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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 3BA PROPERTIES LLC, et al.,

7 Plaintiffs,

8 v.

9 LARRY CLAUNCH, et al.,

10 Defendants.

C13-979 TSZ

ORDER

11 THIS MATTER comes before the Court on (i) a motion to dismiss, docket no. 62,
12 brought by defendants Larry Claunch, 3BA International LLC (“3BA International”), and
13 TenMain Investments, LLC (“TenMain”); (ii) a motion to extend certain deadlines,
14 docket no. 64, brought by Claunch, 3BA International, and TenMain; and (iii) a motion
15 brought by plaintiffs, docket no. 71, to compel defendants TenMain, Larry Claunch
16 Living Trust UTA (the “Claunch Trust”), and One Hundred Sands, LLC (“One Hundred
17 Sands”) to waive service of summons. Having reviewed all papers¹ filed in support of,
18 and in opposition to, each motion, the Court enters the following order.

19 _____
20 ¹ Plaintiffs contend that the motion to dismiss was not timely filed. Defendants argue that plaintiffs’
21 response to the motion to dismiss was one day late and should not be considered. As to Claunch, the
22 Court does not agree that the motion to dismiss was tardy, *see infra* note 5, and to the extent that a motion
23 to dismiss on behalf of 3BA International or TenMain should have been presented earlier, the Court sua
sponte GRANTS an extension. The Court likewise treats plaintiffs’ response to the motion to dismiss as
timely filed.

1 **Discussion**

2 The Court has previously issued two Orders, docket nos. 41 and 60, setting forth
3 the underlying facts of this case. As a result of the Court’s prior rulings, plaintiffs’
4 claims against seven defendants² have been dismissed with prejudice. Several other
5 defendants have not yet appeared, presumably because they have not been served. *See*
6 Minute Order (docket no. 39) (denying plaintiffs’ motion for leave to effect service by
7 mail). Claunch, 3BA International, and TenMain are the only remaining defendants on
8 whose behalf counsel has appeared. Claunch seeks dismissal, pursuant to Federal Rule of
9 Civil Procedure 12(b)(5), for insufficient service of process. In addition, all three of
10 these defendants contend, under Federal Rule of Civil Procedure 12(b)(6), that plaintiffs’
11 claims against them should be dismissed because they are either time barred or otherwise
12 not cognizable.³

13 The 62-page Second Amended Complaint contains the following claims against
14 Claunch and/or 3BA International: (i) breach of contract; (ii) trespass onto land and/or
15 chattels; (iii) misappropriation of trade secrets; (iv) misrepresentation and/or fraud;
16 (v) violation of Section 38 of the Lanham Act, 15 U.S.C. § 1120; (vi) breach of fiduciary
17 duty; (vii) conspiracy in violation of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985;

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19 ² These entities are either attorneys or law firms, specifically Michael Reynvaan, Perkins Coie LLP, Stoel
20 Rives LLP, Brinette Bobb Rounds, Oak Street Law Group, PLLC, Gloria Nagler, and Nagler & Malaier
P.S.

21 ³ A complaint might be lacking for one of two reasons: (i) absence of a cognizable legal theory; or
22 (ii) insufficient facts to support a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749
23 F.2d 530, 534 (9th Cir. 1984). When a complaint fails to adequately state a claim, such deficiency should
be “exposed at the point of minimum expenditure of time and money by the parties and the court.” *Bell*
Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).

1 (viii) violation of 18 U.S.C. § 892; and (ix) violation of the Racketeer Influenced and
2 Corrupt Organizations provisions of the Organized Crime Control Act of 1970, Pub. L.
3 91-452 (the “RICO Act”). 2d Am. Compl. at 32-60 (docket no. 46). Plaintiffs have
4 asserted no claim and include no prayer for relief against TenMain. *Id.* at 32-61. The
5 Clerk will therefore be directed to terminate TenMain as a defendant, effective nunc pro
6 tunc to the date that the Second Amended Complaint was filed, *i.e.*, December 3, 2013.⁴

7 **A. Insufficient Service of Process**

8 Claunch apparently resides in the Republic of Fiji. Lloyd Decl. (docket no. 31-2).
9 Plaintiffs did not serve Claunch in the manner prescribed in Federal Rule of Civil
10 Procedure 4(f) for serving individuals in foreign countries. Instead, plaintiffs arranged
11 for a Polk County Deputy Sheriff to deliver the summons and complaint to Mark Paschke
12 at 12900 Beck Road in Dallas, Oregon. Sheriff’s Affidavit (docket no. 11). Paschke
13 resides at 12910 Beck Road, in a house owned by Claunch. Paschke Decl. at ¶¶ 2 & 4
14 (docket no. 63). Paschke provides maintenance services for the adjacent property located
15 at 12900 Beck Road, which is also owned by Claunch and which is used primarily for
16 farming purposes. *Id.* at ¶ 3. Claunch does not reside at either location (12900 or 12910
17 Beck Road), and he seldom visits. *Id.* at ¶¶ 5 & 7. Paschke has no responsibility for

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19 _____
20 ⁴ With regard to TenMain, plaintiffs’ motion to compel waiver of service of summons is STRICKEN as
21 moot. Not only does the Second Amended Complaint contain no allegations against TenMain, rendering
22 service unnecessary, but TenMain was already served via its registered agent, Oak Street Law Group,
23 PLLC. *See* Resp. at 2 n.1 (docket no. 72); *see also* http://www.sos.wa.gov/corps/search_advanced.aspx
(indicating that TenMain is an active Washington limited liability company and providing the name and
address of its registered agent).

