UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALEJANDRO DOMINGO MALVAR EGERIQUE, PLAINTIFF, -AGAINST- EZRA CHOWAIKI, DAVID BENRIMON FINE ART LLC, DAVID BENRIMON, LINDA BENRIMON, PIEDMONT CAPITAL LLC, AVICHAI ROSEN, AND JOHN DOES 1-10, DEFENDANTS.	NO. 19-CV-03110-KPF HON. KATHERINE POLK FAILLA **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF BENRIMON DEFENDANTS' MOTION FOR RULE 11 SANCTIONS

Dated: October 18, 2019

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Defendants David Benrimon Fine Art LLC ("DBFA"), David Benrimon, Linda Benrimon, (together with David Benrimon, the "Benrimons"), Piedmont Capital LLC ("Piedmont"), and Avichai Rosen (collectively, the "Benrimon Defendants") respectfully submit this memorandum of law in support of their motion for sanctions pursuant to Fed. R. Civ. P. 11.

PRELIMINARY STATEMENT

This case represents Plaintiff's strained and self-serving attempt, based on false and unsubstantiated factual allegations and frivolous and unsupportable legal theories, to implicate the Benrimon Defendants in the crimes that Defendant Ezra Chowaiki has admitted and for which he is currently serving an eighteen-month prison sentence. But the Benrimon Defendants had no involvement in Chowaiki's crimes, and neither the original nor the first amended complaint ("FAC") comes close to alleging with any semblance of specificity that they did. The Benrimon Defendants have never been indicted or implicated in any other way in connection with Chowaiki's crimes; instead, they were victims of those same crimes. Specifically, on September 19, 2017, Piedmont engaged in an arm's length transaction with Chowaiki's gallery (the "Chowaiki Gallery") in which Piedmont was induced to lend $300,000 to Chowaiki based on Chowaiki's lies. Chowaiki stole the $300,000 from Piedmont, and Piedmont eventually obtained rights to artworks in which many other similarly situated victims of Chowaiki also made competing claims of ownership. Piedmont has incurred substantial losses as a result—the $300,000 loan was never repaid, and it lost the right to the unencumbered collateral that was supposed to back the loan.

Although the Benrimon Defendants have advised Plaintiff of these facts in numerous discussions and correspondence, Plaintiff persists in alleging a "conspiracy" between Chowaiki and the Benrimon Defendants based on nothing more than rank speculation about what the Benrimon Defendants "knew or should have known" about Chowaiki's frauds. Plaintiff's claims are legally and factually defective in virtually every respect. Despite purporting to bring multiple

RICO and state law claims against the Benrimon Defendants, the FAC makes zero effort to substantiate these claims or allege a coherent legal theory. It entirely fails in many instances to connect the Benrimon Defendants to the alleged events in any way. This is precisely the kind of case that Rule 11 sanctions are intended to deter.

Even more so here, given the serious nature of the multiple claims of racketeering activity that Plaintiff purports to make against the Benrimon Defendants with no substantiation. Courts in this district routinely recognize the stigmatizing effect of RICO allegations. Indeed, RICO has been described as "the litigation equivalent of a thermonuclear device," with the ability to tarnish innocent reputations and destroy legitimate businesses. It is for this reason that courts should not hesitate to impose sanctions under Rule 11 for RICO claims that have no basis in law or fact, even when they might not impose sanctions in circumstances involving different claims.

Rule 11 sanctions are warranted here for several reasons. *First*, Plaintiff's RICO and state law claims are legally frivolous, as detailed in the Benrimon Defendants' motion to dismiss. Yet Plaintiff continues to assert these claims without any reasonable basis in law.

Second, Plaintiff's allegations concerning the Shtar Isko—that the Benrimon Defendants committed fraud on the court by failing to disclose the agreement in forfeiture proceedings—are factually wrong and legally frivolous. The Benrimon Defendants in fact *did* disclose the existence of Shtar Isko in the forfeiture proceedings. More importantly, the case law is clear that a Shtar Isko is an arrangement between Jewish people to avoid the Talmudic prohibition on lending money for interest, and does not create a legally enforceable partnership or joint venture.

Third, although the Benrimon Defendants have explained to Plaintiff for more than a year that they had nothing to do with one of the paintings at issue in this action, Leger's *Composition avec Profil de Femme* (the "Leger"), Plaintiff continues to insist that the Benrimon Defendants

were involved in his loss of the Leger—despite failing to allege even a single specific allegation tying any of the Benrimon Defendants to the painting.

