NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY MALLEY, Plaintiff-Appellant, v. SAN JOSE MIDTOWN DEVELOPMENT LLC; et al., Defendants-Appellees.	No. 22-15190 D.C. No. 5:20-cv-01925-EJD MEMORANDUM*
GREGORY MALLEY, Plaintiff-Appellee, v. SAN JOSE MIDTOWN DEVELOPMENT LLC; et al., Defendants-Appellants.	No. 22-15191 D.C. No. 5:20-cv-01925-EJD

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted February 6, 2023
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE and BUMATAY, Circuit Judges, and BENNETT,[**] District Judge.

In this civil RICO action, Plaintiff-Appellant Gregory Malley contends that the Defendants-Appellees, San Jose Midtown Development, LLC ("SJMD") and its majority stakeholders, used a capital call investment process to issue usurious loans. On direct appeal, Malley challenges the dismissal of his federal civil racketeering claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. On cross-appeal, Defendants challenge the denial of their motion for attorney's fees. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we **AFFIRM** both decisions.

In 2014, SJMD decided to sell real property located at 777 West San Carlos Street, San Jose, CA. In order to obtain the necessary capital to close this sale, SJMD expanded its membership and welcomed several new members, including Malley. The sale became embroiled in three years of litigation over environmental remediation costs, requiring SJMD to raise additional capital from its membership. To accomplish this, SJMD amended the Operating Agreement to streamline the process for making "capital calls" to its members. As amended, if any member refused to contribute the requested amount in response to a capital call, the remaining members would be authorized to pay an advance on the shortfall. Should this occur,

[**] The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

the defaulting member would face a proportionate loss of their equity in SJMD and their economic interest in the Property unless they reimburse the advancing member with interest. Moreover, members who contributed additional funds to capital calls would also receive a "preferred return" on their investments if the Property was sold at a premium and proceeds remained after primary distributions.

I. Direct Appeal

On direct appeal, Malley contends that the amendments to the Operating Agreement allowed the Defendants to issue usurious loans to the Minority Members. RICO "provides a private cause of action for '[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." *United Broth. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO*, 770 F.3d 834, 837 (9th Cir. 2014) (quoting 18 U.S.C. § 1964(c)) (alterations in original). To state a civil RICO claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's business or property." *United Broth.*, 770 F.3d at 837 (quoting *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005)). The central issue on direct appeal is whether Malley has alleged any predicate acts sufficient to sustain a RICO claim.

Malley primarily contends that the Defendants operated an enterprise engaged in the collection of unlawful debt, a RICO predicate offense. 18 U.S.C. § 1961(6).

To constitute usury, "[t]he [challenged] transaction must be a loan or forbearance." *Korchemny v. Piterman,* 68 Cal. App. 5th 1032, 1043 (2021). SJMD's Operating Agreement creates a mechanism by which members who invest in the acquisition of the Property will receive additional equity in SJMD, while members who refuse to contribute capital may have their equity reduced if other members make an advance on their obligations. This is "a bona fide joint venture," not a loan. *Junkin v. Golden W. Foreclosure Serv., Inc.*, 180 Cal. App. 4th 1150, 1155–56 (2010). The Operating Agreement does not impose "an absolute obligation of repayment," *id.* at 1155, as delinquent members may exit SJMD or forfeit their equity instead of remunerating advances on their capital obligations. Additionally, the capital call process does not eliminate the risk of loss for advancing members, and all SJMD members retain voting control over the organization's affairs.

In the alternative, Malley contends that the Defendants engaged in one of three predicate offenses: attempted extortion, wire fraud, and RICO conspiracy. To allege a pattern of racketeering activity, plaintiff must show at least two valid predicate acts that are "indictable" under RICO. 18 U.S.C. §§ 1961(5), 1962(c); *accord Clark v. Time Warner Cable*, 523 F.3d 1110, 1116 (9th Cir. 2008). Malley has not done so. His allegations of attempted extortion and wire fraud amount to "isolated" incidents that "present[] no threat of continuing." *Jarvis v. Regan*, 833 F.2d 149, 153 (9th Cir. 1987); *accord H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (holding that

a RICO plaintiff must "show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity" (emphasis in original)).[1] Finally, as Malley has failed to allege a substantive RICO offense, he cannot sustain a RICO conspiracy claim. *See Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Accordingly, we **AFFIRM** the dismissal of Malley's civil RICO claims.

II. Cross Appeal

On cross-appeal, Defendants challenge the district court's refusal to award the $237,718.50 in attorney's fees they incurred defending this action. Defendants argue that a fee award is authorized by Section 10.1 of the Amended Operating Agreement, which provides that any dispute "shall be settled by arbitration," and that "[t]he prevailing party shall be entitled to reimbursement of attorney fees, costs, and expenses incurred in connection with the arbitration." The district court declined to issue a fee award after concluding that Section 10.1 is limited to arbitration and

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[1] In any event, neither predicate offense is adequately pled. First, Malley alleges that the Defendants extorted him by warning him that his distribution from the sale of the Property would be withheld unless he waived his right to sue SJMD. However, this warning was not "unlawful," as the Fifth Amendment to the Operating Agreement required all members to sign a general release in order to receive their distributions. *See* Cal. Pen. Code § 519(1). Second, Malley claims that Defendant Peruri committed wire fraud by stating that he was a licensed real estate broker in response to usury allegations. However, the email he relies on does not reference any usury allegations, and Peruri does not appear to have claimed authority to charge above the legal rate of interest.

determining that the Defendants are not a prevailing party. We review the denial of attorney's fees for an abuse of discretion. *Berkla v. Corel Corp.*, 302 F.3d 909, 917 (9th Cir. 2002).

We affirm the denial of attorney's fees on the district court's first rationale.[2] As the plain language of Section 10.1 only authorizes an award of attorney fees in connection with arbitration, this provision is inapplicable in the event of litigation. *See Kalai v. Gray*, 109 Cal. App. 4th 768, 777 (2003) (holding that a clause authorizing an award of "attorney's fees and costs incurred by [the] prevailing party in connection with the Arbitration proceedings" was inapplicable to litigation). Although Defendants sent Malley a letter demanding arbitration, and Malley instead elected to pursue his claims in federal court, the record reflects that Defendants never submitted a motion to compel arbitration. Additionally, Defendants fail to invoke any other contractual or statutory provision authorizing fees in these circumstances. Accordingly, we **AFFIRM** the district court's denial of attorney's fees.

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[2] The district court's second rationale is incorrect as a matter of law. Although there is no "prevailing party" with respect to Malley's state law claims, which were dismissed without prejudice and subsequently re-filed in state court, Defendants are the prevailing party on Malley's federal RICO claim, which has been dismissed with prejudice. *See, e.g.*, *Miles v. California*, 320 F.3d 986, 988 (9th Cir. 2003). Nevertheless, we affirm on the district court's first rationale standing alone.