1 handling Claunch’s mail or dealing with Claunch’s business matters, other than
2 maintaining the farm. *Id.* at ¶ 6.

3 Because Claunch resides outside the United States, delivering the summons and
4 complaint to Paschke did not constitute proper service. *See* Fed. R. Civ. P. 4(f). Even if,
5 however, 12900 Beck Road was Claunch’s “dwelling or usual place of abode,” handing
6 the summons and complaint to Paschke would be insufficient because Paschke does not
7 reside at that location and is not Claunch’s agent within the meaning of Federal Rule of
8 Civil Procedure 4(e)(2)(C). *See* Fed. R. Civ. P. 4(e); *see also* RCW 4.28.080(15);
9 *compare* Ore. R. Civ. P. 7(D). The Sheriff’s Affidavit of Service filed by plaintiffs itself
10 indicates that Paschke is merely a caretaker of the property, and not the requisite resident
11 or agent. Plaintiffs having failed to properly serve Claunch, the Court lacks personal
12 jurisdiction over him. *See Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir.
13 1992); *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688
14 (9th Cir. 1988).

15 The usual 120-day deadline for effecting service does not apply when the
16 defendant is not within a judicial district of the United States, Fed. R. Civ. P. 4(m), and
17 plaintiffs might yet timely serve Claunch. The Court must therefore assess whether to
18 exercise its discretion to dismiss plaintiffs’ claims against Claunch without prejudice or
19 retain the action and allow plaintiffs leave to attempt to effect proper service.⁵ *See*

21 ⁵ Plaintiffs contend that Claunch’s Rule 12(b)(5) motion is untimely. They are incorrect. In response to
22 the original complaint, Claunch preserved the defense of defective service. *See* Answer at ¶ 2.2 (docket
23 no. 14); *see also* Fed. R. Civ. P. 12(h)(1)(B)(ii). Plaintiffs subsequently amended their complaint, but

1 Reyes v. Fircrest Sch., 2012 WL 3144915 at *3 (W.D. Wash. Aug. 1, 2012); see also
2 Romero v. Washoe County, 2013 WL 1955887 at *1 (D. Nev. May 10, 2013) (“In
3 granting a Rule 12(b)(5) motion, the court may either dismiss the action without
4 prejudice or retain the action and permit the plaintiff to cure the defects.”). Such decision
5 depends on the potential merits of plaintiffs’ claims and whether further proceedings are
6 warranted in this case. The Court therefore turns to the Rule 12(b)(6) arguments
7 presented by Claunch and 3BA International.

8 **B. Federal Claims**

9 **1. Fraud in Procuring Trademark Registration**

10 Section 38 of the Lanham Act provides that “[a]ny person who shall procure
11 registration in the Patent and Trademark Office of a mark by a false or fraudulent
12 declaration or representation, oral or in writing, or by any false means, shall be liable in a
13 civil action by any person injured thereby for any damages sustained in consequence
14 thereof.” 15 U.S.C. § 1120. The Lanham Act contains no express statute of limitations,
15 and the Court must therefore look to state law concerning analogous types of actions. See
16 Beauty Time, Inc. v. VU Skin Sys., Inc., 118 F.3d 140, 143 (3d Cir. 1997). A claim under
17 § 38 of the Lanham Act sounds in fraud, and is therefore subject to Washington’s three-
18 year limitation period for fraud claims. See id. (citing Official Airline Guides, Inc. v.

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21 failed to serve the operative pleading on Claunch. See Cert. of Serv. (docket no. 47) (relying solely on
22 electronic notification to Claunch’s attorney). Because Claunch was not properly served with either the
23 original complaint or the Second Amended Complaint, the 21-day period within which he would have
been required to present a motion pursuant to Rule 12(b) never began to run. See Fed. R. Civ. P. 12(a);
see also Fed. R. Civ. P. 15(a)(3).

