs" to advise "certain GMC executives he and his investor group were investing approximately $1,500,000 into GMC." (Compl. ¶¶ 292-293.) Spellman did so "in order to pretend GMC and VIDGO were real, so that [P]laintiffs would continue investing into the company."12 (Compl. ¶¶ 292-293.) In April 2017, Federman sent an "Investor Update" which stated that the Spellman Group (not named as a defendant) planned to invest $1,200,000 in GMC to support the VIDGO venture. (Compl. ¶ 162.) Plaintiffs allege that "the Spellman Group never invested a single dollar into GMC," and never intended to do so. (Compl. ¶ 175.) Instead, Spellman repeated his intention to invest "to certain plaintiffs on the telephone at various points in time"13 hoping to persuade Plaintiffs to continue investing in GMC so he and Johnson could steal that money to "finance, capitalize and conduct business for the Winsonic companies." (Compl. ¶¶ 246, 246(k), 295.) According to Plaintiffs, Spellman had lost his investment in the Winsonic companies when they had filed for Chapter 11 bankruptcy. (Compl. ¶ 295) ("In reality, Spellman knew [the Winsonic companies] had no funds, no capital infusion and no legitimate business. Rather, he conspired with Johnson for them to convert plaintiffs' funds to finance the re-launch of [the Winsonic companies] and/or to recover Spellman's investment in [the Winsonic companies] that previously resulted in Chapter 11 bankruptcy.")

To explain the comingling of Plaintiffs' funds between the Winsonic companies and GMC, Federman, Kostensky and Guthrie told Plaintiffs that the Winsonic companies were an integral part of the VIDGO service, and that Plaintiffs' investments had been deposited into the Winsonic companies to benefit VIDGO. (See Compl. ¶ 202.) Federman wrote that one of the Winsonic companies was "a shell company being used by Gotham to meet certain regulatory and diversity requirements," and that that Winsonic would "facilitate the launch" of

VIDGO. (See Compl. ¶ 164) ("Gotham owns 30% of Winsonic, which was [donated] to facilitate the launch of VIDGO.") Federman also stated that Winsonic would provide investment funding to ensure that Gotham remained "well-capitalized." (Compl. ¶ 164.) Plaintiffs allege that contrary to Defendants' representations, the Winsonic companies were entirely unrelated to GMC and VIDGO. (Compl. ¶¶ 290, 295-296.) Instead, Plaintiffs allege that Spellman and Winston Johnson illegally financed the Winsonic companies using Plaintiffs' investments. (Compl. ¶¶ 290, 295-296.) Plaintiffs suggest that Spellman's desire to advance his personal business interests in the Winsonic companies triggered his participation in Defendants' alleged fraud. (Compl. ¶¶ 423, 432, 435) (alleging alter-ego liability, conspiracy to commit alter-ego liability, and aiding and abetting alter-ego liability as to Spellman.) Further, Defendants allege that Spellman's failure to report Johnson's illegal activities facilitated the scheme. (See Compl. ¶ 296.) ("Spellman presided as Chairman of the Board for [the Winsonic companies] over all of Johnson's . . . illegal actions and conduct while Johnson served duplicitously as the CEO of the defendant entities" while he "intentionally never 13disclosed these [illegal] activities" to Plaintiffs or other GMC officers.) Plaintiffs assert fifteen claims against Defendant Spellman based on the above allegations:

- Count 9: Conversion and Civil Theft of Plaintiffs' Investment Monies

- Count 10: Conspiracy to Commit Conversion & Civil Theft;

- Count 11: Aiding and Abetting Conversion & Civil Theft;

- Count 28: Legal Fraud, Fraud in the Inducement & Alter- Ego Liability;

- Count 29: Conspiracy to Commit Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability;

- Count 30: Aiding and Abetting Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability;

•Count 37: Violation of the Georgia RICO Act;

•Count 38: Conspiracy to violate the Georgia RICO Act;

•Count 39: Violation of the Georgia RICO Act;

•Count 40: Conspiracy to Violate the Georgia RICO Act;

•Counts 43 and 46: Violations of the federal RICO Act;

•Counts 44 and 47: Conspiracy to violate the federal RICO Act; and •Count 45: Unjust Enrichment.

II. STANDARDS OF REVIEW

Generally, when a defendant moves to dismiss on both lack of personal jurisdiction and statute of limitations grounds, the District Court should rule on the personal jurisdiction issue first. SeeMadara v. Hall, 916 F.2d 1510, 1513—14 & n. 1 (11th Cir. 1990). If the Court finds it lacks personal jurisdiction over the defendant, the Court is barred from ruling on the merits of the case because "a defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings." Courboin v. Scott, 596 F. App'x 729, 735 (11th Cir. 2014). 14& n. 1 (11th Cir. 1990). If the Court finds it lacks personal jurisdiction over the defendant, the Court is barred from ruling on the merits of the case because "a defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings." Courboin v. Scott, 596 F. App'x 729, 735 (11th Cir. 2014).

a. Rule 12(b)(2)

A plaintiff's complaint is subject to dismissal if there is a lack of personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). The issue of whether personal jurisdiction is present is a question of law. Diamond Crystal, 593 F.3d at 1257; Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1217 (11th Cir. 2009). "A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." Diamond Crystal

Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249, 1257 (11th Cir. 2010) (quoting United Techs. Corp. v. Mazer, 556 F.3d 1260, 1274 (11th Cir. 2009)); Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000).

Rule 12(b) motions to dismiss for lack of jurisdiction can be asserted on either facial or factual grounds. Carmichael v. Kellogg, Brown & Root Serv., Inc., 572 F.3d 1271, 1279 (11th Cir. 2009). A facial challenge is based solely on the allegations in the complaint. Id. In considering a facial challenge which asserts that the plaintiff failed to sufficiently allege a basis for jurisdiction, the court must accept the complaint's allegations as true. See id.; McElmurray v. Consol. Gov't of Augusta-Richmond County, 501 F.3d 1244, 1251 (11th Cir. 2007) (likening a plaintiff's safeguards to "those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised."); Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (providing that with a "facial attack, a plaintiff is afforded safeguards ... [and] the court must consider the allegations of the complaint as true").

A factual attack, in contrast, challenges the existence of jurisdiction in fact, irrespective of pleadings, and matters outside the pleadings, such as testimony and affidavits, may be considered. Carmichael, 572 F.3d at 1279; McElmurray,501 F.3d at 1251; Lawrence, 919 F.2d at 1529; see also In re CP Ships Ltd Sec. Litig., 578 F.3d 1306, 1312 (11th Cir. 2009) ("In a factual challenge, the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.") (citation omitted).

The court must resolve a personal jurisdiction challenge on the pleadings, if possible, or following an evidentiary hearing. Oldfield, 558 F.3d at 1217 n.19 (citing 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1373). When no evidentiary hearing is held on a motion to dismiss for lack of jurisdiction, the Court determines whether the plaintiff has established a prima facie case of personal jurisdiction over a nonresident defendant. Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990) (citing Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988)). A prima

facie case exists where the plaintiff presents enough evidence to survive a motion for a directed verdict. Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1360 (11th Cir. 2006); Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000). A plaintiff presents enough evidence to withstand a motion for a directed verdict by putting forth evidence of such quality and weight that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." Miller v. Roche Sur. & Cas. Co., 502 F. App'x 891, 893 (11th Cir. 2012) (quoting Christopher v. Fla., 449 F.3d 1360, 1364 (11th Cir. 2006)).

If the nonresident defendant challenges jurisdiction and supports the challenge with affidavit evidence, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction. Diamond Crystal, 593 F.3d at 1257. The plaintiff must "substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint." Polskie Linie Oceaniczne v. Seasafe Transport A/S, 795 F.2d 968, 972 (11th Cir. 1986).

The court, in turn, must accept the facts in the plaintiff's complaint as true, to the extent that they remain uncontroverted by the defendant's affidavits. Cable/Home Commc'n Corp. v. Network Productions, Inc., 902 F.2d 829, 855 (11th Cir. 1990); Paul, Hastings, Janofsky & Walker, LLP v. City of Tulsa, Okla., 245 F. Supp. 2d 1248, 1253 (N.D. Ga. 2002). In addition, "[w]here the plaintiff's complaint and supporting evidence conflict with the defendant's affidavits, the court must construe all reasonable inferences in favor of the plaintiff." Diamond Crystal, 593 F.3d at 1257 (quoting Meier ex rel. Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1269 (11th Cir. 2002)).

The Court engages in a two-part analysis to determine if it may exercise jurisdiction over a non-resident defendant. See, e.g., Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1350 (11th Cir. 2013). First, the Court determines whether the defendant's activities satisfy the state's long-arm statute. Id.Second, the Court determines whether the exercise of personal jurisdiction

comports with the due process requirements of the Fourteenth Amendment. Id. at 1350–51. Separately, if a plaintiff's claim derives from a federal statute, then the court may exercise personal jurisdiction over the defendant as to that claim consistent with the limits of both the statute and the due process requirements of the Fifth Amendment. SeeRepublic of Panama v. BCCI Holdings(Luxembourg) S.A., 119 F.3d 935, 948 (11th Cir. 1997).

b. Rule 12(b)(6)

This Court may dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1216 (3d ed. 2002); see also Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009).In considering a Rule 12(b)(6) motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. See Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993). The pleader need not have provided "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In essence, the pleading "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 (quoting Twombly, 550 U.S. at 570). See Sterling v. Provident Life & Accident Ins. Co., 519 F. Supp. 2d 1195, 1209 (M.D. Fla. 2006) ("While courts must liberally construe and accept as true allegations of fact in the complaint and inferences reasonably deductive there from, they need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party." (quoting Frenck v. Corr. Corp. of Am., No. 8:06-cv-1534-T-17EAJ, 2006 WL 3147656 (M.D. Fla. Nov. 1, 2006) (Kovachevic, J.))); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2002) ("The

court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader's description of what happened, or if these allegations are contradicted by the description itself."); Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992) ("[Courts] are not obliged to ignore any facts in the complaint that undermine the plaintiff's claim.").

III. ANALYSIS

Spellman moves to dismiss Plaintiffs' Complaint, asserting lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim under 12(b)(6).14(Spellman's Mot. at 22-23.) Spellman asserts that "Plaintiffs cannot rely upon the federal RICO statute [to establish personal jurisdiction in Georgia] because they fail to state a claim" under RICO. (Id. at 22-23.) Defendant Spellman further asserts that Plaintiffs "have not adequately alleged that the Georgia long-arm statute permits the exercise of jurisdiction over Dr. Spellman, that 'minimum contacts' exist, or that the exercise of jurisdiction would not violate due process." (Id. at 23.)

Spellman argues that Plaintiffs have impermissibly "brought a garden-variety fraud case in connection with the purchase of securities" under the RICO statute, which the Private Securities Litigation Reform Act ("PSLRA") has barred as a basis for RICO claims. (Id. at 1.)

A. Personal Jurisdiction Over Spellman

As a threshold matter, this Court will address whether Defendant Spellman is subject to personal jurisdiction in this Court. Jurisdiction over a non-resident defendant may be based upon a federal statute or a state long-arm statute. When analyzing a dismissal for lack of personal jurisdiction, when jurisdiction is based on both federal question and diversity jurisdiction, the court must first determine whether an applicable federal statute potentially confers jurisdiction over the defendant. Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997). If personal jurisdiction can be established under RICO, the doctrine

of pendent personal jurisdiction would come into play, making it unnecessary to consider Georgia's long-arm statute. See Koch v. Royal Wine Merchants, Ltd., 847 F.Supp.2d 1370 (S.D. Fla. 2012). Thus, the Court will first assess whether Plaintiffs' federal RICO claims give rise to personal jurisdiction over Spellman.

1. Personal Jurisdiction Under RICO

Plaintiffs' Complaint asserts four counts against Defendant Spellman under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Two counts allege substantive violations of §1962, and two counts allege a conspiracy to violate §1962. (Compl. ¶¶ 496, 515, 518, 537.)

The Eleventh Circuit has held that there is a potential statutory basis for personal jurisdiction under RICO because the statute provides for nationwide service of process. Republic of Panama, 119 F.3d at 942 ("When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction."); see 18 U.S.C. § 1965(d) (providing for service in any judicial district in which the defendant is found). Although RICO contains a nationwide service of process provision, Plaintiffs are entitled to take advantage of this provision only if their "asserted federal claim is not wholly immaterial or 21insubstantial." Republic of Panama, 119 F.3d at 941-942 (stating that, under RICO and other statutes with nationwide service-of-process provisions, a court "should dismiss for lack of jurisdiction only if the right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." (internal quotation marks omitted)). In other words, whether a basis exists for exercising personal jurisdiction under RICO depends on whether the Plaintiffs have stated a colorable RICO claim. (Id. at 942.)

To properly state a claim for a civil RICO violation, Plaintiffs must allege facts showing "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima v. Imrexx Co., Inc., 473 U.S. 479, 496 (1985); Carter v. MGA, Inc., 189 F. App'x 893,894 (11th

Cir. 2006). An enterprise is "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). "Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate acts." Sedima v. Imrexx Co., Inc., 473 U.S. 479, 496 (1985). "Racketeering activity" includes such predicate acts as mail, wire fraud, and obstruction of justice. See 18 U.S.C. § 1961(1); see also American Dental Ass'n v. Cigna Corp., 605 F.3d 1283 (11th Cir. 2010) (discussing predicate acts of mail and wire fraud). A "pattern of racketeering activity" under RICO "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5); Sedima, 473 U.S. at 496, n.14. "While two acts are necessary [for a RICO claim], they may not be sufficient. Indeed, . . . two of anything do not generally form a 'pattern.'" Sedima, 473 U.S. at 496, n.14. RICO's legislative history thus "supports the view that two isolated acts of racketeering activity do not constitute a pattern." Id.

The Private Securities Litigation Reform Act ("PSLRA") "amended the RICO Act to disallow lawsuits that would have been actionable as fraud in the purchase or sale of securities as a predicate act for a RICO action." 31A Am. Jur. 2d Extortion, Blackmail, etc. § 175. Section 1964(c) provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962 [of the federal RICO Act]," unless the person who committed the fraud has been criminally convicted. 18 U.S.C. § 1964(c). See also Licht v. Watson, 567 F. App'x 689, 693 (11th Cir. 2014) (citing 18 U.S.C. § 1964(c)).

Here, Plaintiffs allege RICO violations against Defendant Spellman in Counts 43, 44, 46 and 47 of the Complaint.15 (See Compl. ¶¶ 496-513, 518-536.) Plaintiffs allege that GMC and each of the Winsonic companies was an "enterprise" within the meaning of 18 U.S.C. § 1961(4). (Id. ¶¶ 497, 519, 520.) Plaintiffs further allege that Spellman and his RICO codefendants16 participated "directly or indirectly, in the conduct of the affairs of GMC, Winsonic, WDMG, and WDCSN through a pattern of racketeering activity by continuing to represent to plaintiffs that GMC, Winsonic, WDMG, and

WDCSN were actually [] real businesses performing work and service regarding VIDGO . . . when they were in actuality [] all a fraudulent scheme to defraud plaintiffs." (Id. ¶¶ 503, 525.) Plaintiffs also allege that Spellman and his codefendants:

> (a)"did so orally, through written and digital correspondence sent over interstate lines, through other written and digital communications mailed through the United States Postal Service interstate and/or over by interstate wire in violation of 18 U.S.C. § 1341, and did so through violation of federal securities law and regulation;" and
>
> (b)"[t]hese defendants' predicate acts constituting a pattern of racketeering activity include, but were not limited to forgery, theft of plaintiffs' funds, money laundering of plaintiffs funds through the various defendant business entities, financial institution fraud, engaging in monetary actions with property derived from unlawful activities, re-producing and re-transmitting copyrighted materials and works without authorization, securities violations of SEC Rule 10b-5 and the Securities Act, credit card fraud, computer crimes, mail fraud and wire fraud."

(Id. ¶¶ 503, 504, 512, 525, 527, 535.)

Defendant Spellman argues that "Plaintiffs have unambiguously – and improperly – alleged securities fraud under RICO garb," and that as such, Plaintiffs' federal RICO claims are barred by the PSLRA and should be dismissed. (Spellman's Reply at 1.) In response, Plaintiffs assert that because they have not asserted a claim for a violation of Section 10(b) of the Securities Exchange Act or SEC Rule 10b-5 directly against Spellman, he cannot argue that the federal RICO claims against him are based upon securities fraud, that they sound in securities fraud, or are based on conduct "that would have been actionable in the purchase and sale or securities." (Pl.'s Resp. to Spellman's Mot. at 16-17.) Instead, Plaintiffs contend

that their allegations against Spellman arise from "other actions and conduct outlined in the Complaint" describing a complex fraudulent scheme "based on a variety of different acts, circumstances, and fraud" Spellman knowingly participated in while controlling the Winsonic companies. (Id. at 17.) Plaintiffs suggest that these additional acts nullify the securities fraud claims and render their RICO claims proper under the PSLRA. (Id.) This is incorrect.

The PSLRA plainly states that a RICO claim may not be predicated on allegations of securities fraud. 18 U.S.C. § 1964(c) ("No person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation" of RICO.) The Eleventh Circuit confirmed the breadth of this statutory bar in Licht v. Watson and Dusek v. JPMorgan Chase.17In Licht, the Eleventh Circuit explained that "courts have applied the RICO bar in § 1964(c) broadly, regardless of whether the plaintiff explicitly relied upon securities fraud as a predicate act or even has standing to pursue a securities fraud claim." Licht, 567 F. App'x at 693 (upholding the district court's dismissal of the plaintiff's RICO claims because the claims were based on the plaintiff's allegations that the defendants "engaged in 'racketeering activity' by actively participating, among others, in the activity of 'fraud in the sale of securities'"). The Eleventh Circuit also explained – in Licht and in Dusek – that a "plaintiff may not dodge [the PSLRA] bar by pleading other offenses as predicate acts in a civil RICO action" when the claim is based on alleged acts of securities fraud barred by the PSLRA. Dusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1249 (11th Cir. 2016); Licht, 567 F. App'x at 693 ("Although Licht alleges that the defendants also engaged in wire fraud and mail fraud, this conduct was in furtherance of the defendants' overarching scheme to commit securities fraud.") Thus, contrary to Plaintiffs' arguments, a plaintiff may not evade the PSLRA bar by listing additional predicate acts by a defendant.

It is unquestionable that Plaintiffs have explicitly relied upon securities fraud as a predicate act for their RICO claims against Spellman.18 (See Compl. ¶ 512 (naming Spellman as a Count 43 Defendant and stating: "These defendants' predicate acts constituting a pattern of

racketeering include, but were not limited to . . . securities violations of SEC Rule 10b-5 and the Securities Act), ¶ 535 (naming Spellman as a Count 46 Defendant and stating: "These defendants' predicate acts constituting a pattern of racketeering include, but were not limited to . . . securities violations of SEC Rule 10b-5 and the Securities Act).) That Plaintiffs may lack standing to pursue a claim under the Securities and Exchange Act against Spellman is irrelevant. See Licht, 567 F. App'x at 693 (citing MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 277 (2d Cir. 2011) (holding that the PSLRA bar applies "even where a plaintiff cannot itself pursue a securities fraud action against the defendant") and Howard v. Am. Online Inc., 208 F.3d 741, 749 (9th Cir. 2000) (holding that the RICO bar applies even where the plaintiff does not have standing to sue under securities laws because the plaintiff did not buy or sell securities)). Plaintiffs have alleged that Spellman and his RICO codefendants: (i) engaged in a pattern of racketeering activity for the purpose of "diverting and transferring plaintiffs' ill-gotten investment proceeds to their own defendant companies and individual accounts, thereby stealing plaintiffs' entire approximately $6,000,000 investment;" (ii) "[e]ach of these defendants played a distinct and significant role in facilitating the fraudulent transfer of plaintiffs' funds through the use of their pattern of racketeering and their concealment of their fraud;" (iii) Plaintiffs invested in GMC, Winsonic Holdings, WDMG and WDCSN as a result of these defendants' pattern of racketeering;" and that (iv) [t]hese defendants' predicate acts and pattern of racketeering are the direct proximate result of plaintiffs' lost "investment" in GMC." (Compl. ¶ 509, 511, 529, 532, 534, 540.) As a result, all conduct Plaintiffs have alleged against Spellman is alleged to have been committed in furtherance of the Defendants' scheme to commit securities fraud. Thus, the § 1964(c) RICO bar applies, and Plaintiffs' federal RICO claims enumerated in Counts 43, 44, 46 and 47 must be dismissed as to Defendant Spellman.

Because Plaintiffs' federal RICO claim against Defendant Spellman is barred, Plaintiffs may not rely on RICO's nationwide service-of-process provision to establish personal jurisdiction over Spellman. See Republic of Panama, 119 F.3d at 941–42; Courboin, 596 F. App'x at 732 (11th Cir. 2014).

2. Personal Jurisdiction Under Georgia's Long Arm Statute

This Court must now determine whether Defendant Spellman is subject to personal jurisdiction under Georgia's long arm statute for the Georgia RICO claims and the common law claims asserted here on diversity jurisdiction. See Courboin, 596 F. App'x. at 732 (finding that if there is no potential federal statutory basis for personal jurisdiction, the court must look to the state long arm statute as a basis for exercising jurisdiction).

