UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No.: 18-21924-CIV-MORENO/LOUIS

WORLDSPAN MARINE INC., a Canadian corporation, CSPAN FINANCIAL, LLC, a Florida limited liability company, and WEDMORE FINANCIAL, LLC, a Florida limited liability company,

Plaintiffs,

v.

COMERICA BANK, a Texas banking Association, KURT YOUNKER, an Individual, BARRY SHAW, an individual, CYNTHIA JONES, an individual, HARRY SARGEANT III, an individual, DEBORAH SARGEANT, an individual, MERVYN MONGER, an individual, and KEVIN KIRKEID, an individual,

Defendants.
_____/

REPORT AND RECOMMENDATIONS

This cause comes before the Court upon Defendants, Comerica Bank, Barry Shaw, Cynthia Jones, and the Estate of Kurt Younker's[1] Motion to Dismiss the Complaint (ECF No. 115); and Defendants, Harry Sargeant III, Deborah Sargeant, Mervyn Monger, and Kevin Kirkeide's[2] Motion to Dismiss the Complaint (ECF No. 116). These matters were referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge

[1] Collectively, "Comerica Defendants."
[2] Collectively, "Sargeant Defendants."

Rules of the Local Rules of the Southern District of Florida, by the Honorable Federico A. Moreno, United States District Judge for a Report and Recommendation (ECF No. 64). Having carefully considered the Motions, the record as a whole, and being otherwise fully advised in the premises, the undersigned recommends that Defendants' Motions be **GRANTED**. Because Plaintiffs have now had multiple opportunities to allege their claims against these Defendants but failed to cure the deficiencies previously identified in their original complaint, I recommend that dismissal be without leave to amend.

I. BACKGROUND

A. Factual Background

The following facts are derived from Plaintiffs Worldspan Marine, Inc. ("Worldspan"), CSPAN Financial, LLC ("CSPAN"), and Wedmore Financial, LLC's ("Wedmore") Amended Complaint (ECF No. 105). The Amended Complaint alleges that on February 29, 2008, Defendant Harry Sargeant III and Plaintiff Worldspan, a Canadian corporation entered into a Vessel Construction Agreement for the construction of a superyacht. *See* Am. Compl. (ECF No. 105, ¶ 46). The superyacht was to be constructed in Canada, inside of Worldspan's building, which could house only one superyacht at a time (*id*.). Consistent with industry standards, the agreement provided that Worldspan would hold title of the superyacht, to be transferred to Sargeant upon completion of the vessel. (*id*. at ¶ 47). Defendant Sargeant received a builder's mortgage to hold until delivery and transfer of the title.

Sometime in 2009, Sargeant applied for a construction loan from Defendant Comerica Bank. A condition of the construction loan was that Sargeant assign his interest in the superyacht to Comerica. The Vessel Construction Agreement permitted assignment of Sargeant's interest in the vessel only upon Worldspan's consent (*id.* at ¶ 55). Thus, in July 2009, Defendants Harry

Sargeant III ("Sargeant") and Barry Shaw ("Shaw"), Comerica's representative, met with Steve Barnett, Worldspan's principle, in Delray Beach, Florida, for the purpose of obtaining Worldspan's consent (*id*.). At the meeting, Shaw advised Barnett that he and Sargeant needed to speak privately about a lawsuit. Shaw and Sargeant represented to Barnett that the litigation would not affect Worldspan (*id*. at ¶ 56, 59, 62). Worldspan gave the requested consent, unaware that the litigation about which Shaw and Sargeant spoke privately was a suit against Sargeant, brought by his former business partner Mohammad Al-Saleh, alleging fraud and money laundering (*Id.* at ¶ 62 and n.7). Plaintiffs allege that the $11 million Sargeant paid Worldspan toward construction of the yacht were illegally obtained in the fraud committed against Al-Saleh.

Sargeant and Comerica entered into the construction loan, and Sargeant assigned his interest in the superyacht to Comerica. Comerica paid the proceeds of the loan, approximately $9 million, to Worldspan towards the construction of the superyacht (*Id.* at ¶ 53). Plaintiffs allege that the loan was an artifice to clean Sargeant's illegally obtained money; by comingling Comerica's loan with the $11million Sargeant illegally obtained through the fraud and money laundering scheme he committed against Al-Saleh, Plaintiffs allege Defendants made it harder for victims and creditors to reach Sargeant's ill-gotten gains (*id*.).

In February 2011, Sargeant and Barnett met at a jet aviation business located within the Palm Beach International Airport (ECF No. 105, ¶ 77). During this meeting, Sargeant confronted Barnett about an overcharge in the amount of $2 million dollars, which had been brought to his attention by Defendant Kevin Kirkeide, Sargeant's accountant. Sargeant told Bennett that if Worldspan did not pay Sargeant $2 million within two months, he would destroy all of the companies Barnett was associated with and threatened to have Barnett killed (*id*. at ¶¶ 82, 83).

Worldspan and Sargeant's contractual relationship continued to deteriorate. Between

December 2009 and April 2010, Plaintiffs allege that Defendants Sargeant, his wife Deborah Sargeant, and Mervyn Monger, delayed Worldspan's progress and increased the costs of construction by submitting various change orders, all while reassuring Worldspan that it would be paid for the costs of fulfilling the change orders (ECF No. 105, ¶ 89, 90, 221). Thus, Worldspan continued purchasing materials and constructing the vessel, incurring $4.9 million in materials and labor costs (*id*. at ¶¶ 90, 91).

Worldspan ceased construction on the yacht in April of 2010 (*id.* at ¶ 332). Plaintiffs allege that while operational, Worldspan employed 100 specialized employees, all of whom Worldspan terminated; though the Amended Complaint does not allege when the terminations occurred, the allegations imply that the terminations were subsequent to cessation of work on the yacht (*id.* at ¶ 336).

In July 2010, a subcontractor brought an *in rem* admiralty action against Worldspan in a federal court of Canada as a result of Worldspan's failure to pay for work performed, a failure Plaintiffs attribute to Comerica not paying Worldspan $4.9 million dollars (ECF No. 105, ¶ 91). The federal court ordered the seizure and sale of the vessel and directed all interested creditors to make their claims and assert their interests through affidavits (*id*.). Defendants Sargeant and Comerica were among the creditors to make a claim against the superyacht (*id*.). Mohammad Al–Saleh also filed a claim against the vessel to satisfy a judgment Al–Saleh had obtained against Sargeant as a result of the previously described suit and initiated a claim against Worldspan seeking disgorgement of the $11 million paid by Sargeant (*id.* at n.10).

The Canadian federal court ordered the vessel to be brokered by Fraser Yachts, which opined that the superyacht could be sold for $19 million (*id.* at ¶ 95); an appraisal by Comerica set the value of the vessel at $15 million (*id.* at ¶ 100). Plaintiffs allege that as part of their conspiracy,

Sargeant and Comerica opposed the sale and purposefully delayed the sale and drove the price down of the vessel. Defendant Monger told other superyacht brokers in the United States not to purchase the vessel because it was problem-ridden, and a sale would not be approved by the Canadian federal court, prompting counsel for Worldspan to send a cease and desist letter to counsel for Sargeant and Comerica (*id*. at ¶ 96). In 2013, an offer was made to purchase the superyacht for $5.8 million, however, Sargeant and Comerica opposed the sale and the offeror rescinded his purchase offer (*id*. at ¶ 100). The superyacht eventually sold in 2014 for $5 million (*id*. at ¶ 88). The purchaser subsequently paid an additional $30 million to another yacht constructor to finish construction of the yacht (*id.*).

