Bank of India, N.Y. Branch v Anaya Gems, Inc.
2024 NY Slip Op 33799(U)
October 8, 2024
Supreme Court, New York County
Docket Number: Index No. 655240/2018
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

----------X

BANK OF INDIA, NEW YORK BRANCH, AND ALLAHABAD BANK, HONG KONG BRANCH,

Plaintiffs,

- v -

ANAYA GEMS, INC., ANSHUL GANDHI, AJAY GANDHI, DINIKA A. GANDHI, RAJUL A. GANDHI, STARLIGHT DESIGNS, SDC D/B/A SUPER DIAMOND, DNM, MICHAEL PASQUAL, MICHAEL SCHEINMAN, MANJUSAKA JEWELERS CO. LIMITED, MARS VENTURE LTD., SINO STERLING, DIAGEM, JEWEL ROUGH N.A., and DIVINE ENTERPRISES LTD.,

Defendants.

----------X

INDEX NO. 655240/2018

MOTION DATE _____

MOTION SEQ. NO. 008 009 011 012

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 239, 240, 243, 246, 258, 263

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 237, 238, 242, 247, 259, 264, 270, 271, 290

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 265, 266, 267, 277

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 272, 273, 274, 275, 278, 279, 280, 281, 282, 283

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This is an action by lenders, plaintiffs Bank of India, New York Branch (Bank of India) and Allahabad Bank, Hong Kong Branch (Allahabad Bank, and together, Banks),

against borrower, defendant Anaya Gems, Inc. (Anaya),[1] which allegedly defaulted on certain loans, as well as other numerous defendants who allegedly participated in a scheme to siphon Anaya's assets.

In motion sequence number 008, defendants Michael Pasqual and Michael Scheinman move to dismiss the amended complaint pursuant to CPLR 3211 (a) (7). In motion sequence number 009, defendants Starlight Designs, LLC (Starlight)[2], Super Diamond Jewelry, LLC (Super Diamond),[3] and Diagem, Inc. (Diagem) move to dismiss the amended complaint pursuant to CPLR 3211 (a) (7). In motion sequence number 011, defendant Anshul Gandhi moves to dismiss the causes of action of the amended complaint alleging conspiracy and civil RICO pursuant to CPLR 3211 (a) (7). In motion

---

[1] On March 11, 2024, the court granted the Banks' motion for a default judgment against Anaya. (NYSCEF Doc. No. [NYSCEF] 293, Decision and Order at 2, 4 [mot. seq. no. 013].)

[2] In the amended and supplemental summons, the Banks name "Starlight Designs" as a defendant. (NYSCEF 220, Amended and Supplemental Summons.) The Banks also list "Starlight Designs" as a defendant in the caption of the amended complaint. (NYSCEF 187, AC at 1.) The affidavit of service of the Amended and Supplemental Summons and Amended Complaint provides "that the party served was Starlight Designs Co., LLC named herein as Starlight Designs." (NYSCEF 225, Affidavit of Service.) In the body of the amended complaint, the Banks refer to "Defendant Starlight Designs Co., LLC ('Starlight')." (NYSCEF 187, AC ¶ 51.) Starlight Designs, LLC is the entity moving to dismiss here (NYSCEF 237, Notice of Motion [mot. seq. no. 009]) and will be referred to as Starlight in this decision.

[3] In the amended and supplemental summons, the Banks name "SDC d/b/a SUPER DIAMOND" as a defendant. (NYSCEF 220, Amended and Supplemental Summons.) The Banks lists "SDC d/b/a SUPER DIAMOND" as a defendant in the caption of the amended complaint. (NYSCEF 187, AC at 1.) In the body of the amended complaint, the Banks refer to "Defendants Super Diamond Jewelry, LLC d/b/a SDC Designs LLC ('Super Diamond')." (*Id.* ¶¶ 51-52.) The affidavit of service states "that the party served was Super Diamond Jewelry, LLC named herein as SDC d/b/a Super Diamond." (NYSCEF 226, Affidavit of Service.) The Banks allege that, in November 2017, "Super Diamond was created as a d/b/a of Defendant Starlight Design Concepts LLC." (*Id.* ¶ 134.) Super Diamond Jewelry, LLC is the moving entity here (NYSCEF 237, Notice of Motion [mot. seq. no. 009]) and will be referred to as Super Diamond in this decision.

sequence number 012, defendant Manjusaka Jewelers Co. Limited (Manjusaka) moves to dismiss the amended complaint pursuant to CPLR 3211 (a) (7).

Background

The following facts are drawn from the verified amended complaint (AC) unless otherwise noted and are assumed to be true for purposes of these motions. (*See CBS, Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 499 [1990].)

Credit Agreements

On June 17, 1999, Bank of India and nonparty Antrix Diamond Exports Limited (Antrix) entered into a Working Capital Consortium Agreement, which, as restructured, provided an $80 million working capital loan facility to Antrix (Antrix Loan). (NYSCEF 187, AC ¶ 74.) Anaya, Antrix's affiliate and a wholesale jewelry company, and Anshul Gandhi, Anaya's chief executive officer, guaranteed the Antrix Loan. (*Id.* ¶¶ 2, 6, 47, 74.)

On March 12, 2012, Bank of India and Anaya entered into a credit agreement (BOI Credit Agreement) providing Anaya with a revolving loan credit facility on up to "50% of the aggregate value of Eligible Inventory and 90% of Eligible Accounts Receivable calculated on the basis of Borrowing Base Statement or the aggregate principal amount of [$35 million], whichever is lower." (NYSCEF 191, BOI Credit Agreement at 4 ["Drawing Power" definition]; NYSCEF 187, AC ¶ 75.)[4] Accordingly, Anaya had to submit monthly Borrowing Base Statements. (NYSCEF 191, BOI Credit Agreement ¶ 7.12; NYSCEF 187, AC ¶ 93.) Anaya executed a $35 million promissory

[4] The BOI Credit Agreement was amended on July 6, 2012 is attached to the amended complaint as is the initial agreement. (*See* NYSCEF 191, Amendment at 56 [NYSCEF pagination]; NYSCEF 187, AC ¶ 76.)

note (BOI Note) and Anaya and Bank of India executed a security agreement (BOI Security Agreement). (NYSCEF 187, AC ¶ 75; NYSCEF 192, BOI Note; NYSCEF 193, BOI Security Agreement.) Anshul Gandhi personally guaranteed the loan. (NYSCEF 187, AC ¶ 47; NYSCEF 219, Anshul Gandhi Guarantee.)

In August 2013, Allahabad Bank extended an additional $5 million term loan to Anaya through a credit agreement (AB Credit Agreement). (NYSCEF 187, AC ¶ 77; NYSCEF 194, AB Credit Agreement.) Anaya executed a $5 million promissory note (AB Note), and Anaya and Allahabad Bank executed a security agreement (AB Security Agreement). (NYSCEF 187, AC ¶ 77; NYSCEF 195, AB Note; NYSCEF 196, AB Security Agreement.)