Georgia's long arm statute, O.C.G.A. § 9–10–91, provides in pertinent part that a court of this State may exercise personal jurisdiction over any nonresident if he:

> (1) Transacts any business within this state;
>
> (2) Commits a tortious act or omission within this state;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

The exercise of personal jurisdiction in Georgia requires a court to find that at least one prong of the long arm statute is satisfied. See Rudo v. Stubbs, 472 S.E.2d 515, 516 (Ga. Ct. App. 1996). To satisfy the long arm statute, a nonresident defendant must "do certain acts within the state of Georgia." Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank of Ames, 620 S.E.2d 352, 355 (Ga. 2005).

Plaintiffs, all New Jersey residents, argue that this Court has personal jurisdiction over Spellman, a New York resident, pursuant to subsections (1), (2), and (3) of the Georgia long arm statute and under the Due Process Clause of the Fourteenth Amendment. As the primary basis for personal jurisdiction, Plaintiffs rely on Spellman's alleged role as an officer and director of the three Winsonic companies, which share a principal place

of business in Smyrna, Georgia. (Compl. ¶¶ 15-17, 290; Pl.'s Resp. to Spellman's Mot. at 2) ("The Complaint presents a 'reasonable inference' Spellman is subject to personal jurisdiction since he was an officer/director of the three (3) 'Winsonic' defendants.") Specifically, Plaintiffs contend that Spellman committed fraud in Georgia out of the Facility owned and operated by Gotham (and shared by the Winsonic companies) while also transacting business as Chairman and co-CEO of the Winsonic companies. (Pl.'s Resp. to Spellman's Mot. at 7.)

Plaintiffs, all New Jersey residents, argue that this Court has personal jurisdiction over Spellman, a New York resident, pursuant to subsections (1), (2), and (3) of the Georgia long arm statute and under the Due Process Clause of the Fourteenth Amendment. As the primary basis for personal jurisdiction, Plaintiffs rely on Spellman's alleged role as an officer and director of the three Winsonic companies, which share a principal place of business in Smyrna, Georgia. (Compl. ¶¶ 15-17, 290; Pl.'s Resp. to Spellman's Mot. at 2) ("The Complaint presents a 'reasonable inference' Spellman is subject to personal jurisdiction since he was an officer/director of the three (3) 'Winsonic' defendants.") Specifically, Plaintiffs contend that Spellman committed fraud in Georgia out of the Facility owned and operated by Gotham (and shared by the Winsonic companies) while also transacting business as Chairman and co-CEO of the Winsonic companies. (Pl.'s Resp. to Spellman's Mot. at 7.) i.Subsection (1) "Transacts Any Business" The Georgia long arm statute provides, in pertinent part, that a court may exercise jurisdiction over a nonresident defendant who "[t]ransacts any business within this state." O.C.G.A. § 9-10-91(1). The Georgia Supreme Court has held that the long arm statute "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in the State . . . to the maximum extent permitted by procedural due process."19

Innovative Clinical, 620 S.E.2d at 355 (overruling all prior cases that fail to accord the appropriate breadth to the construction of the "transacting any business" language of subsection (1)). More specifically, the "transaction of business" in Georgia means "the doing of

some act or consummation of some transaction – by the defendant in the state." Diamond Crystal Brands, Inc., 593 F.3d at 1260; Aero Toy Store, LLC v. Grieves, 631 S.E.2d 734, 736–37 (Ga. Ct. App. 2006) (long arm jurisdiction based on the "transaction of business" only exists "if the nonresident defendant has purposefully done some act or consummated some transaction in [Georgia]").

However, "a defendant need not physically enter the state." Diamond Crystal Brands, Inc., 593 F.3d at 1264; see alsoInnovative Clinical, 620 S.E.2d at 355–56; Aero Toy Store, , 631 S.E.2d at 739 ("a single event may be a sufficient basis for the exercise of long arm jurisdiction if its effects within the forum are substantial enough even though the nonresident has never been physically present in the state."). "As a result, a nonresident's mail, telephone calls, and other 'intangible' acts, though occurring while the defendant is physically outside of Georgia, must be considered." Diamond Crystal Brands, Inc., 593 F.3d at 1264 (citing Innovative Clinical, 620 S.E.2d at 355–56). The Court must examine all of a nonresident defendant's tangible and intangible conduct and ask whether it can fairly be said that the nonresident has transacted business in Georgia. (Id.) The Court finds that Spellman's alleged role in the acts underlying this lawsuit cannot subject him to personal jurisdiction in Georgia under the "transacts any business" subsection of the Georgia long arm statute because Plaintiffs have not offered facts to support a reasonable inference that Spellman transacted any business in Georgia.

Without offering any specific factual allegations as to what acts Spellman himself personally undertook or what business he transacted in Georgia, Plaintiffs rely on Spellman's purported role as an officer or director of the Winsonic companies to show that Spellman "transacted business" in Georgia. (Pl.'s Resp. to Spellman's Mot. at 7-8.) The "Winsonic" companies include Winsonic Digital Medial Cable Systems Holdings, Inc. ("Winsonic Holdings"), Winsonic Digital Media Group, Ltd. ("WDMG"), and Winsonic Digital Cable Systems Network, Ltd. ("WDCSN"). (Compl. at 2.) Plaintiffs allege in the Complaint that Spellman sits as Chairman of the Board for each of the Winsonic

companies and is a "co-CEO" of all three Winsonic companies. (Compl. ¶¶ 15-17, 290, 291.) Plaintiffs further allege that all three Winsonic companies share a principal place of business at the 2251 Lake Park Drive, Smyrna, Georgia facility that Gotham owns and operates.20 (Compl. ¶¶ 15-17.) Plaintiffs' allegations are apparently based on an "Investor Update" drafted by Richard Federman, not by Spellman, purporting to identify Spellman as "chairman of WDCSN" and "an influential investor" and detailing Spellman's investments into Winston Johnson's companies. (Compl. ¶ 164.)

The Court takes judicial notice of the corporate records of the Corporations Division of the Office of the Georgia Secretary of State made publicly available on its website for each of the Winsonic companies.21 These records directly contradict Plaintiffs' allegations regarding Spellman's involvement in the Winsonic companies. Georgia's official corporate records also corroborate Spellman's Affidavit filed with his Reply brief in which he attests that he is not and never has been an officer, director, chairman or co-CEO of any of the so-called "Winsonic" entities. (Aff. of Eric Spellman, Doc. 119-2.)22

First, Plaintiffs allege that Winsonic Holdings, is incorporated in Georgia. (Compl. ¶ 15.) It is not. According to the Georgia Secretary of State's office, Winsonic Digital Media Cable Systems Holdings, Ltd. – colloquially referred to by Plaintiffs as "Winsonic Holdings" – is a foreign corporation organized under the laws of the state of Delaware. Contrary to Plaintiff's allegations in Paragraph 15 that Spellman is a director and co-CEO of Winsonic Holdings, the Georgia Secretary of State's records indicate that Winston Johnson is the sole CEO of Winsonic Holdings.

Second, Plaintiffs' allegations in Paragraph 17 of the Complaint regarding Winsonic Digital Cable Systems Network Ltd, referred to by Plaintiffs as WDCSN, are likewise inaccurate according to Georgia Secretary of State's corporate records. Plaintiffs allege that WDCSN is a Maryland corporation and that Winston Johnson and Spellman are the directors and co-CEOs of WDCSN. The Georgia Secretary of States' official records,

however, indicate that WDCSN a foreign corporation organized under the laws of the state of California (not Maryland) and that Winston Johnson is the only officer and sole CEO of WDCSN. Finally, again with respect to Winsonic Digital Media Group, Ltd., identified by Plaintiffs as "WDMG", the corporate records of the Georgia Secretary of State's office do not indicate that Spellman was ever an officer of WDMG at any time relevant to the allegations in Plaintiffs' Complaint. WDMG's last Annual Registrations filed on April 20, 2015 and April 19, 2017, each listed Winston Johnson as the only officer of WDMG and as the sole CEO.23

Thus, Plaintiffs' allegations that Spellman is an officer of Winsonic Holdings, WDCSN, and WDMG are unsupported and inaccurate according to the State of Georgia's official corporate records.

Absent a basis for exercising personal jurisdiction over Spellman by virtue of his alleged role as an officer/director of a company with its principal place of business in Georgia,24 Plaintiffs do not allege facts sufficient to support a reasonable inference that Spellman transacted business in Georgia. Plaintiffs address Spellman's individual actions only twice, and neither allegation suggests that Spellman himself "transacted business" in Georgia. (Compl. ¶¶ 292-295.)

First, Plaintiffs allege that "Spellman travelled to the NAB [National Association of Broadcasters] show in Vegas to meet with GMC officers and investors, including certain plaintiffs," where he "advised certain GMC executives he and his investor group were investing approximately $1,500,000 into GMC in order to pretend GMC and VIDGO were real, so that plaintiffs would continue investing into the company." (Id. ¶¶ 292-293.) In their second allegation, Plaintiffs note that "Spellman reiterated this to certain plaintiffs on the telephone at various points in time, and his statements were also repeated in the April 27, 2017 Investor Update." (Id. ¶ 294.)

Plaintiffs do not allege that Spellman was an officer or director of GMC (the Georgia corporation for which he is alleged to have solicited investments). Plaintiffs merely allege that Spellman, a New York resident, travelled to

Nevada to meet with "certain plaintiffs," all New Jersey residents, to discuss investments by an "Investor Group" with no purported connection to Georgia. (Id.) A meeting between a group of out-of-state residents in Nevada does not amount to "transacting business" in Georgia. Innovative Clinical, 620 S.E.2d at 353 (holding that the Georgia long-arm statute "requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction").

Plaintiffs have not alleged facts to establish that Spellman's phone calls constitute "transacting business" in Georgia. Plaintiffs do not allege to whom the calls were made or from where they were placed. Although courts may establish a connection to a forum state based on intangible acts that occur while the defendant is outside of Georgia, such as the nonresident's mail and telephone calls, those contacts must be connected to the forum state. Diamond Crystal Brands, Inc., 593 F.3d at 1264. Here, Plaintiffs do not allege that Defendant Spellman was in Georgia when he made these calls or that "certain Plaintiffs" received the calls while in Georgia. (See Compl. ¶ 294.) Accordingly, this Court cannot make a reasonable inference that these calls originated in, or were placed to individuals located in, the state of Georgia. To the contrary, because Defendant Spellman is a New York resident and Plaintiffs are New Jersey residents, the most reasonable inference would be these telephone calls were placed between New York and New Jersey25.

Without factual allegations that Spellman "purposefully performed some act or consummated some transaction" in Georgia, Plaintiffs have failed to meet their burden of proof for establishing personal jurisdiction over Defendant Spellman under the first prong of the long arm statute.See Diamond Crystal Brands, 593 F.3d at 1260 ("[Subsection (1) of long-arm jurisdiction in Georgia expressly depends on the actual transaction of business—the doing of some act or consummation of some transaction—by the defendant in the state.")

ii.Subsection (2) "Commits a Tortious Act or Omission in Georgia"

Having found that Defendant Spellman is not subject to personal jurisdiction in Georgia under the first prong of the Georgia long arm statute, the Court now turns to the Subsection (2) of the long arm statute: whether Spellman committed a "tortious act or omission" in Georgia. Under Subsection (2), "a Georgia court may exercise personal jurisdiction over a nonresident who commits a tortious act or omission within this State, insofar as the exercise of that personal jurisdiction comports with constitutional due process." Innovative Clinical & Consulting Servs., LLC, 620 S.E.2d at 354.

Plaintiffs assert that the second prong of the Georgia long arm statute confers personal jurisdiction over Spellman because he "committed his tortious acts and omissions in Georgia out of the 'Facility' . . . as Chairman and co-CEO of 'Winsonic [Defendants]." (Pl.'s Resp. to Spellman's Mot. at 7.) Plaintiffs argue that Spellman physically operated out of the Winsonic/Gotham office in Smyrna, but no such allegations appear in the Complaint. Moreover, as spelled out in section (i) above, when Plaintiff's allegations that Spellman was an officer and director of the Winsonic companies fall away, Plaintiffs have no basis or allege any tortious actions by Defendant Spellman that occurred in Georgia. Even accepting Plaintiff's allegations that Spellman was a member of the fraudulent scheme perpetrated on Plaintiffs, the Complaint is devoid of any allegations that Spellman committed his alleged fraudulent conduct in Georgia as required under Subsection (2) of the long arm statute. See LABMD, Inc. v. Tiversa, Inc., 509 F. App'x 842, 844 (11th Cir. 2013) ("Georgia courts have ruled that — when a defendant uses the telephone or email . . . [his] conduct occurs at the place where [the] defendant speaks into the telephone or types and sends his email.") (citing Anderson v. Deas, 632 S.E.2d 682 (Ga. Ct. App. 2006) and Huggins v. Boyd, 697 S.E.2d 253 (Ga. Ct. App. 2010)).

Alternatively, Plaintiffs contend that their injury occurred in Georgia. (See Pl.'s Resp. to Spellman's Mot. at 7) (stating that "Plaintiffs' injuries occurred in Georgia since their funds were wired to Georgia. . . and

then laundered and diverted by Spellman, Winston and his "Winsonic" co-conspirators at the Facility to themselves."). Plaintiffs allege they purchased an unspecified number of common stock shares in Gotham Media Corporation at a "purchase price of $2.00 per share." (Compl. ¶¶ 89-90.) Plaintiffs purchased the stock by wire transfer to a bank account for Gotham Media Services (alleged to be a Georgia corporation). (Compl. ¶¶ 94-95.) Plaintiffs later executed documents to allow the funds to be transferred to Gotham Media Corporation (another alleged Georgia corporation). (Id. ¶ 96-99.) Plaintiffs allege in general fashion that these funds were diverted or laundered to benefit the Defendants', including Spellman's, other business interests. (See id. ¶¶ 246, 295, 342, 345, 430.)

Under Georgia law, "a tortious act is a composite of both negligence and damage, and if damage occurred within the state then the tortious act occurred within the state within the meaning of subsection (3) of the Long Arm Statute." Coe & Payne Co. v. Wood–Mosaic Corp., 195 S.E.2d 399, 400-401 (Ga. 1973), abrogated on other grounds byInnovative Clinical, 620 S.E.2d 352 (Ga. 2005) (alteration to original); Taeger Enterprises, Inc. v. Herdlein Techs., Inc., 445 S.E.2d 848, 855–56 (Ga. Ct. App. 1994). "Conversely, if, as a result of an out-of-state act or omission, no damage has occurred within Georgia, then no tortious act occurred within this state within the meaning of O.C.G.A. § 9–10–91(3)." Taeger Enterprises, Inc., 445 S.E.2d at 855–56. "To say otherwise would result in an unconstitutionally broad construction of Georgia's Long Arm Statute." Id. (citing State of South Carolina v. Reeves, 423 S.E.2d 32, 34 (Ga. Ct. App. 1992).

Plaintiffs offer no authority for the proposition that their injury occurred in Georgia. Plaintiffs assert claims for fraud and conversion against Spellman. In Georgia, injury from fraud and conversion occurs where the plaintiff resides – here New Jersey. See Taeger Enterprises, Inc., 445 S.E.2d at 856 (Ga. Ct. App. 1994) (Pope, J., concurring specially) ("In this case, a Florida corporation is suing an Illinois corporation and an individual Illinois resident for fraud and conversion. The alleged acts of fraud and conversion occurred in Illinois and caused injury in Florida. Georgia simply has no

interest in this action, and the mere fact that the alleged tortious acts occurred in the context of a dispute about a contract relating to a project in Georgia does not provide such an interest."); Int'l Bus. Machines Corp. v. Kemp, 536 S.E.2d 303, 306–07 (Ga. Ct. App. 2000) ("[T]he 'last event' necessary to make an actor liable for fraud is the injury, and consequently, . . . the place of the wrong is where that injury is sustained."); Mgmt. Science America v. NCR Corp., 765 F. Supp. 738 (N.D. Ga. 1991) ("When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations were made."); Velten v. Regis B. Lippert, Intercat, Inc., 985 F.2d 1515, 1521 (11th Cir. 1993) (finding that harm occurs in the state where the plaintiff resides). Here, the damage Plaintiffs allege to have suffered (i.e., their lost investments) occurred in New Jersey or Florida, where the Plaintiffs are residents.

Unless either the tortious act or the tortious injury actually occurs in Georgia, the Long Arm statute would not apply to an action sounding in tort, and this Court would not have personal jurisdiction over the non-resident defendant. See Gust v. Flint, 356 S.E.2d 513, 514 (Ga. 1987) ("The rule that controls is our statute, which requires that an out of state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction. Where, as here it is shown that no such acts were committed, there is no jurisdiction."); Stacy v. Hilton Head Seafood Co., 688 F. Supp. 599, 604 (S.D. Ga. 1988) ("In actions sounding in tort, Georgia's Long Arm statute will support the exercise of personal jurisdiction only if either the tortious act or the resulting injury occurred in Georgia. Here, both the tortious acts alleged and the resulting injuries occurred outside of Georgia. Accordingly, the Long Arm statute will not support jurisdiction."). Based on the facts alleged, the Court cannot find that Spellman is subject to personal jurisdiction in Georgia under Subsection (2) of the long arm statute. As Plaintiffs themselves are not Georgia residents, Spellman's alleged fraud was not directed toward a Georgia resident. Further, Plaintiffs have failed to allege any injury or damage suffered in Georgia. Plaintiffs merely allege that they wired funds to Georgia and that those funds were "laundered and diverted" by the Defendants collectively at some unspecified time to some unspecified

location. Because "[j]urisdiction must be predicated on the existence of ties among the defendants, this state, and the litigation," and Plaintiffs do not assert any connections between Defendant Spellman and Plaintiffs to Georgia, this Court lacks jurisdiction under Subsection (2) of the long arm statute. Taeger Enterprises, 445 S.E.2d at 856 (citing Shaffer v. Heitner, 433 U.S. 186 (1977) and Hart v. DeLowe Partners, Ltd., 250 S.E.2d 169 (Ga. Ct. App. 1978)).

iii. Subsection (3) "Regularly Solicits Business and Derives Substantial Revenue in Georgia"

Finally, Plaintiffs assert in response to Spellman's Motion to Dismiss that "[t]here is also personal jurisdiction over Spellman under subsection (3) of the statute since he regularly did business/engaged in any other persistent course of conduct and/or derived substantial revenue from his 'services' rendered in Georgia to 'Winsonic' as shareholder, officer, and director." (Pl.'s Resp. to Spellman's Mot. at 8.

Under subsection (3) of the long arm statute, a Georgia court may exercise personal jurisdiction over a nonresident who commits a tortious injury in Georgia caused by an act or omission outside Georgia, only if the tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." Innovative Clinical, 620 S.E.2d at 354. Rather than articulating how these requirements are met, Plaintiffs rest on a conclusory assertion made only in their response brief, pointing to no actual factual allegations.

The first requirement of subsection (3) is the existence of a tortious injury in Georgia. Kason Indus., Inc. v. Dent Design Hardware, Ltd., 952 F. Supp. 2d 1334, 1346 (N.D. Ga. 2013); Whitaker v. Krestmark of Ala., 278 S.E.2d 116 (Ga. Ct. App. 1981) ("[I]t is unquestioned that in the present case both the allegedly tortious act and the resulting injury occurred within ... Alabama.... Accordingly, subsections [two] and [three] of the Long Arm statute are not applicable and [the Court cannot hinge jurisdiction on these sections.]"); Lutz v. Chrysler Corp., 691 F.2d 996, 997 (11th Cir. 1982) ("[The]

allegedly tortious conduct took place in California and the injury said to have resulted from this conduct occurred in Tennessee.... [S]o subsections [2] and [3] are not applicable."). As set forth above in section (ii), Plaintiffs' argument and allegations on this element fail.

But even if Plaintiffs could show tortious injury in Georgia, they have failed to show the additional requirement under subsection (3): that Spellman "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." See Kason Indus., Inc. v. Dent Design Hardware, Ltd., 952 F. Supp. 2d 1334, 1346 (N.D. Ga. 2013). Instead, Plaintiffs' conclusory assertion appears to again be based on Spellman's alleged role as an officer of the Winsonic companies – an allegation that currently garners no credence by this Court. Aside from his status as an investor and shareholder in WDMG, there are no allegations to support Plaintiffs' theory that Spellman derived substantial revenue from his investments. But Georgia courts have acknowledged that stock ownership cannot serve as the sole basis for personal jurisdiction in this state. See Lowdon PTY Ltd. V. Westminster Ceramics, LLC, 534 F.Supp.2d 1354, 1359 ("Georgia has no jurisdiction over an individual whose sole connection to the state is the fact that he has an ownership stake in a corporation over which Georgia could assert personal jurisdiction.") (quoting Jimmy Smith Racing Tires, Inc. v. Ashleman, No. CIVA 1:05CV0970 JEC, 2006 WL 2699127, at *8 (N.D. Ga. Sept. 19, 2006)).

Plaintiffs have sidestepped any attempt to articulate whether, and how, Spellman's purported fraud and his alleged contact with Georgia can meet the requirements of Subsection (3) of the Georgia long arm statute. Instead, Plaintiffs offer factually devoid and conclusory allegations which merely assert that the long arm statute applies. Accordingly, the Court finds that Plaintiffs have failed to demonstrate personal jurisdiction under subsection (3) of the Georgia long arm statute.

IV. CONCLUSION

Plaintiffs have not met their burden of pleading sufficient facts to show that Defendant Spellman is subject to personal jurisdiction in the state of Georgia under RICO's nationwide service-of-process provision or the Georgia long arm 43statute. Thus, the Court need not proceed to the due process analysis. Likewise, the Court need not consider Spellman's motion under Rule 12(b)(6). For the above reasons, Defendant Eric Spellman's Motion to Dismiss [Doc. 52] for lack of personal jurisdiction is GRANTED. IT

IS SO ORDERED this 22nd day of March, 2019.