Plaintiffs allege that Defendants were all part of a ten–year conspiracy against Al–Saleh, Plaintiffs Worldspan, CSPAN, and Wedmore, and several unnamed parties (ECF No. 105, ¶¶ 386). Plaintiffs allege that the conspiracy began in 2005, when Sargeant defrauded Al–Saleh by transferring government contracts, originally belonging to a corporation owned by Sargeant and Al–Saleh, to other companies owned by Sargeant (*id.* at ¶¶ 108–110). Al–Saleh obtained a judgment against Sargeant, as described above. Plaintiffs allege that Sargeant targeted Worldspan for a credit bid scheme[3] to avoid the Al-Saleh judgment and to launder unlawfully obtained funds. All of the funds paid to Worldspan were, Plaintiffs contend, derived from specified unlawful activity (the fraud against Al-Saleh) and each payment to Worldspan is alleged as an independent act of wire fraud, made in furtherance of the credit-bid scheme (*id.* at ¶ 370 & pgs. 101-03).[4] Plaintiffs allege they finally discovered the culmination of the conspiracy in June 2014, when

[3] Plaintiffs characterize a credit bid scheme as one in which a defendant accrues debt against an asset, fails to pay his obligations, then asks a conventional lender for a loan to purportedly pay the outstanding obligations, and then instead of paying its obligations forces a sale of the asset, which he devalues in attempt to purchase the asset through an alter ego corporation, without ever paying for the asset or services performed, and then shielding the asset from defendant's creditors (ECF No. 105, ¶ 101).

[4] The paragraph numbering restarts in this section of the Amended Complaint, thus page numbering is provided for ease of the reader's identification of the intended citation.

Sargeant and Comerica "were forced to pull the trigger on the fraudulent credit bid scheme." (*Id.* at 232). This appears to have entailed an application by Sargeant and other conspirators to have the yacht's construction completed at an alternative site, leased by Defendant Kirkeide (*id.* at ¶ 233-234). While not specifically alleged, it appears the application was unsuccessful, as a third-party ultimately purchased the yacht; Plaintiffs allege however that as a result of Defendants' application to move the yacht, the purchaser "was not prepared to have Worldspan complete the Superyacht in the premises it was located in" (*id.* at ¶ 239). Plaintiffs contend they lost the contract to complete the yacht ($30 million) as a result of all Defendants (*id.* at 240).

B. Procedural Background

On May 14, 2018, Plaintiffs Worldspan, CSPAN, and Wedmore initiated this suit, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964, Florida Racketeer Influenced and Corrupt Organizations Act, Fla. Stat. § 772.103, fraud, and conspiracy against all Defendants (ECF No. 1). Both sets of Defendants filed separate motions to dismiss the Complaint on the grounds that it was a shotgun pleading, failed to state a claim, and Plaintiffs' claims were barred by the statute of limitations (ECF Nos. 45, 47).

The undersigned held a hearing on both motions to dismiss and entered a Report and Recommendations, recommending that Plaintiffs' Complaint be dismissed with leave to amend (ECF No. 99). Judge Moreno adopted the Report in its entirety, dismissed the Complaint, and granted Plaintiffs leave to amend their Complaint (ECF No. 100).

On April 19, 2019, Plaintiffs filed the Amended Complaint, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964 (Counts I & II, by all Plaintiffs against all Defendants); Florida Racketeer Influenced and Corrupt Organizations Act, Fla. Stat. § 772.103 (Count III & IV, by all Plaintiffs against all Defendants),

fraudulent and negligent misrepresentation (Counts V & VII,[5] by Plaintiffs Worldspan and CSPAN against Defendants Comerica, Shaw and Deborah), conspiracy to defraud (Count VI, by Plaintiffs Worldspan and CSPAN against all Defendants); and aiding and abetting fraud (Count VII, by Worldspan and CSPAN against Comerica, Shaw, Jones, Deborah Sargeant, Younker, Kirkeide, and Monger). Defendants now move to dismiss (ECF Nos. 115, 116). The Motions have been fully briefed.

II. DISCUSSION

In their Motions, Defendants assert three grounds for dismissal: (1) the Amended Complaint fails to comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure because it is a shotgun pleading; (2) the Amended Complaint fails to state a claim for which relief can be granted in violation of Rule 12(b)(6) of the Federal Rules of Civil Procedure; and (3) all of Plaintiffs' claims are barred by the statute of limitations. Although both sets of Defendants filed separate Motions, the Motions raise substantively identical grounds for dismissal.[6] Accordingly, the Court will jointly address the issues raised in both Motions in this Report and Recommendations.

A. Rule 8(a)(2)

To adequately plead a claim for relief, Federal Rule of Civil Procedure 8(a)(2) requires a "short and plaint statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "A shotgun complaint is one that, for example: (1) contains multiple counts where each count adopts the allegations of all preceding counts; (2) is replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action; (3) fails to separate into

[5] This Count is mis-numbered in the Amended Complaint, resulting in two Count VII's.
[6] The Sargeant Defendants adopted in full the arguments raised in the Comerica Defendants' Motion to Dismiss (ECF No. 116, at 11–12).

a different count each cause of action; or (4) asserts multiple claims against multiple defendants without specifying which defendant is responsible for which act." *Embree v. Wyndham Worldwide Corp.*, 779 F. App'x 658, 662 (11th Cir. 2019). The previous Report recommending dismissal of Plaintiffs' original Complaint identified multiple defects in the pleading that violated Rule 8. Defendants argue that Plaintiffs did not cure the deficiencies in their Amended Complaint.

The Amended Complaint has been trimmed but remains sprawling. Plaintiffs' RICO claims are based on Plaintiffs' allegations that Sargeant paid Worldspan with "dirty money," stolen from Sargeant's former business partner Al–Saleh. The first 400 paragraphs incorporated into each RICO count contain allegations of a torrid history between Defendant Sargeant and various third parties, who are not named in this the action and who are not alleged to have participated in the specific misconduct the named Defendants committed against any specific Plaintiff, and discuss the actions of all Defendants without clarifying what specific misconduct gave rise to a specific claim. Plaintiffs may not abrogate their duty to allege specific acts for which each Defendant is accountable by generically alleging that each Defendant participated in the conspiracy to defraud; yet that is precisely what the Amended Complaint attempts to do with conclusory and vague assertions of wrongdoing.