"[T]he AB Security Agreement and the BOI Security Agreement [each] granted to the respective Banks a security interest in all of Anaya's accounts [receivable], deposit accounts, inventory and equipment, documents of title, fixed assets, shares, rights, and patents, and other property (the 'Collateral')." (NYSCEF 187, AC ¶ 78.) The Banks filed UCC financing statements. (*Id*; NYSCEF 197, UCC filings.)[5] Per the security agreements, the Banks could take the collateral if Anaya defaulted under the credit documents. (NYSCEF 187, AC ¶ 79.)[6]

---

[5] Bank of India's UCC financing statement is stamped August 28, 2008 (NYSCEF 197, UCC filings at 3-4), and the amendments thereto providing for continuation of the financing statement's effectiveness are stamped May 10, 2013 and May 24, 2018. (*Id.* at 1-2.) Allahabad Bank's UCC financing statement is stamped October 19, 2018. (*Id.* at 5-6.)

[6] The court considers the allegation that Banks "could take the Collateral from Anaya in the event the Banks defaulted" (NYSCEF 187, AC ¶ 80 [emphasis added]) to have been made in error.

Defaults

In February 2018, Anaya defaulted under the BOI Credit Agreement and AB Credit Agreement by "(1) not paying interest … (2) not submitting Borrower Base Statements as required by, e.g., Section 7.12 of the BOI Credit Agreement;[7] and (3) not complying with the financial covenants set forth in, e.g., Section 7.27 of the BOI Credit Agreement." (*Id.* ¶ 93.) On July 12, 2018, the Banks sent a notice of default. (*Id.* ¶ 94.) On October 10, 2018, the Banks sent a letter demanding payment of the $29,352,734.42 and $5,294,305.15 balance due under the BOI Note and AB Note, respectively. (*Id.* ¶¶ 94-95.) Antrix defaulted on the Antrix Loan[8] (*id.* ¶¶ 5, 91), and thus, Anaya and Anshul Gandhi, as guarantors, became liable to Bank of India for the balance due on the Antrix Loan, which was $77,180,665.10 as of December 31, 2017. (*Id.* ¶¶ 91, 114.)

Inspection & Receiver Appointment

The last Borrower Base Statement submitted to Bank of India in March 2018 represented that Anaya's inventory was $47 million. (*See id.* ¶¶ 98, 103.) Bank of India inquired about Anaya's failure to submit the Borrowing Base Statements and Anaya responded that "it would not submit the statements because it did not want to be responsible for 'false statements' in them." (*Id.* ¶ 99.) In July 2018, Anshul Gandhi represented that Anaya's inventory was $35 million. (*Id.* ¶ 103.) Bank of India arranged

---

[7] The Banks allege that Anaya submitted the last Borrowing Base Statement in March 2018. (NYSCEF 187, AC ¶ 98.)

[8] The allegations about the timing of the Antrix loan default are inconsistent. In paragraph 5, the Banks allege Antrix defaulted "[o]n or about May of 2018." (NYSCEF 187, AC ¶ 5.) In paragraph 91, the Banks allege that Antrix defaulted "[i]n or about April of 2018." (*Id.* ¶ 91.) Then, in paragraph 114, the Banks allege that Anaya became liable on the Antrix loan "[i]n early 2017." (*Id.* ¶ 114.)

for an inspection of Anaya's books and records. (*Id.* ¶ 105.) The October 2018 report identified that Anaya's inventory was $31 million as of August 2018. (*Id.* ¶ 108; NYSCEF 203, Field Examination Report at ¶ 2 [Collateral Section].)

On October 22, 2018, the Banks filed this action alleging claims for breach of the BOI Credit Agreement and AB Credit Agreement against Anaya. (*See* NYSCEF 2, Complaint ¶¶ 42-52.) On November 21, 2018, the court appointed a receiver to Anaya. (NYSCEF 187, AC ¶ 111; NYSCEF 77, So-Ordered Stipulation; NYSCEF 78, Order [mot. seq. no. 003].) On May 13, 2021, the court discharged the receiver conditioned upon making certain distributions. (NYSCEF 184, Order Discharging Receiver [mot. seq. no. 007]; NYSCEF 187, AC ¶ 111.) The receiver recovered $3,559,170.11 for the Banks. (*See* NYSCEF 187, AC ¶ 111; NYSCEF 184, Order Discharging Receiver at 2.)

The Banks allege that the information uncovered by the receiver revealed that "not only was Anaya insolvent, but that Anshul [Gandhi], through Anaya and its related entities, conducted a massive fraudulent scheme upon the Banks approximately between early 2017 and March 2018, to avoid his and Anaya's obligations under the Loans and to shed Anaya of most of its remaining value." (NYSCEF 187, AC ¶ 112.) Thus, the Banks filed an amended complaint on December 21, 2022, adding fifteen new defendants, including the movants, and alleging a variety of new causes of action.

Transfer of Assets

Anshul Gandhi and Ajay Gandhi

The Banks allege that between early 2017, when Anaya became liable under the Antrix Loan,[9] and March 2018, Anshul Gandhi and Ajay Gandhi "orchestrated a fraudulent scheme to transfer Anaya merchandise, the entire product sample line, vendor relationships, customers and other proprietary information out of Anaya for the financial benefit of themselves and their family to avoid the obligations owed to the Banks." (*Id.* ¶¶ 112, 114, 244.) Specifically, Anshul Gandhi transferred the assets, including the collateral, to Starlight and ultimately to Super Diamond without the Banks' knowledge and received compensation for the assets. (*Id.* ¶¶ 133, 163, 177-178.) "Meanwhile, Anshul and Ajay used their corporate position to intentionally misrepresent Anaya's business activity and Collateral to the Banks to maintain the Loans." (*Id.* ¶ 246.)

Scheinman & Pasqual

Anshul Gandhi enlisted Scheinman, Anaya's president of sales, and Pasqual, Anaya's vice president of sales and marketing, "to coordinate the transition of customers relationships, samples lines, proprietary information, and inventory from Anaya to Starlight." (*Id.* ¶ 118.) Pasqual "coordinated the false sales of inventory from shell companies such as [defendant DNM Jewelry Inc. (DNM)] and the underreported sales to companies working in concert with Anaya." (*Id.* ¶ 334.) DMN is a shell company controlled by Anshul Gandhi and his family. (*Id.* ¶ 127.) Pasqual "used his personal credit card to purchase the UPC code prefixes that would be used to mask the transfer of merchandise to Super Diamond [Starlight?] that was part of the Collateral"

[9] As discussed *supra*, allegations about the timing of the Antrix Loan default are contradicting.

and he "was reimbursed for his efforts by DNM by check dated June 29, 2018." (*Id.* ¶ 335.) Pasqual also "led Anaya customers to believe Anaya was simply changing its name, first to Starlight and then to Super Diamond, for legitimate purposes and that Anaya would effectively continue under those entities without interruption of business" (*id.* ¶ 336) and together with Scheinman he "coordinated … transfer of the key sales personnel from Anaya to work at Super Diamond." (*Id.* ¶ 340.)

