

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

6  
7 **VERDE MEDIA CORP.,**

8 Plaintiff,

9 v.

10 **RON LEVI, ET AL.,**

11 Defendants.

Case No. 14-cv-00891-YGR

**ORDER GRANTING DEFENDANTS' MOTION  
TO DISMISS WITHOUT LEAVE TO AMEND**

Re: Dkt. No. 94

12 On March 4, 2015, the defendants moved to dismiss the Second Amended Complaint for  
13 failure to state a claim. (Dkt. No. 94 (“Mot.”).) The plaintiff opposed the motion. (Dkt. No. 96  
14 (“Oppo.”).) The motion was heard on May 5, 2015.

15 The Court previously granted a motion to dismiss the plaintiff’s First Amended Complaint  
16 with leave to amend. *Verde Media Corp. v. Levi*, No. 14-CV-00891, 2015 WL 374934 (N.D. Cal.  
17 Jan. 28, 2015). In its Second Amended Complaint, the plaintiff asserts six counts: (i) Breach of  
18 Contract; (ii) Breach of the Implied Covenant of Good Faith and Fair Dealing; (iii) Unjust  
19 Enrichment/Restitution; (iv) Fraudulent Inducement; (v) Violation of the Federal Racketeer  
20 Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (“RICO”); and (vi) Conspiracy to  
21 Violate RICO. (Dkt. No. 92 (“SAC”).)<sup>1</sup> As the Court previously noted, because diversity  
22 jurisdiction is lacking, the only basis for the Court to hear the state law claims is supplemental  
23 jurisdiction. Thus, if the RICO claims fail, and leave to amend is not granted, the entire case will  
24 be dismissed.

25  
26  
27 <sup>1</sup> The SAC lists the RICO counts as the sixth and seventh causes of action, however there  
28 is no fifth. For purposes of clarity, the Court renumbered the causes of action herein. Counts I  
and II are asserted against the corporate defendants. Counts III-V are asserted against all  
defendants. Count VI is asserted against defendants Ardeshir S. Akhavan and Ron Levi.

1           Having carefully considered the papers submitted, the record in this case, and the  
2 arguments of counsel, and good cause shown, the Court hereby **GRANTS** the defendants’ motion  
3 and **DISMISSES** the Second Amended Complaint **WITHOUT LEAVE TO AMEND**. The plaintiff’s  
4 RICO claims (Counts V and VI) are **DISMISSED WITH PREJUDICE**. The remaining claims, arising  
5 under state law, are **DISMISSED WITHOUT PREJUDICE**.

6           **I. BACKGROUND**

7           Generally, this lawsuit relates to a purported web traffic referral agreement under which  
8 plaintiff was allegedly paid only \$5,000 of the millions it was owed for brokering referrals to  
9 defendants’ adult-oriented websites. The relevant background was recounted in substantial detail  
10 in the Court’s January 28, 2015 Order, which dismissed the First Amended Complaint with leave  
11 to amend. *Verde Media Corp.*, 2015 WL 374934 at \*2-3. In its Second Amended Complaint,  
12 among other changes, the plaintiff: (1) abandoned its previously asserted (and apparently baseless)  
13 RICO predicates other than wire fraud; (2) included some additional detail regarding the instant  
14 messages that serve as the basis for the purported wire fraud; (3) accused a more limited set of  
15 defendants; (4) removed a claim under the Lanham Act; (5) removed a claim for tortious  
16 interference; and (6) added allegations, typically conclusory in nature, regarding an alter ego  
17 theory. The Court recounts the factual allegations relevant to the present motion:

18           In a series of instant message<sup>2</sup> exchanges between the plaintiff’s principal Jeremy Greene  
19 and defendant Ardeshir S. Akhavan (purportedly acting on behalf of all defendants) over a two-  
20 day period (November 6-7, 2012), Akhavan allegedly made a series of false representations that:  
21 (1) the defendants were a single company, not multiple entities; (2) the defendants intended to pay  
22 the plaintiff a fee for all income earned as a result of referrals from the plaintiff; and (3) the  
23 defendants would compensate the plaintiff for referrals of entities “previously enrolled with [the  
24 defendants], but . . . not actively driving substantial traffic to [the defendants’ websites] at the time  
25 of the [r]eferral.” (SAC ¶¶ 60-74, 78, 129.) The SAC provides only the following excerpts<sup>3</sup> of

26 \_\_\_\_\_  
27           <sup>2</sup> The SAC references “instant message . . . and electronic mail” as dual avenues of wire  
28 fraud, however the specific allegations relevant to wire fraud relate only to instant messages.

<sup>3</sup> The complaint also includes observations regarding the username and email address

1 instant messages<sup>4</sup> from defendant Akhavan in an attempt to plead a pattern of wire fraud as a  
2 RICO predicate:

- 3 • “Akhavan stated that ‘scott runs the dating department... and adam and fabian are  
4 also part of that team,’ indicating that Defendants’ business was a single entity with  
5 a single ‘dating department,’ even though Defendants’ adult dating websites are  
6 technically owned by numerous different corporations.” (*Id.* ¶ 64)
- 7 • “Akhavan stated that ‘we work [with everyone] in the biz, no reason we aren’t  
8 working together,’ even though the Defendants’ business is spread across numerous  
9 business entities, making it unlikely that any single entity works with ‘everyone’ in  
10 the biz, regardless of colloquial meaning.” (*Id.*)
- 11 • “Akhavan stated, ‘but basically i need marketing people, but also good ole  
12 fashioned sales people / brokers etc.’” (*Id.* ¶ 66.)
- 13 • “Greene asked, ‘what do you guys offer for brokers? On all the deals I have done  
14 besides [name redacted],<sup>5</sup> I got a small fee for the first 3 months so I could put a  
15 tone of time into it and be paid til the accounts started making money. Is that  
16 something you guys would be ok with . . . ,’ to which Akhavan responded,  
17 ‘honestly dude, I don’t even think that short term lol . . . lets just make it happen  
18 . . . you tell me what you need to make a successful attempt / and we can give it a  
19 go.’” (*Id.*)
- 20 • “Akhavan stated ‘you can start [whenever] buddy / just shoot me an invoice for  
21 your service fees / I’ll get that paid for ya and we can begin.’” (*Id.*)
- 22 • “Greene asked ‘just so I know what to base the invoice off of, once volume is up,  
23

---

24 allegedly used by defendant Akhavan and notes his purported (1) agreement to pay “Greene” (not  
25 a party to this litigation) for referrals and (2) failure to disclose certain potentially relevant  
information. (SAC ¶¶ 60-74.)

26 <sup>4</sup> All errors in the original.

27 <sup>5</sup> The plaintiff has apparently not provided the defendants (or the Court) with an un-  
28 redacted version of the SAC.

1 what per sale will I get? I usually get like \$10/sale,’ to which Akhavan responded  
2 ‘really depends man, we usually do 10% of payout / so I can do 10\$.’” (*Id.*)

- 3 • “. . . Greene explained that he could bring a list of his contacts to Defendants to  
4 ‘see who I can and cant touch,’ and Akhavan responded ‘sounds good dude / im  
5 sure we work with a lot of people already but any that we are not or not getting the  
6 max out of I would be [down] for you to rep, no problem.’” (*Id.* ¶ 69.)

7 **II. LEGAL STANDARD**

8 “Federal Rule of Civil Procedure 8(a)(2) requires only a ‘short and plain statement of the  
9 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
10 what the claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
11 544, 554 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Even under the liberal pleading standard of  
12 Rule 8(a)(2), “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires  
13 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
14 will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)  
15 (internal brackets and quotation marks omitted)). The Court will not assume facts not alleged, nor  
16 will it draw unwarranted inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining  
17 whether a complaint states a plausible claim for relief [is] a context-specific task that requires the  
18 reviewing court to draw on its judicial experience and common sense.”).

19 Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon  
20 which relief may be granted. Dismissal for failure to state a claim under Federal Rule of Civil  
21 Procedure 12(b)(6) is proper if there is a “lack of a cognizable legal theory or the absence of  
22 sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*, 646 F.3d  
23 1240, 1242 (9th Cir. 2011) (citing *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
24 1988)). The complaint must plead “enough facts to state a claim [for] relief that is plausible on its  
25 face.” *Twombly*, 550 U.S. at 570. A claim is plausible on its face “when the plaintiff pleads  
26 factual content that allows the court to draw the reasonable inference that the defendant is liable  
27 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. If the facts alleged do not support a  
28 reasonable inference of liability, stronger than a mere possibility, the claim must be dismissed. *Id.*

1 at 678-79; *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (the court is  
2 not required to accept as true “allegations that are merely conclusory, unwarranted deductions of  
3 fact, or unreasonable inferences”).

4 Additionally, Rule 9 establishes a heightened pleading standard for allegations of fraud.  
5 Fed. R. Civ. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the  
6 circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a  
7 person’s mind may be alleged generally.”); *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)  
8 (To be alleged with particularity under Rule 9(b), a plaintiff must allege “the ‘who, what, when,  
9 where, and how’” of the alleged fraudulent conduct.); *see also Tatung Co. v. Shu Tze Hsu*, No. 13-  
10 cv-01743, 2014 WL 4306561, at \*18 (C.D. Cal. Sept. 2, 2014) (applying Rule 9(b)’s heightened  
11 pleading standard to state law claims brought in federal court). Moreover, where a plaintiff  
12 alleges “a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as  
13 the basis of a claim[,] . . . the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the  
14 pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess v.*  
15 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04, 1106 (9th Cir. 2003) (holding “the  
16 circumstances constituting the alleged fraud [must] be specific enough to give defendants notice of  
17 the particular misconduct [alleged] so that they can defend against the charge and not just deny  
18 that they have done anything wrong” (internal quotations and citations omitted)).

19 **III. DISCUSSION**

20 As a threshold matter, the Court addresses the adequacy of the two remaining federal law  
21 claims (under RICO) because, as previously noted, “unless federal claims ultimately survive, [the  
22 Court] will decline to exercise supplemental jurisdiction over the state law claims.” *Verde Media*  
23 *Corp.*, 2015 WL 374934, at \*7 (N.D. Cal. Jan. 28, 2015) (citing *Wade v. Regional Credit Assoc.*,  
24 87 F.3d 1098, 1101 (9th Cir. 1996)).

25 **A. Substantive RICO Violation—18 U.S.C. § 1962(c)**

26 Under section 1962(c), “[i]t shall be unlawful for any person employed by or associated  
27 with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such  
28 enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). To state a

1 claim, a plaintiff must allege: “(1) conduct (2) of an enterprise (3) through a pattern (4) of  
2 racketeering activity.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (*en banc*).  
3 Rule 9(b)’s pleading requirements apply to RICO claims involving fraudulent conduct. *See*  
4 *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (requiring the complaint  
5 “state the time, place, and specific content of the false representations as well as the identities of  
6 the parties to the misrepresentation”).

7 Here, the plaintiff has failed to plead specific facts establishing a *pattern* of racketeering  
8 activity. The SAC generally alleges, and in a conclusory manner, the defendants’ use of “a  
9 complex web of domestic and foreign corporations through which liability and cash flow are  
10 untraceable.” (SAC ¶ 127.) However, there are no specific allegations of any predicate acts other  
11 than wire fraud by the defendants. (*See* Oppo. at 9.) “The elements of wire fraud are: (1) the  
12 existence of a scheme to defraud; (2) the use of wire, radio, or television to further the scheme;  
13 and (3) a specific intent to defraud.” *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013).  
14 The plaintiff apparently believes a series of vague instant messages—sent over the course of *two*  
15 *days*, relating to a single purported scheme, and evincing no clear threat of repetition—constitutes  
16 a pattern of racketeering activity under the statute. The Court disagrees. *See H.J. Inc. v. Nw. Bell*  
17 *Tel. Co.*, 492 U.S. 229, 242 (1989) (“Predicate acts extending over a few weeks or months and  
18 threatening no future criminal conduct do not satisfy [the continuity prong of the pattern]  
19 requirement: Congress was concerned in RICO with long-term criminal conduct.”); *Turner v.*  
20 *Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) (“[W]hile two predicate acts are required under the  
21 Act, they are not necessarily sufficient.”). Each discrete instant message at issue was sent over a  
22 short period of time in the course of communications between one sender and one recipient. Each  
23 involved—at most—another link in the chain of an alleged fraud, whereby defendant Akhavan  
24 attempted to induce the plaintiff to deliver referrals in the absence of any intent on the part of  
25 Akhavan to provide the promised compensation in return. Such allegations are insufficient to  
26 establish RICO liability even if pled with particularity under Rule 9(b). Many of the relevant  
27 allegations, however, still lack the requisite detail. Thus, this claim fails and is **DISMISSED WITH**  
28 **PREJUDICE.**

1           **B. Conspiracy to Violate RICO—18 U.S.C. § 1962(d)**

2           “To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that  
3 is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a  
4 violation of two predicate offenses.” *Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir.  
5 2000). In *Howard*, the Ninth Circuit affirmed the district court’s holding “that the failure to  
6 adequately plead a substantive violation of RICO precludes a claim for conspiracy.” *Id.*; *see also*  
7 *Turner*, 362 F.3d at 1231 n.17 (same). Accordingly, because plaintiff has failed to allege the  
8 requisite elements of a substantive RICO violation under section 1962(c), its claim for conspiracy  
9 under section 1962(d)—which is premised upon the claimed 1962(c) violation—also fails and is

10 **DISMISSED WITH PREJUDICE.**

11           **C. State Law Claims**

12           Having dismissed the only remaining federal law claims with prejudice, the Court declines  
13 to exercise supplemental jurisdiction over the remaining state law claims and therefore those  
14 claims are **DISMISSED WITHOUT PREJUDICE**. *See United Mine Workers of Am. v. Gibbs*, 383 U.S.  
15 715, 726 (1966) (“Needless decisions of state law should be avoided both as a matter of comity  
16 and to promote justice between the parties, by procuring for them a surer-footed reading of  
17 applicable law.”).

18           **D. Leave to Amend**

19           Leave to amend is liberally granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Chodos v.*  
20 *West Pub. Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). One exception to this general rule of  
21 permissiveness, however, is where amendment would be futile. *Foman*, 371 U.S. at 182; *Smith v.*  
22 *Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1101 (9th Cir. 2004). The plaintiff was previously  
23 granted leave to amend, with the Court noting the First Amended Complaint fell far short of  
24 successfully pleading its RICO claims. Nevertheless, the Second Amended Complaint still failed  
25 to allege sufficiently a *pattern* of racketeering activity. At the hearing, the plaintiff pointed to no  
26 other facts or theories warranting leave to amend. Thus, the Court finds that granting such leave  
27 would be futile.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IV. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** the defendants' motion and the case is **DISMISSED WITHOUT LEAVE TO AMEND**. The plaintiff's RICO claims (Counts V and VI) are **DISMISSED WITH PREJUDICE**. The remaining claims, arising under state law, are **DISMISSED WITHOUT PREJUDICE**. The defendants shall prepare and file a proposed form of judgment, approved as to form by the plaintiff, within five (5) business days from the date of this Order.

This Order terminates Docket Number 94.

**IT IS SO ORDERED.**

Dated: May 18, 2015

  
YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT COURT JUDGE