/s/ Amy Totenberg
United States District Judge

Footnotes

1 In paragraph 2 of the Complaint, Plaintiffs allege that "plaintiffs are all citizens of the state of New Jersey." However, paragraph 4 of the Complaint states that plaintiff John Clifford, who is "by far the largest investor in GMC," is a "citizen of the state of Florida." (See Compl. ¶¶ 2, 4.)

2 The factual background the Court describes below is based on the allegations in Plaintiffs' Complaint, which the Court construes in Plaintiffs' favor consistent with the standards discussed herein.

3 Plaintiffs' Complaint appears to use "Gotham Media," referring to both Gotham Media Corporation (GMC) and its predecessor corporation, Gotham Media Services, Inc. (GMS). (See Compl. at 5 ("Federman, Johnson, Kostensky, Arnold and their defendant conspirators advertised to the public, plaintiffs and other investors that GMC was imminently launching its "over the top" internet 'cable' television service."); id. at 6 (Defendants "deceptively and pathologically diverted, and recklessly expended, all of the over $11,000,000 in GMC investment contributions. . ."); id. ¶ 75 ("All representations that Federman, Kostensky, Johnson and Arnold made to. . . fraudulent[ly] induce the plaintiffs, the public and other investors to invest into GMS/GMC. . ."); id. ¶ 76 ("In late 2015/early 2016, Federman announced to existing GMS investors. . . that

GMS would be launching the VIDGO service. . .); id. ¶ 77 ("In early January 2016, Federman, Johnson, Arnold and Kostensky began disseminating knowingly false. . . information. . . that 'Gotham Media' would soon be introducing an OTT live linear television service. . ."); id. ¶ 79 ("Federman, Johnson, Arnold and Kostensky further announced. . . that 'Gotham Media' would brand the OTT live linear cable television service as 'VIDGO'. . .").)

4 Plaintiff's Complaint alleges Federman represented that VIDGO would be launched by GMS, not GMC. (Compl. ¶ 76.) Plaintiffs also allege; however, that although Defendants initially deposited Plaintiffs' funds into the GMS account, VIDGO was designed and launched by GMC. (Compl. ¶ 95.) ("Specifically, following plaintiffs' and other common stock investors' funds being wired to GMS, plaintiffs learned their funds had been wired to the improper and/or "older" "Gotham entity" that was GMS, and that a new entity had actually been formed to serve as the investment vehicle for the VIDGO venture.").

5 Plaintiffs have named RHI temporary employees Heather Clippard, George Hairston, and Tamela Walker as defendants in this action. (Compl. ¶¶ 412-416.) Plaintiffs allege that RHI and these employees "stole Plaintiffs' funds by knowing they were not working for GMC towards launching the VIDGO service, but rather working for [other defendant business ventures] while being paid using plaintiffs' funds. (Compl. ¶ 414.)

6 Plaintiffs allege defendants Winston Johnson, Wesley Snipes, and Richard Federman used Plaintiffs' investments in GMC to finance sixteen different entertainment business ventures. (*See* Compl. at 10.) These defendant business ventures include three separate "Winsonic" business entities (the "Winsonic companies") comprised of (1) Winsonic Digital Cable Systems Network, Ltd., (2) Winsonic Digital Media Cable System Holdings, Inc., and (3) Winsonic Digital Media Group, Ltd.; seven separate "Maandi" business entities (the "Maandi Defendants") comprised of (1) Maandi Entertainment LLC, (2) Maandi Media Holdings International LLC, (3) Maandi Media Productions Digital LLC, (4) Maandi Media Productions LLC, (5) Maandi Park MS LLC, (6) DMM-Expendables 3 LLC, and (7) Doc Maandi Movies LLC, as well as six additional entertainment business entities, comprised of

(1) 1094 Digital Distribution LLC, (2) 2251 Lake Park Investment Group LLC, (3) 2496 Digital Distribution LLC, (4) Kimberlyte Productions Services, Inc., (5) SST Swiss Sterling, Inc., and (6) Rickshaw Productions, LLC. (Compl. at 10, ¶¶ 246(d), 414.)

7 These GMC consultants and business partners include Kristy Thurman and KT Communications Consulting, Inc. Justin Su and Cascade ("Su Defendants"), Daryl Arthur and Megatone Music, LLC ("Arthur Defendants"). (*See* Compl. ¶¶ 18, 19, 27-30.)

8 These accountants and accounting firms include Ashcraft Opperman & Associates LLC ("AOA LLC"); Business Consulting, LLC ("BC LLC"); Katie Ashcraft; and Jan Emmenegger (collectively, "Accounting Defendants"). (*See* Compl. ¶¶ 45, 50-52.)

9 Gotham Media Services, Inc. ("GMS") is GMC's predecessor organization. (*See* Compl. ¶¶ 6168.) GMS failed around 2014, at which time Defendant Federman started to explore OTT internet cable television, the concept that would later serve as the foundation for GMC's VIDGO service. (*See* Compl. ¶¶ 61-71.) At GMC's inception, approximately $3,000,000 of common stock investor proceeds were wired into the old GMS account. (Compl. ¶¶ 94-95.) GMC ultimately prepared legal documents reflecting that "[P]laintiffs' investment proceeds were credited for plaintiffs' appropriate pro rata investment shares in GMC, so plaintiffs' funds would go toward infusing GMC rather than GMS to finance the VIDGO business endeavor." (Compl. ¶ 96.)

10 Patrick Shaw was Federman's roommate. (Compl. ¶ 25.) Shaw also owned 50% of Rickshaw, an unrelated "musical recording and production business." (Compl. ¶ 26; 246(d).) Plaintiffs allege that Federman and Shaw "stole hundreds of thousands of plaintiffs' funds . . . to finance Rickshaw," and that "Shaw was fully aware Federman was removing Plaintiffs' funds from the GMC fiction and depositing those funds into the Rickshaw account for Rickshaw's illegal use." (Compl. ¶ 308-309.)

11 Lori Poole is Johnson's wife. (Compl. ¶ 20.) Plaintiffs allege that Johnson forged "numerous checks and contracts" to "pay for his wife Poole's personal expenses and lifestyle." (Compl. ¶ 257.) Plaintiffs allege that Johnson paid Poole "approximately $5,000 per month . . . under the falsehood and pretext that she served as the bookkeeper and the 'accounting department' for GMC" when she did not. (Compl. ¶ 270.) Plaintiffs further

allege that Johnson and Poole "stole approximately $1,200,000 for their own personal use to build a computer lab in their home, to upgrade and renovate their home, to make repairs to their home, to ride limousines and Uber livery services to neighborhood locations for basic errands such [as] trips to supermarkets, stores and the Georgia Campus, [and] to build out and finance an IPTV cable network and purchase IPTV cable content rights for Johnson's formerly bankrupt [Winsonic] businesses." (Compl. ¶ 246(b).)

12 Plaintiffs note that GMC executives traveled to the annual NAB show to showcase VIDGO on two separate occasions, but do not specify when Spellman also attended the show. (See Compl. at 7 ("Defendants' fictitious investment scheme was so pathological and abominable that Federman, Johnson, Kostensky and Arnold even announced and presented the alleged VIDGO service and purported VIDGO network at the National Association of Broadcasters ('NAB') show's annual convention in Las Vegas on two (2) separate occasions."), and ¶ 292 ("Spellman traveled to the annual NAB show in Las Vegas to meet with GMC officers and investors of GMC, including certain plaintiffs.")

13 Plaintiffs do not specify to whom, or when, Spellman made this representation

14 Although this Court must rule first on the question of personal jurisdiction, Spellman devotes the majority of his arguments in support of dismissal on 12(b)(6) grounds (i.e., 3 pages of his 32-page Motion and 2 pages of his 20-page Reply).

15 The Complaint does not contain a Count 45.

16 Codefendants named in Count 43 are Federman, Arnold, Su, Cascade, Kostensky, GMC, GMS, [the Winsonic companies], Poole, 2496 Digital, 1094 Digital, Emmenegger, Ashcraft, BC LLC, AOA LLC, KTC and Thurman. (See Compl. at 174.) Codefendants named in Count 46 are Johnson, Poole, [the Winsonic companies], Su, Cascade, Poole [sic], Emmenegger, Ashcraft, BC LC and AOA LLC. (See Compl. at 179.)

17 Plaintiffs' reading of Licht and their attempt to draw a distinction between their allegations here and the facts in Licht are entirely off-base.

18 Plaintiffs allege in Counts 28 through 30 that Spellman is liable as the alter-ego of Winsonic Holdings, WDMG, and WDCSN. (Compl. at 153-57, ¶¶ 423-439.)

In Count 24, Plaintiffs assert a claim for "Violation of 1934 Securities Exchange Act § 10(b) and SEC Rule 10b-5" against Winsonic Holdings, WDMG, and WDCSN. (Compl. at 147-48, ¶¶ 397-405.) Finally, in their prayer for relief, Plaintiffs demand an award of "attorneys' fees and costs of suit pursuant to Rule 10b-5/the Securities Act" against "all defendants." (Compl. at 194.)

19 Once a court determines that there is a basis for jurisdiction under the long arm statute, the court must then engage in the traditional due process inquiry to determine whether (a) the cause of action arises from or is connected with such act or transaction, and (b) the exercise of jurisdiction by the courts of this state would offend traditional notions of fairness and substantial justice. Diamond Crystal Brands, Inc., 593 F.3d at 1272 n.11 (quoting Aero Toy Store, LLC v. Grieves, CRI, Inc., 601 S.E.2d 163, 166 (Ga. Ct. App. 2004)). This is because under Georgia law, there must be a long arm assessment that is separate and apart from the due process analysis. Id.

20 In their most recent 2018 Annual Registrations filed with the Georgia Secretary of State's office, the principal office address for Winsonic Holdings and WDCSN changed to 6 West Druid Hills Drive, Atlanta GA 30329. See footnote 20, infra.

21 A court may take judicial notice of appropriate adjudicative facts at any stage of a proceeding, whether or not the notice is requested by the parties. Fed. R. Evid. 201(c); R.S.B. Ventures v. Fed. Deposit Ins. Corp., 514 F. App'x. 853, 856, n. 2 (11th Cir.2013) (taking judicial notice of information on FDIC's website); Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1301 (N.D. Fla. 2017); see also O.C.G.A. § 24–2–201(b)(2) (allowing court to take judicial notice of adjudicative facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). In general, a court may judicially notice a fact not subject to reasonable dispute because it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); Navelski v. Int'l Paper Co., 244 F. Supp. 3d at 1301. Documents that are public records are the proper subject of judicial notice. Universal Express, Inc. v. U.S.S.E.C., 177 F. App'x 52, 53–54 (11th Cir. 2006). Courts commonly take judicial notice of factual information

found on official governmental agency websites. Navelski v. Int'l Paper Co., 244 F. Supp. 3d at 1301 (citing cases). Plaintiffs in fact ask this Court to take judicial notice of the Georgia Secretary of State's online corporate records in their response to Defendant Robert Half International Inc.'s Motion for Judgment on the Pleadings. (See Pls.' Resp., Doc. 95 at 11-12, 26.)

22 Spellman further attests he is a full-time dentist and has had no other job since he started his dental practice in 1978. (Spellman Aff. ¶ 2.) Spellman admits that in 2006 he and several of his family members bought shares in Winsonic Digital Media Group, Ltd. ("WDMG") and that he has made loans to Winston Johnson over the years. (Id. ¶ 3.) Finally, Spellman states that he did not make or authorize anyone to make the statements attributed to him in the "Investor Update" referred to in paragraph 164 of Plaintiffs' Complaint. (Id. ¶ 8.) Spellman also offers the Affidavit of Winston Johnson to rebut Plaintiffs' factual allegation that he was an officer or director of the Winsonic companies. (See Affidavit of Winston Johnson, Doc. 119-1) (attached to Spellman's Reply brief). The Court is not bound to consider arguments or evidence submitted for the first time in a Reply rather than in the initial motion to dismiss. See e.g.,Herring v. Secretary, Dept. of Corrections, 397 F.3d 1338 at 1342 ("As we repeatedly have admonished, '[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.' United States v. Coy, 19 F.3d 629, 632 n. 7 (11th Cir.1994)(citation omitted); see also United States v. Whitesell, 314 F.3d 1251, 1256 (11th Cir.2002) (Court need not address issue raised for first time in reply brief), cert. denied, 539 U.S. 951 (2003); United States v. Dicter, 198 F.3d 1284, 1289 (11th Cir.1999) (issue raised for first time in reply brief waived); United States v. Martinez, 83 F.3d 371, 377 n. 6 (11th Cir.1996) (declining to consider arguments raised for the first time in a reply brief).") However, because Plaintiffs' allegations are rebutted by the records of the Corporations Division of the Office of the Georgia Secretary of State as discussed herein (and because the Spellman and Johnson Affidavits are consistent with those records), the Court does not accept as true Plaintiffs' allegations that Defendant Spellman was an officer and director of the Winsonic companies.

23 Moreover, on June 30, 2018 the Georgia Secretary of State served a Notice of Intent to Revoke WDMG's certificate of authority to transact business in the state

of Georgia for its failure to deliver its annual registration. On September 7, 2018, the Georgia Secretary of State issued a Certificate of Administrative Dissolution/Revocation for WDMG.

24 In Amerireach v. Walker, the Georgia Supreme Court noted that merely serving as an officer or director of a Georgia corporation does not establish that an individual has "transacted business" within Georgia. Amerireach.com, LLC v. Walker, 719 S.E.2d 489, 494-95 (Ga. 2011) ("As the Supreme Court of the United States has held, jurisdiction over a corporate employee or officer 'does not automatically follow from jurisdiction over the corporation.'"); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984) (same); see also Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 851–52 (11th Cir. 1988) (noting that an individual is not personally liable for a corporation's torts solely because of his position as an officer or director of a corporation, but that personal participation by a corporate employee, officer, or director in the wrongful activities of a corporation is sufficient to make the individual, as well as the corporation, substantively liable for a tort).

25 Or Florida in the case of Plaintiff John Clifford.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.: 1:18-CV-01953-AT

JOHN CLIFFORD, et al, Plaintiffs,

v.

RICHARD FEDERMAN, et al, Defendants.

ORDER

This matter is before the Court on the Motion for Judgment on the Pleadings of Robert Half International, Inc. [Doc. 65], the Motion for Judgment on the Pleadings of Todd Guthrie and Tech CXO, LLC [Doc. 81], and the Omnibus Motion to Dismiss for Failure to State a Claim [Doc. 82] and Motion to Strike Complaint [Doc. 83] of 1094 Digital Distribution LLC, 2251 Lake Park Investment Group LLC, 2496 Digital Distribution LLC, Katie Ashcraft, Ashcraft Opperman & Associates, LLC, Business Consulting, LLC, DMM-Expendables 3 LLC, Doc Maandi Movies LLC, Winston Johnson, Kimberlyte Productions Services, Inc., Maandi Entertainment LLC, Maandi Media Holdings International LLC, Maandi Media Productions Digital LLC, Maandi Media Productions LLC, Maandi Park MS LLC, Lori Poole, Winsonic Digital Cable Systems Network, Ltd., Winsonic Digital Media Cable Systems Holdings, Inc., and Winsonic Digital Media Group, Ltd. (collectively as the "Johnson Defendants"), Defendant Richard Federman's Motion to Join Motion to Strike "Shotgun" Complaint Filed by the Johnson Defendants [153],1 Federman's Motion to Dismiss [Doc. 154], Federman's Motion for a Stay of All Preliminary Activities and for Adoption of and Amendment to the Court's Order on Defendant's Joint Motion to Stay Discovery and Extend Deadlines Until Rulings on Pending Dispositive Motions [Doc. 155], and Plaintiffs' and Federman's Joint Motion for an Extension of Time to File Response Briefing Concerning Defendant Federman's Motion to Dismiss and Motion to Strike [Doc. 160].2

I. BACKGROUND

The general facts of this case are set forth in the Order on Defendant Eric Spellman's Motion to Dismiss. Plaintiffs filed a 195-page Complaint, asserting 50 counts against 42 defendants. Plaintiffs' Complaint centers on the allegation that Defendants committed fraud when they solicited investments for a "fictitious and non-existent" internet television service trademarked as "VIDGO" and later used those investments to fund personal projects unrelated to the purported business venture. (Compl. at 5.) Plaintiffs' Complaint weaves a complicated web of alleged fraud Plaintiffs describe as diabolical. As laid out in the Complaint's Preliminary Statement, this fraudulent scheme was primarily orchestrated and perpetrated by four individuals – Richard Federman, Winston Johnson, Mark 1 The Court GRANTS Defendant Federman's Motion to Join in the Johnson Defendants' Motion to Strike Plaintiffs' Complaint as a shotgun pleading [Doc. 153]. 2 The Court has separately addressed the Motions to Dismiss of Defendants Eric Spellman [Doc. 52] and Kristy Thurman and KT Communications Consulting, Inc. [Doc. 97], who each moved for dismissal for lack of personal jurisdiction. 2 0 Arnold and Robert Kostensky. According to the Complaint, the alleged fraudulent scheme was part of a larger conspiracy carried out using various levels of participation, assistance, conspiracy and aiding and abetting by specific "silos" of named defendant conspirators who knowingly partnered with the primary defendants to swindle Plaintiffs of their money to fund those defendants' own unrelated business interests, personal hobbies, personal expenses and lifestyles. The following table identifies each of the enumerated counts:

Count Claim[s] Defendant[s] 1 Breach of fiduciary duty of Richard Federman ("Federman"); loyalty Winston Johnson ("Johnson"); Mark Arnold ("Arnold"); Todd Guthrie, CPA ("Guthrie"); Tech CXO, LLC; Robert Kostensky ("Kostensky"); Justin Su ("Su"); Cascade Northwest, Inc. ("Cascade"); Gotham Media Corporation ("GMC")

2 Breach of fiduciary duty of Federman; Johnson; Arnold; Guthrie; care Tech CXO; Kostensky; Su; Cascade; GMC

3 Breach of fiduciary duty of Federman; Johnson; Arnold; Guthrie; disclosure Tech CXO; Kostensky; Su; Cascade; GMC

4 Conspiracy to commit Federman; Johnson; Arnold; Guthrie; breach of fiduciary duty of Tech CXO; Kostensky; Su; Cascade; care GMC

5 Aiding and Abetting breach Federman; Johnson; Arnold; Guthrie; of fiduciary duty of care Tech CXO; Kostensky; Su; Cascade; GMC

6 Conversion & Civil Theft of Federman; Johnson; Arnold; Kostensky; Plaintiffs' Investment Su; Cascade Monies

7 Conspiracy to commit Federman; Johnson; Arnold; Kostensky; conversion & civil theft of Su; Cascade plaintiffs' investment monies

8 Aiding and Abetting Federman; Johnson; Arnold; Kostensky; conversion & civil theft of Su; Cascade plaintiffs' investment monies

9 Conversion & Civil Theft of Johnson; Lori Poole ("Poole"); Winsonic Plaintiffs' Investment Digital Media Cable Systems Holdings, Monies Inc. ("Winsonic Holdings"); Winsonic Digital Media Group, Ltd. ("WDMG"); Winsonic Digital Cable Systems Network Ltd. ("WDCSN"); Su; Cascade; Eric Spellman ("Spellman"); 1094 Digital Distribution LLC; 2496 Digital Distribution LLC; Jan Emmenegger ("Emmenegger"); Katie Ashcraft ("Ashcraft"); Business Consulting, LLC ("BC LLC"); Ashcraft Opperman & Associates, LLC ("AOA LLC")

10 Conspiracy to commit Johnson; Poole; Winsonic Holdings; conversion & civil theft of WDMG; WDCSN; Su; Cascade; plaintiffs' investment Spellman; 1094 Digital; 2496 Digital; monies Emmenegger; Ashcraft; BC LLC; AOA LLC

11 Aiding and Abetting Johnson; Poole; Winsonic Holdings; conversion & civil theft of WDMG; WDCSN;

Su; Cascade; plaintiffs' investment Spellman; 1094 Digital; 2496 Digital; monies Emmenegger; Ashcraft; BC LLC; AOA LLC

12 Conversion & Civil Theft of Johnson; Poole; Winsonic Holdings; Plaintiffs' Investment WDMG; WDCSN; Su; Cascade; Monies Spellman; 1094 Digital; 2496 Digital; Emmenegger; Ashcraft; BC LLC; AOA LLC 4 0 Count Claim[s] Defendant[s]

13 Conspiracy to commit civil Johnson; Wesley Snipes ("Snipes"); 2251 conversion/civil theft of Lake Park Investment Group LLC ("2251 plaintiffs' investment LPI"); Doc Maandi Movies LLC ("Doc monies Movies"); DMM Ependables 3 LLC ("DMM Expendables"); Maandi Media Productions Digital LLC ("Maandi MPD"); Maandi Entertainment LLC ("Maandi Entertainment"); Maandi Media Productions LLC ("Maandi Media"); Maandi Park MS LLC ("Maandi Park"); Maandi Media Holdings International LLC ("Maandi International"); Kimberlyte Productions Services, Inc. ("Kimberlyte"); 2496 Digital Distribution LLC ("2496 Digital"); 1094 Digital Distribution LLC ("1094 Digital"); SST Swiss Sterling, Inc. ("SST Swiss") as to Poole; Emmenegger; Ashcraft; BC LLC; AOA LLC; Robert Half International, Inc. ("RHI"); Tamela Walker ("Walker"); George Hairston ("Hairston"); Heather Clippard ("Clippard")