Scheinman additionally assisted Pasqual "in preparing false sales records and the Borrowing Base Statements that were used to misrepresent to the Banks that Anaya was sufficiently collateralized and continuing as a business able to satisfy the Loans." (*Id.* ¶ 347.) Scheinman and Pasqual ultimately took management positions in Super Diamond identical to those they held in Anaya. (*Id.* ¶¶ 341, 347.)

Starlight, Super Diamond & Diagem

The Banks allege that Anaya redirected its inventory to Starlight, an entity created to receive Anaya's inventory, which was unrelated to Anaya and controlled by owners of "SDC."[10] (*Id.* ¶¶ 116, 298.) "SDC and its principals arranged a stream of payments to Anshul [Gandhi] through other entities that he controlled" as compensation

[10] The Banks repeatedly refers to "SDC" as a defendant (NYSCEF 187, AC ¶¶ 68-69, 71) but fail to clarify which of the defendants is so abbreviated. There are no causes of action specifically alleged against "SDC." However, the Banks name defendant "SDC d/b/a SUPER DIAMOND, DNM" in the caption of the amended complaint. (*Id.* at 1.) In the body of the amended complaint, the Banks allege that "Super Diamond was initially founded as a d/b/a of SDC." As discussed *supra*, in the body of the amended complaint, the Banks also refer to "Defendant Super Diamond Jewelry, LLC d/b/a SDC Designs LLC ('Super Diamond')." (*Id.* ¶ 52.) The affidavit of service states "that the party served was Super Diamond Jewelry, LLC named herein as SDC d/b/a Super Diamond." (NYSCEF 226, Affidavit of Service.) The Banks also refer to SDC as a Super Diamond affiliate. (NYSCEF 187, AC ¶ 136.) While the Banks allege that the court has jurisdiction over SDC, again it is unclear which entity is SDC. (*Id.* ¶ 68.)

for "shifting Anaya business to SDC or its affiliates and entities controlled by the owners of SDC." (*Id.* ¶ 125.) Specifically, "SDC utilized its shell company, Diagem, which made a total of $5,575,000 in wire payments to DNM, a shell company controlled by Anshul and the Gandhi family." (*Id.* ¶ 127.) Diagem's payments to DNM started on April 24, 2017, "which corresponded with the initial work to transition the fulfillment of Anaya orders and transfer of Anaya relationships to Starlight." (*Id.* ¶ 129.) "[T]he plan to transition the Anya business and assets to Starlight was [subsequently] modified so that all of those invoices, business, and relationships were then transferred over to Super Diamond" (*id.* ¶ 133), a SDC affiliate controlled by SDC's principals. (*Id.* ¶¶ 136, 307.) "In late 2017, Anaya began transitioning key employees—all of whom were still on Anaya's books and payroll—to exclusively work on customer orders and vendor relationships transferred to Starlight … and, ultimately, Super Diamond." (*Id.* ¶ 145.) The employees were "eventually put on Super Diamond payroll and paid the same amounts they were paid at Anaya." (*Id.* ¶ 146.)

The Banks allege that "SDC recognized that its participation in these transactions might result in the Banks taking legal action against it or its affiliates." (*Id.* ¶ 136.) "SDC demanded that Anaya provide to it additional collateral as security in the event that Bank of India and the other Banks demanded return or repayment for the fraudulently transferred collateral." (*Id.* ¶ 137.) "Anaya transferred an additional $3.8 million worth of inventory for SDC to hold as 'security' in the event the Banks discovered the fraudulent payments scheme for the transfer of business." (*Id.* ¶ 138.) "After Anshul [Gandhi] had completed transferring most of Anaya's valuable assets to Super Diamond, SDC returned the security collateral to Anaya on September 20, 2018—a

month before the Banks initiated this legal action seeking a receiver to take over Anaya." (*Id*. ¶ 140.)

Manjusaka

Prior to the alleged fraudulent scheme, Anaya owed Manjusaka, a Hong Kong manufacturing company, approximately $5.3 million through open accounts receivable. (*Id*. ¶¶ 56, 148.) In January 2018, Anaya shipped Manjusaka its sample line "and valued the 'inventory' at $3,242,506." (*Id*. ¶ 150.) "The sample line is, in effect, the 'product line' of the company." (*Id*. ¶ 160.) "The true value of the sample line … vastly exceeded the value of the Anaya debt to Manjusaka." (*Id*. ¶ 156.) Manjusaka did not credit the sample line against Anaya's balance but sent a letter "accep[ting] the merchandise return of USD $3,242,506 from Anaya Gems against the outstanding balance owed." (NYSCEF 209, Manjusaka letter; *see also* NYSCEF 187, AC ¶ 151.) "This letter was simply a cover in case the Banks questioned the invoices reflecting the product sample line and Anaya accordingly transferred the amount from receivables to payables to reduce the amount owed to Manjusaka on Anaya's books." (NYSCEF 187, AC ¶ 152.) Manjusaka sold the sample line to Super Diamond for $1.8 million and at Super Diamond's instructions reduced the outstanding Anaya balance by that amount. (*Id*. ¶¶ 157-158.) Manjusaka then filed a $3.7 million insurance claim for Anaya's outstanding accounts receivable and recovered the loss. (*Id*. ¶¶ 171-172, 362.) The

Banks allege that "Manjusaka acted as a 'fence' through which the merchandise and the sample line would pass from Anaya … to Super Diamond." (*Id.* ¶ 166.)

Claims

As against the moving defendants, the Banks allege the following claims: breach of the Anaya loan guaranty against Anshul Gandhi (*id.* ¶¶ 213-218), fraud against Anshul Gandhi (*id.* ¶¶ 243-248), conspiracy and civil RICO[11] against Anshul Gandhi, Pasqual, Scheinman, Manjusaka, and Diagem (*id.* ¶¶ 249-279, 290-296), aiding and abetting fraud against Pasqual, Scheinman, Manjusaka, Diagem, Starlight and Super Diamond (*id.* ¶¶ 297-311, 321-363), conversion against Super Diamond (*id.* ¶¶ 285-393), and breach of fiduciary duty against Pasqual and Scheinman. (*Id.* ¶¶ 394-407.)