For these reasons, the Court should impose all available sanctions under Rule 11 against Plaintiff and his counsel for their unreasonable conduct in filing and continuing to pursue this action without any reasonable basis in law or fact, including by awarding the Benrimon Defendants their attorneys' fees and costs they have incurred in defending this action.

LEGAL STANDARD

Rule 11 provides that, "[b]y presenting to the court a pleading, … an attorney … certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances … the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law … [and] the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b). "[A]n attorney may not transcend the facts of a given case," and counsel may not "concoct[] 'facts' that [are] not well grounded." *Levine v. F.D.I.C.*, 2 F.3d 476, 479 (2d Cir. 1993). Moreover, Rule 11 imposes an "affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading" before filing it. *O'Malley v. N.Y. City Transit Auth.*, 896 F.2d 704, 706 (2d Cir. 1990).

"Rule 11 is particularly significant in the civil RICO context because commencement of a civil RICO action has an almost inevitable stigmatizing effect on those named as defendants," and "[c]ourts have not hesitated to impose sanctions under Rule 11 when RICO claims have been found to have been frivolous." *Edmonds v. Seavey*, 2009 WL 4404815, at *3 (S.D.N.Y. Dec. 2, 2009); *see also Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655, 660 (S.D.N.Y. 1996)

(describing RICO as "the litigation equivalent of a thermonuclear device" and noting importance of "Rule 11's deterrence value … in the RICO context"), *aff'd*, 113 F.3d 1229 (2d Cir. 1997).

A violation of Rule 11 "requires only a showing of *objective unreasonableness* on the part of the attorney or client signing the papers." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997); *see also McCabe v. Lifetime Entm't Servs., LLC*, 761 F. App'x 38, 41 (2d Cir. 2019) ("Rule 11 requires that the conduct in question be objectively unreasonable and therefore does not require a finding of subjective bad faith."). The Court "may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). Such sanctions may include attorneys' fees and costs in defending the action. *See LCS Grp., LLC v. Shire LLC*, 2019 WL 1234848, at *18 (S.D.N.Y. Mar. 8, 2019) (appropriate sanctions on defendant and its counsel under Rule 11 for asserting frivolous RICO claims consisted of "reasonable attorney's fees and other expenses associated with briefing the motion to dismiss and the motion for sanctions"). Significant sanctions are warranted here given the serious nature of the multiple RICO claims asserted with no adequate basis or substantiation, despite multiple opportunities to investigate and withdraw the claims or amend the pleading.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE BASED ON FRIVOLOUS AND UNSUPPORTABLE LEGAL THEORIES

Despite having had ample notice of the factual and legal deficiency of the claims and, now, two attempts to submit a proper pleading or withdraw the defective claims, Plaintiff's claims against the Benrimon Defendants remain legally defective on their face. The FAC consists of ten causes of action against the Benrimon Defendants—seven RICO claims and three state law claims—that are defective in virtually every respect, as explained in the Benrimon Defendants' memorandum of law in support of their motion to dismiss ("Mem.").

A. Plaintiff's RICO Claims Are Frivolous

The FAC's RICO claims against the Benrimon Defendants are meritless and lack any semblance of the required factual substantiation. Indeed, the FAC attempts to meet many of the required elements of the RICO claims through entirely conclusory allegations devoid of any factual support or elaboration—because there is none. Yet Plaintiff nonetheless persists in advancing these serious claims with no articulated (or articulable) legal basis for doing so.

Counts I and II characterize the Benrimon's gallery, DBFA, as a RICO enterprise and accuse the Benrimons of a "pattern of racketeering activity." FAC ¶¶ 112-18. These claims fail because the FAC lacks allegations of predicate acts of racketeering that satisfy both the relatedness and continuity requirements, and fails to allege the required "nexus" between the enterprise and the predicate acts. Mem. at 4-15. Counts III through VI are predicated on the Benrimon Defendants' alleged violation of RICO through the "collection of unlawful debt." FAC ¶¶ 119-32. These claims fail because the FAC lacks sufficient allegations that any of the Benrimon Defendants were "in the business" of making usurious loans, a required element for such claims. Mem. at 15-17. Count VIII identifies the Chowaiki Gallery as a RICO enterprise, and alleges that the Benrimon Defendants conspired with Chowaiki to facilitate Chowaiki's pattern of racketeering activity through the enterprise. FAC ¶¶ 136-40. This claim fails because the FAC lacks sufficient allegations that the Benrimon Defendants agreed with Chowaiki to violate RICO's substantive provisions, a required element of a RICO conspiracy. Mem. at 17-20.