1 Goss, 6 F.3d 1385, 1395 (9th Cir. 1993) (applying Oregon’s two-year limitation period));
2 see RCW 4.16.080(4).

3 The Second Amended Complaint is less than clear concerning the facts underlying
4 the claim pursuant to § 38 of the Lanham Act. The records of the United States Patent
5 and Trademark Office (“PTO”) indicate that 3BA International holds two registrations
6 for the mark “3BA,” one related to clothing and the other in the field of “entertainment in
7 the nature of professional basketball games.” Registration Nos. 2,499,830 & 2,940,640
8 (see Trademark Electronic Search System at <http://tmsearch.uspto.gov>). The dates of
9 registration are October 23, 2001, and April 12, 2005, respectively. Id. The original
10 owner of the registrations was plaintiff Kevin M. LuBahn. Id. Plaintiffs are presumably
11 not asserting that LuBahn engaged in fraud to obtain the registrations. Thus, the acts on
12 which plaintiffs base their Lanham Act claim must relate to the assignment of the marks
13 recorded with the PTO on December 4, 2008. Such assignment, from LuBahn to
14 Claunch,⁶ was accomplished by filing a copy of a Bankruptcy Court order entered on
15 September 23, 2008. See Reel 3899, Frames 586-599 (<http://assignments.uspto.gov>). On
16 April 27, 2009, the bankruptcy trustee filed a report indicating that the sale to Claunch of
17 LuBahn’s intellectual property had been completed.⁷ See Order at 3 (docket no. 60).

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19 ⁶ Claunch subsequently assigned the registrations to 3BA International. See Reel 4024, Frames 515-518
20 (<http://assignments.uspto.gov>). Such assignment did not affect LuBahn’s interest in the registrations and
therefore cannot be a basis for plaintiffs’ claim under § 38 of the Lanham Act.

21 ⁷ Claunch also purchased two registered copyrights for the 3BA logo and a text setting forth the rules of
22 the game, Registration Nos. VA 1-037-004 and TX 5-316-689, respectively, and three registered domain
names, 3BA.com, 3BA.net, and 3BA.org. See Order at ¶ 3 (E.D. Wash. Bankr. 07-1877, docket no. 35 at
23 3). Plaintiffs make no separate federal claim for fraud relating to Claunch’s acquisition of these assets.

1 This action commenced on June 6, 2013. *See id.* at 4 (citing Order at 7 & n.4
2 (docket no. 41)). Thus, to pursue the Lanham Act claim, plaintiffs must establish that
3 they did not know and could not have known prior to June 6, 2010, the facts on which the
4 claim under § 38 is based. *E.g., McLeod v. Nw. Alloys, Inc.*, 90 Wn. App. 30, 36, 969
5 P.2d 1066 (1998) (“[A] cause of action accrues when the claimant knew or should have
6 known the essential elements of the cause of action. . . . The cause of action accrues
7 when the claimant knows or should know the relevant facts, ‘whether or not the plaintiff
8 also knows that these facts are enough to establish a legal cause of action.’”). Plaintiffs
9 fail to do so. They had all relevant facts relating to the assignment of the trademark and
10 service mark registrations at issue by April 27, 2009, at the latest, when the bankruptcy
11 trustee filed the related report, and as early as September 23, 2008, when the Bankruptcy
12 Court entered its order, or December 4, 2008, when the assignment was recorded with the
13 PTO. Plaintiffs’ claim under § 38 of the Lanham Act is time barred.

14 **2. Ku Klux Klan Act of 1871**

15 Plaintiffs attempt to invoke 42 U.S.C. § 1985, which provides, in relevant part,
16 that an action may be asserted against a person who conspires to obstruct “the due course
17 of justice,” with the intent to deny a citizen of the equal protection of the laws or who
18 conspires “for the purpose of depriving, either directly or indirectly, any person or class
19 of persons of the equal protection of the laws, or of equal privileges and immunities
20 under the laws.” 42 U.S.C. §§ 1985(2) & (3). To establish a conspiracy claim under
21 § 1985 against a private entity, a plaintiff must show *inter alia* that (i) a racial or other
22 class-based invidious discriminatory animus motivated the conspirators’ action, and
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1 (ii) the conspiracy was aimed at interfering with rights that are protected against private,
2 as well as official or governmental, encroachment. *Butler v. Elle*, 281 F.3d 1014, 1028
3 (9th Cir. 2002) (citing *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267-68
4 (1993)). In the context of actions against private conspirators, the Supreme Court has
5 thus far recognized only two rights protected under § 1985, namely the right to be free
6 from involuntary servitude and the right to engage in interstate travel. *See Brown v.*
7 *Philip Morris Inc.*, 250 F.3d 789, 805 (3d Cir. 2001).