Discussion

On a CPLR 3211 (a) (7) motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].) However, "a court may consider any factual submissions made in opposition to a motion

[11] The conspiracy and civil RICO and claims are alleged in one cause of action but plead in the alternative. (*See* NYSCEF 264, Opp MOL at 15 [mot. seq. no. 009] [NYSCEF pagination].) The Banks clarify that they allege conspiracy in connection with the alleged scheme to defraud the Banks, not conspiracy to violate RICO. (*See id.* at 16; NYSCEF 290, tr at 61:17 ["The common law conspiracy is not [RICO] conspiracy"].)

to dismiss in order to remedy pleading defects." (*Quinones v Schaap*, 91 AD3d 739, 740 [2d Dept 2012] [citations omitted].)

Motion Seq. 008 – Pasqual and Scheinman's Motion to Dismiss

Civil RICO (18 USC §§ 1961-1968)[12]

"The Racketeer Influenced and Corrupt Organizations Act (RICO or Act), 18 U.S.C. §§ 1961-1968, provides a private right of action for treble damages to '[a]ny person injured in his business or property by reason of a violation' of the Act's criminal prohibitions." (*Bridge v Phoenix Bond & Indem. Co.*, 553 US 639, 641 [2008] [citation omitted].) "Section 1962 contains RICO's criminal prohibitions." (*Id.* at 647.) One such prohibition states that

> "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (18 USC § 1962 [c].)

Accordingly, "[t]o establish a civil RICO claim for violation of Section 1962(c), a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." (*Azrielli v Cohen Law Offs.*, 21 F3d 512, 520 [2d Cir 1994] [internal quotation marks and citation omitted].) "RICO claims must be pleaded with particularity." (*Robbins MBW Corp. v Ashkenazy*, 228 AD2d 357, 359 [1st Dept 1996].)

---

[12] Although the Banks do not specify in the amended complaint the RICO provision that defendants allegedly violated, the Banks' opposition memorandum makes it clear that they allege violations of 18 USC 1962 (c). (*See* NYSCEF 263, Opp MOL at 12-14 [mot. seq. no. 008] [NYSCEF pagination].)

"In considering RICO claims, courts must attempt to achieve results consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime." (*Schmidt v Fleet Bank*, 16 F Supp 2d 340, 346 [SD NY 1998] [internal quotation marks and citation omitted].)

> "RICO ... is an unusually potent weapon, sometimes referred to as the litigation equivalent of a thermonuclear device.... Accordingly, courts ... have warned that putative civil RICO claims that are nothing more than sheep masquerading in wolves' clothing, or ordinary fraud cases clothed in the Emperor's trendy garb should be flush[ed] out at early stages of the litigation." (*Cedar Swamp Holdings, Inc. v Zaman*, 487 F Supp 2d 444, 449 [SD NY 2007] [internal quotation marks and citations omitted].)

1. Enterprise

Pasqual and Scheinman argue that the Banks fail to allege a RICO enterprise. An enterprise is defined to include "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 USC § 1961 [4].) "[A] RICO enterprise is 'a group of persons associated together for a common purpose of engaging in a course of conduct,' the existence of which is proven 'by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" (*First Capital Asset Mgt. v Satinwood, Inc.*, 385 F3d 159, 173 [2d Cir 2004], quoting *United States v Turkette*, 452 US 576 [1981].) "[T]o state a claim under RICO, a Plaintiff must allege and prove the existence of an enterprise which is separate and distinct from the alleged pattern of racketeering activity." (*Goldfine v Sichenzia*, 118 F Supp 2d 392, 400 [SD NY 2000] [internal questions marks and citation omitted]; *see also United States v Turkette*, 452 US at 583 ["The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in

which it engages"].) Thus, if "the alleged enterprise would not exist but for the alleged pattern of racketeering activity," the claim must be dismissed. (*Id.*) The enterprise must also be "distinct from the person conducting the affairs of the enterprise." (*First Capital Asset Mgt., Inc.*, 385 F3d at 173 [citations omitted].)

The U.S. Supreme Court confirmed that an "association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., must have 'an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.'" (*Boyle v United States*, 556 US 938, 940-941 [2009] [citation omitted].)

> "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose. That an 'enterprise' must have a purpose is apparent from the meaning of the term in ordinary usage, i.e., a 'venture,' 'undertaking,' or "project.' The concept of 'associat[ion]' requires both interpersonal relationships and a common interest. Section 1962(c) reinforces this conclusion and also shows that an 'enterprise' must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had 'affairs' of sufficient duration to permit an associate to 'participate' in those affairs through 'a pattern of racketeering activity.'" (*Id.* at 946 [citations omitted].)

Here, the Banks allege, in sum and substance, that between early 2017 and March 2018, Anshul Gandhi and Ajay Gandhi orchestrated and other defendants, including Pasqual and Scheinman,[13] carried out a scheme to defraud the Banks by secretly transferring Anaya's assets, including the collateral, to remove the assets from the reach of Banks, all for the financial benefit of the Gandhi family. (*See e.g.* NYSCEF

[13] The civil RICO claim is alleged against Anshul Gandhi, Ajay Gandhi, Pasqual, Scheinman, Manjusaka, and Diagem, as well as non-moving defendants Mars Venture Limited and Sino Sterling. (NYSCEF 187, AC ¶¶ 249-296.)

187, AC ¶¶ 250, 257, 265.) The Banks heavily rely on the single allegation that "Anshul and his co-conspirators' fraudulent scheme involved conduct that defrauded the United States Government through underreporting the value of imported jewelry and resulted in the United States Attorneys' Office … bringing a civil action against Anshul, Anaya, and many of the other Defendants."[14] (NYSCEF 187, AC ¶ 113.) To support this allegation, the Banks attach the United States Government's Complaint-in-Intervention as an exhibit to the amended complaint.

In July 2020, the United States Government filed a Complaint-in-Intervention against Anaya and Anshul Gandhi seeking damages and civil penalties "for defraud[ing] the United States by materially underreporting to U.S. Customs and Border Protection (CBP) … the value of jewelry … imported from Hong Kong and Thailand, and submitted, or caused to be submitted, false entry summaries and invoices to CBP to avoid paying customs." (NYSCEF 204, Complaint-in-Intervention ¶ 1.) The Banks assert that the allegations of the Complaint-in-Intervention establish that Pasqual and Scheinman were part of a pre-existing enterprise, existing as far back as 2014, whose purpose was to import and export and sell jewelry but was also used to effectuate fraudulent schemes. (*See* NYSCEEF 263, Opp MOL at 13 ["as the [Complaint-in-Intervention] demonstrates, many of the Defendants herein, including those directly linked to [Pasqual's and Scheinman's] tortious conduct against the Banks herein (e.g., Manjusaka, DNM, Ajay Gandhi, Super Diamond), were an enterprise by association of

[14] Contrary to the Banks' allegation that the federal action was against "Anshul, Anaya, and many of the other Defendants," only Anaya and Anshul Gandhi are named defendants in the civil action filed by the United States Attorneys' Office (SDNY). (*See* NYSCEF 204, Complaint-in-Intervention ¶ 1.)

entities and individuals since prior to April 2014 and continuing today. With respect to [Pasqual and Scheinman], their tortious conduct against the Banks to divest Defendant Anaya of its value … was the same pattern of wire fraud underlying the allegations in [the Complaint-in-Intervention]. Thus, the fraudulent scheme against the Banks, specifically the knowing participation of [Pasqual and Scheinman], was possible only because of the pre-existing enterprise of these Gandhi family closely-held entities comprising the Defendants herein."].)