14 Aiding & Abetting Johnson; Snipes; 2251 LIP; Doc Movies; Conversion/Civil Theft of DMM Expendables; Maandi MPD; Plaintiffs' Investment Maandi Entertainment; Maandi Media; Monies Maandi Park; Maandi International; Kimberlyte; 2496 Digital; 1094 Digital; SST Swiss as to Poole; Emmenegger, Ashcraft; BC LLC; AOA LLC; RHI; Walker; Hairston; Clippard

15 Conversion & Civil Theft of RHI; Walker; Hairston; Clippard Plaintiffs' Investment Monies

16 Conversion & Civil Theft of Federman; Shaw; Rickshaw Plaintiffs' Investment Monies

17 Conspiracy to commit Federman; Shaw; Rickshaw conversion/civil theft of plaintiffs' investment monies 5 0 Count Claim[s] Defendant[s]

18 Aiding & Abetting Federman; Shaw; Rickshaw Conversion/Civil Theft of Plaintiffs' Investment Monies

19 Conversion & Civil Theft of Federman; Arthur; Megatone Music, LLC Plaintiffs' Investment ("Megatone") Monies

20 Conspiracy to commit Federman; Arthur; Megatone conversion/civil theft of plaintiffs' investment monies

21 Aiding & Abetting Federman; Arthur; Megatone Conversion/Civil Theft of Plaintiffs' Investment Monies

22 Breach of common stock GMC; Federman purchase agreements

23 Breach of Gotham Media GMC; Federman Corporation Subscription Agreements for Convertible Notes

24 Violation of 1934 Securities Federman; Arnold; Kostensky; Johnson; Exchange Act § 10(b) and GMC; Winsonic Holdings; WDMG; SEC Rule 10b-5 WDCSN; Ashcraft; BC LLC; AOA LLC; Emmenegger

25 Unjust enrichment All Defendants

26 Negligent Hiring, RHI supervision & retention of employees

27 Respondeat RHI superior/vicarious for employees Walker; Hairston; Clippard

28 Legal fraud, fraud in the Federman; Johnson; Arnold; Su; inducement & alter-ego Cascade; Kostensky; GMC; Gotham Media liability Services, Inc. ("GMS"); Winsonic Holdings; WDMG; WDCSN; Spellman; 2496 Digital; 1094 Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC; KT Communications Consulting, Inc. ("KTC"); Kristy Thurman ("Thurman") Count Claim[s] Defendant[s]

29 Conspiracy to commit legal Federman; Johnson; Arnold; Su; fraud, fraud in the Cascade; Kostensky; GMC; GMS; inducement and alter-ego Winsonic Holdings; WDMG; WDCSN; liability Spellman; 2496 Digital; 1094 Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

30 Aiding and abetting legal Federman; Johnson; Arnold; Su; fraud, fraud in the Cascade; Kostensky; GMC; GMS; inducement, and alter-ego Winsonic Holdings; WDMG; WDCSN; liability Spellman; 2496

Digital; 1094 Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC"; KTC; Thurman

31 Legal fraud, fraud in the Johnson; Su; Poole; GMC; GMS; inducement & alter-ego Winsonic Holdings; WDMG; WDCSN; liability 2251 LPI; Doc Movies; DMM Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

32 Conspiracy to commit legal Johnson; Su; Poole; GMC; GMS; fraud, fraud in the Winsonic Holdings; WDMG; WDCSN; inducement and alter-ego 2251 LPI; Doc Movies; DMM liability Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss SST Swiss; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

33 Aiding and abetting legal Johnson; Su; Poole; GMC; GMS; fraud, fraud in the Winsonic Holdings; WDMG; WDCSN; inducement, and alter-ego 2251 LPI; Doc Movies; DMM liability Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman 7 0 Count Claim[s] Defendant[s]

34 Legal fraud, fraud in the Johnson; RHI; Walker; Hairston; inducement & alter-ego Clippard; 2251 LPI; Doc Movies; DMM liability Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss

35 Conspiracy to commit legal Johnson; RHI; Walker; Hairston; fraud, fraud in the Clippard; 2251 LPI; Doc Movies; DMM inducement and alter-ego Expendables; Maandi MPD; Maandi liability Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss

36 Aiding and abetting legal Johnson; RHI; Walker; Hairston; fraud, fraud in the Clippard; 2251 LPI; Doc Movies; DMM inducement, and alter-ego Expendables; Maandi MPD; Maandi liability Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; SST Swiss

37 Violation of Georgia State Federman; Johnson; Arnold; Su; Racketeer Influenced & Cascade; Kostensky; GMC; GMS; Corrupt Organizations Act Winsonic Holdings; WDMG; WDCSN; ("RICO"), O.G.C.A. § 16-14- Spellman; Poole; 2496 Digital; 1094 1 et. seq. Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

38 Conspiracy to violate Federman; Johnson; Arnold; Su; Georgia State RICO Act, Cascade; Kostensky; GMC; GMS; O.G.C.A. 16-14-1 et. seq. Winsonic Holdings; WDMG; WDCSN; Spellman; Poole; 2496 Digital; 1094 Digital; Emmenegger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

39 Violation of Georgia RICO Johnson; Poole; Winsonic Holdings; Act; O.C.G.A. § 16-4-1 et. WDMG; WDCSN; Su; Cascade; Poole; seq. Spellman; Emmenegger; Ashcraft; BC LLC; AOA LLC

40 Conspiracy to violate Johnson; Poole; Winsonic Holdings; Georgia RICO Act, O.G.C.A. WDMG; WDCSN; Su; Cascade; Poole; 16-14-1 et. seq. Spellman; Emmenegger; Ashcraft;

41 Violation of Georgia RICO Act; O.C.G.A. § 16-4-1 et. seq. Johnson; Snipes; Ashcraft; BC LLC; AOA LLC; Emmenegger; 2251 LPI; Doc Movies; DMM Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; 2496 Digital; 1094 Digital; SST Swiss

42 Conspiracy to violate Georgia State Racketeer Influenced & Corrupt Organizations Act O.C.G.A. § 16-4-1 et. seq. Johnson; Snipes; Ashcraft; BC LLC; AOA LLC; Emmenegger; 2251 LPI; Doc Movies; DMM Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; 2496 Digital; 1094 Digital; ST Swiss

43 Violation of Federal Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. Federman; Johnson; Arnold; Su; Cascade; Kostensky; GMC; GMS; Winsonic Holdings; WDMG; WDCSN; Spellman; Poole; 2496 Digital; 1094 Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

44 Conspiracy to violate Federal Racketeer Influenced & Corrupt Organizations Act 18 U.S.C. § 1961 et. seq. Federman; Johnson; Arnold; Su; Cascade; Kostensky; GMC; GMS; Winsonic Holdings; WDMG; WDCSN; Spellman; Poole;2496 Digital; 1094 Digital; Emmeneger; Ashcraft; BC LLC; AOA LLC; KTC; Thurman

45 No count 45

46 Violation of Federal Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. Johnson; Poole; Winsonic Holdings; WDMG; WDCSN; Su; Cascade; Poole; Spellman; Emmenegger; Ashcraft; BC LLC; AOA LLC

47 Conspiracy to violate Federal Racketeer Influenced & Corrupt Organizations Act 18 U.S.C. § 1961 et. seq. Johnson; Poole; Winsonic Holdings; WDMG; WDCSN; Su; Cascade; Poole; Spellman; Emmenegger; Ashcraft; BC LLC; AOA LLC

48 Violation of Federal Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. Johnson; Snipes; Ashcraft; BC LLC; AOA LLC; Emmenegger; 2251 LPI; Doc Movies; DMM Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; 2496 Digital; 1094 Digital; SST Swiss

49 Conspiracy to violate Federal Racketeer Influenced & Corrupt Organizations Act 18 U.S.C. § 1961 et. seq. Johnson; Snipes; Ashcraft; BC LLC; AOA LLC; Emmenegger; 2251 LPI; Doc Movies; DMM Expendables; Maandi MPD; Maandi Entertainment; Maandi Media; Maandi Park; Maandi International; Kimberlyte; 2496 Digital; 1094 Digital; SST Swiss

50 Negligence Ashcraft; AOA LLC; BC LLC; Emmenegger 51 Intentional Misrepresentation Ashcraft; AOA LLC; BC LLC; Emmenegger

Each of the current moving Defendants seeks dismissal of Plaintiffs' Complaint as a shotgun pleading. Alternatively, these Defendants seek either judgment on the pleadings or dismissal for failure to state a claim as to each of the individual counts asserted against them.

II. DISCUSSION

In Weiland v. Palm Beach County Sheriff's Office, the Eleventh Circuit described four categories of shotgun pleadings:(1) the most common type is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint; (2) the next most common type is a complaint that is replete with conclusory, vague, and 11immaterial facts not obviously connected to any particular cause of action; (3) the third type is one that commits the sin of not separating into a different count each cause of action or claim for relief; and (4) the fourth type asserts multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against. 792 F.3d 1313, 1321-23 (11th Cir. 2015) (citing cases).

The Eleventh Circuit has repeatedly condemned the incorporation of preceding paragraphs where a complaint "contains several counts, each one incorporating by reference the allegations of its predecessors [i.e., predecessor counts], leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp., 305 F.3d 1293, 1295 (11th Cir. 2002); see also Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001) (identifying a complaint as a shotgun pleading where "[e]ach count incorporates by reference the allegations made in a section entitled 'General Factual Allegations' — which comprise[d] 146 numbered paragraphs — while also incorporating the allegations of any count or counts that precede[d] it.") (emphasis added). The Eleventh Court has criticized as equally problematic complaints framed in complete disregard of the rules requiring that separate, discrete causes of action should be plead in separate counts and those that fail to distinguish conduct attributable to multiple defendants. Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 905 (11th Cir. 1996); Magluta, 256 F.3d at 1284 ("The complaint is replete with allegations that 'the defendants' engaged in certain conduct, making no distinction among the fourteen defendants charged, though geographic and temporal realities make plain

that all of the defendants could not have participated in every act complained of.").

Pleading in this manner results in a situation where "a reader of the complaint must speculate as to which factual allegations pertain to which count" and which defendant. See, e.g., Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1359 n. 9 (11th Cir. 1997); Cramer v. State of Fla., 117 F.3d 1258, 1261 (11th Cir. 1997) (describing the complaint as "a rambling 'shotgun' pleading that is so disorganized and ambiguous that it is almost impossible to discern precisely what it is that these [plaintiffs] are claiming"); Pelletier v. Zweifel, 921 F.2d 1465, 1518 (11th Cir. 1991) (noting that "Zweifel and the district court had to sift through the facts presented and decide for themselves which were material to the particular cause of action asserted, a difficult and laborious task indeed"). As a result, the Eleventh Circuit mandates that district courts should enter an order striking a shotgun complaint and require a repleading of all claims that satisfies the requirements of Rule 8 and Rule 10(b) and any heightened pleading requirement applicable to the specific claims. Magluta, 256 F.3d at 1284-85; Cesnik, 88 F.3d at 910.

The Court has engaged in the painstaking task of wading through and deciphering Plaintiffs' tangled mass of allegations to determine the merits of the Defendants' pending motions. As the Johnson Defendants aptly explain in their motion, the difficulty of this Augean task is exponentially compounded because: (a) the Complaint incorporates by reference 312 paragraphs of factual allegations into each of its 50 enumerated causes of action; (b) each cause of action incorporates by reference each and every prior cause of action; (c) many of its enumerated causes of actions are actually comprised of multiple sub-causes of action; (d) each enumerated cause of action is asserted against multiple defendants; and (e) Plaintiffs essentially accuse all defendants of being responsible for all alleged acts and omissions, such that no one defendant can identify what exactly he or she did wrong. As a result, the Complaint as currently written makes it "nearly impossible [for] the Court to determine with any certainty which factual allegations give rise to which claims for relief against which defendants." Jackson v. Bank of America, 898 F.3d 1348 (11th Cir. 2018); Anderson v. District Bd. of Trs. of Cent. Fla.

Cmty. Coll., 77 F.3d 364, 366 (11th Cir. 1996); U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 972 F. Supp. 2d 1317, 1336–37 (N.D. Ga. 2013).3

Moreover, Plaintiffs' Complaint as currently drafted fails to plead the allegations of fraud with the requisite particularity. To satisfy Rule 9(b) a complaint must set forth: (1) precisely what statements were made in what documents or oral representations or what omissions were made, (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud. E.g., United States ex rel. Clausen v. Laboratory Corp. of America, Inc., 290 F.3d 1301, 1310 (11th Cir. 2002) In addition, in a fraud-based claim involving multiple defendants, the complaint may not lump together all of the defendants, as "the complaint should inform each defendant of the nature of his alleged participation in the fraud." Brooks v. Blue Cross & Blue Shield of Florida, Inc., 116 F.3d 1364, 1381 (11th Cir. 1997); Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1291 (11th Cir. 2010) ("The plaintiff must allege facts with respect to each defendant's participation in the fraud."). Additionally, under the Private Securities Litigation Reform Act ("PSLRA"), a securities fraud class action complaint must:

(1) specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed, and

(2) with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u–4(b)(1)(B); 15 U.S.C. § 78u–4(b)(2); see also Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1238 (11th Cir. 2008); Phillips v. Scientific–Atlanta, Inc., 374 F.3d 1015, 1016 (11th Cir. 2004) (holding that the in a securities fraud action, the complaint must allege facts supporting a strong inference of scienter "for each defendant with respect to each violation").

Accordingly, the Court GRANTS the Johnson Defendants' Motion to Strike Plaintiffs' Complaint [Doc. 83]4 and DIRECTS Plaintiffs to replead their Complaint according to the directives set forth below.

(1) Plaintiffs may not incorporate all 312 factual paragraphs into each count. Plaintiffs instead must indicate which of the factual paragraphs are alleged to support each individual count alleged.

(2) Each individual count may only be based on a single legal claim or legal basis for recovery (i.e. Plaintiffs may not assert "Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability" together in the same count).

(3) Plaintiffs are permitted to assert a single count against multiple defendants; however, Plaintiffs must identify what precise conduct is attributable to each individual defendant separately in each count.

(4) As to Count 24 (Securities Fraud): Plaintiffs must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (PSLRA).

(5)As to Counts 28 through 46 (Fraud) and Count 51 (Intentional Misrepresentation): Plaintiffs must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).

While the Court will allow Plaintiffs to replead their Complaint, the Court also finds that Plaintiffs' claims for violations of the civil provisions of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., against Defendants Federman, Johnson, Arnold, Su, Cascade, Kostensky, GMC, GMS, Winsonic Holdings, WDMG, WDCSN, Poole, 2496 Digital, 1094 Digital, Emmeneger, Ashcraft, Business Consulting, LLC, Ashcraft Opperman & Associates, LLC, Snipes, 2251 LPI, Doc Movies, DMM Expendables, Maandi MPD, Maandi Entertainment, Maandi Media, Maandi Park, Maandi International, Kimberlyte, and SST Swiss are barred. Thus, any amendment of those claims would be futile. As discussed in the Court's prior Orders on the Motions to Dismiss of Defendants Eric Spellman, Kristy Thurman, and KT Communications Consulting Inc., because Plaintiffs' RICO claims expressly assert securities fraud as a predicate act, their

RICO claims are barred by the PSLRA. See 18 U.S.C. § 1964(c) (providing that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962" of the federal RICO Act); see alsoDusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1249 (11th Cir. 2016) (holding that a "plaintiff may not dodge [the PSLRA] bar by pleading other offenses as predicate acts in a civil RICO action" when the claim is based on alleged acts of securities fraud barred by the PSLRA); Licht v. Watson, 567 F. App'x 689, 693 (11th Cir. 2014) (upholding the district court's dismissal of the plaintiff's RICO claims because the claims were based on the plaintiff's allegations that the defendants "engaged in 'racketeering activity' by actively participating, among others, in the activity of 'fraud in the sale of securities'"). Accordingly, the Court GRANTS IN PART the Johnson Defendants' Omnibus Motion to Dismiss [Doc. 82] and Federman's Motion to Dismiss [Doc. 154] only as to Plaintiffs' federal RICO claims asserted in Counts 43 through 49.5 Plaintiffs may not renew their RICO claims in the refiled complaint.

Finally, a review of the docket indicates that the following named Defendants have not been served: Gotham Media Corporation, Gotham Media Services, Patrick Shaw, Rickshaw Productions, LLC, Daryl Arthur, Megatone Music, LLC, Wesley Snipes, Jan Emmeneger, Georgia Hairston, and Tamela Walker. Thus, Plaintiffs' claims against these Defendants are subject to dismissal under Federal Rule of Civil Procedure 4(m). Fed. R. Civ. P. 4(m) ("If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.").

III. CONCLUSION

For the foregoing reasons, the Court GRANTS the Johnson Defendants' Motion to Strike Plaintiffs' Complaint [Doc. 83]6 and DIRECTS Plaintiffs to REPLEAD their Complaint NO LATER THAN APRIL 22, 2019, as follows:

(1)Plaintiffs may not incorporate all 312 factual paragraphs into each count.

Plaintiffs instead must indicate which of the factual paragraphs are alleged to support each individual count alleged.

(2) Each individual count may only be based on a single legal claim or legal basis for recovery (i.e. Plaintiffs may not assert "Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability" together in the same count).

(3) Plaintiffs are permitted to assert a single count against multiple defendants; however, Plaintiffs must identify what precise conduct is attributable to each individual defendant separately in each count.

(4) As to Count 24 (Securities Fraud): Plaintiffs must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (PSLRA).

(5)As to Counts 28 through 46 (Fraud) and Count 51 (Intentional Misrepresentation): Plaintiffs must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b).

he Court GRANTSIN PART the Johnson Defendants' Omnibus Motion to Dismiss [Doc. 82] and Federman's Motion to Dismiss [Doc. 154] only as to Plaintiffs' federal RICO claims asserted in Counts 43 through 49 as barred by the Private Securities Litigation Reform Act ("PSLRA"), 18 U.S.C. § 1964(c). Plaintiffs may not renew their RICO claims in the refiled complaint.

Finally, the Court ORDERS Plaintiffs to SHOW CAUSE in writing NO LATER THAN APRIL 12, 2019 why the claims against Defendants Gotham Media Corporation, Gotham Media Services, Patrick Shaw, Rickshaw Productions, LLC, Daryl Arthur, Megatone Music, LLC, Wesley Snipes, Jan Emmeneger, Georgia Hairston, and Tamela Walker should not be dismissed pursuant to Federal Rule of Civil Procedure 4(m). Fed. R. Civ. P. 4(m) ("If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the

plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.").

IT IS SO ORDERED this 22nd day of March, 2019.

/s/ Amy Totenberg
United States District Judge

Footnotes

1 The Court GRANTS Defendant Federman's Motion to Join in the Johnson Defendants' Motion to Strike Plaintiffs' Complaint as a shotgun pleading [Doc. 153].

2 The Court has separately addressed the Motions to Dismiss of Defendants Eric Spellman [Doc. 52] and Kristy Thurman and KT Communications Consulting, Inc. [Doc. 97], who each moved for dismissal for lack of personal jurisdiction.

3 The Court recognizes that some complaints might be characterized as using shotgun pleading features but in fact, be clear as to the basis of each parties' claims and thus not require re-pleading. Plaintiffs' massive Complaint here certainly does not fall in this category.

4 As the Court has chosen the proper course of action under applicable Eleventh Circuit authority in striking Plaintiffs' Complaint and requiring Plaintiffs to replead their Complaint, the Court DENIES IN PART the Motion for Judgment on the Pleadings of Robert Half International, Inc. [Doc. 65], the Motion for Judgment on the Pleadings of Todd Guthrie and Tech CXO, LLC [Doc. 81] and the Johnson Defendants' Omnibus Motion to Dismiss for Failure to State a Claim [Doc. 82] in so far as they seek the dismissal of this action based on Plaintiffs' having filed a shotgun Complaint.

5 The Court previously dismissed the federal RICO claims asserted against Defendants Eric Spellman, Kristy Thurman, and KT Communications Consulting Inc.

6 As the Court has chosen the proper course of action under applicable Eleventh Circuit authority in striking Plaintiffs' Complaint and requiring Plaintiffs to replead their Complaint, the Court DENIES IN PART the

Motion for Judgment on the Pleadings of Robert Half International, Inc. [Doc. 65], the Motion for Judgment on the Pleadings of Todd Guthrie and Tech CXO, LLC [Doc. 81], the Johnson Defendants' Omnibus Motion to Dismiss for Failure to State a Claim [Doc. 82], and Federman's Motion to Dismiss [Doc. 154] in so far as they seek the dismissal of this action based on Plaintiffs' having filed a shotgun Complaint. The Court DENIES AS MOOT the remainder of Defendants' motions. Accordingly, the Court also DENIES AS MOOT Federman's Motion for a Stay of All Preliminary Activities and Discovery pending ruling on his dispositive motions [Doc. 155], and DENIES AS MOOT Plaintiffs' and Federman's Joint Motion for an Extension of Time to File Response Briefing Concerning Defendant Federman's Motion to Dismiss and Motion to Strike [Doc. 160].

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.: 1:18-CV-01953-AT

JOHN CLIFFORD, et al, Plaintiff,
v.
RICHARD FEDERMAN, et al, Defendants.