8 In the Second Amended Complaint, plaintiffs fail to allege any racial or class-
9 based discriminatory animus. They indicate merely that Claunch and his alleged co-
10 conspirators sought to acquire LuBahn’s intellectual property without an arms-length
11 negotiation,⁸ thereby depriving LuBahn of his rights under the Bankruptcy Code, and
12 extorted the intellectual property from LuBahn by advising him that he could go to jail if
13 he was found to have concealed assets from the bankruptcy trustee. *See* 2d Am. Compl.,
14 11th Cause of Action, ¶¶ 3 & 4 (docket no. 46 at 45); Letter to LuBahn from Nagler &
15 Associates (docket no. 68-1 at 3).⁹

17 ⁸ The Court notes that, in moving for approval to sell LuBahn’s intellectual property to Claunch, the
18 Chapter 7 Trustee indicated that the sale had been “negotiated in good faith,” “at arms length,” and
19 “without collusion.” Motion at ¶ 19 (E.D. Wash. Bankr. 07-1877, docket no. 27 at 5). The purchase price
20 of \$5,000 exceeded the estimated aggregate fair market value of the intellectual property, namely \$1,509,
21 and a “private sale” allowed the debtor to “realize the full value of the Property without undertaking
22 substantial time and expenditures attempting to obtain a higher purchase price.” *Id.* at ¶¶ 18-19.

23 ⁹ In response to the pending motion to dismiss, plaintiffs have submitted various materials outside the
pleadings, including the declarations of LuBahn and plaintiff Brenda Beamer Ford. The Court has
considered these papers, and has taken judicial notice of public records like those on file with the PTO,
see Fed. R. Evid. 201 & 803(14), only to the extent that they clarify the nature and scope of plaintiffs’
claims, and not for the purpose of assessing whether plaintiffs can prove the facts alleged in the Second
Amended Complaint. The Court therefore DECLINES to convert the pending motion to dismiss into a

1 Even if these assertions were true, they would not establish the type of class-based
2 discriminatory animus required to pursue a claim under § 1985. *See Butler*, 281 F.3d at
3 1028 (indicating that, although the Supreme Court has not yet defined the parameters of a
4 “class” other than race, “the term unquestionably connotes something more than a group
5 of individuals who share a desire to engage in conduct that the § 1985(3) defendant
6 disfavors,” and cautioning that “§ 1985(3) should ‘not be extended to every class which
7 the artful pleader can contrive’”). Moreover, these allegations do not involve the type of
8 rights as to which a violation may be redressed in an action under § 1985 against private
9 actors. *See Brown*, 250 F.3d at 805 (reasoning that, because property and contract rights
10 are “statutorily enacted, rather than of purely constitutional provenance,” they “cannot be
11 vindicated under § 1985”). Plaintiffs’ claim under § 1985 is not cognizable.

12 **3. Extortionate Extension of Credit**

13 Plaintiffs’ claim under 18 U.S.C. § 892, which criminalizes the making of, or
14 conspiring to make, an extortionate extension of credit, is not cognizable because the
15 statute creates no private right of action. *See Bey v. Nissan Motors Acceptance Corp.*,
16 1992 WL 174730 (E.D. Pa. July 21, 1992), *aff’d*, 983 F.2d 1049 (3d Cir. 1992). In
17 addition, the Second Amended Complaint does not plead the requisite facts to establish
18 an extortionate extension of credit, which requires an understanding between the creditor
19 and debtor at issue that delay in making or failure to make repayment could result in the

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21 motion for summary judgment. *See* Fed. R. Civ. P. 12(d); *see also Allen v. United Fin. Mortg. Corp.*, 660
22 F. Supp. 2d 1089, 1093 (N.D. Cal. 2009); *Atlas v. Accredited Home Lenders Holding Co.*, 556 F. Supp.
23 2d 1142, 1161 (S.D. Cal. 2008) (in deciding a Rule 12(b)(6) motion, a court may consider facts that are
subject to judicial notice).

1 use of violence or other criminal means of causing harm. *See* 18 U.S.C. § 891(6). The
2 Second Amended Complaint alleges that Claunch and/or others threatened LuBahn that
3 he could go to jail if he was found to have concealed assets from the bankruptcy trustee.
4 Advice concerning the legal consequences of wrongdoing does not rise to the level of
5 “violence or other criminal means.” Plaintiffs’ claim under § 892 will be dismissed with
6 prejudice.

7 **4. RICO Claim**

8 When this litigation commenced, plaintiffs’ RICO claim was the only stated basis
9 for subject-matter jurisdiction; all other claims were pleaded under state law and,
10 although some defendants are domiciled outside the State of Washington, complete
11 diversity does not exist. *See* Compl. (docket no. 1); *see also* 28 U.S.C. §§ 1331 & 1332.
12 As a result, the Court directed plaintiffs to file a RICO statement. *See* Minute Order
13 (docket no. 42). Before submitting the RICO statement, however, plaintiffs filed the
14 Second Amended Complaint, thereby adding the three other federal claims discussed
15 earlier. Having concluded that the claim under Section 38 of the Lanham Act is time
16 barred and the claims under 42 U.S.C. § 1985 and 18 U.S.C. § 892 are not cognizable, the
17 Court must now undertake a substantive review of the RICO statement to determine
18 whether subject-matter jurisdiction exists.