The enterprise alleged in this action is an association "in fact" and "not a legal entity." (18 USC § 1961 [4].) Despite the Banks' contentions, the allegations in the Complaint-in-Intervention are also insufficient to support their claim of a RICO enterprise. The Complaint-in-Intervention focuses on the alleged fraudulent conduct of Anaya and Anshul Gandhi of underreporting the value of jewelry and submitting false information to the United States Government; conduct that did not even involve Pasqual and Scheinman. The Banks are now asserting Pasqual and Scheinman joined the enterprise and committed other acts of fraud against the Banks.

"As to the purpose requirement, a plaintiff must demonstrate that the members of the association 'share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.'" (*Zamora v Fit Intl. Group Corp.*, 834 F Appx 622, 625 [2d Cir 2020] [citation omitted].) The allegations in the amended complaint and Complaint-in-Intervention fall woefully short of sufficiently pleading an association in fact enterprise.

First, the Banks fail to allege the defendants are "connected in some overarching way." (*D'Addario v D'Addario*, 901 F3d 80, 101 [2d Cir 2018].) "[A] group of individuals

related by a structure that mimics so-called 'rimless hub-and-spoke' conspiracies cannot be considered a RICO association-in-fact." (*Id.* [citations omitted].) Even when the U.S. government's allegations are coupled with the Banks' allegations in the amended complaint, the Banks fail to plead sufficient facts to allege a RICO enterprise. "Proof that 'several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates, . . . [is] not . . . enough to show that the individuals were members of an enterprise.'" (*Id.* [citations omitted].) Here, "'[t]he only common factor that linked' the individually named defendants 'and defined them as a distinct group was their direct or indirect participation' in the engineered investment scheme to defraud the [Banks]." (*Crest Constr. II, Inc. v Doe*, 660 F3d 346, 355 [8th Cir 2011] [citations omitted].) This is insufficient. "[A] plaintiff [is required] to 'allege something more than the fact that individuals were all engaged in the same type of illicit conduct during the same time period.'" (*Azima v Dechert LLP*, 2024 US Dist LEXIS 176048, at *41 [SDNY Sep. 26, 2024, No. 22-CV-8728 (PGG) (JW)] [citation omitted].)

Further, the Banks fail to allege any association beyond or separate from the alleged scheme to defraud the Banks. (*See Goldfine*, 118 F Supp 2d at 400; *Schmidt v Fleet Bank*, 16 F Supp 2d 340, 349 [SD NY 1998] ["the enterprise cannot simply be … the minimal association which surrounds the [pattern racketeering] acts" (internal quotation marks and citation omitted)].) It follows from Banks' allegations that no enterprise "would … exist if the [alleged conduct was] removed from the equation." (*Schmidt*, 16 F Supp 2d at 349 [internal quotation marks and citation omitted].) Moreover, no purpose of the purported enterprise other than to defraud the Banks is alleged. (*See Goldfine*, 118 F Supp 2d at 401 ["in a fraud-based RICO claim, if the sole

purpose of the alleged enterprise is to perpetrate the alleged fraud, there can be no enterprise for RICO purposes"].)

Second, the amended complaint also lacks "any 'specific factual allegation[s] about the intent' of" Pasqual and Scheinman. (*D. Penguin Bros. v City Natl. Bank*, 587 F App'x 663, 668 [2d Cir 2014] [citations omitted].) Thus, the Banks fail to allege an existence of an enterprise, which is fatal for their civil RICO claim.

As the Banks' allegations are woefully insufficient to plead an enterprise, they are not entitled to discovery on the details of the purported enterprise's "hierarchy, organization, and activities" as they assert in their opposition. (NYSCEF 263, Opp MOL at 14; *see e.g. Giannacopolous v Credit Suisse*, 965 F Supp 549, 553 [SD NY 1997] ["plaintiff's argument that he is entitled to conduct a 'fishing expedition' in the absence of any evidence that there has been a pattern of racketeering activity is unfounded in the law" (citations omitted)].)

2. Pattern of Racketeering Activity

The Banks also fail to sufficiently allege a pattern of racketeering activity.

> "To be liable under the RICO statute, a defendant must commit at least two acts of racketeering activity. The statute broadly defines 'racketeering activity' to encompass a variety of state and federal offenses including, inter alia, murder, kidnapping, gambling, arson, robbery, bribery and extortion." (*Black v Ganieva*, 619 F Supp 3d 309, 337 [SD NY 2022] [internal quotation marks and citations omitted]; *see* 18 USC § 1961 [1] [defining "racketeering activity"].)

> "Racketeering activities must amount to or pose a threat of continued criminal activity. To meet this so-called 'continuity' requirement, a plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." (*Grace Intl Assembly of God v Festa*, 797 Fed Appx 603, 605 [2d Cir 2019] [internal quotation marks and citations omitted], *cert denied* 141 S Ct 358 [2020].)

The Banks allege that Pasqual and Scheinman "were responsible for transitioning the lines of business and customer relationships away from Anaya to Starlight" as part of the scheme to divert Anaya's assets. (NYSCEF 187, AC ¶¶ 120, 123.) This not adequate to establish predicate criminal acts defendants committed that would constitute a continuous pattern of racketeering activity under the statute. The Banks reference a "pattern of wire fraud" in their opposition, but do not specifically allege such in the amended complaint.

Further, "[t]o satisfy closed-ended continuity, the plaintiff must prove 'a series of related predicates extending over a substantial period of time.'" (*Spool v World Child Intl. Adoption Agency*, 520 F3d 178, 184 [2d Cir 2008] [citation omitted].) "The relevant period, moreover, is the time during which RICO predicate activity occurred, not the time during which the underlying scheme operated, or the underlying dispute took place." (*Id.* [citations omitted].) Courts rarely find that a time period of less than two years "establishes closed-ended continuity, particularly where, … '[t]he activities alleged involved only a handful of participants' and do not involve a 'complex, multi-faceted conspiracy.'" (*Id.* [citations omitted].) Here, the Banks allege that the illicit conduct of defrauding the Banks occurred "between early 2017 and March 2018." (NYSCEF 187, AC ¶¶ 112.) This is not a substantial period of time to satisfy closed-ended continuity.