ORDER

This matter is before the Court on Defendant Kristy Thurman and Defendant KT Communications Consulting Inc.'s Joint Motion to Dismiss [Doc. 91]. On May 3, 2018, Plaintiffs John Clifford, Craig Clifford, Scott Clifford, Paul Clifford, Stephen Dazzo, Jersey Cord Cutters, and Kasolas Family and Friends VG Investment, LLC, filed their Complaint in this Court. In the 195-page Complaint, Plaintiffs assert 50 counts against 42 defendants including Defendants Kristy Thurman and KT Communications Consulting Inc. ("KTC") (See Complaint ("Compl."), Doc. 1 at 2-4, ¶¶ 29, 30.) Plaintiffs' Complaint centers on the allegation that Defendants committed fraud when they solicited investments for a "fictitious and non-existent" internet television service trademarked as "VIDGO" and later used those investments to fund personal projects unrelated to the purported business venture. (Compl. at 5.) The Court's ruling is set forth below.

I. BACKGROUND1

The Court set forth the facts of this case in detail in its Order on Defendant Spellman's Motion to Dismiss. Accordingly, the Court now describes the facts solely as they relate to Defendants Thurman and KTC.

Plaintiffs' allegations against Defendants Thurman and KTC are based primarily on Thurman and KTC's alleged role in orchestrating the fraudulent VIDGO beta demonstrations that induced Plaintiffs' initial investments in GMC and sustained their financial support over the course of the alleged scheme. (Compl. ¶¶ 105-108.) Plaintiffs allege that Thurman and KTC "used their digital and technological expertise" to "orchestrate and coordinate[]" at least five fraudulent demonstrations to "induce plaintiffs and other investors to 'invest' in GMC and the VIDGO service." (Compl. ¶¶ 82, 83.) (See Compl. ¶¶ 82-89, 105- 109, 115-118, 119-121, 124-128, and 155-162) (detailing alleged fraudulent demonstrations and Plaintiffs' subsequent investments in January 2016, February/March 2016, April/May 2016, July 2016, August/September 2016, and April 2017.) Plaintiffs allege the following as to Defendants Thurman and KTC.

Thurman is a Missouri resident and is the 100% owner of KTC, a Delaware corporation2 with a principal place of business in Columbia, Missouri. (Compl. ¶¶ 29-30.) "KTC is an internet protocol television (IPTV) provider" with approximately 60,000 current subscribers in the United States. (Compl. ¶ 276.) IPTV is a broadcasting technology "utilized primarily in hotels and multi-dwelling units in lieu of traditional cable distribution systems and signals." (Compl. ¶ 277.) Unlike over-the-top ("OTT") content distribution services, an "IPTV signal cannot legally be broadcast to OTT type devices such as tablets, cell phones, internet sticks" and other similar devices. (Compl. ¶ 277.)

From Fall 2015 through January 2016, Plaintiffs allege that Thurman and KTC "solicited Federman, Johnson, and [the Winsonic companies] with KTC's IPTV programming content and backend technology system." (Compl. ¶ 278). In a January 21, 2016 letter to Johnson (as GMC's Chief Technology Officer) Thurman

represented that: (a) in addition to the IPTV programming content, KTC could license GMC to deliver OTT programming via its "OTT platform, content licensing middleware and software;" (b) KTC had "'content licensing rights for core cable television networks, ethnic channels and specialty channels for special markets;'" and (c) the "platform could be 'white labeled' 3 and/or broadcast to traditional 'set top boxes,' as well as OTT devices utilizing the Google Android or Apple IOS operating systems," and that it could be "easily modified to interface with existing billing systems." (Compl. ¶¶ 279-282.) Plaintiffs suggest that Thurman and Johnson discussed plans to merge their companies, KTC and the Winsonic 3 In general, "white labeling" is a manufacturing and marketing practice in which a product or service is produced by one company and then rebranded by another company to make it appear to be their own. 3 8 companies, to create a larger customer base and expanded IPTV network capacity without regard for GMC's business interests. (Compl. ¶ 286.) Thurman and KTC formed a business relationship with Johnson following this exchange. (See Compl. ¶¶ 283-284.)

Shortly thereafter, Plaintiffs allege Thurman and KTC helped orchestrate the first of at least five fraudulent VIDGO demonstrations to "induce plaintiffs and other investors to 'invest' into the VIDGO fiction." (Compl. ¶ 82). In January 2016, Thurman and KTC worked with Federman, Johnson, Justin Su, and Su's company Cascade to obtain temporary software licenses from Minerva Networks and/or Vubiquity. (Compl. ¶ 83). Plaintiffs allege these Defendants then "used their digital and technological expertise/know-how to orchestrate and coordinate[]the deceptive illegal broadcasting of these IPTV signals interstate directly to plaintiffs (and other investors') mobile devices/phones/tablets containing all local[ ] channels and the most popular cable channel programming." (Compl. ¶ 83.) The Complaint alleges that Federman, Kostensky, Arnold, and Johnson represented to plaintiffs and other investors that the broadcasts were legal, authorized, and properly licensed by Gotham for OTT application through the VIDGO service. (Compl. ¶ 87). Plaintiffs, in reliance on this VIDGO demonstration, made their initial investments in GMC. (See Compl. ¶¶ 89-90.)

Plaintiffs allege that in February or March of 2016, Thurman and KTC joined with Federman, Johnson, Su and Cascade to orchestrate a second fraudulent VIDGO demonstration. (Compl. ¶ 105.) These Defendants "again manipulated Minerva and/or Vubiquity IPTV temporary licenses and [sic] to activate IPTV cable television packages. . . for. . . broadcast and transmission" to Plaintiffs' devices. (Compl. ¶ 106.) This time, Thurman and KTC helped Johnson, Federman, Su and Cascade create and load a VIDGO software application onto Amazon Fire Sticks, which were later sent to Plaintiffs. (Compl. ¶ 106.) Similar to the first demonstration, the Amazon Fire Sticks contained "Minverva [sic] and/or Vubiquity IPTV live cable programming." (Compl. ¶ 107). Plaintiffs then used the Amazon Fire Sticks to view what they believed to be the VIDGO service; but in reality, the Fire Sticks "only broadcast [sic] IPTV cable programming signals that were non-licensed for OTT use or distribution." (Compl. ¶ 107.)

In April or May of 2016, Thurman and KTC, along with Johnson, Federman, Su, and Cascade, created a third fraudulent demonstration, this time to "demonstrate. . . GMC's 'readiness' and 'imminent product launch'" for VIDGO to "continue duping plaintiffs and others into investing additional funds into GMC." (Compl. ¶¶ 113-118.) As in the previous demonstration, Thurman and KTC "manipulated Minerva and/or Vubiquity IPTV licenses and account setups" to transmit IPTV cable television packages to Plaintiffs via additional Amazon Fire Sticks. (Compl. ¶ 115.)

In August or September 2016, Plaintiffs allege Thurman and KTC participated in the creation of a fourth fraudulent demonstration to make "plaintiffs and other investors believe that VIDGO was a real product about to be launch[ed], when i[n] reality it was a fraudulent scheme." (Compl. ¶ 124.) This demonstration was identical to the January 2016 demonstration, where Thurman and KTC worked with Federman, Johnson, Su and Cascade to manipulate Minerva and/or Vubiquity software licenses to transmit illegal signals to Plaintiffs' OTT devices. (Compl. ¶ 125.) This time, Plaintiffs allege that these Defendants, including Thurman and KTC, purchased these licenses "using plaintiffs' money." (Compl. ¶ 126.) In December 2016, Plaintiffs allege these

Defendants deactivated the demonstrations that Plaintiffs had on their OTT devices "based on the pretext that 'licensing fees' for that robust cable programming and the local channels was an unnecessary expense for the [sic] GMC to continue incurring before launch." (Compl. ¶ 147.)

Plaintiffs allege that Thurman and KTC contributed to the fifth fraudulent demonstration in April 2017. (Compl. ¶ 155.) This time, Plaintiffs allege that Thurman and KTC joined with Federman, Johnson, Su and Cascade to broadcast 21 channels that Kostensky, Federman and Johnson had told Plaintiffs were "up and running on the VIDGO network." (Compl. ¶ 152.) "None of these twenty one (21) channels were channels previously represented as included in the VIDGO service. . . Rather, these channels were essentially comprised of unfamiliar and/or startup channels not contained in the traditional cable service programming packages, and not commonly known to the public." (Compl. ¶ 153.) According to Plaintiffs, Thurman and KTC "white labeled" these channels "at plaintiffs' expense and cost" to extend the VIDGO charade. (Compl. ¶ 154.) Plaintiffs allege that "KTC and Thurman deceptively and intentionally provided her [sic] 'white label' OTT content channels to Johnson, Federman, Sue [sic] and Cascade for their use in some and/or all of the 'beta' demonstration that led up to the April 27, 2017 Investor pack and plaintiffs' subsequent investment," and that the use of KTC's 'white label' content in the 'beta' demonstrations induced plaintiffs into investing in GMC on the belief that GMC had an actual VIDGO service broadcasting live linear OTT cable and local programming. (Compl. ¶¶ 287, 289.)

Plaintiffs allege that "Federman, Johnson, Su, Cascade, Thurman, KTC and Kostensky had utilized an IPTV middleware software platform from Minerva and/or Vubiquity to run the entire business operation and to repeatedly demonstrate the non-existent VIDGO service to plaintiffs." (Compl. ¶ 210.) Further, Johnson misrepresented GMC's partnership with Thurman and KTC to solicit additional financial support. (See Compl. ¶ 285.) Thurman confirmed Johnson's misrepresentations, and confirmed to Plaintiffs via telephone that Winsonic would purchase KTC for

$6,000,000, that Thurman was the actual CEO of two Winsonic companies, and that Thurman was working with the National Telco Television Consortium ('NTTC') "to secure OTT content rights for the purported VIDGO service." (Compl. ¶¶ 285-286.) Further, Plaintiffs allege that as early as January 2016, Thurman "was listed as an executive of GMS and GMC according to the business records of both companies, and subsequently held herself out as the CEO of all three Winsonic companies." (Compl. ¶¶ 282-283.)

According to Plaintiffs, Thurman and KTC concocted that scheme intentionally with Federman, Johnson, Su, Cascade and Arnold in order to ensure 7 8 continued investment by plaintiffs and other third-party investors into GMC, thereby permitting additional financing and expansion of Thurman and KTC's and Johnsons'/WDCSN's/WDMG's IPTV network and business endeavor. (Compl. ¶ 287.) According to the Complaint, an invoice from 2496 Digitial to GMC "for preparing the fraudulent 'beta' demonstrations contains specific itemizations for services rendered by KTC in the preparation and assistance of creating and displaying those fraudulent 'beta' demonstrations, thereby evidencing KTC's and Thurman's involvement in those fraudulent schemes and artifices."4 (Compl. ¶ 288.)

Plaintiffs assert eleven causes of action against Defendants Thurman and KTC based on the above allegations:

- Counts 28 and 31: Legal Fraud, Fraud in the Inducement & Alter-Ego Liability;
- Counts 29 and 32: Conspiracy to Commit Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability;
- Counts 30 and 33: Aiding and Abetting Legal Fraud, Fraud in the Inducement, and Alter-Ego Liability;
- Count 37: Violation of the Georgia RICO Act;
- Count 38: Conspiracy to Violate the Georgia RICO Act;
- Count 43: Violation of the federal RICO Act;
- Count 44: Conspiracy to Violate the federal RICO Act; and
- Count 25: Unjust Enrichment.

II. STANDARDS OF REVIEW

Generally, when a defendant moves to dismiss on both lack of personal jurisdiction and statute of limitations grounds, the District Court should rule on the personal jurisdiction issue first. SeeMadara v. Hall, 916 F.2d 1510, 1513—14 & n. 1 (11th Cir. 1990). If the Court finds it lacks personal jurisdiction over the defendant, the Court is barred from ruling on the merits of the case because "a defendant that is not subject to the jurisdiction of the court cannot be bound by its rulings." Courboin v. Scott, 596 F. App'x 729, 735 (11th Cir. 2014).

a. Rule 12(b)(2)

A plaintiff's complaint is subject to dismissal if there is a lack of personal jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2). The issue of whether personal jurisdiction is present is a question of law. Diamond Crystal, 593 F.3d at 1257; Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1217 (11th Cir. 2009). "A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249, 1257 (11th Cir. 2010) (quoting United Techs. Corp. v. Mazer, 556 F.3d 1260, 1274 (11th Cir. 2009)); Consolidated Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000).

Rule 12(b) motions to dismiss for lack of jurisdiction can be asserted on either facial or factual grounds. Carmichael v. Kellogg, Brown & Root Serv., Inc., 572 F.3d 1271, 1279 (11th Cir. 2009). A facial challenge is based solely on the allegations in the complaint. Id. In considering a facial challenge which asserts that the plaintiff failed to sufficiently allege a basis for jurisdiction, the court must accept the complaint's allegations as true. See id.; McElmurray v. Consol. Gov't of Augusta-Richmond County, 501 F.3d 1244, 1251 (11th Cir. 2007) (likening a plaintiff's safeguards to "those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised."); Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (providing that with a "facial attack, a plaintiff is afforded safeguards ...

[and] the court must consider the allegations of the complaint as true").

A factual attack, in contrast, challenges the existence of jurisdiction in fact, irrespective of pleadings, and matters outside the pleadings, such as testimony and affidavits, may be considered. Carmichael, 572 F.3d at 1279; McElmurray,501 F.3d at 1251; Lawrence, 919 F.2d at 1529; see also In re CP Ships Ltd Sec. Litig., 578 F.3d 1306, 1312 (11th Cir. 2009) ("In a factual challenge, the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.") (citation omitted).

The court must resolve a personal jurisdiction challenge on the pleadings, if possible, or following an evidentiary hearing. Oldfield, 558 F.3d at 1217 n.19 (citing 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1373). When no evidentiary hearing is held on a motion to dismiss for lack of jurisdiction, the Court determines whether the plaintiff has established a prima facie case of personal jurisdiction over a nonresident defendant. Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990) (citing Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988)). A prima facie case exists where the plaintiff presents enough evidence to survive a motion for a directed verdict. Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1360 (11th Cir. 2006) ; Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000). A plaintiff presents enough evidence to withstand a motion for a directed verdict by putting forth evidence of such quality and weight that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." Miller v. Roche Sur. & Cas. Co., 502 F. App'x 891, 893 (11th Cir. 2012) (quoting Christopher v. Fla., 449 F.3d 1360, 1364 (11th Cir. 2006)).

11th Court determines whether the plaintiff has established a prima facie case of personal jurisdiction over a nonresident defendant. Madara v. Hall, 916 F.2d 1510, 1514 (11th Cir. 1990) (citing Morris v. SSE, Inc., 843 F.2d 489, 492 (11th Cir. 1988)). A prima facie case exists where the plaintiff presents enough evidence to survive a motion for a directed verdict. Stubbs v.

Wyndham Nassau Resort & Crystal Palace Casino, 447 F.3d 1357, 1360 (11th Cir. 2006) ; Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1291 (11th Cir. 2000). A plaintiff presents enough evidence to withstand a motion for a directed verdict by putting forth evidence of such quality and weight that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." Miller v. Roche Sur. & Cas. Co., 502 F. App'x 891, 893 (11th Cir. 2012) (quoting Christopher v. Fla., 449 F.3d 1360, 1364 (11th Cir. 2006)). If the nonresident defendant challenges jurisdiction and supports the challenge with affidavit evidence, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction. Diamond Crystal, 593 F.3d at 1257. The plaintiff must "substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint." Polskie Linie Oceaniczne v. Seasafe Transport A/S, 795 F.2d 968, 972 (11th Cir. 1986).

The court, in turn, must accept the facts in the plaintiff's complaint as true, to the extent that they remain uncontroverted by the defendant's affidavits. Cable/Home Commc'n Corp. v. Network Productions, Inc., 902 F.2d 829, 855 12(11th Cir. 1990); Paul, Hastings, Janofsky & Walker, LLP v. City of Tulsa, Okla., 245 F. Supp. 2d 1248, 1253 (N.D. Ga. 2002). In addition, "[w]here the plaintiff's complaint and supporting evidence conflict with the defendant's affidavits, the court must construe all reasonable inferences in favor of the plaintiff." Diamond Crystal, 593 F.3d at 1257 (quoting Meier ex rel. Meier v. Sun Int'l Hotels, Ltd., 288 F.3d 1264, 1269 (11th Cir. 2002)).

The Court engages in a two-part analysis to determine if it may exercise jurisdiction over a non-resident defendant. See, e.g., Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1350 (11th Cir. 2013). First, the Court determines whether the defendant's activities satisfy the state's long-arm statute. Id. Second, the Court determines whether the exercise of personal jurisdiction comports with the due process requirements of the Fourteenth Amendment. Id. at 1350–51. Separately, if a plaintiff's claim derives from a federal statute, then the court may exercise personal

jurisdiction over the defendant as to that claim consistent with the limits of both the statute and the due process requirements of the Fifth Amendment. See Republic of Panama v. BCCI Holdings(Luxembourg) S.A., 119 F.3d 935, 948 (11th Cir. 1997).

b. Rule 12(b)(6)

This Court may dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable legal theory. 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §1216 (3d ed. 2002); see also Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009).In considering a Rule 12(b)(6) motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. See Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993). The pleader need not have provided "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In essence, the pleading "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 (quoting Twombly, 550 U.S. at 570). See Sterling v. Provident Life & Accident Ins. Co., 519 F. Supp. 2d 1195, 1209 (M.D. Fla. 2006) ("While courts must liberally construe and accept as true allegations of fact in the complaint and inferences reasonably deductive there from, they need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party." (quoting Frenck v. Corr. Corp. of Am., No. 8:06-cv-1534-T-17EAJ, 2006 WL 3147656 (M.D. Fla. Nov. 1, 2006) (Kovachevic, J.))); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (3d ed. 2002) ("The court will not accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from the pleader's description of what happened, or if these

allegations are contradicted by the description itself."); Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992) ("[Courts] are not obliged to ignore any facts in the complaint that undermine the plaintiff's claim.").

II. ANALYSIS

Thurman and KTC move to dismiss Plaintiffs' Complaint, asserting lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim under 12(b)(6). (Kristy Thurman and KT Communication Consulting Inc.'s Joint Motion to Dismiss ("Thurman's Mot."), Doc. 97 at 1.) Thurman and KTC address jurisdiction only under the Georgia long arm statute and do not address the potential jurisdictional consequences of the federal RICO claims against them. Specifically, they allege that Plaintiffs' "complaint does not plead any actual or meaningful contacts by Thurman and KTC with Georgia that would establish jurisdiction over them." (Memorandum In Support Of Kristy Thurman And KT Communications Consulting, Inc.'s Joint Motion To Dismiss (Thurman's Memo.") Doc 97 at 2.)

A. Personal Jurisdiction Over Thurman and KTC

As a threshold matter, this Court will address whether Defendants Thurman and KTC are subject to personal jurisdiction in this Court. Jurisdiction over a non-resident defendant may be based upon a federal statute or a state long arm statute. When analyzing a dismissal for lack of personal jurisdiction, when jurisdiction is based on both federal question and diversity jurisdiction, the court must first determine whether an applicable federal statute potentially confers jurisdiction over the defendant. Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 942 (11th Cir. 1997). If personal jurisdiction can be established under RICO, the doctrine of pendent personal jurisdiction would come into play, making it unnecessary to consider Georgia's long arm statute. See Koch v. Royal Wine Merchants, Ltd., 847 F.Supp.2d 1370 (S.D. Fla. 2012). Thus, although Defendants Thurman and KTC do not address the possible jurisdictional effect of the federal RICO claim, the Court must first assess whether Plaintiffs' federal RICO claims give rise to personal jurisdiction over Thurman and KTC.

1. Personal Jurisdiction Under RICO

Plaintiffs' Complaint asserts two counts against Defendants Thurman and KTC under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. One count alleges a substantive violation of §1962, and one count alleges a conspiracy to violate §1962. (Compl. ¶¶ 496, 515.)

Although RICO provides a potential statutory basis for personal jurisdiction Plaintiffs are entitled to take advantage of this provision only if their "asserted federal claim is not wholly immaterial or insubstantial." Republic of Panama, 119 F.3d at 941-942 (stating that, under RICO and other statutes with nationwide service-of-process provisions, a court "should dismiss for lack of jurisdiction only if the right claimed is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise devoid of merit as not to involve a federal controversy." (internal quotation marks omitted)). In other words, whether a basis exists for 16exercising personal jurisdiction under RICO depends on whether the Plaintiffs have stated a colorable RICO claim. (Id. at 942.)

As discussed in the Court's prior Order on Defendant Spellman's Motion to Dismiss, because Plaintiffs' RICO claims expressly assert securities fraud as a predicate act, their RICO claims are barred by the Private Securities Litigation Reform Act ("PSLRA"). See 18 U.S.C. § 1964(c) (providing that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962" of the federal RICO Act); see also Dusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1249 (11th Cir. 2016) (holding that a "plaintiff may not dodge [the PSLRA] bar by pleading other offenses as predicate acts in a civil RICO action" when the claim is based on alleged acts of securities fraud barred by the PSLRA); Licht v. Watson, 567 F. App'x 689, 693 (11th Cir. 2014) (upholding the district court's dismissal of the plaintiff's RICO claims because the claims were based on the plaintiff's allegations that the defendants "engaged in 'racketeering activity' by actively participating,

among others, in the activity of 'fraud in the sale of securities'").