19 RICO provides a private right of action for any person “injured in his business or
20 property by reason of a violation of section 1962.” 18 U.S.C. § 1964(c). For purposes of
21 this case, the relevant provision of § 1962 prohibits a person “employed by or associated
22 with any enterprise engaged in, or the activities of which affect, interstate or foreign
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1 commerce, to conduct or participate, directly or indirectly, in the conduct of such
2 enterprise's affairs through a pattern of racketeering activity or collection of unlawful
3 debt." 18 U.S.C. § 1962(c); see also RICO Stmt. at ¶ 1 (docket no. 48) (indicating that
4 the only violation plaintiffs allege is of § 1962(c)). Racketeering activity is statutorily
5 defined to include certain felonies under state law and certain indictable acts or offenses
6 under federal law. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" requires, at
7 a minimum, two predicate acts of racketeering, occurring within ten years of each other,
8 with at least one act taking place after October 15, 1970. 18 U.S.C. § 1961(5). To form a
9 "pattern," the predicate acts must be both "related" and "continuous." H.J. Inc. v. Nw
10 Bell Tel. Co., 492 U.S. 229 (1989); Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1527 (9th Cir.
11 1995).

12 In their RICO Statement, docket no. 48, plaintiffs indicate that they are relying
13 inter alia on predicate acts directed at Spokane Hoopfest Association ("SHA"), William
14 Steven Kaczaraba, the Snoqualmie Tribe (the "Tribe"), and the Republic of Fiji ("Fiji").
15 As to these predicate acts, plaintiffs do not have standing to pursue a RICO claim. See
16 Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990); see also Hill v. Opus Corp.,
17 841 F. Supp. 2d 1070 (C.D. Cal. 2011). Plaintiffs have not pleaded and cannot show the
18 requisite causal connection between the alleged acts targeted at other entities and a
19 business or property injury suffered by plaintiffs. See Reddy, 912 F.2d at 294 ("[W]e
20 hold that Reddy lacks standing to sue under § 1962(c) because the injury he suffered was
21 the result of his alleged wrongful termination and was not caused by predicate RICO
22 acts."). To the extent that SHA, Kaczaraba, the Tribe, or Fiji were "direct victims" of
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1 any predicate RICO acts perpetrated by Claunch and/or 3BA International, the applicable
2 standing doctrines envision that they, and not plaintiffs, are the ones to “be counted on to
3 vindicate the law as private attorneys general.” Hill, 841 F. Supp. 2d at 1098.

4 The predicate acts outlined in plaintiffs’ RICO Statement that were allegedly
5 aimed at plaintiffs LuBahn or Ford are as follows: (i) e-mails and telephone calls
6 between Claunch and Ford concerning allegedly fraudulent loans and false promises to
7 repay \$750,000 relating to a resort project in Fiji; (ii) correspondence between LuBahn
8 and his bankruptcy attorney, who was paid by Claunch, see Order at 2 (docket no. 60),
9 threatening LuBahn that he could be jailed if he was found to have concealed assets from
10 the bankruptcy trustee; and (iii) telephone calls between Claunch and LuBahn regarding
11 allegedly fraudulent promises to make LuBahn a member of 3BA International, with a
12 50% interest, to induce LuBahn to continue his efforts to establish a professional three-
13 on-three basketball league. See RICO Stmt. at ¶¶ 5-7 (docket no. 48 at 4-5). The RICO
14 Statement does not provide any dates for these events, but the documents submitted along
15 with plaintiffs’ response to the pending motion to dismiss indicate that (i) as a partner in a
16 project to develop the Nukudrau Island Resort in Fiji, Ford’s share of the proceeds was
17 approximately \$750,000, payment of which was deferred in 2007; Claunch signed a letter
18 on April 13, 2010, docket no. 68-1 at 15, indicating that Ford was projected to be paid in
19 January 2011; (ii) the letter in which the firm of Nagler & Associates advised LuBahn
20 that “if the U.S. Trustee or the Chapter 7 Trustee believes that you concealed the assets
21 you are about to disclose, the penalties are harsh: loss of discharge, possible fine and
22 imprisonment, etc.,” docket no. 68-1 at 3, was dated December 18, 2007; and (iii) drafts
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1 of an amended limited liability company agreement for 3BA International and an
2 employment agreement, making LuBahn a 50% member of, and the Chief Operating
3 Officer for, 3BA International, were circulated to LuBahn and Claunch on July 3, 2008,
4 docket no. 68-1 at 13.