Accordingly, the civil RICO claim is dismissed without prejudice with leave to replead. The Banks, however, are reminded that "[p]laintiffs' burden is high when pleading RICO allegations as [c]ourts look with particular scrutiny at claims for a civil RICO, given RICO's damaging effects on the reputations of individuals alleged to be engaged in RICO enterprises and conspiracies." (*LGN Intl., LLC v Hylan Asset Mgt.*

LLC, 2023 WL 3570444, *5, 2023 US Dist LEXIS 88032, *13 [WD NY, May 19, 2023, No. 21-CV-940S] [internal quotation marks and citation omitted].)

Conspiracy

Pasqual and Scheinman's argument regarding the conspiracy claim was first raised on reply, and thus, will not be considered. (*See Fetahu v New Jersey Tr. Corp.*, 197 AD3d 1065, 1066 [1st Dept 2021].)

Aiding and Abetting Fraud

To plead aiding and abetting fraud, a plaintiff "must allege: '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud.'" (*Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [citation omitted], *lv denied* 13 NY3d 709 [2009].) Although an aiding and abetting fraud claim is subject to the heightened pleading standard of CPLR 3016 (b) (*see Oster v Kirschner*, 77 AD3d 51, 52 [1st Dept 2010]),

> "actual knowledge need only be pleaded generally, cognizant, particularly at the prediscovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind. Participants in a fraud do not affirmatively declare to the world that they are engaged in the perpetration of a fraud.... an intent to commit fraud is to be divined from surrounding circumstances." (*Id.* at 55-56 [citation omitted]; *see also Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476 ["[a]ctual knowledge of the fraud may be averred generally" (internal quotation marks and citation omitted)].)

"Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." (*Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476 [internal quotation marks and citation omitted].)

The underlying fraud is by Anshul Gandhi and Ajay Gandhi who allegedly "orchestrated a fraudulent scheme to transfer Anaya merchandise, the entire product sample line, vendor relationships, customers and other proprietary information out of Anaya for the financial benefit of themselves and their family to avoid the obligations owed to the Banks" (NYSCEF 187, AC ¶ 244) while misrepresenting to the Banks Anaya's financial health "through fake invoices, inaccurate inventory reports, and false borrowing statements to the Banks." (*Id.* ¶ 245.)

Pasqual and Scheinman argue that there are no allegations of their knowledge of the underlying fraud. The court disagrees. The Banks allege that Pasqual was Anaya's vice president of sales and Scheinman was Anaya's President of Sales (NYSCEF 187, AC ¶ 118) and that they both were aware of the terms of the loans and participated in transferring Anaya's assets, including the collateral, and prepared false sales records and the Borrowing Base Statements. (*See e.g.* NYSCEF 187, AC ¶¶ 332, 344, 347.) In light of these allegations, Pasqual and Scheinman's knowledge of Anshul Gandhi's fraudulent plan and intent to aid in it can be inferred at this pre-discovery stage.[15] (*See Bankers Conseco Life Ins. Co. v Egan-Jones Ratings Co.*, 193 AD3d 539, 540 [1st Dept 2021] ["The amended complaint adequately alleges defendant's actual knowledge of the fraud based on allegations of conduct and surrounding circumstances from which its knowledge of the fraud may be inferred, which is all that is required at this prediscovery stage" (citations omitted)]; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010] ["at this early stage of the litigation, plaintiffs are entitled to the most

[15] Though the court appointed a receiver for Anaya, there is no indication that the Banks obtained evidence of Pasqual and Scheinman's knowledge of the fraud, so as to require more detailed allegations of actual knowledge.

favorable inferences, including inferences arising from the positions and responsibilities of defendants" (citation omitted)]; *Pludeman v N. Leasing Sys., Inc.*, 40 AD3d 366, 367 [1st Dept 2007] ["At this early juncture, according plaintiffs' complaint the most favorable inferences, one can readily deduce, given the corporate positions and titles of the individual defendants, that these individuals actually operate the day-to-day business of corporate defendant, and consequently were involved in or knew about the alleged fraudulent concealment of most of the lease"], *affd* 10 NY3d 486 [2008].)

The same factual allegations of Pasqual and Scheinman's involvement in fraud (see *e.g.* NYSCEF 187, AC ¶¶ 332, 344, 347) demonstrate that their conduct exceeded routine business services by sales executives. (*Cf. McBride v KPMG Intl.*, 135 AD3d 576, 579 [1st Dept 2016] ["substantial assistance 'means more than just performing routine business services for the alleged fraudster'" and "[a] bank's allowing its customer to transfer money from its account is a routine business service" (citations omitted)].) The claim for aiding and abetting fraud is sustained.

Breach of Fiduciary Duty

Pasqual and Scheinman argue that the Banks cannot allege a breach of fiduciary duty claim against them as Anaya's officers. Indeed, the Banks allege that Pasqual and Scheinman owed and breached their fiduciary duties to Anaya, not the Banks. (*See* NYSCEF 187, AC ¶¶ 395-397, 402-404.) In opposition, the Banks fail to address this argument. Instead, the Banks argue that as creditors of Anaya, an insolvent entity, they have a direct claim for breach of fiduciary duty against Pasqual and Scheinman.

As a preliminary matter, the Banks fail to allege the existence of fiduciary relationship between Pasqual and Scheinman, on one hand, and the Banks, on the

other hand. In any event, "[t]here is generally no fiduciary obligation in a contractual arm's length relationship between a debtor and a note-holding creditor." (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 593 [2012] [internal quotation marks and citations omitted], *rearg denied* 19 NY3d 1065 [2012].) Here, "[t]he sole theory underlying plaintiff[s'] breach of fiduciary duty claim … [is] the so-called 'trust fund doctrine,' under which persons in control of an insolvent corporation must hold the corporation's remaining assets in trust for the benefit of its creditors." (*Aldoro, Inc. v Gold Force Intl. Ltd.*, 52 AD3d 223, 224 [1st Dept 2008], citing *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549-50 [2000].) The trust fund doctrine, however, "cannot be invoked by a 'simple contract creditor' like plaintiff[s], who ha[ve] not yet obtained a judgment on the debt and had execution returned unsatisfied." (*Id.*) Thus, even if the breach of fiduciary duty claim was sufficiently pleaded, it would be premature. The breach of fiduciary duty claim is dismissed without prejudice.

Motion seq. 009 – Starlight, Super Diamond and Diagem's Motion to Dismiss

Civil RICO (18 USC §§ 1961-1968) against Diagem

Starlight, Super Diamond and Diagem argue that the Banks failed to plead an enterprise and a pattern of racketeering activity. They further argue that even if these elements are sufficiently pleaded, the nature of Diagem's participation in any enterprise is not alleged.

As discussed *supra*, the Banks fail to allege a RICO enterprise and a pattern of racketeering activity. The civil RICO claim is dismissed without prejudice with leave to replead.