Here, Plaintiffs allege RICO violations against Defendants Thurman and KTC in Counts 43 and 44 of the Complaint. (See Compl. ¶¶ 496-513, 514-517.) Plaintiffs allege that GMC and GMS were each an "enterprise" within the meaning of 18 U.S.C. § 1961(4). (Id. ¶¶ 497, 498.) Plaintiffs further allege that Thurman, KTC and their RICO codefendants5 participated "directly or indirectly, in the conduct of the affairs of GMC and GMS through a pattern of racketeering activity by continuing to represent to plaintiffs that GMC and its VIDGO service were actually [] real businesses when they were in actuality a fraudulent scheme to defraud plaintiffs." (Id. ¶ 503.) Plaintiffs allege that Thurman and KTC and their codefendants:

(a) "did so orally, through written and digital correspondence sent over interstate lines, through other written and digital communications mailed through the United States Postal Service interstate and/or over by interstate wire in violation of 18 U.S.C. § 1341, and did so through violation of federal securities law and regulation;" and

(b) "[t]hese defendants' predicate acts constituting a pattern of racketeering activity include, but were not limited to forgery, theft of plaintiffs' funds, money laundering of plaintiffs funds through the various defendant business entities, financial institution fraud, engaging in monetary actions with property derived from unlawful activities, re-producing and re-transmitting copyrighted materials and works without authorization, securities violations of SEC Rule 10b-5 and the Securities Act, credit card fraud, computer crimes, mail fraud and wire fraud."
(Id. ¶¶ 503, 504, 512.)

As Plaintiffs have explicitly relied upon securities fraud as a predicate act for their RICO claims against Thurman and KTC, Plaintiffs may not evade the PSLRA bar by also listing additional predicate acts. (See Compl. ¶ 512 (naming Thurman and KTC as Count 43 Defendants and stating: "These defendants' predicate acts constituting a pattern of racketeering [that] include,

but were not limited to . . . securities violations of SEC Rule 10b-5 and the Securities Act). Plaintiffs have alleged that Thurman, KTC and their RICO codefendants: (i) engaged in a pattern of racketeering activity for the purpose of "diverting and transferring plaintiffs' ill-gotten investment proceeds to their own defendant companies and individual accounts, thereby stealing plaintiffs' entire approximately $6,000,000 investment;" (ii) "[e]ach of these defendants played a distinct and significant role in facilitating the fraudulent transfer of plaintiffs' funds through the use of their pattern of racketeering and their concealment of their fraud;" and that (iii) [t]hese defendants' predicate acts and pattern of racketeering are the direct proximate result of plaintiffs' lost "investment" in GMC." (Compl. ¶¶ 509, 511, 516.) As a result, all conduct Plaintiffs have alleged against Thurman and KTC is alleged to have been committed in furtherance of the Defendants' scheme to commit securities fraud. Thus, the § 1964(c) RICO bar applies. Because Plaintiffs' federal RICO claims against Defendants Thurman and KTC are barred, Plaintiffs may not rely on RICO's nationwide service-of-process provision to establish personal jurisdiction over Thurman and KTC in Georgia. See Republic of Panama, 119 F.3d at 941–42; Courboin, 596 F. App'x at 732.

2. Personal Jurisdiction Under Georgia's Long Arm Statute

This Court must now determine whether Defendants Thurman and KTC are subject to personal jurisdiction under Georgia's long arm statute for the Georgia RICO claims and the common law claims asserted here on diversity jurisdiction. See Courboin, 596 F. App'x at 732 (finding that if there is no potential federal statutory basis for personal jurisdiction, the court must look to the state long arm statute as a basis for exercising jurisdiction).

Georgia's long arm statute, O.C.G.A. § 9–10–91, provides inter alia that a court of this State may exercise personal jurisdiction over any nonresident if he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

The exercise of personal jurisdiction in Georgia requires a court to find that at least one prong of the long arm statute is satisfied. See Rudo v. Stubbs, 472 S.E.2d 515, 516 (Ga. Ct. App. 1996). To satisfy the long arm statute, a nonresident defendant must "do certain acts within the state of Georgia." Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank of Ames, 620 S.E.2d 352, 355 (Ga. 2005).

Defendants' motion raises a facial challenge,6 asserting that Plaintiffs do not allege actual or sufficient contacts by Thurman and KTC with Georgia. Although some of the other defendants are citizens of Georgia, Defendants contend that Plaintiffs do not allege sufficient contacts by Thurman and KTC with any of those defendants in Georgia. Defendants argue that Plaintiffs have not plead facts showing that personal jurisdiction is proper under Georgia's long arm statute because: (1) Thurman (a Missouri citizen) and KTC (a citizen of Missouri and Delaware)7 are not residents of Georgia; (2) the Complaint does not allege that Thurman or KTC own any real property in Georgia, signed a contract in Georgia or with Georgia residents, ever visited Georgia, had employees working in Georgia, or targeted Georgia with advertising; (3) the Complaint's allegations that Thurman and KTC participated in a fraudulent scheme with other resident defendants by creating the VIDGO beta demonstrations do not provide a basis for personal jurisdiction because the complaint contains no facts alleging where Thurman or KTC created these demonstrations or where Plaintiffs viewed them; (4) the Complaint's broad allegations that Thurman and KTC "solicited" various defendants and that Thurman sent a letter to Defendant Johnson do not establish how or where Thurman or KTC undertook this alleged solicitation or where any of the Defendants were physically located at the time of the alleged conduct. Finally, Defendants assert that even assuming Plaintiffs' allegations that Thurman was a CEO or

executive of the Georgia companies (e.g., GMC and/or the Winsonic companies) are true, "merely being the 'president of a company that does business in Georgia is insufficient to satisfy' the 'transacts business' prong of the long-arm statute." (Defs.' Mot. at 6 (citing Canty v. Fry's Electronics, Inc., 736 F.Supp.2d 1352, 1360 (N.D. Ga. 2010)).

In Response, Plaintiffs who are all either New Jersey or Florida8 residents argue that this Court has personal jurisdiction over Thurman and KTC pursuant to subsections (1), (2), and (3) of the Georgia long arm statute and under the Due Process Clause of the Fourteenth Amendment. (See Plaintiffs' Memorandum Of Law In Opposition To Defendants Kristy Thurman's And KT Communications Consulting, Inc.'s Joint Motion To Dismiss ("Pls.' Resp."), Doc. 125 at 3-11.) Specifically, Plaintiffs contend that Thurman and KTC: (i) committed tortious acts and omissions in Georgia out of the GMC Facility located in Smyrna "by maintaining KTC's systems there;" and "(ii) transacted business as 'Winsonic's President and CEO and as an executive of Gotham in Georgia by having multiple meetings at the Facility" with Winston Johnson, GMC investors, and GMC's corporate counsel "regarding Gotham, 'Winsonic' and KTC business." (Pls.' Resp. at 7.) As support for the assertion of personal jurisdiction over Thurman and KTC, Plaintiffs point to their Complaint allegations that Thurman/KTC solicited business from GMC, as well as Thurman's alleged roles as an "executive of GMC" and as "CEO" of the Winsonic companies. (Compl. ¶¶ 278, 283; Pls.' Resp. at 1, 7.) In addition, Plaintiffs rely on the affidavits of Orkan Arat, another shareholder in GMC, and Michael R. Greenlee, Esq., the former corporate counsel for GMC regarding meetings Thurman attended at the GMC/Winsonic facility in Smyrna, Georgia.9 (See Docs. 125-1, 125-2.) Defendants, in turn, offer the affidavit of Kristy Thurman along with their Reply, thus converting the motion to a factual challenge to personal jurisdiction.

i. Subsection (1) "Transacts Any Business"

The Georgia long arm statute provides, in pertinent part, that a court may exercise jurisdiction over a nonresident defendant who "[t]ransacts any business within this state." O.C.G.A. § 9-10-91(1). The Georgia Supreme Court has held that the long arm statute "grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in the State . . . to the maximum extent permitted by procedural due process."10Innovative Clinical, 620 S.E.2d at 355 (overruling all prior cases that fail to accord the appropriate breadth to the construction of the "transacting any business" language of subsection (1)). More specifically, the "transaction of business" in Georgia means "the doing of some act or consummation of some transaction – by the defendant in the state." Diamond Crystal Brands, Inc., 593 F.3d at 1260; Aero Toy Store, LLC v. Grieves, 631 S.E.2d 734, 736–37 (Ga. Ct. App. 2006) (long arm jurisdiction based on the "transaction of business" only exists "if the nonresident defendant has purposefully done some act or consummated some transaction in [Georgia]").

However, "a defendant need not physically enter the state." Diamond Crystal Brands, Inc., 593 F.3d at 1264; see alsoInnovative Clinical, 620 S.E.2d at 355–56; Aero Toy Store, , 631 S.E.2d at 739 ("a single event may be a sufficient basis for the exercise of long arm jurisdiction if its effects within the forum are substantial enough even though the nonresident has never been physically present in the state."). "As a result, a nonresident's mail, telephone calls, and other 'intangible' acts, though occurring while the defendant is physically outside of Georgia, must be considered." Diamond Crystal Brands, Inc., 593 F.3d at 1264 (citing Innovative Clinical, 620 S.E.2d at 355–56). The Court must examine all of a nonresident defendant's tangible and intangible conduct and ask whether it can fairly be said that the nonresident has transacted business in Georgia. (Id.)

Plaintiffs assert that Thurman and KTC transacted business in this state because they "sold their products and services in Georgia." (Pls.' Resp. at 2.) First, Plaintiffs allege that from Fall 2015 through January 2016, Thurman and KTC "solicited Federman, Johnson,

Winsonic Holdings, WDMG and WDCSN," with KTC's IPTV programming content and backend technology system. (Compl. ¶ 278.) On January 21, 2016, Thurman sent a letter (on KTC letterhead) to Johnson (as GMC's Chief Technology Officer) describing the content and programming services that KTC could offer these defendants. (Compl. ¶¶ 279-282.) Federman is a Georgia resident and was the CEO of GMC during the relevant time period of this action. (Compl. ¶ 11.) Johnson is a Georgia resident and was the Chief Technology Officer of GMC and is the CEO of the Winsonic companies. (Compl. ¶¶ 12, 15-17.) Winsonic Digital Medial Cable Systems Holdings, Inc. ("Winsonic Holdings"),11 Winsonic Digital Cable Systems Network Ltd (WDCSN)12, and Winsonic Digital Media Group, Ltd. (WDMG)13 each share a principal place of business at 2251 Lake Park Drive, Smyrna, Georgia – a facility Plaintiffs allege is owned and operated by GMC.14 (Compl. ¶¶ 15-17.) The Complaint further alleges that Thurman provided IPTV programming to Federman and Johnson for use in GMC's VIDGO service and helped Federman and Johnson create five separate VIDGO beta demonstrations that induced Plaintiffs to invest in GMC. (Compl. ¶¶ 82-83, 105-107, 113-118, 124-126, 152-154.)

Defendants argue that the Complaint contains no information about wherethe alleged solicitation took place or where the alleged letter was sent. However, Georgia law permits the court to consider intangible acts that occur while the defendant is outside of Georgia, such as the nonresident's mail and telephone calls connected to Georgia. Diamond Crystal Brands, Inc., 593 F.3d at 1264. Here, Plaintiffs allege that Thurman solicited business from Georgia residents and companies headquartered in Georgia and followed up her discussions with a letter. (See Compl. ¶¶ 278-281.) Plaintiffs attach as an Exhibit to their Response the January 21, 2016 letter addressed to Winston Johnson (CTO of GMC) at an address in Georgia. (See Doc. 125-2 at 14-15.) Thurman admits in her Reply affidavit that she provided Winston Johnson the content licensing rights for various channels in April 2017 for a price of $15,000. (Thurman Aff. ¶ 5; see also Compl. ¶ 288 discussing invoice containing specific itemizations for services rendered by KTC in the preparation and assistance of creating and displaying the alleged

fraudulent VIDGO beta demonstrations). Thurman further admits that she travelled to Georgia in June and August of 2017 to meet with Johnson, Gotham, Winsonic, and their investors to discuss future business opportunities between KTC and Winsonic and/or Gotham. (Id. ¶¶ 6, 9.)

Plaintiffs' unrebutted allegations permit the Court to draw the reasonable inference that these contacts were directed to Georgia and constitute "transacting business" in Georgia. SeeInnovative Clinical, 620 S.E.2d 352 (holding that "nothing in subsection (1) [of OCGA § 9–10–91] requires the physical presence of the nonresident in Georgia or minimizes the import of a nonresident's intangible contacts with the State"); ATCO Sign & Lighting Co., LLC v. Stamm Mfg., Inc., 680 S.E.2d 571, 576 (Ga. Ct. App. 2009) (Georgia law allows the assertion of long-arm jurisdiction over nonresident defendants, based on business conducted by the defendant or its agent "through postal, telephonic, and Internet contacts" with Georgia resident); Home Depot Supply v. Hunter Management, LLC, 656 S.E.2d 898 (Ga. Ct. App. 2008) ("even where a nonresident defendant has no physical presence in Georgia, intangible contacts, such as telephone communications, can be sufficient to establish 'minimum contacts' which meet the constitutional standard for the exercise of personal jurisdiction").

Plaintiffs further rely on Thurman's alleged role "as an executive of GMC and GMS"15 and that Thurman "held herself out as the CEO" of the Winsonic companies. (See Compl. ¶ 283.) While the corporate records of the Corporations Division of the Office of the Georgia Secretary of State for the three Winsonic entities indicate that Thurman was not in fact named as CEO of any of the three Winsonic companies,16 Plaintiffs have submitted evidence in support of their allegations.

Plaintiffs rely on the affidavit of Orkan Arat, a shareholder and convertible note holder in the now administratively dissolved GMC/Gotham, an investor in the VIDGO service, and owner of the VIDGO domain page (www.vidgo.com) and the VIDGO Facebook page. (Certification of Orkan Arat in Opposition to Defendants Kristy Thurman's and KT Communications Consulting, Inc.'s Motion To Dismiss ("Arat Cert.") Doc. 125-1 ¶ 1.)

Following lengthy delays in the launch of the VIDGO service, Arat attests that he obtained a seat on Gotham's board of directors in July 2017, and discovered that Gotham did not have the capability to establish an "over-the-top" live cable television service broadcast over the internet. (Id. ¶ 2.) Arat arranged for a technical team to perform technical, operational, and content audits at Gotham's Georgia facility and learned that Gotham had no OTT live television service in the works, despite receiving $11,000,000 in investor contributions. (Id.¶ 3.) Arat, along with Michael Greenlee, Esq., visited Gotham's facility on August 4, 2017, and met with Winston Johnson and Kristy Thurman. (Id. ¶ 4.) Given his concerns, Arat recorded the meeting using his cell phone. (Id. ¶ 5; Audio Recording, Exhibit A to Arat Cert.) During the meeting, Thurman stated she was the "President and CEO of Winsonic," and that her "role as President and CEO of Winsonic was to make 100% sure that all of the items that concerned [Arat] as an investor and a board member are correct and accurate and taken care of, [and] running the business on a day-to-day fashion . . ." (Id. ¶ 6; Audio Recording, Exhibit A to Arat Cert.) She also stated her role was to ensure that the relationship between Winsonic and Gotham was mutually beneficial. (Id.) When questioned by Arat on specific details, Thurman admitted she had only "officially" gotten the job of President and CEO that day and that it was "in the process of happening," despite the fact Winston Johnson had previously indicated that Thurman had been working in that capacity for months. (Id. ¶¶ 7-8.) Thurman stated that on the "back side of it" she had been "standing tall with Winston on the Winsonic side" to understand what the Gotham and Winsonic content needs were to use the leverage of the subscribers to the VIDGO platform for both Winsonic and Gotham for content licensing purposes. (Id. ¶9; Audio Recording, Exhibit A to Arat Cert.) Prior to officially becoming President and CEO of Winsonic on August 4, 2017, Thurman indicated she had been serving as a content consultant up to that point and that she would be providing Winsonic access to the broad client base she had built over the last 25 years through her own company, KT Communications. (Id.) When Arat indicated he felt misled by Winston Johnson about Thurman's existing role as Winsonic's CEO, Johnson chimed in that he and Thurman had been working for months on a "reverse merger" agreement with

Thurman's organization that had been accelerated because Gotham needed an "additional network expansion." (Id. ¶ 11.)

Plaintiffs also rely on the affidavit of Michael R. Greenlee, Esq. who served as GMC's corporate counsel on certain legal matters prior to its administrative dissolution on September 7, 2018. (Certification of Michael R. Greenlee, Es1. ("Greenlee Cert."), Doc. 125-2 ¶ 2.) Greenlee attended meetings at Gotham's office on June 7, 2017 and August 4, 2017 where Kristy Thurman was present. (Id. ¶¶ 4-5.) During the August 4, 2017, Thurman referred to herself as the President and CEO of Winsonic. (Id. ¶ 6.) According to Greenlee, Kristy Thurman maintained an office on the second floor of Gotham's office building located at 2251 Lake Park Drive in Smyrna Georgia. (Id.¶ 7.) Finally, attached to Greenlee's affidavit are several documents evidencing Thurman's involvement with Gotham, Winsonic, and VIDGO, including: an Agenda for the June 2017 Content Team Meeting concerning among other things the VIDGO platform, a phone list from August 2017 reflecting Kristy Thurman's phone extension at Gotham's Georgia offices, a screenshot of Gotham's "Key Card List" indicating that Kristy Thurman was issued a building access card on June 2, 2017, and an October 11, 2017 email from Winston Johnson to Greenlee with an attached stock register for WDCSN reflecting the issuance of a Warrant for Common Stock of 150,000 shares to Kristy Thurman on July 9, 2017. (Id. ¶¶ 5, 8-12; Exs. to Greenlee Cert.)

In a rebuttal declaration filed with her Reply brief, Thurman attests to the following:

(a) "KTC has never had any joint ownership, management, or control with Winsonic or any Winsonic affiliate, or Gotham, GMC or GMS."17 (Thurman Decl., Doc. 136-1 ¶ 4.)

(b) Thurman attended the meetings at Gotham in June 2017 to learn about Gotham and Winsonic and to explore whether there might be future business opportunities between KTC and Winsonic and/or Gotham. (Id. ¶ 6.)

(c) Thurman was issued an access card during the June 2017 meetings (which she understood to be a temporary access card for that meeting) so that she could get around the building during the meetings. Thurman never took the access card off premises and left the card with the front desk when she left to return to Missouri. (Id. ¶ 7.)

(d) Thurman "never performed any managerial duties on behalf of Winsonic or any Winsonic affiliate." (Id. ¶ 8.)

(e) Thurman "was not President or CEO of Winsonic or any Winsonic affiliate before August 4, 2017." (Id.) (emphasis added).

(f) Thurman attended the August 4, 2017 meeting in Georgia at Winston Johnson's request "for the purpose of learning more about Winsonic and Gotham" and because it would be good for her to meet Gotham investors "if KTC and Winsonic were to work together in the future." (Id.)

(g) Thurman was "surprised" when Winston Johnson informed her "it was his desire to make [Thurman] the new President and CEO of Winsonic." According to Thurman, "[d]espite the discussions on August 4, 2017," she was "never actually made the president or CEO of Winsonic, never received any paycheck or other compensation for such roles, and never performed any functions for any such roles." (Id. ¶ 9.)

(h) Thurman "did not request an office, phone, or access card at the building in Smyrna, Georgia. Because [she] did not work for Winsonic, any Winsonic affiliates, or Gotham, [she] never used the office for conducting any 'business' for Winsonic, any Winsonic affiliates, Gotham, or even KTC." Instead, the office "was used (at most) only a few times as a waiting area" for Thurman when Johnson was finishing meeting with others. (Id. ¶ 11.)

Because Plaintiffs' Complaint and supporting evidence conflict (in some respects) with Thurman's declaration, the Court must accept the facts in the Plaintiffs' Complaint as true and construe all reasonable inferences in favor of the Plaintiffs. Diamond Crystal,

593 F.3d at 1257. Although Thurman attempts to downplay the extent of her involvement with Winsonic and Gotham, she does not directly refute any of the testimony from Orkan Arat about her representations to Arat as an investor and board member at the August 4, 2017 meeting in Georgia. Thus, the evidence is undisputed that Thurman held herself out as the President and CEO of Winsonic,18 attended several meetings in Georgia, provided content licenses to Winston Johnson for the promotion of the VIDGO platform, and made certain representations to Gotham's investors to ease their concerns about Gotham's and Winsonic's programming capabilities. More notably, Thurman does not affirmatively deny the allegations in Plaintiffs' Complaint that she participated in the creation of the alleged fraudulent VIDGO beta demonstrations that ultimately induced Plaintiffs to invest millions of dollars in the Gotham/Winsonic enterprise.