For example, Plaintiffs bring claim against Defendant Estate of Kurt Younker, who the Plaintiffs allege committed RICO violations and conspiracy to defraud. Younker was the Regional Manager of Comerica. The Amended Complaint alleges that sometime in May 2011, Younker made false statements to Barnett, Worldspan's principal, by reassuring him that Sargeant intended to complete construction of the vessel at Worldspan's premises; and that Comerica's role was limited to ensuring that its interest in the superyacht remained secured (ECF No. 105, ¶¶ 192-204). The Amended Complaint alleges that Younker omitted material information about the litigation

against Sargeant for fraud and that the real purpose of the loan from Comerica was to set into motion the alleged credit bid scheme (ECF No. 105, ¶¶ 192, 194, 196, 197). This May 2011 meeting is the singular event alleged involving Younker; no additional facts are pled to support Plaintiffs' conclusory allegation that "Younker knowingly, affirmatively, and actively concealed the true nature of the fraudulent credit scheme…From 2011 until 2018, Younker intentionally and knowingly participated directly and indirectly in the Defendants' fraudulent credit bid scheme and or associated with the defendants' through a pattern of racketeering consisting of repeated violations of the federal mail and wire fraud statutes…based on the use of the United States mails and wires to send emails, facsimiles and letters. . .." (ECF No. 105, ¶¶ 203, 204).

It is not enough that Plaintiffs generally allege that Younker used interstate wire communications in order to execute the fraudulent bid scheme (*id.* at ¶ 208); or that he sent and received emails in furtherance of the conspiracy over a nine-year period (*id.* at ¶ 213); or that he was aware that correspondence were sent through the mails (*id.* at ¶ 210). Despite these conclusory statements, Plaintiffs allege no *facts* sufficient to support a reasonable inference that any emails or correspondence sent by Younker was indeed in furtherance of a conspiracy or to execute the alleged scheme, or facts sufficient to support the allegation that he knew that others did. *Compare Cordell Consultant, Inc. Money Purchase Plan & Tr. v. Abbott*, 561 F. App'x 882, 885 (11th Cir. 2014) (allegations of extensive disclosures to all four individual defendants that financial documents supplied in loan transaction were false were sufficient to support allegation that defendants knew about the fraud). The deficiencies described here in relation to Defendant Younker permeate the Amended Complaint and despite Plaintiffs' efforts to delineate their allegations against the various Defendants in separate sections, the Amended Complaint fails to allege facts sufficient support a reasonable inference that the respective Defendants are liable for

the misconduct alleged. Accordingly, the RICO claims should be dismissed. *Embree*, 779 F. App'x at 664 (affirming dismissal with prejudice plaintiff's second amended complaint which remained a shot gun pleading following prior orders dismissing with instructions).

Perhaps the most poignant pleading failure presented in the Amended Complaint is its failure to describe the conduct alleged to have caused Plaintiffs' respective RICO injuries. In spectacularly conclusory fashion, Plaintiffs allege that all three Plaintiffs "and the Crescent and Queenship brands" were destroyed "as a direct and proximate result" of the yacht selling for $5 million and Worldspan's inability to secure the contract to complete construction for the new purchaser (ECF No. 105 ¶ 337). The devaluation of the Crescent and Queenship brands appear to form the basis of CSPAN's alleged injuries. *See generally* Plaintiffs' Response (ECF No. 122). Despite the brands' central role in CSPAN's claim for over $14 million dollars resulting from their devaluation, Plaintiffs allege *no facts* from which it may be reasonably inferred that any Defendant contributed to their depreciation. The Amended Complaint tells us that in 2005, these brands were valued at $6 and $7 million dollars, respectively; and that they were among the assets assigned to CSPAN by Worldspan following its insolvency in 2011 in order to satisfy a debt. There is no factual connection alleged between the devaluation of the brands (or how Plaintiffs even arrived at the conclusion that the brands have further depreciated since assignment)[7] and Defendants' attempted credit bid scheme and alleged interference with the yacht's sale. The failure to allege a cognizable domestic injury is considered more fully below, but it bears noting here that the undersigned's efforts to discern *what* Plaintiffs contend to be their injuries, then attempt to trace *how* Plaintiffs allege it occurred, were not insignificant.[8] The Eleventh Circuit has recognized this

[7] While the Amended Complaint alleges a valuation performed in 2005 assessed the brands collectively at approximately $14 million, in 2011, Worldspan assigned them to CSPAN to absolve a debt valued at just over $1 million. (ECF No. 105–1).

as a trait of the shotgun pleading, for which dismissal is appropriate. *Embree*, 799 F. App'x at 664.

In short, the Amended Complaint remains a shotgun pleading, subject to dismissal as such. *See Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) ("Each count incorporates by reference the allegations made in a section [. . .] which comprises 146 numbered paragraphs [. . .] [t]he result is that each count is replete with factual allegations that could not possibly be material to that specific count, and that any allegations that are material are buried beneath innumerable pages of rambling irrelevancies."); *see also Merchant One, Inc. v. TLO, Inc.*, No. 19-CV-23719, 2020 WL 248608, at *3 (S.D. Fla. Jan. 16, 2020) ("Overall shotgun pleadings fail to make the connection between the substantive count and the factual predicates . . .." (internal citations omitted)).

In the first Report and Recommendations, despite recommending dismissal of the original complaint for violating Rule 8, the undersigned analyzed Defendants' challenges to the merits of Plaintiffs' claims, "as repetition of such deficiencies would again warrant dismissal." ECF No. 99 (citing *Fox v. Loews Corp.*, 309 F. Supp. 3d 1241, 1245 (S.D. Fla. 2018)). Again, despite the serious and uncured deficiencies in the Amended Complaint, I have considered whether the facts alleged here state claims on which relief may be had by these Plaintiffs.

B. Rule 12(b)(6)

Defendants additionally contend that the Amended Complaint should be dismissed for failure to state a claim in violation of Federal Rule of Civil Procedure 12(b)(6).

To survive a 12(b)(6) motion to dismiss, a complaint must contain facts sufficient to "state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); Fed. R. Civ. P. 12(b)(6). This requires a plaintiff to allege facts sufficient to raise grounds for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts alleged

must allow a court to draw the reasonable inference that a defendant is liable for the misconduct alleged. *Id.* When considering a motion to dismiss, the reviewing court is limited to the facts contained in the complaint and the attached exhibits. *See Wilchombe v. TeeVee Toons, Inc*., 555 F.3d 949, 959 (11th Cir. 2009). The facts alleged are taken as true and all reasonable inferences are drawn in plaintiffs' favor. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012).

1. Statute of Limitations

Defendants again move to dismiss on the basis that Plaintiffs' RICO claims are time barred. Defendants contend that Plaintiffs' alleged injuries occurred as early as 2010, when the Superyacht went "untouched" due to nonpayment, and they had knowledge of their injuries no later than late 2010 with initiation of the Canadian court proceedings (ECF No. 116, at 23). Plaintiffs insist that their claims became actionable no earlier than in 2014, when the Defendants' credit bid was discovered by them and the yacht sold for $5 million.

"A Rule 12(b)(6) dismissal on statute of limitations is appropriate only if it is apparent from the face of the complaint that the claim is time-barred." *GolTV, Inc. v. Fox Sports Latin America, Ltd.*, No. 16-24431-CIV, 2018 WL 1393790, at *22 (S.D. Fla. Jan. 26, 2018). The statute of limitations for a civil RICO claim is four years and begins to accrue as soon as the plaintiff discovers or should have reasonably discovered its injuries. *Id.* In the first Report, I recommended against dismissal of the claims as time-barred, explaining that it was not clear from the face of the original complaint that the alleged injuries occurred, as Defendants, insist in 2010. As explained more fully below, my recommendation remains not to dismiss on this basis; Plaintiffs' allegations, particularly with respect to discernable injury, are not plead with sufficient clarity to enable the Court to make this determination from the face of the Amended Complaint.