Plaintiff's "unlawful debt" claims are particularly egregious. In his original complaint, Plaintiff did not allege that any of the Benrimon Defendants were "in the business" of making usurious loans—a necessary element of an unlawful debt claim requiring allegations of "other individuals or companies to whom [defendants] lent money or the usurious interest rates attached to any other loan by the defendants." *Weisel v. Pischel*, 197 F.R.D. 231, 241 (E.D.N.Y. Oct. 31,

2000). Instead, the Complaint alleged a single usurious loan by Piedmont. The Benrimon Defendants raised this deficiency in their pre-motion to dismiss letter. Dkt. 14 at 2. During the July 29, 2019 pre-motion conference (the "Pre-Motion Conference"), Plaintiff's counsel assured the Court that he would amend the complaint to "make it very clear" that the Benrimon Defendants were "making usurious loans, in the business of usurious loans." July 29, 2019 Hrg. Tr. at 4:1-5.[1] Yet the FAC still contains just one allegation of a specific usurious transaction, and as to only one defendant: the $300,000 loan from Piedmont to the Chowaiki Gallery. FAC ¶¶ 81-91. Plaintiff's attempt to bolster this allegation by stating in a vague and conclusory fashion, with respect to Count III, that "Piedmont and Avichai Rosen's business is to lend money or a thing of value at a usurious rate," FAC ¶ 85, is patently insufficient. And with respect to Count V, the FAC lacks even *conclusory* allegations that the Benrimons were "in the business" of making usurious loans. It is plain that Plaintiff has no articulable basis for advancing these claims. Plaintiff's initial deficiency in the Complaint "manifest[ed] a total lack of legal research and preparation," warranting Rule 11 sanctions. *McLoughlin v. Altman*, 1995 WL 640770, at *2 (S.D.N.Y. Oct. 31, 1995). Plaintiff's continued insistence on asserting these claims in the FAC has now risen to the level of bad faith—although Rule 11 sanctions would be appropriate even without such a showing. *See McCabe*, 761 F. App'x at 41 (Rule 11 sanctions require "objective[] unreasonab[ility]").

B. Plaintiff's State Law Claims Are Frivolous

The FAC's state law claims against the Benrimon Defendants are equally frivolous. On the face of the pleading, Count IX does not state a valid claim for fraud against the Benrimon Defendants because there is no allegation that any of the Benrimon Defendants ever communicated

[1] Excerpts from the Pre-Motion Conference transcript cited herein are attached as Exhibit 1 to the accompanying declaration of Luke Nikas (the "Nikas Declaration").

anything to Plaintiff, false or otherwise—an essential element of that claim. Mem. at 20-22. The Benrimon Defendants raised this issue in their pre-motion to dismiss letter. Dkt. 14 at 3. In an apparent effort to remedy the deficiency, Plaintiff now alleges that the Benrimon Defendants "intended" that Plaintiff would rely on the "false and fraudulent" Pledge Agreement and other transaction documents. FAC ¶ 59. This is frivolous. Plaintiff does not even allege that any of these documents were communicated or provided to him by the Benrimon Defendants (or anyone else). Further, those documents—which on Plaintiff's view were intended to conceal that Chowaiki had no right to pledge the subject artworks as collateral—would have *alerted* Plaintiff to the alleged fraud; there is no sense in which Plaintiff could have *reasonably relied* on them.

Count X for conversion and Count XI for replevin fail because "demand and refusal are requisite elements of the [claims] if defendant is a good faith purchaser." *Williams v. Nat'l Gallery of Art, London*, 2017 WL 4221084, at *7 n.13 (S.D.N.Y. Sept. 21, 2017); Mem. at 22-24. After the Benrimon Defendants raised the issue in their pre-motion to dismiss letter, Dkt. 14 at 3, Plaintiff's counsel stated during the Pre-Motion Conference that he would amend the Complaint "[t]o allege that we did make a demand on the defendants," and that such amendment would "leave no doubt as to the viability of the claims." July 29, 2019 Hrg. Tr. at 18:18-19:4. But the promised amendment is entirely conclusory and consists of a singular unsubstantiated allegation: "Plaintiff has requested each defendant to return *le Gueridon* to plaintiff, and defendants have refused to do so." FAC ¶ 66. Plaintiff does not allege that each of the Benrimon Defendants refused the demand in a way that "clearly convey[ed] an intent to interfere with [Plaintiff's] possession or use of his property." *Polanco v. NCO Portfolio Mgmt., Inc.*, 132 F. Supp. 3d 567, 588 (S.D.N.Y. 2015). Nor can he: When Plaintiff asked Piedmont about *le Gueridon*, Piedmont truthfully responded that it did not possess the work. (None of the Benrimon Defendants possess or own *le Gueridon*.)

Finally, Count IX for conspiracy to defraud and Count X for conspiracy to convert both fail because the FAC lacks sufficient allegations of a corrupt agreement between Chowaiki and the Benrimon Defendants. Mem. at 24. Plaintiff attempts to infer a conspiracy from allegations about what the Benrimons Defendants "knew or should have known," which is plainly insufficient. *See Browning Ave. Realty Corp. v. Rosenshein*, 774 F. Supp. 129, 145 (S.D.N.Y. 1991).

II. PLAINTIFF'S ALLEGATIONS CONCERNING THE SHTAR ISKO ARE LEGALLY FRIVOLOUS AND FACTUALLY WRONG

Plaintiff rests much of his case on the unhinged allegation that the Benrimon Defendants committed fraud on the court in the forfeiture proceedings following Chowaiki's guilty plea by not disclosing the Shtar Isko, an agreement that—according to Plaintiff—shows that Piedmont and Chowaiki "were actually 50%-50% equal partners—and not unrelated bona fide purchasers for value reasonably without knowledge to believe that the property was subject to forfeiture." FAC ¶ 76. This is both factually wrong and legally frivolous. The Shtar Isko, also called a Heter Iska, was expressly referenced—not concealed—in the documents that Piedmont filed in the forfeiture proceedings. For instance, Piedmont attached as Exhibit A to its verified petition the September 19, 2017 Note between Piedmont and the Chowaiki Gallery, which specifically stated the parties' agreement that repayment shall be made "in accordance with Heter Iska." *United States v. Ezra Chowaiki*, Case No. 18-cr-00323-JSR, Dkt. 57-1 at 1.[2]

More importantly, it has been settled law for decades that a Heter Iska does not create a legally enforceable partnership—it is a document that must be signed when one Jewish person lends money to another to avoid the Talmudic prohibition on lending money for interest. *See Madison Park Investors LLC v. 488-486 Lefferts LLC*, 2015 WL 471786, at *10 n.3 (N.Y. Sup.

[2] A copy of the September 19, 2017 Note is attached as Exhibit 2 to Nikas Declaration.

Ct. Feb. 5, 2015) ("[A] Hetter Iska constitutes merely a compliance in form with Hebraic law, and does not create a partnership, joint venture, or profit sharing agreement." (quotation omitted)); *Edelkind v. Fairmont Funding, Ltd.*, 539 F. Supp. 2d 449, 454 (D. Mass. Mar. 6, 2008) ("In civil courts, Shtar Heter Iska agreements have been interpreted as merely a compliance in form with Hebraic law, that does not create a partnership between the parties, and that causes of action based on an attempt to create obligations out of such an agreement are devoid of merit." (quotations omitted)), *abrogated on other grounds by Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282 (1st Cir. 2013); *Colby v. Newman*, 2013 WL 12124390, at *12 (C.D. Cal. June 11, 2013) ("New York courts have found heter iska agreements to not be legally enforceable.").

Even after the Benrimon Defendants raised this issue in their pre-motion letter, Dkt. 21 at 2-3, Plaintiff's counsel persisted in these baseless allegations during the Pre-Motion Conference:

> What the Shtar Isko does represent, once it has been created, is that Chowaiki and Piedmont were 50/50 partners. Therefore, when Piedmont made a claim in this court for the other two paintings or one other painting, it did not disclose to the Court that it was Chowaiki's. That, in my mind, was a fraud. It was a fraud on the Court. It was a fraud on the creditors. Nobody else but me, until very late in the game, knew that Piedmont was related in any way to the Benrimons.

July 29, 2019 Hrg. Tr. at 11:22-12:5. Plaintiff continues to repeat these same allegations in the FAC. *See, e.g.*, FAC ¶¶ 48, 57, 76, 86. Plaintiff's insistence on asserting these baseless allegations, in the face of contrary factual evidence and clear law, also warrants Rule 11 sanctions. *See Galin v. Hamada*, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017) (Rule 11 sanctions appropriate when a party "refus[es] to withdraw an allegation or claim even after it was shown to be inaccurate").