Plaintiffs' allegations and evidence, construed in their favor, indicate that Thurman and KTC were doing business Georgia as required to authorize the exercise of personal jurisdiction over them under O.C.G.A. § 9–10–91(1). See Home Depot Supply, Inc., 656 S.E.2d at 900-02 ("Even though it did not itself own or manage the Apartments, Hunter LLC [an Illinois limited liability company] represented itself as owner in [the Credit] Application. Construing the evidence in favor of the exercise of personal jurisdiction, Hunter LLC induced Home Depot to supply approximately $205,000 worth of goods to a Georgia apartment complex and to provide credit to the benefit of a Georgia limited liability company, Gem LLC, under common control with Hunter LLC . . . Based on the evidence that Hunter LLC initiated its relationship with Home Depot and that the goods were delivered in Georgia to a commonly-controlled apartment complex in Georgia, and that payment was handled by Hunter LLC, and considering the long course of dealing between Home Depot and Hunter LLC, the exercise of personal jurisdiction over Hunter LLC by the Georgia court is reasonable."); ATCO Sign & Lighting Co., LLC, 680 S.E.2d at 576-77 ("Resolving the disputes of fact in favor of ATCO, the evidence shows that Stamm Manufacturing intentionally sought business in this State and placed King, as its agent, in the position where he could deal

with both ATCO and Atlanta Sign. Without the actions and assurances of Stamm Manufacturing, its agent King would not have been positioned to obtain Atlanta Sign's old truck, receive ATCO's checks, fail to send the proceeds of the sale to the finance company, or fail to deliver title to ATCO. As all of these actions occurred in Georgia, Stamm Manufacturing was not forced to litigate in this State solely as a result of 'random, fortuitous or attenuated' contacts."); Power Guardian, LLC v. Directional Energy Corp., 904 F. Supp. 2d 1313, 1320–21 (M.D. Ga. 2012) (defendant 'transacted business' in Georgia because, "[e]ven if its agents did not physically enter the state, defendant exchanged electronic and personal communications with a Georgia company, engaged in face-to-face contract negotiations with a Georgia company, and accepted payment from a Georgia company, all in furtherance of executing a transaction in Georgia."); A.L. Williams & Associates, Inc. v. D.R. Richardson & Associates, Inc., 98 F.R.D. 748, 754 (N.D. Ga. 1983) (defendant "transacted business" in Georgia where contracts were negotiated and signed in Texas, but parties' representatives met in Georgia, defendant's officers communicated with Georgia party regularly by telephone and writing, and defendant mailed applications for life insurance to Georgia, where the applications were acted on by plaintiff).19

ii. Due Process

Having found that jurisdiction is appropriate under the Georgia long arm statute, the Court turns to whether jurisdiction is consistent with due process. Plaintiffs argue this Court has specific jurisdiction over Thurman and KTC based on their minimum contacts with Georgia that arise out of and relate to this action.

The Due Process Clause of the Fourteenth Amendment protects a nonresident's liberty interest in not being bound to a judgment in a foreign state (Georgia, in this case), without first establishing meaningful "contacts, ties, or relations" with that foreign jurisdiction. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V., 598 F.3d 802, 811 (11th Cir. 2010). This due process inquiry focuses on "the relationship among the defendant, the forum, and the litigation." Keeton, 465 U.S. at 775

(quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014). Because this constitutional limitation on jurisdiction is designed principally to protect the liberty interests of the nonresident defendant, the connection to the forum "must arise out of contacts that the 'defendant himself' creates with the forum State." Id. at 1122 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)) (emphasis in original).

The Eleventh Circuit has adopted a three-part due process test in specific personal jurisdiction cases, which examines:

(1) whether the plaintiff's claims "arise out of or relate to" at least one of the defendant's contacts with the forum; (2) whether the nonresident defendant "purposefully availed" himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice."

Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1355 (11th Cir. 2013) (citations omitted). Once the plaintiff establishes the first two prongs, the burden shifts to the defendant to make a 'compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice." Id. (quoting Diamond Crystal, 593 F.3d at 1267).

"[A] fundamental element of the specific jurisdiction calculus is that plaintiff's claim must 'arise out of or relate to' at least one of defendant's contacts with the forum." Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009) (quoting Burger King Corp., 471 U.S. at 472); Fraser v. Smith, 594 F.3d 842, 850 (11th Cir. 2010) ("[The] inquiry must focus on the direct causal 'relationship among the defendant, the forum, and the litigation.'").

In this case, as explained above, Plaintiffs' claims against Thurman arise, in part, out of Thurman's and her co-conspirator's contacts with Georgia. This first prong is satisfied with the unrebutted allegations that Thurman was a primary participant in a conspiracy with other resident Defendants including Federman, Johnson, GMC, the Winsonic entities, and others to induce Plaintiffs to invest in the fraudulent VIDGO service. Additionally, the first prong is satisfied by the fact that Thurman admits to selling content licenses to Winston Johnson and Gotham for use in the VIDGO service, which Plaintiffs allege was undertaken in furtherance of the scheme to defraud Plaintiffs. There is, accordingly, a direct causal relationship between Thurman and Plaintiffs' claims in satisfaction of the first part of the due process analysis. See Louis Vuitton, 736 F. 3d at 1356.

The Court finds that these same allegations and evidence also supports finding that Thurman's contacts with Georgia are sufficient to establish that she purposefully availed herself of the privilege of conducting activities within Georgia such that she could reasonably expect to be haled into court here. SeeHyperdynamics Corp., 699 S.E.2d at 467 (finding that exercise of personal jurisdiction over the non-resident defendants in Georgia did not offend due process under theory of conspiracy jurisdiction where the record contains sufficient evidence that they "took deliberate actions directed toward the State of Georgia designed to facilitate a potentially lucrative business opportunity in conjunction with the resident [] Defendants," and that "Georgia has a substantial interest in adjudicating claims related to allegedly fraudulent conduct that is contrived within its borders and involves its residents, even in the absence of a Georgia plaintiff"); Home Depot Supply, Inc., 656 S.E.2d at 901 ("The constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum State, that is, whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. Prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated in determining whether the defendant has purposefully established minimum contacts within the forum.").

Thurman has failed to make any case, much less a "compelling" one, that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice. Louis Vuitton, 736 F. 3d at 1355 (quoting Diamond Crystal, 593 F.3d at 1267). The Court therefore concludes that the exercise of personal jurisdiction over Thurman and KTC is both proper under Georgia's Long Arm statute and consistent with Due Process.

IV. CONCLUSION

For the above reasons, Defendant Kristy Thurman and KT Communications Consulting, Inc.'s Joint Motion to Dismiss [Doc. 52] for lack of personal jurisdiction is DENIED. Nonetheless, as explained in the Court's Order on the Johnson Defendants' Motion to Strike Complaint [Doc. 83], the Court has ordered that Plaintiffs' Complaint be struck as a shotgun pleading and ordered Plaintiffs to replead as set forth in detail in that Order NO LATER THAN APRIL 22, 2019.20

IT IS SO ORDERED this 22nd day of March, 2019.

/s/ Amy Totenberg
United States District Judge

Footnotes

1 The factual background the Court describes below is based on the allegations in Plaintiffs' Complaint, which the Court construes in Plaintiffs' favor consistent with the standards discussed herein.

2 The Delaware Corporations division shows no results for KTC. The business is registered with the Missouri Secretary of State as a domestic corporation having its principal place of business and corporate headquarters at either 2409 N Stadium, Columbia, MO 65202 or 520 Ryan Street, Suite C, Boonville, MO 65233. Kristy Thurman is the President of Defendant KTC.

3 In general, "white labeling" is a manufacturing and marketing practice in which a product or service is produced by one company and then rebranded by another company to make it appear to be their own.

4 Plaintiffs allege "2496 Digital is a Georgia limited liability company having its principal place of business located at 2251 Lake Park Drive, Smyrna, Georgia 30080." (Compl. ¶ 42.) The 2017 Annual Registration filed with the State of Georgia, publicly available on the Corporations Division of the Office of the Georgia Secretary of State's website, contradicts Plaintiffs' allegation that 2496 is a Georgia LLC. According to these records, it was a Delaware limited liability company with a principal place of business at 2251 Lake Park Drive, Smyrna, Georgia 30080 prior to its dissolution in 2018.

5 The Defendants identified in Counts 43 and 44 are Federman, Arnold, Su, Cascade, Kostensky, GMC, GMS, [the Winsonic companies], Poole, 2496 Digital, 1094 Digital, Emmenegger, Ashcraft, BC LLC, AOA LLC, KTC and Thurman. (See Compl. at 174, 178.)

6 Indeed, because Plaintiffs bears the initial burden of alleging a prima facie case of jurisdiction in their complaint, Thurman and KTC assert they are not required to submit affidavit evidence in support of their motion. (Defs.' Mot. at 2 (citing Askue v. Aurora Corp. of America, 2012 WL 843939, at *1 (N.D. Ga. Mar. 12, 2012)).

7 See supra, note 2.

8 In paragraph 2 of the Complaint, Plaintiffs allege that "plaintiffs are all citizens of the state of New Jersey." However, paragraph 4 of the Complaint states that plaintiff John Clifford, who is "by far the largest investor in GMC," is a "citizen of the state of Florida." (See Compl. ¶¶ 2, 4.)

9 Although the burden shifting on a motion to dismiss for lack of personal jurisdiction typically occurs when the nonresident defendant offers evidence in support of the motion, nothing prevents a plaintiff from rebutting a facial jurisdictional attack with evidence of his own. Defendants do not object to the Court's consideration of Plaintiffs' evidence offered in opposition to the motion. Rather, Defendants offer their own evidence in reply and assert that Plaintiffs' evidence is insufficient to show

that Plaintiffs' claims arise out of or relate to the Defendants' contacts with Georgia.

10 Once a court determines that there is a basis for jurisdiction under the long arm statute, the court must then engage in the traditional due process inquiry to determine whether (a) the cause of action arises from or is connected with such act or transaction, and (b) the exercise of jurisdiction by the courts of this state would offend traditional notions of fairness and substantial justice. Diamond Crystal Brands, Inc., 593 F.3d at 1272 n.11 (quoting Aero Toy Store, LLC v. Grieves, CRI, Inc., 601 S.E.2d 163, 166 (Ga. Ct. App. 2004)). This is because under Georgia law, there must be a long arm assessment that is separate and apart from the due process analysis. Id.

11 Winsonic Holdings is incorporated under the laws of the state of Delaware.

12 WDCSN is a foreign corporation organized under the laws of the state of California.

13 WDMG is incorporated under the laws of the state of Nevada.

14 In their most recent 2018 Annual Registrations filed with the Georgia Secretary of State's office, the principal office address for Winsonic Holdings and WDCSN changed to 6 West Druid Hills Drive, Atlanta GA 30329.

15 The Georgia Secretary of State corporate records available on its website do not contain a listing of all executive positions of a corporation and thus would not indicate whether Thurman served as an executive of GMC or GMS in a capacity other than CEO, CFO, or Secretary. See note 21 infra.

16 The Court takes judicial notice of the corporate records of the Corporations Division of the Office of the Georgia Secretary of State made publicly available on its website for GMS, GMC, Winsonic Holdings, WDMG, and WDCSN. A court may take judicial notice of appropriate adjudicative facts at any stage of a proceeding, whether or not the notice is requested by the parties. Fed. R.

Evid. 201(c); R.S.B. Ventures v. Fed. Deposit Ins. Corp., 514 F. App'x 853, 856, n. 2 (11th Cir.2013) (taking judicial notice of information on FDIC's website); Navelski v. Int'l Paper Co., 244 F. Supp. 3d 1275, 1301 (N.D. Fla. 2017); see also O.C.G.A. § 24–2–201(b)(2) (allowing court to take judicial notice of adjudicative facts that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). In general, a court may judicially notice a fact not subject to reasonable dispute because it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); Navelski v. Int'l Paper Co., 244 F. Supp. 3d at 1301. Documents that are public records are the proper subject of judicial notice. Universal Express, Inc. v. U.S.S.E.C., 177 F. App'x 52, 53–54 (11th Cir. 2006). Courts commonly take judicial notice of factual information found on official governmental agency websites. Navelski v. Int'l Paper Co., 244 F. Supp. 3d at 1301 (citing cases). Plaintiffs in fact ask this Court to take judicial notice of the Georgia Secretary of State's online corporate records in their response to Defendant Robert Half International Inc.'s Motion for Judgment on the Pleadings. (See Pls.' Resp., Doc. 95 at 11-12, 26.)

17 Plaintiffs' Complaint does not differentiate between Thurman and KTC. Rather, Plaintiffs appear to impute all of Thurman's alleged acts to KTC. "Corporations act only through their officers and agents. Under the traditional law of agency, the acts and intentions of those agents are therefore imputed to the corporation itself." Tr. v. O'Connor, No. 1:10-CV-1438-AT, 2012 WL 12836517, at *9 (N.D. Ga. Sept. 28, 2012) citing Beck v. Deloitte & Touche, 144 F.3d 732, 736 (11th Cir. 1998)("In Georgia, the actions of a corporate agent who perpetrates fraud are imputed to the corporation so long as the agent acts within the scope of his employment and not 'in such a way that his private interest outweighs his obligation as a corporate representative.'") (quoting Martin v. Chatham Cnty, Tax Comm'r, 574 S.E.2d 407 (Ga. Ct. App. 2002)). Here, Thurman is the 100% owner and President of KTC, and is therefore undisputedly its corporate agent. (Compl. ¶¶ 30.) Further, all actions Plaintiffs have alleged against Thurman were made within the scope of her employment with KTC and were not adverse to KTC's interests; rather, Plaintiffs allege

that Thurman desired to form a partnership with Johnson to benefit KTC. Thus, Thurman's acts and intentions may be imputed to KTC for jurisdictional purposes. SeeHyperdynamics Corp. v. Southridge Capital Management, LLC, 699 S.E.2d 456, 460 n.2 (Ga. Ct. App. 2010) ("Since all of the allegedly tortious conduct involving the Hicks Defendants is attributed to both Hicks individually and to each of the entities under his control, all of which are alleged to be part of the conspiracy, it is not necessary to distinguish the entity on whose behalf he was allegedly acting when he undertook any single subject action to determine personal jurisdiction as to him.")

18 Although merely acting as the "president of a company that does business in Georgia is insufficient to satisfy" the long arm statute, the court may exercise jurisdiction over a corporate employee, officer, or director for her personal participation in the wrongful activities of a corporation. See Amerireach.com, LLC v. Walker, 719 S.E.2d 489, 494-95 (Ga. 2011) (recognizing that jurisdiction over a corporate employee or officer "does not automatically follow from jurisdiction over the corporation," but holding that employees of a corporation that is subject to the personal jurisdiction of the courts of the forum may themselves be subject to jurisdiction if they were primary participants in the activities forming the basis of jurisdiction over the corporation); Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 851–52 (11th Cir. 1988) ("The crucial matter is whether the individual defendant can be held personally liable for acts committed in the forum, not whether his contacts with the forum arose in his personal capacity. If substantive liability can extend to an individual for acts performed on behalf of a corporation, then the individual is amenable to the forum's long-arm statute, at least in situations where the nonresident individual physically was present in the forum when he participated in the tort."). The Court finds that Thurman's alleged role in the acts underlying this lawsuit subjects her to the "transacts any business" prong of the Georgia long arm statute. See Amerireach.com, 290 Ga. at 267 (holding that an individual who is a "primary participant" in the underlying facts of a lawsuit may be subject to personal jurisdiction in Georgia under the "transacting business" provision of Georgia's long arm statute, even if all of her

contacts with the state were made solely in her "corporate capacity").

19 Additionally, Plaintiffs' allegations and evidence are also sufficient to establish a basis for personal jurisdiction under O.C.G.A. 9-10-91(2) for Thurman's alleged commission of a "tortious act or omission" in Georgia. Georgia recognizes the concept of conspiracy jurisdiction based upon the notion that the acts of one conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy. Hyperdynamics Corp. v. Southridge Capital Management, LLC, 699 S.E.2d 456, 466 (Ga. Ct. App. 2010) (citing Rudo v. Stubbs, 472 S.E.2d 515 (Ga. Ct. App. 1996)). Under the theory of conspiracy jurisdiction, the in-state acts of a resident co-conspirator may be imputed to a nonresident co-conspirator so as to satisfy the specific contact requirements of the Georgia Long Arm Statute. Id. In addition to being a primary participant in the alleged wrongdoing of Winsonic and Gotham, Plaintiffs allege that Thurman was part of a conspiracy with Federman, Johnson and other resident Defendants to defraud Plaintiffs.

20 As the Court has chosen the proper course of action under applicable Eleventh Circuit authority in striking Plaintiffs' Complaint and requiring Plaintiffs to replead their Complaint, the Court DENIES IN PART Thurman and KTC's Joint Motion to Dismiss in so far as they seek the dismissal of this action based on Plaintiffs' having filed a shotgun Complaint. See Magluta v. Samples, 256 F.3d 1282, 1284-85 (11th Cir. 2001); Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 910 (11th Cir. 1996). The Court GRANTS IN PART Thurman and KTC's Joint Motion to Dismiss only as to Plaintiffs' federal RICO claims asserted against Thurman and KTC in Counts 43 and 44 as barred by the PLSRA as set forth above.

APPENDIX E

United States District Court, N.D. Georgia, Atlanta Division.

John CLIFFORD et al., Plaintiffs,

v.
Richard FEDERMAN et al., Defendants.

CIVIL ACTION NO. 1:18-CV-01953-JPB
|

Signed 01/07/2020

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James Johnson, Johnson Trial Law, LLC, Decatur, GA, Nicholas Tivy Sears, Knight Palmer, LLC, Peter Hall Steckel, James Larry Stine, Sherri G. Buda, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA, for Defendants Winston Johnson, Winsonic Digital Media Group, Ltd., Winsonic Digital Cable Systems Network, Ltd., Lori Poole, 2251 Lake Park Investment Group LLC, Doc Maandi Movies LLC, DMM-Expendables 3 LLC, Maandi Media Productions Digital LLC, Maandi Entertainment LLC, Maandi Media Productions LLC, Maandi Park MS LLC, Maandi Media Holdings International LLC, Kimberlyte Productions Services, Inc., 2496 Digital Distribution LLC, 1094 Digital Distribution LLC.

Ivy Neal Cadle, Sarah Margaret Carrier, Baker Donelson Bearman Caldwell & Berkowitz, P.C., Atlanta, GA, for Defendants Justin Su, Cascade Northwest, Inc.

Jenna Beth Rubin, Gregory, Doyle, Calhoun & Rogers, LLC, Marietta, GA, Jonathan J. Kandel, Kandel Law, LLC, Peachtree Corners, GA, Rebecca Elizabeth Strickland, Roger E. Harris, Swift, Currie, McGhee & Hiers, LLP, Atlanta, GA, for Defendants Todd Guthrie, Tech CXO, LLC.

Candice Devonne McKinley, Thomas E. Reynolds, Jr., Reynolds Law Group, LLC, Atlanta, GA, for Defendants Patrick Shaw, Rickshaw Productions, LLC.

Jeffrey L. Schultz, Lucas T. Pendry, Armstrong Teasdale, LLP, St. Louis, MO, Anthony Binford Minter, Smith Moore Leatherwood, LLP, Dorothy Cornwell, G. Marshall Kent, Jr., Fox Rothschild, LLP, Atlanta, GA, for Defendants Kristy Thurman, KT Communications Consulting, Inc.

James Larry Stine, Peter Hall Steckel, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA, for Defendant SST Swiss Sterling, Inc.

John Douglas Bennett, John C. Stivarius, Jr., Tracy Lynn Glanton, Elarbee, Thompson, Sapp & Wilson, LLP, Atlanta, GA, for Defendant Robert Half International, Inc.

James Johnson, Johnson Trial Law, LLC, Decatur, GA, Nicholas Tivy Sears, Knight Palmer, LLC, Sherri G. Buda, Knight Johnson, LLC, Atlanta, GA, for Defendants Katie Ashcraft, Business Consulting, LLC, Ashcraft Opperman & Associates, LLC.

James Johnson, Johnson Trial Law, LLC, Decatur, GA, James Larry Stine, Peter Hall Steckel, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA,

for Defendant Winsonic Digital Cable Systems Network Holdings, Ltd.

ORDER

J. P. BOULEE, United States District Judge

*1 This matter comes before the Court on Defendants Todd Guthrie and Techcxo, LLC's Motion to Dismiss [Doc. 188], Defendant Richard Federman's Motion to Strike "Shotgun" First Amended Complaint [Doc. 196], Defendants Justin Su and Cascade Northwest, Inc.'s Motion to Dismiss [Doc. 217], Defendants Kristy Thurman and KT Communications Consulting, Inc.'s Joint Motion to Strike Plaintiffs' Amended Complaint [Doc. 226] and the Johnson Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint [Doc. 230] (collectively, "the Motions"). The Motions seek dismissal of Plaintiffs' First Amended Complaint on shotgun pleading grounds.1 This Court finds as follows:

BACKGROUND

Claiming that they were the victims of a "diabolical" fraud, Plaintiffs, who are represented by counsel, sued numerous defendants on May 3, 2018. [Doc. 1]. Plaintiffs' Complaint ("Original Complaint") was 195 pages long and asserted fifty counts against forty-two different defendants. Id.

Early in the litigation, many of the defendants moved to dismiss the Original Complaint on shotgun pleading grounds. After engaging "in the painstaking task of wading through and deciphering Plaintiffs' tangled mass of allegations," the Court determined that Plaintiffs' Original Complaint was an improper shotgun pleading and ordered Plaintiffs to replead no later than April 22, 2019. [Doc. 162, pp. 12, 18]. Importantly, the Court thoroughly explained the various pleading deficiencies and gave Plaintiffs specific directives they must follow in filing their amended complaint. Id. at 15-16. The Court's instructions included, but were not limited to, the following: (1) Plaintiffs may not incorporate all 312

factual paragraphs into each count and Plaintiffs must indicate which of the factual paragraphs support each individual count alleged; and (2) Plaintiffs must identify what precise conduct is attributable to each individual defendant separately in each count when asserting a single count against multiple defendants. Id.

On April 23, 2019, Plaintiffs filed their First Amended Complaint. [Doc. 173]. The First Amended Complaint ballooned to 258 pages (sixty-three more pages than the Original Complaint) and asserted fifty-two counts against thirty-six defendants. Id. As with the Original Complaint, many of the defendants moved to dismiss Plaintiffs' First Amended Complaint on shotgun pleading grounds.