Aiding and Abetting Fraud against Starlight, Super Diamond and Diagem

Starlight, Super Diamond and Diagem argue that the Banks fail to plead these defendants' knowledge of the underlying fraud. The court agrees. The Banks allege that Starlight and Super Diamond "had knowledge of the scheme because [they were] controlled by the principals of SDC, who were very aware of the Banks' secured interests related to the Loans due to the UCC filing statements." (NYSCEF 187, AC ¶¶ 300, 307.)[16] The Banks acknowledge that Starlight is "an unrelated [to Anaya] company controlled by the owners of SDC" (*id*. ¶ 116) and that Super Diamond is SDC's affiliate. (*Id*. ¶ 136). There are no allegations that SDC's owners are affiliated with Anaya or Anshul Gandhi. As to Diagem, there are no allegations of its knowledge of the fraud other than that it "was a shell company controlled by the principals of SDC and Super Diamond." (*Id*. ¶ 322.) These allegations are insufficient to plead Starlight, Super Diamond and Diagem's actual knowledge of Anshul Gandhi and Ajay Gandhi's alleged scheme to misrepresenting to the Banks Anaya's financial health while siphoning Anaya's assets. Likewise, the factual allegations about these defendants' conduct – in sum, that Starlight and Super Diamond received Anaya's assets and Diagem paid for

[16] The Banks allege that the asset transfer to Super Diamond was complete by September 20, 2018. (*See* NYSCEF 187, AC ¶ 140.) Bank of India's UCC financing statement is stamped August 28, 2008. (NYSCEF 197, UCC filings at 3-4 [NYSCEF pagination].) Allahabad Bank's UCC financing statement, however, is stamped October 19, 2018 (*id*. at 5-6), i.e., after the asset transfer was complete. Thus, the allegation that SDC principals at the time of the alleged scheme were aware of Allahabad Bank's security interest based on Allahabad Bank's UCC financing statement is contradictory.

such assets to Anshul Gandhi's entity – do not support an inference that Starlight, Super Diamond and Diagem knew of the alleged fraudulent scheme.

The allegations that principals of SDC were aware of the Banks' secured interests in certain assets due to the UCC filing statements "amount to, at best, constructive knowledge, which is insufficient to support an aiding and abetting fraud claim." (*Lumen at White Plains, LLC v Stern*, 135 AD3d 600, 600 [1st Dept 2016] [citation omitted].) Moreover, as to Allahabad Bank, its UCC financing statement was filed after the asset transfer was complete. (*See supra* at 20 n 18.) The aiding and abetting fraud claim is dismissed without prejudice with leave to replead.

Conversion against Super Diamond

Starlight, Super Diamond and Diagem argue that the conversion claim is subject to a three-year statute of limitation and is time-barred.[17] The Banks argue that the six-year statute of limitation applies.

Generally, "[a]n action for conversion is subject to a three-year limitation period [of CPLR 214 (3)] …. The cause of action normally accrues on the date the conversion takes place and not the date of discovery or the exercise of diligence to discover." (*Maya NY, LLC v Hagler*, 106 AD3d 583, 585 [1st Dept 2013] [citations omitted]; *see* CPLR 214 [3] ["The following actions must be commenced within three years … an action to recover a chattel or damages for the taking or detaining of a chattel"].) "However, when the allegations of fraud are essential to a cause of action alleging

[17] Although Starlight, Super Diamond and Diagem's Notice of Motion does not seek to dismiss the conversion claim as time-barred pursuant to CPLR 3211 (a) (5) (NYSCEF 237, Notice of Motion), these defendants seek such relief in their moving brief. The Banks have addressed the statute of limitations argument in the opposition brief.

conversion based upon actual fraud, the cause of action is governed by the [six-year] limitations period for fraud set forth in CPLR 213 (8)." (*Star Auto Sales of Queens, LLC v Filardo*, 203 AD3d 865, 867-868 [2d Dept 2022] [citations omitted]; *see* CPLR 213 [8] ["The following actions must be commenced within six years … an action based upon fraud"].)

The Banks allege that Super Diamond received Anaya's assets, which included collateral (*see* NYSCEF 187, AC ¶¶ 386-387), "exerted possessory right to the Collateral in derogation of the Banks' secured interest in the same, and despite Super Diamond' knowledge of the Banks' rights," (*id*. ¶ 391) refused to return the collateral to the Banks. (*Id*. ¶ 392.) Because the gravamen of the conversion claim is Super Diamond's alleged receipt and retention of the collateral, the three-year statute of limitation is applicable. The alleged conversion by Super Diamond is not based upon any fraud by Super Diamond. Indeed, as discussed *supra*, the Banks failed to allege a fraud-based aiding and abetting claim against Super Diamond due to lack of actual knowledge allegations.

Although the dates of the alleged asset transfers to Super Diamond are not specified, the Banks allege that "[a]fter Anshul had completed transferring most of Anaya's valuable assets to Super Diamond, SDC returned the security collateral to Anaya on September 20, 2018." (*Id*. ¶ 140.) Thus, the conversion took place no later than September 20, 2018. As the amended complaint was filed on December 21, 2022,

which is outside of the three-year limitation period, this claim is untimely. Thus, the conversion claim is dismissed with prejudice.

Conspiracy against Diagem[18]

"The allegation of a civil conspiracy, without more, does not in and of itself give rise to a cause of action. The actionable wrong lies in the commission of a tortious act, or a legal one by wrongful means, but never upon the agreement to commit the prohibited act standing alone." (*Hoag v Chancellor*, 246 AD2d 224, 230 [1st Dept 1998] [internal quotation marks and citation omitted].) "[A]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [internal quotation marks and citation omitted].)

Accordingly, the cause of action alleging conspiracy is dismissed with prejudice. The allegations of conspiracy, if any, will be "deemed part of the remaining causes of action to which they are relevant," if repleaded. (*Hoag*, 246 AD2d at 230.)

Motion seq. 011 – Anshul Gandhi's Motion to Dismiss

Anshul Gandhi moves to dismiss the conspiracy and civil RICO claims. He submits an attorney affirmation incorporating by reference certain arguments set forth in the briefs submitted in support of motions sequence 008 and 009.

The civil RICO claim is dismissed for the reasons discussed *supra* without prejudice with leave to replead. The conspiracy claim is dismissed for the reasons

[18] In their opposition brief, the Banks refer to conspiracy claim as being alleged against Starlight, Super Diamond and Diagem (NYSCEF 264, Opp MOL at 15 [NYSCEF pagination].) The court notes that the conspiracy claim is alleged against Diagem, but not against Starlight or Super Diamond. (NYSCEF 187, AC ¶¶ 290-296.)

discussed *supra* with prejudice. The allegations of conspiracy, if any, will be "deemed part of the remaining causes of action to which they are relevant." (*Id.*)

Motion seq. 012 – Manjusaka's Motion to Dismiss

Civil RICO (18 USC §§ 1961-1968)

Manjusaka argues that the Banks fail to plead an enterprise and that Manjusaka engaged in a pattern of racketeering activity. As discussed *supra*, the Banks fail to allege a RICO enterprise and they fail to adequately address the remaining arguments. The civil RICO claim is dismissed without prejudice with leave to replead.