5 As argued by Claunch and 3BA International, plaintiffs' RICO claim appears to be
6 time barred. The deferment of payment (or "false promise" to pay \$750,000) to Ford
7 occurred in 2007, the advice to LuBahn about potential penalties in connection with the
8 bankruptcy proceedings was conveyed in December 2007, and the conversations between
9 LuBahn and Claunch concerning LuBahn becoming a member of 3BA International must
10 have transpired before July 2008, when an attorney attempted to memorialize whatever
11 agreement the two men had reached. All of these alleged predicate acts occurred more
12 than four years before this suit was commenced on June 6, 2013. *See Agency Holding*
13 *Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (adopting a four-year
14 limitation period for RICO claims). To the extent, however, that plaintiffs might be
15 relying on Claunch's April 2010 letter as evidencing fraud aimed at Ford or on any
16 telephone calls between Claunch and LuBahn after June 6, 2009, and before April 29,
17 2010, when LuBahn was discharged as manager of 3BA International, *see* Order at 3
18 (docket no. 41), the Court is reluctant to base its ruling on the statute of limitations.

19 Instead, the Court concludes that plaintiffs have not asserted the requisite "pattern
20 of racketeering activity." Plaintiffs essentially rely on two acts of alleged fraud
21 accomplished via mail or wire, *see* 18 U.S.C. § 1961(1) (citing 18 U.S.C. §§ 1341 (mail
22 fraud) & 1343 (wire fraud)), and one act of alleged extortion, *see id.* ("racketeering
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1 activity” includes extortion chargeable as a felony under state law). With regard to the
2 latter, plaintiffs fail to plead the type of “wrongful threat” required to establish extortion
3 under Washington law. *See* RCW 9A.56.130; *see also State v. Pauling*, 149 Wn.2d 381,
4 69 P.3d 331 (2003). As recognized in *Pauling*, for a verbal threat to give rise to liability
5 for extortion, it must fall outside the realm of protected speech. 149 Wn.2d at 388-91.
6 Here, the attorney’s advice to LuBahn, about imprisonment being a possible ramification
7 if LuBahn was found to have concealed assets, had the requisite “nexus” to the services
8 the attorney anticipated providing to LuBahn, namely reopening LuBahn’s bankruptcy
9 case to dispose of intellectual property that might not have previously been adequately
10 disclosed, to qualify as protected speech, and it cannot count as a predicate RICO act.
11 *See id.* at 390-91 (to be “wrongful,” a threat must lack a nexus to its objective or a
12 plausible claim of right).

13 With regard to plaintiffs’ reliance on mail and/or wire fraud, the Court agrees with
14 Claunch and 3BA International that plaintiffs have not satisfied the heightened pleading
15 standards set forth in Federal Rule of Civil Procedure 9(b). *See Allwaste*, 65 F.3d at
16 1530-31 (holding that allegations of mail and wire fraud failed to meet the particularity
17 requirement of Rule 9(b), but remanding for the district court to consider whether to grant
18 leave to amend the complaint). Moreover, the Court declines to permit plaintiffs to
19 attempt to cure these defects because, even if plaintiffs were to provide dates and further
20 details, they could not establish the necessary relatedness between the alleged predicates
21 to demonstrate a pattern of racketeering activity. To be related, the predicate acts must
22 be more than isolated criminal acts; they must have “the same or similar purposes,
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1 results, participants, victims, or methods of commission.” *H.J. Inc.*, 492 U.S. at 240
2 (quoting former 18 U.S.C. § 3575(e)); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364,
3 366 (9th Cir. 1992).

4 The remaining allegations of fraud do not satisfy this standard. They involve
5 different objectives, results, victims, and methods. The actions allegedly aimed at Ford
6 concerned a resort in Fiji, as to which payment for Ford’s share of the proceeds was
7 deferred. The conduct toward LuBahn related to the formation of a professional three-
8 on-three basketball league in the United States, in connection with which promises to
9 make LuBahn a 50% member of a limited liability company were unfulfilled. Given
10 these disparate allegations, the Court is persuaded that the RICO claim as currently
11 pleaded lacks merit and that allowing plaintiffs to amend their RICO claim would be
12 futile.

13 **C. Supplemental Claims**

14 Although all of plaintiffs’ federal claims are subject to dismissal, the Court
15 continues to have subject-matter jurisdiction; the Court refuses to decline and will instead
16 exercise supplemental jurisdiction over the remaining state law claims. *See* 28 U.S.C.
17 §§ 1367(a) & (c). Most of plaintiffs’ state law claims, however, are time barred. A
18 three-year limitation period applies to plaintiffs’ claims of (i) misrepresentation and/or
19 fraud, (ii) misappropriation of trade secrets, and (iii) breach of fiduciary duty. *See*
20 RCW 4.16.080(4) (fraud); RCW 19.108.060 (trade secret); *see also Hudson v. Condon*,
21 101 Wn. App. 866, 874, 6 P.3d 615 (2000) (fiduciary duty). These claims are premised
22 on LuBahn’s and Claunch’s interactions prior to April 29, 2010, when LuBahn was
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1 terminated as manager of 3BA International. The claims therefore accrued more than
2 three years before this action was commenced in June 2013, and they will be dismissed
3 with prejudice.

4 Plaintiffs have also pleaded two breach of contract claims: one against Claunch
5 and 3BA International that is related to agreements with LuBahn, and the other against
6 Claunch, One Hundred Sands, and the Claunch Trust that arises from dealings with Ford.
7 In response to the pending motion to dismiss, plaintiffs insist that their claims are based
8 on written contracts and are therefore governed by a six-year statute of limitations. *See*
9 RCW 4.16.040(1). The Second Amended Complaint, however, does not identify with
10 particularity any written contracts or any specific terms alleged to have been breached.

11 Plaintiffs attached to their response a copy of 3BA International's limited liability
12 company agreement, docket no. 68-1 at 4-11, which was executed by Claunch and
13 LuBahn effective December 18, 2007. Plaintiffs, however, cite no provision of the
14 agreement that Claunch and/or 3BA International supposedly breached. The agreement
15 indicates that Claunch is the sole member of 3BA International, and designates Claunch
16 and LuBahn as co-managers of 3BA International. Agr. at ¶¶ 1.1 & 2.1 (docket no. 68-1
17 at 4-5). The agreement further provides that the member may remove a manager "at any
18 time with or without cause by written notice." *Id.* at ¶ 2.1. According to the agreement,
19 Claunch's approval is required for the admission of additional members. *Id.* at ¶ 4.1.
20 Such admission would necessitate an amendment of the agreement to specify the voting
21 and management rights of members, the manner of allocating profits and losses among
22 members, and any restrictions on transferring members' interests. *Id.* at ¶ 4.3. Although
23

1 Claunch and LuBahn apparently discussed the possibility of LuBahn becoming an equal
2 member of 3BA International, plaintiffs have proffered no evidence, and have not even
3 pleaded, that the limited liability company agreement was modified accordingly.

4 In their breach of contract claims, plaintiffs do not allege that Claunch and/or 3BA
5 International improperly removed LuBahn as manager. Indeed, the agreement itself
6 envisioned that such removal could be accomplished unilaterally by Claunch for no
7 reason. Rather, plaintiffs contend that Claunch breached promises to (i) make LuBahn
8 “a full 50% owner” of 3BA International, (ii) pay LuBahn \$200,000 “for the first 50%
9 Claunch acquired from LuBahn,” and (iii) terminate a promissory note and security
10 agreement. 2d Am. Compl. at 33 (docket no. 46). The Court agrees with Claunch and
11 3BA International that the first two of these allegations are time barred. Plaintiffs have
12 not alleged that such promises were ever memorialized in writing, and to the extent any
13 oral promises were made to admit LuBahn as an additional member of 3BA International
14 or to pay LuBahn \$200,000, they would have been uttered before April 29, 2010, when
15 LuBahn’s tenure as manager ended and the parties’ relationship became acrimonious,
16 which was more than three years before this action commenced. *See* RCW 4.16.080(3)
17 (an action on an oral contract must be commenced within three years of accrual). With
18 regard to a promissory note and security agreement, the contours of plaintiffs’ breach of
19 contract claim are difficult to decipher. What appears clear, however, is that the claim is
20 asserted solely against Claunch, and does not involve 3BA International. *See* 2d Am.
21 Compl. at ¶¶ 52-54 (docket no. 46 at 8-9). Thus, as to 3BA International, the motion to
22 dismiss the first breach of contract claim will be granted with prejudice.

1 With regard to Claunch, the Court concludes that the portion of the first breach of
2 contract claim premised on an alleged promissory note and security agreement, as well as
3 the second breach of contract claim and the claim for trespass onto land and/or chattels,
4 must be dismissed without prejudice. In the second breach of contract claim, plaintiffs
5 allege that Ford is owed \$750,000 for “engineering services,” \$400,000 relating to a
6 “bank loan,” and \$100,000 in restitution for a motor home that had been retrieved from
7 Ford’s property by Carl Wenham, allegedly on Claunch’s behalf. 2d Am. Compl. at 32,
8 34-35. The trespass claim is also based on the removal of the motor home from Ford’s
9 property.¹⁰ *Id.* at 35. Because these claims are asserted either solely against Claunch or
10 against Claunch and other defendants who have not been served and have not appeared,
11 namely One Hundred Sands, the Claunch Trust, and Wenham,¹¹ the Court exercises its
12 discretion to dismiss these claims without prejudice for failure to effect proper service.
13 *See Romero*, 2013 WL 1955887; *Reyes*, 2012 WL 3144915; *see also* Fed. R. Civ. P.
14 4(m).

17 ¹⁰ Wenham supposedly drove the motor home away from Ford’s property on April 16, 2012, *id.* at 32, and
18 thus, the trespass claim and the portion of the second contract claim involving the motor home were both
brought within the three-year limitation period. *See* RCW 4.16.080(1), (2), & (3).

19 ¹¹ With regard to co-defendants One Hundred Sands and the Claunch Trust, plaintiffs’ motion to compel
20 waiver of service of summons, docket no. 71, is DENIED. Plaintiffs fail to cite any authority for the
21 proposition that the Court may compel a defendant to waive service of summons, and the entire notion
22 runs contrary to due process jurisprudence; *see Seretse v. Andersen Corp.*, 2013 WL 2434876 at *3 (D.
23 Minn. June 4, 2013) (“a ‘defendant[] ha[s] no obligation to waive [its] due process right to proper
service’” (alterations in original, quoting *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 886
(8th Cir. 1996))). Plaintiffs have had ample opportunity to serve all defendants, and they have been on
notice for quite some time that failure to do so could result in the dismissal of claims against defendants
on whom service has not been accomplished. *See* Minute Orders (docket nos. 39 & 61).

1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

3 (1) The motion to dismiss, docket no. 62, brought by defendants Claunch, 3BA
4 International, and TenMain is GRANTED as follows:

5 (a) Because no claim or prayer for relief has been pleaded against
6 TenMain, the motion is GRANTED as to TenMain, and the Clerk is DIRECTED
7 to terminate TenMain as a defendant, effective nunc pro tunc to the date that the
8 Second Amended Complaint was filed, *i.e.*, December 3, 2013;

9 (b) With regard to plaintiffs' federal claims for (i) violation of Section
10 38 of the Lanham Act, 15 U.S.C. § 1120; (ii) conspiracy in violation of the Ku
11 Klux Klan Act of 1871, 42 U.S.C. § 1985; (iii) violation of 18 U.S.C. § 892; and
12 (iv) violation of the Racketeer Influenced and Corrupt Organizations provisions
13 of the Organized Crime Control Act of 1970, Pub. L. 91-452, the motion is
14 GRANTED, and such federal claims are DISMISSED with prejudice as either
15 time barred or not cognizable as a matter of law;

16 (c) With regard to plaintiffs' state law claims for (i) misrepresentation
17 and/or fraud; (ii) misappropriation of trade secrets; and (iii) breach of fiduciary
18 duty, the motion is GRANTED, and such state law claims are DISMISSED with
19 prejudice as time barred;

20 (d) With regard to plaintiffs' state law claim for breach of contract based
21 on alleged oral promises to make LuBahn a member of 3BA International and to
22
23

1 pay LuBahn \$200,000, the motion is GRANTED, and such claim is DISMISSED
2 with prejudice as time barred; and

3 (e) With regard to plaintiffs' state law claims for (i) breach of contract
4 premised on failure to terminate a promissory note and security agreement;
5 (ii) breach of contract related to amounts allegedly owed to Ford; and (iii) trespass
6 onto land and/or chattels, the motion is GRANTED in part, and such claims are
7 DISMISSED **without** prejudice for failure to effect proper service.

8 (2) Plaintiffs' motion to compel waiver of service of summons, docket no. 71,
9 is STRICKEN in part as moot with regard to TenMain, *see supra* note 4, and DENIED in
10 part as to One Hundred Sands and the Claunch Trust, *see supra* note 11.

11 (3) The motion to extend certain deadlines, docket no. 64, brought by Claunch,
12 3BA International, and TenMain is STRICKEN as moot.

13 (4) Because the Second Amended Complaint contains no claim against either
14 Spokane Slam LLC or Destination Ten, the Clerk is DIRECTED to terminate Spokane
15 Slam LLC and Destination Ten as defendants, effective nunc pro tunc to the date that the
16 Second Amended Complaint was filed, *i.e.*, December 3, 2013.

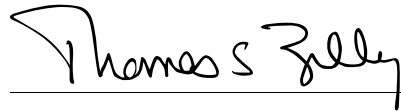
17 (5) With regard to defendants Julie (Juli M.) Koentopp, Gayland Hammack,
18 Infinity Plus Investments LLC, and 3BA Management Holdings, LLC,¹² plaintiffs are

19 _____
20 ¹² Hammack and Koentopp are alleged to be husband and wife. 2d Am. Compl. at ¶ 19 (docket no. 46).
21 According to the Nevada Secretary of State, Infinity Plus Investments LLC is an active business entity for
22 which Koentopp is the registered agent, and Hammack is the registered agent for 3BA Management
23 Holdings, LLC, which is in "revoked" status, its business license having expired on November 30, 2011.
See <http://nvsos.gov/sosentitysearch/corptest.asp>. Because these defendants may be served within the
United States, the 120-day deadline set forth in Federal Rule of Civil Procedure 4(m) applies.

1 DIRECTED to show cause within fourteen (14) days of the date of this Order why the
2 claims against such defendants should not be dismissed without prejudice for failure to
3 effect timely service. See Fed. R. Civ. P. 4(m).

4 IT IS SO ORDERED.

5 Dated this 12th day of June, 2014.

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8 Thomas S. Zilly
9 United States District Judge
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