ANALYSIS

As already explained at length in this Court's March 22, 2019 Order, "[c]ourts in the Eleventh Circuit have little tolerance for shotgun pleadings." Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291, 1295 (11th Cir. 2018). Typically, shotgun pleadings are characterized by: (1) multiple counts that each adopt the allegations of the preceding counts; (2) conclusory, vague and immaterial facts that do not clearly connect to a particular cause of action; (3) failing to separate each cause of action into distinct counts; or (4) combining multiple claims against multiple defendants without specifying which defendant is responsible for which act." McDonough v. City of Homestead, 771 Fed. App'x 952, 955 (11th Cir. 2019).

*2 Shotgun pleadings "waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the public's respect for the courts." Arrington v. Green, 757 Fed. App'x 796, 797 (11th Cir. 2018).

Shotgun pleadings, whether filed by plaintiffs or defendants, exact an intolerable toll on the trial court's docket, lead to unnecessary and unchannelled discovery, and impose unwarranted expense on the litigants, the court and the court's parajudicial personnel and resources. Moreover, justice is delayed for the litigants

who are "standing in line," waiting for their cases to be heard. The courts of appeals and the litigants appearing before them suffer as well.

Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1356–57 (11th Cir. 2018). The Eleventh Circuit has even stated that tolerating shotgun pleadings "constitutes toleration of obstruction of justice." Id. at 1357.

This Court finds that the First Amended Complaint is a "quintessential 'shotgun' pleading of the kind [the Eleventh Circuit has] condemned repeatedly." Magluta v. Samples, 256 F.3d 1282, 1284 (11th Cir. 2001). At 258 pages, it is in no sense a "short and plain statement of the claim" required by the Federal Rules of Civil Procedure. Here, it is virtually impossible to know which allegations of fact are intended to support which claims of relief since each cause of action incorporates more than 200 paragraphs. Unfortunately, the First Amended Complaint may be even more confusing and cumbersome than the Original Complaint and suffers from many of the same deficiencies as the first. For the reasons explained below, Plaintiffs failed to correct the pleading deficiencies identified in the March 22, 2019 Order, and thus Plaintiffs' First Amended Complaint is an impermissible shotgun pleading.

A. Plaintiffs' First Amended Complaint fails to identify which facts support each individual count alleged.

Plaintiffs were specifically instructed that they were not to incorporate all 312 factual paragraphs into each count and instead must indicate which of the factual paragraphs support each individual count alleged. In Plaintiffs' Original Complaint, the 312 paragraphs that this Court was referring to were the paragraphs supporting jurisdiction and venue, the paragraphs identifying the parties and almost 250 paragraphs of facts. Plaintiffs argue that because they now specifically identify which paragraphs are incorporated into each count (instead of all 312) and deleted the incorporation of the each and every paragraph language that preceded

each count, they are in full compliance with this Court's directive.

While Plaintiffs did not technically incorporate all 312 factual paragraphs into each count, the vast majority of the fifty-two counts contained within the First Amended Complaint incorporate the entirety of the section entitled "The Facts," which consists of almost 250 paragraphs and spans 104 pages. Plaintiffs only omitted the introductory facts relating to the identification of the parties and the paragraphs relating to jurisdiction and venue. For instance, of the 296 paragraphs preceding Count One (previously 312), Plaintiffs incorporated all but thirty paragraphs. Of those thirty paragraphs, three related to jurisdiction and venue and the remaining twenty-seven simply identified the residences of various defendants. What Plaintiffs have done here is equally as cumbersome as simply incorporating every prior allegation into each successive count, if not more so. Instead of looking back at the First Amended Complaint as a whole, each count of the First Amended Complaint requires the reader to identify and sift through hundreds of individual paragraphs that are incorporated into each count and then parse through numerous allegations to identify those that have some relevance to a particular defendant or cause of action.

*3 Notably, some counts even contain more allegations than the Original Complaint. For instance, Count 26 incorporates 358 prior paragraphs and Count 42 incorporates 345 paragraphs. Because Plaintiffs again chose to plead in this fashion, "each count is replete with factual allegations that could not possibly be material to that specific count" and any allegations "that are material are buried beneath innumerable pages of rambling irrelevancies." See id. Thus, this Court finds that Plaintiffs failed to follow this Court's March 22, 2019 Order.

B. Plaintiffs failed to adequately identify the precise conduct that is attributable to each defendant.

Plaintiffs were also specifically instructed by this Court that when a single count is brought against multiple

defendants, Plaintiffs must identify what precise conduct is attributable to each individual defendant. [Doc. 162, p. 18]. In Plaintiffs' Original Complaint, many of the counts were brought against a group of defendants. [Doc. 1]. For example, Count 1 was brought against Defendants Federman, Johnson, Arnold, Guthrie, Tech CXO, Kostensky, Su, Cascade and GMC. Id. at 132. Plaintiffs began Count 1 by realleging each and every paragraph above and then stating, in a conclusory fashion, that the defendants' "actions, conduct, inactions and omissions set forth above constitute breach of their fiduciary duties of loyalty to plaintiffs as GMC shareholders, convertible note holders and investors." Id. In other words, Plaintiffs asserted all 312 factual allegations in the same manner against the named defendants.

Plaintiffs argue that their First Amended Complaint complies with this Court's instructions. Plaintiffs further argue that because some of the defendants were able to form a response to the First Amended Complaint in the form of a motion to dismiss on the merits, the defendants obviously understood with clarity the nature of the First Amended Complaint, and thus the First Amended Complaint could not be a shotgun pleading. The Court disagrees.

Despite this Court's direction to identify the precise conduct attributable to each individual defendant, Plaintiffs changed the Original Complaint only in minor ways. For example, in Count 1, instead of realleging each and every paragraph (the 312 previously explained), Plaintiffs simply identify the factual paragraphs that state the particular defendant's residence and then incorporate every single paragraph from the factual section, which spans more than 100 pages. Plaintiffs never attempt to segregate the alleged wrongdoing of the defendants, and many of the paragraphs refer to all defendants or a grouping of defendants. This method of pleading is in no manner any clearer than it was in the Original Complaint nor does it specifically identify the precise conduct attributable to each individual defendant. Ultimately, Plaintiffs' First Amended Complaint remains an impermissible shotgun pleading.

LEAVE TO AMEND

In this case, Plaintiffs argue that they should be granted another opportunity to amend their claims.2 As a general rule, before dismissing a complaint with prejudice on shotgun pleading grounds, "the district court must first explain how the pleading violates the shotgun-pleading rule and give the plaintiff at least one opportunity to re-plead the complaint." Arrington, 757 Fed. App'x at 797. Implicit in any repleading order is the "notion that if the plaintiff fails to comply with the court's order—by filing a repleader with the same deficiency—the court should strike his pleading, or depending on the circumstances, dismiss his case and consider the imposition of monetary sanctions." Jackson, 898 F.3d at 1358. Importantly, the Eleventh Circuit has never adopted "a rule requiring district courts to endure endless shotgun pleadings." Vibe Micro, 878 F.3d at 1297.

*4 In this case, the Court thoroughly explained to Plaintiffs why the Original Complaint violated the shotgun pleading rule. Furthermore, the various motions to dismiss on shotgun pleading grounds also provided Plaintiffs with notice of the defects. Significantly, this Court gave Plaintiffs an opportunity to amend their Original Complaint. Because Plaintiffs did not meaningfully amend their Original Complaint, this Court finds that Plaintiffs should not be afforded another opportunity to amend. Plaintiffs had their chance. See Jackson, 898 F.3d at 1358 (holding that the district court should have dismissed the amended complaint with prejudice on shotgun pleading grounds because the plaintiffs were put on notice of the specific defects and failed to correct them). Here, after being put on notice of the specific defects in their Original Complaint, Plaintiffs filed their First Amended Complaint afflicted with almost all of the same defects, "attempting halfheartedly to cure only one of the pleading's many ailments by" separating each cause of action into distinct counts. See id. at 1359; see also McDonough, 771 Fed. App'x at 956 (affirming decision of district court to dismiss with prejudice the plaintiff's shotgun pleading with prejudice when the plaintiff was

given one opportunity to replead). Given the "aggregate negative effects of shotgun pleadings on trial courts" and the resulting harm to the administration of justice, this Court denies Plaintiffs' request for a second chance to amend their pleadings. See Byrne v. Nezhat, 261 F.3d 1075, 1131 (11th Cir. 2001). "There is simply a point in litigation when a defendant is entitled to be relieved from the time, energy, and expense of defending itself against seemingly vexatious claims, and the district court relieved of the unnecessary burden of combing through them." Jackson, 898 F.3d at 1360 (Bloom, J., specially concurring).

CONCLUSION

For the reasons stated above, to the extent the Motions seek dismissal on shotgun pleading grounds, the motions are GRANTED and Plaintiffs' First Amended Complaint is DISMISSED with prejudice. To the extent the motions address the merits, the motions are DENIED AS MOOT.3 The Clerk is DIRECTED to CLOSE this case.

SO ORDERED this 7th day of January, 2020.

/s/ J.P. Boulee
United States District Judge

Footnotes

1 Some of the motions raise other grounds for dismissal in addition to shotgun pleading grounds.

2 Although Plaintiffs argue that they should be given a second chance to amend in the event the First Amended Complaint is a shotgun pleading, Plaintiffs have not formally moved for leave to amend under Federal Rule of Civil Procedure Rule 15 through the filing of a separate motion. Even if a formal motion were made, it would not be granted.

3 Also DENIED AS MOOT are Defendant Robert Half International Inc.'s Motion for Judgment on the

Pleadings as to Plaintiffs' First Amended Complaint [Doc. 195], Defendant Richard Federman's Motion to Dismiss Plaintiffs' First Amended Complaint [Doc. 198], Defendant Richard Federman's Motion to Strike John Clifford's Filing Entitled First Amended Complaint [Doc. 197], Defendants Kristy Thurman and KT Communications Joint Motion to Dismiss First Amended Complaint [Doc. 225], Defendant Patrick Shaw's Motion to Dismiss First Amended Complaint [Doc. 209], Defendant Rickshaw Production, LLC's Motion to Dismiss Plaintiffs' First Amended Complaint [Doc. 210] and Ashcraft Defendants' Motion to Dismiss [Doc. 211].

APPENDIX F

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION NO. 1:18-CV-01953-JPB

CHRISTINE C. CLIFFORD, as administrator of the Estate of John Clifford, et al., Plaintiffs

v.

RICHARD FEDERMAN et al., Defendants.

ORDER

This matter comes before the Court on Plaintiffs' Motion Pursuant to Federal Rule of Civil Procedure 60 and Northern District of Georgia Local Rule 7.2(E) for Reconsideration, Clarification and/or Modification of the Court's January 7, 2020 Order Dismissing Plaintiffs' Amended Complaint with Prejudice [Doc. 283]. This Court finds as follows:

PROCEDURAL HISTORY

Plaintiffs brought this action against Defendants on May 3, 2018. [Doc. 1]. Plaintiffs' Complaint ("Original Complaint") contained fifty counts against forty- two different defendants and spanned 195 pages. Id. After several of the defendants moved to dismiss, this Court determined that Plaintiffs' Original Complaint was an impermissible shotgun pleading. [Doc. 162]. After giving specific repleading instructions, this Court ordered Plaintiffs to amend their Original Complaint. Id. Plaintiffs filed their First Amended Complaint ("Amended Complaint") on April 23, 2019. The Amended Complaint, which was 258 pages, asserted fifty-two counts against thirty-six defendants. [Doc. 173]. Like with the Original Complaint, many of the defendants moved to dismiss. Upon consideration of those motions

to dismiss, this Court determined that the Amended Complaint was another shotgun pleading, and because Plaintiffs had previously been given an opportunity to amend, dismissed Plaintiffs' Amended Complaint with prejudice. [Doc. 281]. On January 31, 2020, Plaintiffs moved for reconsideration of this Court's Order dismissing the action with prejudice. [Doc. 283].

ANALYSIS

Local Rule 7.2 provides that motions for reconsideration are not to be filed "as a matter of routine practice," but only when "absolutely necessary." Reconsideration is limited to the following situations: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. Pepper v. Covington Specialty Ins. Co., No. 1:16-CV-693-TWT, 2017 WL 3499871, at *1 (N.D. Ga. Aug. 3, 2017). Importantly, a party "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Id. In their motion for reconsideration, Plaintiffs argue that reconsideration is necessary for four independent reasons. Each reason is discussed below.

1. Dismissal of State Law Claims

Plaintiffs first argue that this Court should reconsider its decision to dismiss the state law claims with prejudice. More specifically, Plaintiffs argue that when a complaint is dismissed solely on shotgun pleading grounds, any state law claims should be dismissed without prejudice as to refiling in state court. Plaintiffs rely on Vibe Micro, Inc. v. Shabanets, 878 F.3d 1291 (11th Cir. 2018) and Toth v. Antonacci, 788 F. App'x 688 (11th Cir. 2019). In both cases, the district courts dismissed the plaintiffs' federal and state law claims with prejudice. The Eleventh Circuit Court of Appeals upheld the dismissal of the federal claims in both cases but determined that the state law claims should have

been dismissed without prejudice. Toth, 788 F. App'x at 692-93; Vibe Micro, 878 F.3d at 1297. Importantly, in both cases, the Eleventh Circuit observed that "[w]hen all federal claims are dismissed before trial, a district court should typically dismiss the pendent state claims 1 as well." Toth, 788 F. App'x at 691 (emphasis added); Vibe Micro, 878 F.3d at 1297 (same). In these cases, the Eleventh Circuit further recognized that "[a]lthough it is possible for the district court to continue to exercise supplemental jurisdiction over these pendent claims," if the district court chooses to dismiss the pendent state law claims over which it had been exercising supplemental jurisdiction, "it usually should do so without prejudice as to refiling in state court." Toth, 788 F. App'x at 692; Vibe Micro, 878 F.3d at 1297 (same). Ultimately, the Eleventh Circuit determined that the state law claims in both cases should have been dismissed without prejudice. As stated above, Plaintiffs argue that all state law claims must be dismissed without prejudice, not just pendent state law claims. The responding defendants countered that this rule only applies to those state law claims before the court through supplemental jurisdiction. This Court agrees.

In this case, Plaintiffs argue that:

> [t]he oppositions' attempt to distinguish Vibe Micro and Toth by contending the state claims in those cases were before those courts through supplemental jurisdiction are a sham on this Court. Tellingly, the plaintiff in Vibe Micro alleged the Southern District of Florida had both diversity jurisdiction as well as federal question jurisdiction.

[Doc. 288, p. 6]. Plaintiffs even go on to argue that because the state law claims in Vibe Micro were not before the trial court or Eleventh Circuit based on supplemental jurisdiction, the "entire arguments defendants have advanced is meritless and misleading." Id. at 7. Plaintiffs are mistaken. In its briefing before the Eleventh Circuit, the Vibe Micro plaintiff argued that the state law claims should have been dismissed without

prejudice because the "district court possessed only supplemental jurisdiction over the state-law claims. . . under 28 U.S.C. § 1367 because complete diversity of the parties was lacking." Opening Brief for Appellants at 37-38, Vibe Micro, 878 F.3d 1291 (No. 16-15276-AA), 2016 WL 6609358 at *37-38. The Vibe Micro plaintiff went on to argue that "[w]here a district court possesses only supplemental jurisdiction over a state-law claim and the district court has dismissed all federal claims prior to trial—as occurred here— a district court should dismiss the state-law claim without prejudice to refiling in state court." Id. The Vibe Micro plaintiff's admissions regarding jurisdiction directly contradicts Plaintiffs' argument in this case. It is thus clear to this Court that the state law claims in Vibe Micro were before the court pursuant to the court's supplemental jurisdiction—not original jurisdiction as Plaintiffs claim. This Court recognizes that the Eleventh Circuit never explicitly states that the state law claims in Vibe Micro or Toth were pendent claims or that the rule requiring dismissal without prejudice only applies to claims over which a court has supplemental jurisdiction. When reading the dismissal language contained in both cases in context with the entire orders, however, this Court finds that it is only pendent state law claims that must be dismissed without prejudice when a dismissal is based on non-merits grounds—not all state law claims. In this case, this Court does not have supplemental jurisdiction over any pendent state law claims pursuant to 28 U.S.C. § 1367. Instead, this Court has original jurisdiction over the state law claims pursuant to 28 U.S.C. § 1332. In the dismissal order, the original jurisdiction claims were dismissed due to a violation of Federal Rule of Civil Procedure 8, and therefore there are no remaining state law claims to dismiss, either with or without prejudice. Because this case does not involve pendent state law claims, the rule regarding dismissal of pendent claims does not apply, and therefore dismissal of this action with prejudice was appropriate.

2. Findings Necessary to Support a Dismissal with Prejudice

In arguing for reconsideration, Plaintiffs claim that this Court failed to make the requisite findings to support a dismissal with prejudice because this Court did not address whether Plaintiffs' conduct was "willful or contumacious" and this Court did not address whether lesser sanctions would be inadequate. This Court disagrees.

Reconsideration is not warranted here because this Court was not required to make a finding that Plaintiffs' conduct was willful or contumacious or that a lesser sanction would be inadequate. Eleventh Circuit authority is clear that dismissal of a complaint with prejudice on shotgun pleading grounds is warranted where the plaintiff has been given an opportunity to remedy pleading deficiencies but fails to do so. Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1358 (11th Cir. 2018). "[T]he key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them. If that chance is afforded and the plaintiff fails to remedy the defects, [a court] does not abuse its discretion in dismissing the case with prejudice on shotgun pleading grounds." Id. In this case, Plaintiffs had fair notice of the defects and had the opportunity to replead their complaint. Because Plaintiffs failed to replead in a manner that complied with the Federal Rules of Civil Procedure, dismissal with prejudice on shotgun pleading grounds was appropriate.

3. Fraud-Based Claims and Federal Rule of Civil Procedure

Plaintiffs argue in their third enumeration of error that this Court improperly applied Federal Rule of Civil Procedure 8 to the entire Amended Complaint despite portions of the Amended Complaint being based on fraud, which must comply with the heighted pleading requirements contained in Federal Rule of Civil Procedure 9. In other words, Plaintiffs seem to argue that because the fraud-based claims required particular

pleading, Federal Rule of Civil Procedure 8's requirement of a "short and plain statement of the claim" is inapplicable and this Court was precluded from dismissing the fraud-based claims on shotgun pleading grounds.

Reconsideration is not warranted here. "The pleading requirements of [Federal Rule of Civil Procedure 9(b)] for claims involving fraud or mistake do not allow a plaintiff to 'evade the less rigid—though still operative—strictures of [Federal Rule of Civil Procedure 8].'" Silverthorne v. Yeaman, 668 F. App'x 354, 355 (11th Cir. 2016). In other words, Plaintiffs were required to comply with both Federal Rule of Civil Procedure 8 and Federal Rule of Civil Procedure 9. Plaintiffs did not do so.

Contrary to Plaintiffs' arguments, Plaintiffs' Amended Complaint was not dismissed because it was too long. While this Court stated that "[a]t 258 pages, [the Amended Complaint] is in no sense a 'short and plain statement of the claim' required by the Federal Rules of Civil Procedure," the Amended Complaint was not dismissed because of the length of Plaintiffs' Amended Complaint. Plaintiffs' Amended Complaint was dismissed because it failed to identify which specific facts supported each count alleged (instead incorporating the entirety of the 104- page section entitled "The Facts" into each and every count) and failed to adequately identify the precise conduct that was attributable to each defendant. Ultimately, because Plaintiffs' Amended Complaint failed to comply with the pleading requirements of Federal Rule of Civil Procedure 8, no need existed for this Court to assess whether the pleading also complied with the more stringent standard of Federal Rule of Civil Procedure 9(b). This Court did not err in applying Federal Rule of Civil Procedure 8 to the entire Amended Complaint.

4. Compliance with Previous Orders

Plaintiffs' final argument is that they complied with this Court's March 22, 2019 directives. Plaintiffs argue that this Court's previous order only prohibited them from

including all 312 factual paragraphs into each count, and because they incorporated slightly less than all 312 paragraphs, they complied with this Court's instructions. This argument simply repackages arguments previously made to this Court and is thus improper as a basis for reconsideration. Even if this argument was a proper basis for reconsideration, in this Court's March 22, 2019 Order, this Court explained to Plaintiffs that they were not to incorporate all of the paragraphs because it was "nearly impossible for the Court to determine with any certainty which factual allegations give rise to which claims for relief against which defendants." Instead of meaningfully complying with this Court's directive, Plaintiffs simply elected not to incorporate the introductory venue and jurisdictional provisions and continued to incorporate over 104 pages of facts. As this Court already explained in its previous order, Plaintiffs' decision to only delete the venue and jurisdictional provisions did not aid the Court in determining with any certainty which of the 104 pages of facts gives rise to which claims for relief. As a result, this Court did not err in finding that Plaintiffs failed to comply with this Court's previous orders.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion Pursuant to Federal Rule of Civil Procedure 60 and Northern District of Georgia Local Rule 7.2(E) for Reconsideration, Clarification and/or Modification of the Court's January 7, 2020 Order Dismissing Plaintiffs' Amended Complaint with Prejudice [Doc. 283] is DENIED.

SO ORDERED this 15th day of June, 2020

/s/ J.P. Boulee
United States District Judge

Footnotes

1 Pendent jurisdiction, which is discretionary, exists whenever there is a claim arising under the Constitution or Laws of the United States and the "relationship

between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966). "Supplemental jurisdiction permits parties to append state claims in federal cases, provided that the state-law claims 'form part of the same case or controversy' as the federal claims." Crosby v. Paulk, 187 F.3d 1339, 1352 (11th Cir. 1999). Importantly, "[a] district court has discretion to dismiss state-law claims when 'all claims over which it has original jurisdiction' have been dismissed." Id. (emphasis added).