Aiding and Abetting Fraud

1. Substantial Assistance

In light of the Banks' allegations that Anshul Gandhi and Ajay Gandhi perpetrated fraud by siphoning Anaya's assets while misrepresenting its financial health to the Banks, the allegations of Manjusaka's involvement rise to the level of substantial assistance. Indeed, it is alleged that Manjusaka accepted the sample line from Anaya and sold it to Super Diamond for a fraction of its value, thus "fencing" or transferring the sample line. (*See e.g.* NYSCEF 187, AC ¶¶ 150, 157; *see U.S. Tsubaki Holdings, Inc. v Estes*, 194 AD3d 590, 591 [1st Dept 2021] ["The 'substantial assistance' prong need not be very great and can be met by as little as 'implor[ing]' the active tortfeasor to effect the fraud" (citation omitted)].)

The allegations that the sample line was worth more than $5.3 million but was sold by Manjusaka to Super Diamond for $1.8 million (NYSCEF 187, AC ¶¶ 148, 154, 156) defeats Manjusaka's argument that Manjusaka was merely involved in an ordinary business transaction which cannot constitute substantial assistance. (*Cf. McBride*, 135

AD3d at 579 ["substantial assistance 'means more than just performing routine business services for the alleged fraudster'" and "[a] bank's allowing its customer to transfer money from its account is a routine business service" (citations omitted)].)

2. Actual Knowledge

The Banks, however, fail to allege Manjusaka's actual knowledge of the underlying fraud. Manjusaka was a manufacturer to whom Anaya owed approximately $5.3 million through open accounts receivable. (NYSCEF 187, AC ¶¶ 56, 148.) Manjusaka's knowledge of the alleged fraud by Anshul Gandhi and Ajay Gandhi cannot be inferred from the factual allegations, which in sum are that Manjusaka (i) accepted the sample line from Anaya as return of merchandise without crediting the same against Anaya's balance but sent a letter "accep[ting] the merchandise return of USD $3,242,506 from Anaya Gems against the outstanding balance owed" (NYSCEF 209, Manjusaka letter; *see* NYSCEF 187, AC ¶¶ 151, 356), (ii) sold the sample line to Super Diamond for $1.8 million (NYSCEF 187, AC ¶¶ 157, 356), (iii) used the proceeds to reduce Anaya's outstanding debt (*id*. ¶¶ 158, 361), and then (iv) filed a $3.7 million insurance claim to recover the outstanding Anaya accounts receivable. (*Id*. ¶¶ 171, 363.)

The allegations that Manjusaka "never recorded the 'accepted' merchandise in its records as a credit against the Anaya receivables, despite sending a letter to Anaya claiming this merchandise was a credit" (*id*. ¶ 358) likewise does not allow an inference of actual knowledge of the underlying scheme to defraud the Banks. Finally, conclusory allegations are insufficient to plead actual knowledge. (*See e.g. id*. ¶ 167; *see Roni LLC v Arfa*, 72 AD3d 413, 414 [1st Dept 2010] [conclusory allegations are insufficient to

plead aider and abettor's actual knowledge (internal quotation marks and citation omitted)].) The affidavit of the receiver submitted with the Banks' opposition brief does not remedy the pleading deficiency as to the actual knowledge element. (*See* NYSCEF 280, John C. Esposito aff ¶¶ 12-17.) The aiding and abetting fraud claim is dismissed without prejudice with leave to replead.

Conspiracy

The conspiracy claim is dismissed for the reasons discussed *supra* with prejudice. The allegations of conspiracy, if any, will be "deemed part of the remaining causes of action to which they are relevant," if repleaded. (*Hoag*, 246 AD2d at 230.)

The court has considered the parties' remaining arguments relating to motions sequence 008, 009, 011, and 012 and finds that they do not affect the outcome.

Accordingly, it is

ORDERED that Michael Pasqual and Michael Scheinman's motion (seq. no. 008) is granted, in part, to the extent that civil RICO and breach of fiduciary duty claims are dismissed without prejudice; the balance of the motion is denied; and it is further

ORDERED that Starlight Designs, LLC, Super Diamond Jewelry, LLC, and Diagem, Inc.'s motion to dismiss (seq. no. 009) is granted and civil RICO and aiding and abetting fraud claims are dismissed without prejudice and conspiracy and conversion claims are dismissed with prejudice; and it is further

ORDERED that Anshul Gandhi's motion to dismiss (seq. no. 011) is granted and the civil RICO claim is dismissed without prejudice and conspiracy claim is dismissed with prejudice; and it is further

ORDERED that Manjusaka Jewelers Co. Limited's motion to dismiss (seq. no. 012) is granted and civil RICO and aiding and abetting fraud claims are dismissed without prejudice and conspiracy claim is dismissed with prejudice; and it is further

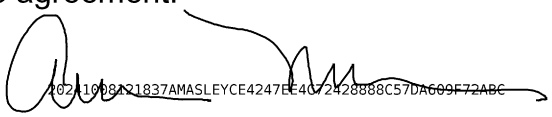
ORDERED that Bank of India, New York Branch and Allahabad Bank, Hong Kong Branch are granted leave to serve and file an amended complaint in which the claims for civil RICO and aiding and abetting fraud, which were dismissed without prejudice *supra*, may replead consistent with CPLR 3016 (b); and it is further

ORDERED that the amended complaint shall be served and filed within 20 days after service on Bank of India, New York Branch and Allahabad Bank, Hong Kong Branch's counsel of a copy of this order with notice of entry; and it is further

ORDERED that in the event that Bank of India, New York Branch and Allahabad Bank, Hong Kong Branch fail to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the following claims shall be dismissed with prejudice: (i) civil RICO against Michael Pasqual and Michael Scheinman, (ii) civil RICO against Diagem, Inc., (iii) aiding and abetting fraud against Starlight Designs, LLC, Super Diamond Jewelry, LLC, and Diagem, Inc., (iv) civil RICO against Anshul Gandhi, and (v) civil RICO and aiding and abetting fraud against Manjusaka Jewelers Co. Limited; and it is further

ORDERED that moving defendants shall move or otherwise answer the amended complaint, if served, within 20 days of that service, or if not served, answer the existing complaint within 40 days of service of a copy of this order with notice of entry to the extent of the claims sustained; and it is further

ORDERED that by October 22, 2024, the parties shall submit a joint preliminary conference order or competing orders if there is no agreement.



10/8/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE