UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISKEN GROUP LLC and CK PROPERTY MANAGEMENT, LLC,	)	
Plaintiff,	)	Case No.: 1:16-cv-08251
vs.	)	Hon. William T. Hart
HAS CAPITAL, LLC, STEPHEN A. WHEELER, ERIC R. DECATOR LLC, ERIC R. DECATOR, BMO HARRIS BANK, N.A. and KONSTANTINO APOSTOLOU,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF BMO HARRIS BANK N.A.'S AND KONSTANTINO APOSTOLOU'S MOTION TO DISMISS

Plaintiffs' complaint attempts to manufacture a civil RICO case from three proposed real estate transactions by which Defendant HAS Capital, LLC ("HAS") might have purchased real property from three separate non-party sellers. All three transactions were proposed and then fell through over a single two-month period. The transactions were proposed to HAS by Plaintiff ChrisKen Group ("CKG") and both Plaintiffs could potentially have earned fees had the deals closed. After they did not, no further deals were proposed because Defendant Eric Decator, HAS's lawyer, told CKG that HAS could not proceed. Neither BMO Harris Bank N.A. ("BMO Harris") nor its employee, Konstantino Apostolou, is alleged to have been party to the transactions or to have had any relationship with any defendant, other than a banking relationship with HAS. Their only alleged conduct is Mr. Apostolou's participation in three phone calls during which he allegedly confirmed HAS's assets, not to Plaintiffs but to the non-party sellers.

This is not a RICO case. Among other reasons, the complaint does not allege facts to support: (a) the existence of a RICO enterprise; (b) a pattern of racketeering activity; or (c)

concrete damages suffered by Plaintiffs and proximately caused by BMO Harris or Mr. Apostolou. Neither does the complaint plead facts to support any of the common-law tort claims it purports to state in the alternative against BMO Harris or Mr. Apostolou. Again, this is for multiple reasons, central among them being that nothing BMO Harris or Mr. Apostolou allegedly did was the but-for, let alone was the proximate, cause of any injury to Plaintiffs. Even according to the complaint, BMO Harris and Mr. Apostolou's *de minimus* involvement in the underlying transactions came only in June and July 2015, at the end of a commercial relationship between Plaintiffs and HAS that allegedly had begun in 2012. None of that alleged involvement was directed to Plaintiffs, but concerned the proposed property sellers. Plaintiffs have not and cannot state a plausible claim against BMO Harris or Mr. Apostolou under any theory. Their complaint against BMO Harris and Mr. Apostolou is properly dismissed and dismissed with prejudice.

I. The Alleged Facts

Motions to dismiss turn on the well-pleaded facts, but not the conclusions, of the complaint. *See Hartford Fire Ins. Co. v. Henry Bros. Const. Management Servs., LLC*, 877 F. Supp. 2d 614, 619 (N.D. Ill. 2012) (observing that the Court "'need not accept as true legal conclusions or opinions that are couched as factual allegations.'") (citation omitted). Concerning exhibits to the complaint, "[t]he court is not bound to accept the pleader's allegations as to the effect of the exhibit, but can independently examine the document and form its own conclusions as to the proper construction and meaning to be given the material." *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002) (citation omitted).

In this case, the complaint alleges that HAS, on March 5, 2012, acting through Defendant Stephen Wheeler, approached Plaintiffs to be its "operating partners" for large real estate acquisitions "ranging in price from $30,000,000 to $100,000,000." Complt. ¶ 33. Thereafter,

"[a]t all relevant times," Plaintiffs used broker contacts to find properties to acquire, conducted underwriting and financial analysis relating to the acquisition of properties, and conducted due diligence and negotiation relating to the acquisition of properties. *Id.* ¶ 34.

Having thus begun their relationship with HAS in 2012, Plaintiffs allege that, in March and April of 2015, HAS and Wheeler informed Plaintiffs that they had "secured" a middle-eastern "Sovereign Fund" to fund certain transactions. *Id.* ¶¶ 37-44. On April 18, 2015, Plaintiff CKG and HAS entered into a formal "Operating Partnership and Management Agreement" concerning those transactions, attached as Exhibit A to the complaint. *Id.* ¶ 45; Complt. Ex. A.

The complaint says that the agreement between CKG and HAS included fees that Plaintiffs would earn after any transaction closed, Complt. ¶ 48, but the agreement contradicts that conclusion. It says CKG's compensation was to be pursuant to an exhibit to the contract, Complt. Ex. A at 2, but the referenced exhibit provides only that compensation was "[t]o be determined," *id.* at Ex. A. The contract's exhibit promised no particular compensation. *Id.* The complaint's allegations on this point rely on an April 22, 2015 Memorandum, created by CKG to record a subsequent meeting between CKG and Wheeler. Complt. Ex. A at Memorandum (stating, "These are my recollections from my notes from the meeting of April 21.").

Plaintiffs apparently worked with HAS on the three transactions at issue under the auspices of the April 18, 2015 agreement. That work ceased on or about July 29, 2015, after Plaintiffs allege Decator and others told them that HAS had no investor or assets sufficient to fund the real estate deals. Complt. ¶¶ 125-30.

Concerning the underlying transactions, the first is alleged to have been reduced to terms, but HAS's 19-day delay in executing the agreement is alleged to have caused the seller to revoke its offer to sell. *Id.* ¶¶ 76-80. HAS's 7-day delay executing the final agreement for the second

transaction is alleged to have resulted in that seller revoking its offer to sell. *Id.* ¶¶ 103-07. That delay occurred after Decator had already allegedly told Plaintiffs that HAS in fact lacked the necessary funding to close. *Id.* ¶ 126. For the third transaction, HAS's offer to buy the property was never agreed-to by the seller, so there was no deal to close. *Id.* ¶¶ 123-24.

BMO Harris and Mr. Apostolou are mentioned in just 15 paragraphs of the 130-paragraph "fact" section of the complaint. Four of those paragraphs identify BMO Harris (a) as a bank doing business in Illinois; that (b) employs Mr. Apostolou as an assistant vice president and senior premier banker. *Id.* ¶¶ 14-17. The remaining paragraphs that mention the bank or Mr. Apostolou describe three phone calls on June 9, July 6 and July 21, 2015. *Id.* ¶¶ 58-59, 61-63, 88-90 & 119-121. According to the complaint, those calls were set up for the benefit of prospective real estate sellers to confirm that HAS could back up its bids on each of the three pieces of commercial real estate. *Id.* Mr. Apostolou allegedly participated in the calls and allegedly confirmed in each that HAS had sufficient assets to close. *Id.* The complaint alleges this was not true and that on July 29, 2015, a little more than a week after the last call, Decator told Plaintiffs that "there was no money available" for the transactions. *Id.* ¶ 126. These facts are accepted as true for the purposes of the present motion only.

The complaint contains no other allegations of conduct by either BMO Harris or Mr. Apostolou, prior or subsequent to Mr. Apostolou's participation in the three phone calls. As noted, it also does not allege any relationship between BMO Harris or Mr. Apostolou and the other defendants, other than a banking relationship between HAS and BMO Harris.

Based on these allegations, the complaint purports to state claims against BMO Harris and Mr. Apostolou for violations of RICO, 18 U.S.C. § 1962(c) (Count I); Fraudulent Misrepresentation (Counts VI & VII); and Negligent Misrepresentation (Counts XII and XIII).

Plaintiffs further claim Negligent Supervision against BMO Harris for failing to adequately supervise Mr. Apostolou (Count XIV). Each of these counts fails as a matter of law.

II. Argument

To survive a motion to dismiss, a complaint "'must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Savarirayan v. Blue Cross Blue Shield of Illinois*, No. 10 C 4723, 2011 WL 1362591, at *2 (N.D. Ill. Apr. 7, 2011) (Hart, J.) (dismissing complaint with prejudice), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* The complaint in this case fails to allege facts that would make out a plausible claim against BMO Harris or Mr. Apostolou under any legal theory.

A. This is not a RICO case

Civil RICO is a "unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity." *Gamboa v. Velez*, 457 F.3d 703, 705 (7th Cir. 2006). Its elements are: (1) conduct (2) of an enterprise (3) through a pattern with continuity (4) of racketeering, as required by 18 U.S.C. 1962(c). *See Gamboa*, 457 F.3d at 705 (reversing district court's denial of motion to dismiss RICO claim).

The statute has no application here, where the complaint does not describe the bank or Mr. Apostolou's involvement in any organized, long-term, habitual criminal activity and fails to "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Kaye v. D'Amato*, 357 Fed.Appx. 706, 710 (7th Cir. 2009), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (affirming dismissal of RICO complaint for failure to state a claim). This is especially true given the heightened pleading requirements for

RICO claims. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 599 (7th Cir. 2001) (affirming dismissal where the plaintiff "failed to allege a pattern of racketeering with sufficient particularity to satisfy the requirements of Rule 9(b)").

To take just the most obvious RICO prerequisites missing here:

There is no Enterprise. RICO requires an "enterprise." While this can be "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity," it requires "'a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 853 (7th Cir. 2013), quoting *Boyle v. United States*, 556 U.S. 938, 946 (2009). Not every combination is an enterprise: ordinary commercial relationships will not suffice. *Id.* at 855 ("This type of interaction, however, shows only that the defendants had a commercial relationship, not that they had joined together to create a distinct entity for purposes of [violating the law]."); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 400 (7th Cir. 2009) (distinguishing "garden-variety marketing arrangement" comprised of distinct entities from RICO enterprise). Moreover, to survive a motion to dismiss, a complaint must allege facts that would demonstrate an association with a structure and goals separate from the predicate acts themselves. *Crichton*, 576 F.3d at 400 (affirming dismissal in absence of allegations of structure and goals separate from predicate acts); *see also Panwar v. Access Therapies, Inc.*, 975 F. Supp. 2d 948, 957 (S.D. Ind. 2013) (dismissing complaint that had "not alleged that the Defendants had a structure and goals separate from the predicate acts themselves, which is necessary for a finding of an association-in-fact enterprise.").

Here the complaint does not allege any enterprise, and certainly none in which BMO Harris or Mr. Apostolou participated, with any goal or purpose unique from the three proposed transactions that supposedly comprise the predicate acts. Concerning those transactions, neither the bank nor Mr. Apostolou is alleged to have had any involvement whatsoever other than the three discrete phone calls described above. Neither is alleged to have had any stake or interest in the underlying deals. In fact, neither the bank nor Mr. Apostolou is alleged to have had anything to do with the other defendants at all, other than the implication that they generally acted as HAS's commercial bankers. These facts do not describe a RICO enterprise as a matter of law.

There is No Pattern of Racketeering. The complaint's allegations of a "pattern" of racketeering are fatally defective, too. "RICO provides that a 'pattern of racketeering activity requires at least two acts of racketeering activity,' 18 U.S.C. § 1961(5), but case law shows that two predicate acts are not always sufficient." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 2016 WL 4097439, at *8 (7th Cir. Aug. 2, 2016) (citation omitted). Rather, a plaintiff must plead and prove "'continuity plus relationship.'" Focusing on continuity, it is "'centrally a temporal concept' … that "ensures that RICO targets 'long-term criminal conduct' …." *Id.* (citations omitted). Continuity can be closed-end, where the conduct has stopped but had continued over an extended period. *Id.* But closed-end continuity does not apply here, where the three proposed transactions began and ended entirely within a two-month period. *Id.* (holding that conduct over even a five-month period is insufficiently extended to support closed-end continuity). Continuity can also be open-ended, where the conduct was brief, but there is a threat of its repetition. *Id.* (describing open-ended continuity as requiring "'past conduct that by its nature projects into the future with a threat of repetition'") (citation omitted).

This is the notion on which the complaint here relies. Complt. ¶ 147 (alleging Defendants' conduct "carr[ied] with it an implicit threat of continued criminal activity in the future").

The complaint pleads no facts that could plausibly support a finding of open-ended continuity here. Rather, by alleging Decator told Plaintiffs on July 29, 2015 that HAS did not have sufficient funds to move forward with any deals, *id.* ¶¶ 125-29, stating in the heading before that allegations that the supposed fraud was thus "uncovered," *id.* at 23, the complaint pleads that the conduct ceased as of that point. No other conduct by any party is alleged after that and it is wholly implausible that Plaintiffs would do business with HAS again having felt they had uncovered a "fraud." *See Draper v. Pickus*, No. 04 C 8150, 2005 WL 1564983, at *6 (N.D. Ill. June 29, 2005) ("In this case, the predicate acts of mail fraud and wire fraud have not established open-ended continuity since the partnership at issue has ceased to exist and Draper has not alleged any future threat of repetition.") This further demonstrates that this is not a RICO case.

There are No Concrete Damages or Proximate Cause. Finally, the complaint fails to allege facts to support the conclusion that BMO Harris or Mr. Apostolou proximately caused Plaintiffs any actual and concrete injury. "'[I]njuries proffered by plaintiffs in order to confer RICO standing must be 'concrete and actual,' as opposed to speculative and amorphous.'" *Vazquez v. Cent. States Joint Bd.*, 547 F. Supp. 2d 833, 860-61 (N.D. Ill. 2008) (citation omitted) (dismissing RICO claim, including because expectancy and intangible damages do not support a cause of action pursuant to RICO); *Triumph Packaging Grp. v. Ward*, 877 F. Supp. 2d 629, 641 (N.D. Ill. 2012) (dismissing RICO claim, including based on failure of plaintiff to earn bonus because of alleged misconduct, because right to bonus was not mandatory or certain). Moreover, any such concrete injury must be proximately caused by the defendant's conduct, which requires a demonstration of "directness of the relationship between the [defendant's alleged] conduct and

the harm." *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 729 (7th Cir. 2014) (affirming summary judgment, in part, based on failure to demonstrate how defendant's specific conduct caused plaintiff's financial harm).

The complaint here does not allege any concrete and actual damages to Plaintiffs caused by the bank or Mr. Apostolou's conduct, all of which post-dates both Plaintiffs' agreement to be HAS's "operational partner" and Plaintiffs' having located for HAS the three potential deals that failed to close. The complaint seeks damages for "good will" and expectancy damages for fees Plaintiffs say that they *could* have earned had the deals closed. Complt. ¶ 150. These are precisely the sorts of intangible damages held not to support a RICO claim. Moreover, the complaint does not allege how these "damages" were caused by Mr. Apostolou allegedly telling the sellers in June and July 2015 that HAS could close on the deals. Had he said that HAS could not close, the result would have been the same in the first two cases: that is, the deals would not close. The end would only have come a few weeks earlier. As for the third transaction, it is alleged that the seller rejected HAS's bid, so it did not matter what Mr. Apostolou said.

The complaint here does not describe a RICO case, certainly not as to BMO Harris and Mr. Apostolou. None of the elements of the claim are or could be satisfied based on the pleaded facts and the claim is properly dismissed with prejudice.

B. Plaintiffs' common-law counts against BMO Harris and Mr. Apostolou fail

In the alternative to the RICO count, the complaint includes five common law counts against BMO Harris and Mr. Apostolou. These also fail to state a claim as a matter of law.

1. The misrepresentation counts (Counts VI, VII, XII and XIII) are contradicted by the complaint's own allegations

The complaint does not state a claim for either fraudulent or negligent misrepresentation against BMO Harris and Mr. Apostolou based on Mr. Apostolou's statements to the property

sellers and not to Plaintiffs. Fraudulent misrepresentation requires not just the allegation of a false statement of material fact, known or believed to be false by the party making it, but also: (1) *intent to induce the other party to act*; (2) *action by the other party in reliance* on the truth of the statement; and (3) *damage* to the other party *resulting from that reliance*. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 569 (7th Cir. 2012). Negligent misrepresentation is the same, except: (a) the defendant's conduct can be careless or reckless and need not be intentional; and (b) there must be some duty owed by the defendant to the plaintiff to communicate accurate information. *Hartford Fire Ins. Co. v. Henry Bros. Const. Mgmt. Servs., LLC*, 877 F. Supp. 2d 614, 618-19 (N.D. Ill. 2012).

The complaint's misrepresentation counts rely almost entirely on conclusions of law unsupported or even contradicted by its allegations of fact. Concerning BMO Harris and Mr. Apostolou, the complaint relies entirely on the three phone calls – on June 9, July 6 and July 21, 2015 – in which Mr. Apostolou allegedly participated and, according to the complaint, assured the sellers (not Plaintiffs) about HAS. The complaint pleads the conclusion that these calls were intended to and did induce Plaintiffs to provide "expertise, skill, knowledge, effort, labor, time and other resources" to facilitate transactions for HAS and to perform under the agreement between HAS and Plaintiffs. Complt. ¶ 169; *see also id.* ¶ 170 (pleading the conclusion that "but-for" the phone calls, Plaintiffs would not have provided their services to HAS).

But this conclusion is rebutted by the pleaded facts, including that it was the prospective sellers – not Plaintiffs – who required a "qualifying telephone conference" and proof of sufficient capital from HAS. *Id.* ¶ 42; *see id.* ¶ 55 (alleging that it was the "Balmoral Seller" who would "want a clear articulation" of the money available to close). A party cannot state a misrepresentation claim based on misrepresentations made to, and relied on, by *someone else*.

See, e.g., People ex rel. Broadview, Ill. V. Village of N. Riverside, Illinois, No. 05 C 4737, 2006 WL 1156549, at *5 (N.D. Ill. Apr. 26, 2006) (plaintiff may not recover where representations made to and relied upon by a third party, even though the third party's action affected plaintiff: third party, not plaintiff, "acted, relied, and was arguably damaged by those misrepresentations" and was therefore the only correct party to assert a misrepresentation claim).

Nowhere in the complaint is it alleged that Plaintiffs inquired or required from HAS any proof of its financial wherewithal before Plaintiffs agreed to be HAS' "operational partner" (in 2012) or before it signed the April 18, 2015 contract with HAS (which required HAS to help locate and negotiate the transactions at issue). Rather, according to the complaint, by the time of the alleged phone calls involving Mr. Apostolou, Plaintiffs were already doing or had already done their work for HAS. By the complaint's account, the phone calls happened in the final weeks of Plaintiffs' relationship with HAS. Even if Mr. Apostolou spoke as alleged during these calls (conceded here only for the purpose of this motion), whether he acted intentionally or negligently, the complaint demonstrates that he was not speaking to Plaintiffs, not intending for them to rely on him and that they did not actually rely on him. This is a fatal defect to the misrepresentation counts against the bank and Mr. Apostolou. *See Prescott v. Argen Corp.*, No. 13 CV 6147, 2015 WL 94168 at *3 (N.D. Ill. Jan. 6, 2015) (dismissing fraudulent misrepresentation claim where alleged facts did not establish reliance on misrepresentations).

The misrepresentation counts also fail because the complaint does not plead facts that would plausibly support the conclusion that Plaintiffs' suffered "damages" proximately caused by BMO Harris or Mr. Apostolou. Proximate cause "generally is a question of fact, but 'where the facts alleged indicate that a party would never be entitled to recover', proximate cause 'can…become a question of law.'" *Barham v. Knickrehm*, 661 N.E.2d 1166, 1170 (Ill. App.

1996) (affirming dismissal of negligence action). "In stating the elements of fraud, courts skip over, as too obvious to require comment, that the fraud made the victim of it worse off than he would have been had there been no fraud." *Stromberger v. 3M Co.*, 990 F.2d 974, 976 (7th Cir. 1993) (at-will employee who elected to take severance package based on alleged fraud could not prove damages because he could have been fired anyway). This "essential element" is implicit the "general requirement of tort law" that the victim prove he was injured by the defendant. *Id.*

Plaintiffs' alleged "damages" are a combination of the work they did for HAS to find the transactions and their expectancy of future earnings from managing the properties had the deals closed. *See* Complt. ¶ 171. Those "damages" arise from the Plaintiffs' agreements with HAS, begun in 2012 and memorialized in the April 18, 2015 contract, all before any alleged conduct by BMO Harris or Mr. Apostolou. "[W]here as a result of a misrepresentation one is induced to perform a preexisting legal obligation, there can be no injury compensable by law." *Sinclair v. State Bank of Jerseyville*, 566 N.E.2d 44, 45 (Ill. App. 1991) (plaintiff "could not have suffered a detriment by paying an amount of interest that he was already required to pay, regardless of any misrepresentation."). Moreover, to the extent that Plaintiffs rely on the notion that they would not have agreed to work for HAS between March 2012 and June 2015 had Mr. Apostolou not stated what he did in June and July 2015 calls, the timeline is backward so that an "essential element of a cause of action for fraudulent misrepresentation is lacking." *Bank of Lincolnwood v. Comdisco, Inc.*, 444 N.E.2d 657, 661 (Ill. App. 1982) (affirming dismissal where alleged misrepresentations occurred subsequent to plaintiff's agreement to work for defendant).

In addition, and specific to the negligent misrepresentation counts, the complaint fails to plead facts that establish any tort duty owed the Plaintiffs by BMO Harris or Mr. Apostolou. The complaint states that BMO Harris "owed a duty to communicate accurate information regarding

the existence and extent of the capital and assets under BMO Harris's control that was drawable and available to HAS Capital and Wheeler for the purposes of initiating, participating in, and consummating the…real estate transactions," Complt. ¶ 188, and that Mr. Apostolou "owed a duty to communicate accurate information regarding the existence and extent of the capital and assets under BMO Harris's control that were drawable and available to HAS Capital and Wheeler for the purpose of participating in, and consummating the…real estate transactions," *id.* ¶ 193. Yet courts have consistently held that banks do not owe such a general duty of care to non-customers. *E.g.*, *Thompson v. Capital One Bank, Inc.*, 375 F. Supp. 2d 681, 683-84 (N.D. Ill. 2005) (dismissing claim by non-customer that bank negligently cashed cashier's check and sent funds to third party, damaging plaintiff; holding no duty of care ran from bank to non-customer); *Popp v. Dyslin*, 500 N.E.2d 1039, 1043 (Ill. App. 1986) (refusing to impose duty on bank and affirming dismissal of negligent misrepresentation claim; representation by bank that it extended a loan based on its credit investigation not intended to directly confer a benefit upon a third-party creditor). Here, it is alleged that Mr. Apostolou's communications were intended for the non-party sellers and not Plaintiffs – none of whom are alleged to be customers of the bank.

For all of these reasons, the misrepresentation counts against BMO Harris and Mr. Apostolou are properly dismissed.

2. The negligent supervision count (Count XIV) fails as a matter of law

The complaint alleges no facts that would support a negligent supervision claim against BMO Harris based on Mr. Apostolou's participation in the three pleaded phone calls. To the contrary, the complaint fundamentally misapprehends the nature of such a claim.

A negligent supervision claim is fundamentally different than a vicarious liability claim against an employer because it requires allegations of a duty owed directly by the employer and

conduct by employer separate from the conduct of the employee. *Nat'l R.R. Passenger Corp. v. Terracon Consultants, Inc.*, 13 N.E.3d 834, 840 (Ill. App. 2014) (explaining distinction between vicarious liability and negligent supervision; stating the latter requires "the existence of a duty on the part of the employer to the injured party, a breach of that duty, and an injury proximately caused by the breach"). As discussed, the law is that banks do not owe duties to non-customers and Plaintiffs do not allege that they were customers of BMO Harris. Neither do the pleaded facts demonstrate any conduct by the bank that caused them any injury.

Moreover, to state a negligent supervision claim against the bank based on Mr. Apostolou's participation on the subject calls, Plaintiffs would have had to "'plead and prove that the [the bank] knew or should have known that [Mr. Apostolou] had a particular unfitness for his position so as to create a danger of harm to third persons and that the [bank's] failure to safeguard the plaintiff against this particular unfitness proximately caused the plaintiff's injury.'" *Anicich v. Home Depot, U.S.A., Inc.*, No. 14 C 7125, 2016 WL 930655, at *5 (N.D. Ill. Mar. 11, 2016) (dismissing negligent supervision claim), quoting *Hasbun v. United States*, 941 F. Supp. 2d 1011, 1015 (N.D. Ill. 2013) (citation omitted). "[T]he particular unfitness of the employee must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position." *Id.* That is not the case here.

The complaint here cites no conduct by Mr. Apostolou other than the three subject phone calls and no facts that would support the conclusion that, in advance of those three phone calls, the bank knew or should have known that Mr. Apostolou would have stated to the non-party sellers that HAS was prepared to close on the three proposed transactions when it was not in fact ready to do so (a fact that is accepted here solely for the purposes of the present motion). Neither does it allege that anyone else at the bank knew anything about the subject transactions or these

calls such that the first call would have put the bank on some sort of notice concerning the potential for its repetition. For this reason, and the others noted above, the complaint does not make out a plausible claim for negligent supervision against BMO Harris as a matter of law.

CONCLUSION

Ultimately, this case is a commercial dispute between Plaintiffs and HAS for economic, if intangible, losses. Neither BMO Harris nor Mr. Apostolou are alleged to have had any commercial relationship with Plaintiffs or even to have directed any conduct to them. Neither are BMO Harris or Mr. Apostolou alleged to have been involved with the other defendants, except as HAS's bank. Rather, the bank and Mr. Apostolou are "add-ons" to the 16-count "shotgun" style complaint. Whatever the motive for including them, whether RICO, the misrepresentation counts, or the negligent supervision count against the bank, in each case Plaintiffs attempt to put a square peg into a round hole. In fact, and as a matter of law, the case against BMO Harris and Mr. Apostolou does not fit into any cause of action. The complaint against them is properly dismissed and dismissed with prejudice.

Respectfully submitted,

BMO HARRIS BANK, N.A. and KONSTANTINO APOSTOLOU

By: //s// Robert M. Andalman
One of their attorneys

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CERTIFICATE OF SERVICE

I, Robert M. Andalman, hereby certify that on October 17, 2016 I caused to be electronically filed the foregoing **MEMORANDUM IN SUPPORT OF BMO HARRIS BANK N.A.'S AND KONSTANTINO APOSTOLOU'S MOTION TO DISMISS,** which will be served electronically on all registered parties of record.

/s/ Robert M. Andalman