2. Federal and Florida RICO Violations

Counts I and II of the Amended Complaint allege RICO violations pursuant to 18 U.S.C. §§ 1962(c), 1964(c), and Count II alleges violations pursuant to 18 U.S.C. § 1962(d). Counts III and IV allege state RICO violations pursuant to Florida Statute Section 772.104.[9]

A civil RICO claim under Section 1962(c) requires a plaintiff to allege that defendants operated or managed an enterprise through a pattern of racketeering activity. *GolTV, Inc.*, 2018 WL 1393790, at *8 (S.D. Fla. Jan. 26, 2018) (citing *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1348 (11th Cir. 2016)). Additionally, civil RICO claims are "essentially a certain breed of fraud claims" and thus must satisfy Rule 9(b) heightened pleading standard. *Cantano v. Capuano*, No. 18-20223-CIV, 2019 WL 3890343, at *2 (S.D. Fla. May 28, 2019) (quoting *Ambrosia Coal & Const. Co. v. Pages Morales*, 482 F.3d 1309, 1316 (11th Cir. 2007)).

To establish standing, RICO claimants must demonstrate that they suffered the requisite injury to business or property and that such injury was the result of a RICO predicate act. *Cantano*, 2019 WL 3890343, at *2 (S.D. Fla. May 28, 2019). It is insufficient to allege that the defendants' conduct caused injury to someone, but rather a complaint must plead with specificity the injury felt by each plaintiff as a result of RICO violations. *Ray*, 836 F.3d at 1349.

Defendants contest Plaintiffs' standing on the grounds that none have alleged a domestic injury suffered as a result of Defendants' alleged RICO violations. The Amended Complaint fails to allege facts sufficient to support a reasonable inference that these Plaintiffs have standing, accordingly, these claims are due to be dismissed.

[9] The Florida RICO Act is patterned after the federal RICO Act and accordingly, courts in this Circuit apply the federal RICO claim analysis to state claims. *See Jackson v. Bell South Telecomm.*, 372 F.3d 1250, 1264 (11th Cir. 2004) (explaining that "the analysis we apply to the plaintiffs' federal RICO claims is equally applicable to their state RICO claims.").

a. Plaintiffs' Alleged Injuries

Plaintiffs contend that each Plaintiff has suffered concrete injuries to its own business. Plaintiffs allege that Worldspan suffered financial loss as a result of Defendants' RICO violations, specifically: (1) Worldspan was unable to pay its employees and was unable to pay for its warehouse, resulting in a tax lien against Worldspan and its property (ECF No. 105, ¶¶ 400–402); (2) loss of value in the sale of the vessel, which sold for $5 million (*id.* at ¶ 403); (3) loss of a $30 million contract to complete the superyacht, which was paid to a different builder by the new owner of the vessel (*id.* at ¶ 403); and (4) damages of $4.9 million, work and materials purchased towards completion of the vessel that was not paid under the terms of the Vessel Construction Agreement (ECF No. 121, at 28).

Plaintiffs allege that CSPAN suffered a concrete injury because it obtained assets from Worldspan, including the brands Queenship and Crescent, that were tarnished by Defendants' actions (ECF No. 105, ¶¶ 399, 404). Lastly, Plaintiffs allege that Wedmore suffered damages because it holds a 66.66% stake in Worldspan, and therefore, was injured in the same way as Worldspan (*id.* at ¶ 405). In Plaintiffs' Response in Opposition, Plaintiffs further explain that Wedmore suffered a unique injury by way of threats made by Sargeant to Barnett individually and the businesses he was affiliated with (ECF No. 122, at 12).

Defendants argue that Plaintiffs' alleged injuries are not domestic because they occurred, if at all, in Canada and challenge Plaintiffs' contention that CSPAN or Wedmore suffered domestic injuries by virtue of the assignment or ownership of shares, respectively.

b. Standing

To establish they have standing to bring their civil RICO claims, Plaintiffs must allege that they suffered domestic injuries and that those injuries were the result of Defendants' RICO

violations. *Cantano*, 2019 WL 3890343, at *2 ("Under Section 1964(c), civil RICO claimants must also demonstrate standing by showing (1) the requisite injury to business or property; and (2) that such injury was by reason of the substantive RICO violation.") (internal quotations omitted)); *Lan Li v. Walsh*, No. 16-81871-CIV, 2017 WL 3130388, at *10 (S.D. Fla. Jul. 24, 2017). The focus of the domestic injury inquiry is the geographic location of the injury to Plaintiffs, not the location of the Defendants' wrongful acts. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2108 (2016); *Absolute Activist Value Master Fund Ltd. v. Devine*, 233 F. Supp. 3d 1297, 1326 (M.D. Fla. 2017).

i. Domestic Injury to Business or Property

a. Worldspan Has Not Suffered A Domestic Injury

Defendants claim Plaintiff Worldspan, a Canadian company, lacks standing to assert RICO claims because a RICO action does not have extraterritorial reach and all of Worldspan's alleged injuries were felt in Canada. Plaintiffs contend that Worldspan's injuries are domestic because "[Worldspan] was doing business in the United States, that the Superyacht was being built for [Sargeant], a U.S. citizen residing in Florida, who was going to, upon completion of the Superyacht transport it from Canada to Florida." (ECF No. 122, at 19).

A foreign plaintiff's residency is not dispositive on whether its injury is domestic or foreign. *Cantano*, 2019 WL 3890343, at *5. "Evidence of foreign nationality or primary place of business alone is insufficient to categorize an injury as foreign under RICO" and courts consider "factors such as where the injury to a property interest took place, and whether Plaintiffs were working, traveling or doing business in the United States at the time..." *GolTV*, 2018 WL 1393790, at *20 (S.D. Fla. Jan. 26, 2018). Courts in this district also consider whether Courts consider whether a foreign plaintiff maintained tangible property in the United States that was harmed as a

result of the defendant's misconduct. *Cantano*, 2019 WL 3890343, at *4 (citing *Buscunan v. Elsaca*, 874 F.3d 806, 814 (2nd Cir. 2017)).

Worldspan is a Canadian corporation with no alleged offices in the United States (ECF No. 105, ¶ 21), yet this alone is not dispositive on the question of domestic injury. Plaintiffs' characterize Worldspan's injuries as the devaluation of the superyacht; failure to pay for work performed; loss of facility; low sale of the superyacht; and loss of contract to finish building the superyacht (id. at ¶¶ 400–403). Each of these injuries were felt in Canada. Specifically, the vessel was partially constructed in Worldspan's warehouse located in Canada. Defendants' actions resulted in Worldspan's termination of its employees and the loss of its warehouse in Canada. Moreover, the sale of the superyacht and eventual $30 million contract to finish the vessel occurred in Canada.

In the response in opposition, Worldspan argues that its injuries are domestic because Defendants' predicate acts, such as initiation of fraudulent wire transfers and mailings, were performed in the United States. However, the focus of the domestic injury inquiry is on the location where the alleged injuries were suffered, not where the predicate acts were performed. *See Absolute Activist*, 233 F. Supp. 3d 1297, at *1326 (holding that corporate plaintiffs did not suffer domestic injuries because their injuries were felt outside the United States, and explaining it was immaterial where the predicate acts were performed); *Lan Li v. Walsh*, 2017 WL 3130388, at *10 ("Even accepting Plaintiffs' claims that the basis of the RICO claim occurred in the United States because Defendants moved money around in the United States . . . does not change the fact that the injury was felt by Plaintiffs in their home countries.").

Citing to *Akishev v. Kapustin*, No. 13-CV-7152, 2016 WL 7165714, at 5–8 (D.N.J. Dec. 8, 2016), Worldspan argues that although it is a Canadian corporation with no offices in the United

States, it has nonetheless suffered a domestic injury to its business (ECF No. 122, at page 14–15). In *Akishev*, the plaintiffs, who were residents of Russia, brought a RICO suit against defendants, United States-based car dealerships, for defendants' alleged RICO violations. *Id.* at *1. The plaintiffs alleged that the defendants ran a "bait and switch" scheme, in which they advertised cars to foreigners in Russia, representing that the cars were in excellent condition, when in reality the cars had been declared "a total loss" and were never delivered to the plaintiffs despite receipt of payments. *Id.* The defendants argued that the plaintiffs lacked standing because they had not suffered domestic injuries since they accessed the website and paid for the vehicles in Russia. *Id.* at *5. The court rejected the defendants' arguments holding that the plaintiffs' injuries were domestic because in that case the plaintiffs "suffered their injuries the moment they clicked the computer mouse—on a United States–based website representing United States–based car dealerships […]." *Id.* at *7. The court further explained that if the plaintiffs had traveled to the United States and walked into one of the defendant dealerships and paid for the car on the spot, plaintiffs would have suffered a domestic injury and that the plaintiffs' "traveling by way of the internet . . . should not change their injuries from domestic to foreign…" *Id.* at *7.

The Court does not find *Akishev* analogous because the holding in that case was based on the unique features of the internet and therefore, the court equated the electronic transaction to one that had occurred at the defendants' United States-based dealerships. The similarities between *Akishev* and the subject case end at the fact that both involved foreign plaintiffs. The present case does not involve an internet transaction; instead it involves a foreign plaintiff who was fraudulently induced to perform a contract at its facility in Canada, whose assets including its facility and its interest in the vessel it was building were devalued and ultimately lost in Canada. Plaintiffs did not offer to analogize the facts of their case to *Akishev*, relying instead on their allegations that

Defendants committed predicate acts in the United States. To the extent that Plaintiffs rely on the location of Defendants' acts, their argument is misplaced as foreign plaintiffs suffer economic injuries where the injuries are felt, not where the RICO predicate acts occurred. *Lan Li*, 2017 WL 3130388, at *10; *Absolute Activist Value Master Fund, Ltd.*, 233 F. Supp. at 1226.

b. CSPAN Has Not Suffered a Domestic Injury by Virtue of Assignment

Plaintiffs allege that CSPAN, a Florida limited liability company, suffered a domestic injury because it was the owner of all of Worldspan's assets, including the Crescent and Queenship brands, which were devalued as a result of Defendants' actions. (ECF No. 105, ¶ 399). In December 2011, Worldspan satisfied a debt obligation in the amount of $1.2 million owed to CSPAN by assigning to it all of its assets. Plaintiffs attached to the Amended Complaint a document titled "Accord and Satisfaction" between Worldspan and CSPAN dated December 1, 2011, which represents that Worldspan transferred all of its assets, generally including contracts, equipment, inventory, and investment properties, to CSPAN, its creditor, in satisfaction of the debt owed (ECF No. 105, at 141–42). The assignment provides that it was intended to satisfy Worldspan's debt in the amount of $1,294,248.96 (ECF No. 105–1).

Plaintiffs provide only conclusory allegations ("As a direct and proximate cause of the Superyacht Credit Bid Fraud and Conspiracy, the Crescent brand was destroyed, along with the Queenship brand and along with Worldspan."),[10] which are insufficient to allege that CSPAN suffered a cognizable injury as a result of the alleged predicate acts. *See Viridis Corp. v. TCA Global Credit Master Fund*, LP, 155 F. Supp. 3d 1344, 1357 (S.D. Fla. 2015) ("Aside from conclusory allegations that Plaintiffs have incurred costs and attorneys' fees and have had their business reputation and/or customer goodwill injured, there are no allegations that Plaintiffs…have

[10] *See also* ECF No. 105, ¶¶ 337, 339, 395, 396, 399.

suffered any damages as a direct result of Defendants' conduct."); *Marrero v. Benitez*, No. 17-CV-21026, 2017 WL 7796341, at *6 (S.D. Fla. Aug. 3, 2017) (finding that plaintiffs had not alleged an injury because "Plaintiffs cannot simply allege that they have incurred damages—as a result of Defendants' alleged RICO scheme…without specifically identifying how each Defendant's conduct directly resulted in an injury to each specific Plaintiff."). Accepting all facts pled as true, the assigned brands were valued at $14 million in 2005; assigned to CSPAN in 2011 after Worldspan's insolvency; and were part of assets collectively assigned to absolve a $1.2 million debt. No facts are alleged to support Plaintiff's conclusory allegations that any action—including the attempted credit bid—caused further devaluation of the brands,[11] or critically, *how* Defendants' actions caused the depreciation.

Perhaps in recognition that any injury to the brands occurred, if at all, before their assignment to CSPAN, Plaintiffs provide a litany of support for the proposition that an assignment is the transfer of property or an interest from one person to another, and that the assignee steps into the shoes of the assignor and may enforce contracts against parties in privity with the assignor. *See Rev v. Bank of America*, 752 So. 2d 637 (Fla. 1st DCA 2000); *MDS (Canada) Inc. v. Rad Source Tech., Inc.*, 720 F.3d 833, 857; *Dove v. McCormick*, 698 So. 2d 585 (Fla. 5th DCA 1997). This argument is misplaced as Plaintiff CSPAN here does not seek to step into the shoes of Worldspan to enforce a contract, an indisputably assignable right; none of the cases cited recognize a plaintiff's right to assign, or step into the shoes of another to redress, a RICO injury.

In support of CSPAN's domestic injury, Plaintiffs cite to *Gusevs v. AS Citadele Banka*, No. 2:16-CV-03793-SVW-FFM, 2016 WL 9086931 (C.D. Cal. Sep. 8, 2016). In *Gusevs*, the

[11] Indeed, it is not even clear whether Plaintiffs intend to allege that it is the loss in value of the brands that constitutes CSPAN's injury; or whether injury to CSPAN *caused* the alleged damage to the Crescent brand. *See* ECF No. 105 at ¶ 399 ("Comerica and its co-conspirators caused direct injury to the U.S. entity, CSPAN, *thereby creating domestic injury by destroying the brand Crescent*.") (emphasis added).

plaintiffs, nine Latvian entities and their chief executive officer, a resident of California, brought suit against Latvian banks, for injuries stemming from defendants' RICO violations. *Id.* at *2–3. The plaintiffs alleged losses on lines of credit they obtained from a Latvian bank, which were secured by property in Latvia. *Id.* at *7. There the court found that the plaintiffs failed to allege a domestic injury because all of the injuries occurred in Latvia, noting that all of the affected properties securing the credit lines were located outside the United States. The court further explained that two domestic plaintiffs had not alleged a domestic injury because the first had not alleged a connection to the transactions or conduct alleged in the complaint, despite having its principle place of business in the United States; and the second, a resident of California, had not alleged that any of his business or property held in the United States was injured, and as such, his residency in the United States did not create a domestic injury. *Id*. at *7.

Plaintiffs argue that CSPAN has suffered a domestic injury because it can be distinguished from *Gusevs*. (ECF No. 122, at 16) ("Conversely, the injuries to Plaintiffs CSPAN and Wedmore occurred in the United States. Unlike in *Gusevs* where all of the injured entities were in Latvia, the injured entities in this case, Wedmore and CSPAN are in the United States."). As in *Gusevs*, Plaintiffs here simply rely on the location of CSPAN, which is not dispositive of the question of domestic injury, and thus, is insufficient and does not persuade the Court that Plaintiffs have successfully alleged a cognizable domestic injury caused by the Defendants' predicate acts. *See Cantano*, 2019 WL 3890343, at *5. In sum, neither the Amended Complaint nor Plaintiffs' response in opposition successfully establishes a domestic injury suffered by CSPAN.

c. Wedmore Has Not Suffered a Domestic Injury as Shareholder of Worldspan

Defendants move to dismiss Wedmore's RICO claims against them on the grounds that it lacks standing to bring RICO claims because a shareholder's injury is derivative to any injury

suffered by a corporation targeted by RICO violations; it is not actionable in a direct, as opposed to derivative, action. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998). In response, Plaintiffs contend that Wedmore has suffered an injury unique to it and separate to the harm suffered by Worldspan, and thus, has standing to bring claims against Defendants. *See* ECF No. 122, at 19.

The Eleventh Circuit in *Maiz v. Virani*, 253 F.3d 641, 654–55 (11th Cir. 2001) stated that "RICO standing will not arise solely because one is a shareholder or a limited partner in a company that was the target of the alleged RICO violation. Such injury is too indirect or derivative to confer RICO standing." *Id*. at 655 (quoting *Beck v. Prupis*, 162 F.3d 1090, 1096 n.10). The court explained that determining whether shareholder plaintiffs have standing to bring RICO claims is a fact intensive inquiry which requires the shareholders to establish they suffered an injury separate from that of the corporation in which they hold shares. *Id.* In *Maiz*, the circuit court held that the individual shareholders in that case had suffered separate injuries as a result of the RICO enterprise than those suffered by the corporations of which they were shareholders because the individual plaintiffs had been targets of the RICO scheme before and after the corporations were formed and thus the individual plaintiffs had standing to assert RICO claims against the defendants. *Id*. at 655–56. The cases on which Plaintiffs rely all demonstrate that only in cases where shareholders allege an individual injury apart from those felt by the company or the loss of their investments in the company, can shareholders maintain RICO claims. *See* Maiz, 252 F.3d at 655; *Stooksbury v. Ross*, 528 F. App'x 547, 557 (6th Cir. 2013) ("*separate and apart from just depleted value in investment*, Plaintiff established that Ross used Tellico as his alter ego to further the Ross' Defendants' criminal enterprise. . . to unknowingly contribute capital and resources to the enterprise scheme, resulting in the misappropriation to Plaintiff's funds and profits.") (emphasis added).

Plaintiffs contend that "Wedmore had its non-derivative value of its assets also reduced to zero as well as its rights to receive benefits [i.e. dividends] from its subsidiary completely wiped out." *See* ECF No. 121, at 26. Yet, Plaintiffs support this injury with only the allegation that Sargeant threatened to kill Barnett *and destroy his companies*, which Plaintiffs allege included Wedmore: "[Sargeant] specifically told Barnett at the Jet Aviation Death Threat & Extortion Meeting that he was going to destroy all of his companies. Barnett is a principal of all the Plaintiffs companies …" *id*.; ECF No. 122 at 12. Plaintiffs argue that "This evidences an intent to destroy Wedmore, thereby creating direct as opposed to derivative injury." *See* Plaintiffs' Response in Opposition (ECF No. 122 at 12). An alleged *intent* to destroy Wedmore is not an injury in fact, and no individual injury to Wedmore is alleged that is not derivative to the alleged loss of Worldspan's value. Plaintiffs' conclusory assertion of non-derivative assets, without identifying those injured assets, is insufficient to meet a RICO plaintiff's burden.

c. Causation

Defendants further contend that Plaintiffs do not satisfy the proximate causation requirement because they were not the direct victims of the alleged predicate acts and rather, any injuries felt were the result of the Parties' deteriorated contractual relationship. In response, Plaintiffs argue that the Defendants' predicate acts are the necessary cause of their injuries, even if other parties were also victims of Defendants' acts.

To satisfy RICO's heightened proximate cause standard, a complaint must allege a direct relationship between the alleged predicate act and the plaintiff's alleged injury. *GolTV*, 2018 WL 1393790, at *9 ("RICO only reaches harm that necessarily is caused by the predicate acts.") (citing *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010)). A link that is "too remote," "purely contingent," or "indirect" is insufficient. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457

(2006).

When determining proximate cause, courts consider whether "(1) difficulty would arise when a court attempts to ascertain damages caused by a remote action; (2) the nature of the proceedings would be speculative if the plaintiff were permitted to proceed; (3) the harm could have resulted from independent factors; (4) there is a risk of duplicative recoveries by other plaintiffs; and (5) other immediate victims of the RICO violation are better suited to vindicate the laws by pursuing their own claims." *GolTv*, 2018 WL 1393790, at *9 (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). "The less direct the injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

Plaintiffs have not alleged that there is a direct relationship between the Defendants' predicate acts and the injuries Plaintiffs allege they have suffered. Plaintiff alleges predicate acts of mail and wire fraud; money laundering by way of using illegally obtained funds and comingling clean and dirty money through the Comerica loan; extortion and death threats; and violations of the travel act (ECF No. 105 ¶¶ 365-381).

Plaintiffs fail to directly connect the injury of financial loss in the form of devaluation of the superyacht with the predicate acts alleged. The Amended Complaint alleges "[i]n a nutshell, these Defendants intentionally delayed the sale process to make the Superyacht become 'old' and less marketable and made false representations to dissuade prospective purchasers from buying the Superyacht." (ECF No. 105, ¶ 94). Plaintiffs describe these efforts to include telling superyacht brokers in the United States that the superyacht was problem ridden and that a sale of the yacht would not likely be approved (*id.* at ¶ 95), and misrepresentations to the Canadian federal court regarding the state of Worldspan's facility (*id.* at ¶ 97). Defendant Monger's acts of interference

with the superyacht sale alleged here do not constitute any of the predicate crimes alleged by Plaintiffs (listed above). Plaintiffs allege that the submission of false affidavits and evidence to the Canadian court constituted acts of wire and mail fraud (¶ 127, 366). There is no indication in any of the facts alleged however that Plaintiffs were injured by these submissions; there is no allegation that the court relied on the false affidavits or otherwise acted to Plaintiffs' detriment as a result of receiving the evidence. Ultimately, there is no link alleged between the injuries purportedly suffered and Defendants' many RICO predicate acts alleged.

Likewise, with respect to Worldspan's injury of losing a $30 million contract, Plaintiffs argue that they have "meticulously detailed" how Defendants' actions resulted in this injury. (ECF No. 121, at 27). In fact, the Amended Complaint is scant on details about the "contract" Plaintiffs allegedly "lost" as a result of the credit bid scheme, providing no facts for the Court to infer that the contract was Plaintiffs' for the losing. In their Response in Opposition (ECF No. 121, at 27), Plaintiffs direct the Court to the following allegation in the Amended Complaint: "The actions of the co-conspirators, in undertaking the 2014 credit bid fraud, were the direct and proximate cause in Worldspan losing the $30 million dollar contract to finish the Superyacht." (ECF No. 105 at ¶ 395). The Amended Complaint again repeats that Worldspan was denied the ability to provide services to finish the yacht "as a result of the June 2014 credit bid fraud" (ECF No. 105, ¶ 397, 403) in which Defendants applied to move the vessel to complete it at another cite. Assuming the truth of the allegations regarding the credit bid, they are nonetheless insufficient to show that Plaintiffs' injuries (assuming this is a cognizable injury) were proximately caused by the predicate acts alleged. Plaintiffs make additional references to statements made to yacht brokers in the United States that dissuaded potential buyers from making an offer to purchase the yacht (ECF No. 105, ¶ 94). These general references do not directly connect the injury to Defendants' specific

predicate acts, and therefore, do not meet the heightened pleading requirements. Likewise, statements made to yacht brokers, to the extent Plaintiffs contend were a partial cause of the injury, do not constitute any of the alleged RICO predicate acts.

Because the Amended Complaint does not allege that any of the Plaintiffs have suffered a domestic injury or that their injury was the result of Defendants' misconduct, I recommend dismissal with prejudice because Plaintiffs lack standing to bring RICO claims against the Defendants.

3. Fraud Claims

In Count V, Plaintiffs Worldspan and CSPAN allege a claim for fraudulent misrepresentation Defendants Comerica, Shaw, and Deborah Sargeant (ECF No, 105, ¶¶ 465–72). Plaintiffs allege that at two different meetings in 2008 and 2009, Defendants Shaw, Comerica, and Deborah "knowingly made a serious of fraudulent misrepresentations and fraudulently concealed material facts in order to induce the reliance of Worldspan." *Id*. at ¶ 466. The Amended Complaint further states "Defendants Comerica, Shaw, and Deborah made such false statements and omissions without legal justification or excuse, with malice, ill will and/or intent to purposely defraud Worldspan, and by assignment CSPAN." *Id*. at ¶ 467.

To state a claim for fraudulent misrepresentation in Florida, a plaintiff must establish the following elements: (1) a false statement regarding a material fact; (2) the person making the statement knew or should have known that the representation was false; (3) intent by the person making the statement to induce action or reliance upon the representation; and (4) injury suffered because of justifiable reliance on the representation. *Martinez v. Goodwill Industries of South Florida*, No. 11-60256-CIV, 2011 WL 13217232, at *4 (S.D. Fla. Apr. 1, 2011); *Hearn v. Int'l Bus. Machines*, 588 F. App'x 954, 956–57 (11th Cir. 2014). Claims for fraudulent

misrepresentation must meet the heightened pleading requirement of Rule 9.

Count V suffers from the same pleading deficiencies described above in more detail with respect to Plaintiffs' RICO claims. This count incorporates by reference over 100 paragraphs (ECF No. 105, ¶ 465). Count V collectively alleges that Defendants Comerica, Shaw, and Deborah Sargeant committed the acts supporting their fraud claims, without attributing the alleged fraud by one Defendant to any particular injury felt by any Plaintiff, alleging instead that Worldspan justifiably relied on the fraudulent statements and material omissions made by these Defendants at both meetings, resulting in losses in excess of $66million to Worldspan and its assignee CSPAN (ECF No. 105 ¶ 465-71). This is utterly deficient to enable any of these Defendants—or the Court—to discern what allege fraud is attributable to Plaintiffs' various injuries.

Specific to the respective alleged meetings at which the misrepresentations were made, Plaintiffs allege that Deborah made the following misrepresentations at the "Deborah HSE Superyacht Meeting": (1) the superyacht was hers (ECF No. 105, ¶ 269); (2) she instructed Worldspan on how she wanted the superyacht constructed (*id*. at ¶ 270); and (3) prior to Worldspan entering into the contract, she opined that construction of the superyacht would be a good opportunity for Worldspan to make money (*id*.). Plaintiffs allege that "[h]ad these fraudulent statements and omissions not been made, Worldspan would not have commenced construction on the Superyacht and would not have suffered injuries referred to herein." *Id*. at ¶ 271.

Plaintiffs' claim for fraudulent misrepresentation lacks facts sufficient to support their allegation that these representations were material. Plaintiffs do not allege facts to support the element of reliance: that without her misrepresentations, Worldspan would have never entered into the construction contract. Relatedly, Plaintiffs have not alleged facts sufficient to support their conclusory allegation that they were injured resulting from the misrepresentations. The Amended

Complaint alleges "[a]s a result of the above-described fraudulent misrepresentations and omissions, Worldspan, and its assignee CSPAN have sustained losses in excess of $66 million." ECF No. 105, ¶ 471. While Plaintiffs may now regret having ever entered into the Agreement to construct the yacht, the Amended Complaint does not allege that Plaintiffs' injury is tied to commencement of its construction.

Plaintiffs' claims for fraudulent misrepresentation against Comerica and Shaw fail for similar reasons. Plaintiffs claim that Defendants Comerica and Shaw omitted material facts and made fraudulent misrepresentations to obtain Worldspan's consent to the assignment of Sargeant's interests in the construction contract to Comerica (ECF No. 105, ¶¶ 158, 466). As a result of these omissions, Plaintiffs claim that they consented to the assignment of Sargeant's interests to Comerica, which harmed Plaintiffs because without the assignment, Defendants would not have been able to execute the credit bid scheme (*id*. at ¶¶ 172, 471–72).

The Amended Complaint alleges that Worldspan relied on the misrepresentations made at the Delray meeting, specifically those representing that the loan was for the purpose of completing construction of the vessel and that litigation against Sargeant would not affect Worldspan, when it consented to the assignment to Comerica to its detriment. Plaintiffs allege that Shaw and Comerica had an obligation to disclose the unrelated Al–Saleh judgment against Sargeant because Al-Saleh eventually filed a claim *in rem* against Worldspan, causing it to incur fees in defending that action (ECF No. 105, ¶ 56). In their response, Plaintiffs clarify that the omissions and misrepresentations, which resulted in Worldspan consenting to the assignment, also injured Plaintiffs because the assignment was the mechanism which permitted Defendants to carry out their credit bid scheme (ECF No. 122, at 26).

Taking all well-pled factual allegations as true, the Amended Complaint fails to allege that

Defendants' actions in procuring the assignment caused injury to Worldspan. Independent of the alleged misrepresentations and omissions regarding the assignment, Worldspan had already entered into a contract with Sargeant and would have been presumably still subject to Al–Saleh's demand for Sargeant's rights in the vessel. Before the fraudulent statements and omissions were made, Sargeant paid Worldspan $11 million in monies allegedly taken by fraud from Al-Saleh. Those are the funds that were the subject of Al-Saleh's disgorgement claim for which Plaintiffs' claim damages; no factual connection is alleged here between the disgorgement claim and the assignment. Even if it was procured by Defendants' fraud, Plaintiffs have not alleged that they were harmed by it. Similarly, notwithstanding Plaintiffs' characterization of the assignment as the "cornerstone" of the credit bid scheme and conspiracy (ECF No. 105 ¶ 74), no facts are alleged to support Plaintiffs' contention that enabled Defendants' alleged actions in the credit bid, in any way. Thus, accepting Plaintiffs' allegations that the Defendants' misrepresentations and omissions were both material and false, and that Plaintiff Worldspan relied justifiably thereupon, the Count nonetheless fails to allege injury therefrom. Accordingly, it should be dismissed.

Count VII, which alternatively alleges negligent misrepresentation fails for the same reasons. To state a claim for negligent representation, a plaintiff must allege that (1) the defendant made a representation of material fact that he believed to be true but which was false; (2) the defendant was negligent in making the statement because he should have known the representation was false; (3) the defendant intended to induce the plaintiff to rely …on the misrepresentation; and (4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation. *McGee v. JP Morgan Chase Bank, NA*, 520 F. App'x 829, 831 (11th Cir. 2013). Plaintiffs' absence of injury resulting from the reliance is fatal to both claims, and Count VII should be dismissed as well.

4. Conspiracy to Defraud

In Count VI, Plaintiffs Worldspan and CSPAN a claim of conspiracy to defraud against all Defendants (ECF No. 105, ¶ 474). The fraud alleged as the object of the conspiracy is that described in the preceding section.

Conspiracy to defraud, like fraudulent misrepresentation requires that Plaintiffs allege that they have suffered an injury as a result of the alleged misconduct. *See Regions Bank v. Kaplan*, No. 8:12-CV-1837-T-17MAP, 2013 WL 1193831, at *9 (M.D. Fla. March 22, 2013) (explaining that a civil conspiracy requires the following elements: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to the plaintiff as a result of the acts done under the conspiracy) (emphasis added)). As discussed in the previous sections, the Amended Complaint has failed to allege a cognizable injury as a result of the Defendants' fraudulent actions. In their response in opposition, Plaintiffs contend that all of the damages as a result of the conspiracy are found in the Amended Complaint. (ECF No. 122, at 28). Those injuries include: (1) harm to Plaintiffs' business brands; (2) imposition of lien and loss of Worldspan property; (3) devaluation of brands Crescent and Queenship; (4) devaluation of the superyacht and resulting sale for $5 million; and (4) loss of $30 million contract to finish construction of vessel (*id.* (citing ECF No. 105, ¶¶ 394–405)). The undersigned has already recommended dismissal because Plaintiffs failed to connect any of Defendants' conduct to those alleged injuries. Accordingly, Plaintiffs cannot establish that there was a conspiracy to defraud if none of alleged injuries were the result of the misconduct alleged to have been a conspiracy.

5. Aiding and Abetting Fraud

In Count VII (the second), Plaintiffs Worldspan and CSPAN bring claims against all

Defendants but Sargeant for aiding and abetting fraud (*id.* at ¶ 480). In order to establish a claim for aiding and abetting fraud a plaintiff must establish that (1) the aider and abettor had knowledge of the underlying fraud; (2) that he substantially assisted or encouraged commission of the fraud. *Daccache v. Quiros*, No. 16-21575-CIV, 2018 WL 2248409, at *12 (S.D. Fla. May 15, 2018). Aiding and abetting fraud is a tort in Florida and like all torts, additionally requires a plaintiff to demonstrate injury resulting from the alleged misconduct. *See G*arcia *v. Chapman*, No. 12-21891-CIV, 2014 WL 11822750, at *11, 13 (S.D. F. Jan. 29, 2014) (relating the element of substantial assistance in an aiding and abetting claim to common tort law proximate cause to determine whether defendant's conduct contributed to the injury alleged); *see also SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 335 (2nd Cir. 2018) ("Substantial assistance requires the plaintiff to allege that the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated…That is, the injury must be direct or reasonable foreseeable result of the conduct.") (internal citations omitted). An act performed for the actor's own purposes will not satisfy the element of substantial assistance. *ZP No. 54 Ltd. P'ship v. Fid. & Deposit Co. of Maryland*, 917 So. 2d 368, 374 (Fla. 5th DCA 2005).

Count VII generally alleges that all Defendants had knowledge of the underlying fraud ("Plaintiffs define the fraud or the scheme to defraud as the Superyacht Credit Bid Fraud"), and substantially assisted in the commission of that fraud. Defendants contend that Plaintiffs have not stated a claim for aiding and abetting because they "did not cite any specific alleged actions to support their claim…." (ECF No. 155, at 34). This is a fair criticism. Count VII incorporates by reference over 400 paragraphs of allegations, without any discernable connection between the specific Defendants' actions to the alleged conspiracy or the resulting injuries. Plaintiffs' Responses in Opposition, which simply list a number of paragraphs in the Amended Complaint,

does nothing to assist the Court in identifying the acts allegedly undertaken to assist the underlying fraud. Additionally, Plaintiffs' failure to articulate the harm suffered as a result of any Defendants' alleged conduct is again fatal to this Count, as with their other claims. This Count should likewise be dismissed.

C. Prejudice

The Amended Complaint should be dismissed with prejudice with respect to all Counts. Plaintiffs have been provided an opportunity to amend their complaint for failure to comply with Federal Rule of Civil Procedure 8 and have failed to do so despite this Court's instructions. *See Jackson v. Bank. Of Am.*, 898 F.3d 1348, 1358–59 (11th Cir. 2018) (holding that district court could dismiss a case with prejudice of the defendants moved for a more definite statement on the grounds that the complaint was shotgun pleading and the plaintiff had an opportunity to amend). Additionally, Plaintiffs' RICO claims should be dismissed because Plaintiffs cannot establish a domestic injury as a matter of law, and amendment would be futile. *See Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1212 (11th Cir, 2011) (holding that if a more carefully drafted complaint could not state claim, dismissal with prejudice is proper).

III. RECOMMENDATION

For the foregoing reasons, the undersigned recommends that both Motions to Dismiss Plaintiffs' Complaint (ECF Nos. 115, 116) be **GRANTED;** and that Plaintiffs' Amended Complaint be dismissed, with prejudice.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 72(b)(2), the Parties have until March 11, 2020 to file written objections to this Report and Recommendation, if any, with the Honorable Federico A. Moreno, United States District Judge. Responses are due by March 20, 2020. Failure to timely file objections shall bar the Parties from *de novo* determination by the

District Judge of any factual or legal issue covered in the Report and shall bar the Parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017).

RESPECTFULLY SUBMITTED in Chambers this 27th day of February 2020.

LAUREN LOUIS
UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Federico A. Moreno
Counsel of Record