III. PLAINTIFF CONTINUES TO MAKE FALSE AND UNSUBSTANTIATED FACTUAL ALLEGATIONS TYING THE BENRIMON DEFENDANTS TO THE LEGER

Nearly nine months before Plaintiff initiated this action, Piedmont's counsel explained to Plaintiff's counsel by letter dated July 30, 2018 that Piedmont had nothing to do with the Leger,

one of the paintings that Plaintiff consigned to the Chowaiki Gallery that is at issue in this case.[3] Despite this correspondence and the lack of any evidence tying the Benrimon Defendants to the Leger, each count in the original Complaint sought damages from the Benrimon Defendants for Plaintiff's alleged loss of the Leger—including those counts that did not allege a conspiracy with Chowaiki. Compl. ¶¶ 4, 149-74. Yet the Complaint lacked even a single specific allegation tying any of the Benrimon Defendants to the Leger; the allegations concerning its acquisition and disposition pertained solely to Chowaiki. *Id.* ¶¶ 57-70.

The Benrimon Defendants raised the issue again in their pre-motion letters, Dkt. 14 at 1 n.1, Dkt. 21 at 3, and counsel for Chowaiki confirmed during the conference that "the Benrimons had nothing to do with Leger at all." July 29, 2019 Hrg. Tr. at 42:12-14. In response, Plaintiff's counsel attempted to clarify during conference that the Benrimon Defendants were "responsible" for the Leger based on their "knowing and willful[]" participation in a conspiracy with Chowaiki, and promised that there "certainly" would not be any allegations in the amended complaint that the Benrimon Defendants "participated in the Leger." July 29, 2019 Hrg. Tr. at 55:15-56:2.

Contrary to Plaintiff's representations during the Pre-Motion Conference, the FAC does not allege merely that the Benrimon Defendants are jointly and severally liable for Plaintiff's alleged loss of the Leger based on their purported participation in a conspiracy with Chowaiki. Instead, the FAC contains numerous allegations that Plaintiff lost the Leger ***as a direct result*** of the Benrimon Defendants' actions:

- "***As a result***" of the Benrimon Defendants' "agree[ment] with each other to join, facilitate, further, and to participate in Ezra Chowaiki's pattern of Racketeering Activity, … plaintiff was injured by the loss, theft, fraudulent taking, or conversion of … his Leger." FAC ¶ 111 (emphasis added).

[3] A copy of the July 30, 2018 letter is attached as Exhibit 3 to the Nikas Declaration.

- "***As a direct and proximate result*** of the conspiracy defendants' predicate actions in furtherance of violating 18 U.S.C. § 1962(d) … plaintiff has been and is continuing to be injured in his business or property, including by the unlawful conversion of his Leger …." *Id.* ¶ 140 (emphasis added).

- The Benrimon Defendants "conspired and agreed with Mr. Chowaiki to join [his] scheme and advance it, and engaged in actions … to do so. And plaintiff was harmed ***thereby*** in the loss of … the Leger." *Id.* ¶ 143 (emphasis added).

- "Each defendant intentionally took overt acts in furtherance of that agreement to defraud art owners of the art they had consigned to Mr. Chowaiki's Gallery. And Plaintiff was harmed ***thereby*** by the loss of his … Leger." *Id.* ¶ 148 (emphasis added).

The FAC contains not one specific allegation tying the Benrimon Defendants to the Leger, much less any explanation of how Plaintiff lost the Leger "as a direct and proximate result" of anything that the Benrimon Defendants ever did. Plaintiff's insistence on asserting these reckless allegations, without a shred of evidence to support them, warrants Rule 11 sanctions. *See Galin*, 283 F. Supp. 3d at 202 ("[A] court may impose [Rule 11] sanctions on a party for refusing to withdraw an allegation or claim even after it was shown to be inaccurate …." (quotations omitted)).

CONCLUSION

Plaintiff and his counsel have thrown together an incoherent hodgepodge of largely unrelated and frivolous allegations for the purpose of using the RICO law improperly as a "thermonuclear device." They have attempted to stain legitimate people and businesses for their own financial gain—in the face of clear law and facts that undermine their positions. This motion is not just about a defective complaint. It is about the Plaintiff's reckless disregard for the lives and reputations of innocent people and disregard for the justice system and this Court. The Court should impose all available sanctions under Rule 11 against Plaintiff and his counsel, including by awarding the Benrimon Defendants their attorneys' fees and costs they have incurred in defending this action. That is the only way to remedy the harm caused and send a clear message that frivolous RICO claims will not be tolerated

Dated: October 18, 2019
New York, NY

Respectfully submitted,

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