UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GUCCI AMERICA, INC., BALENCIAGA S.A., BALENCIAGA AMERICA, INC., BOTTEGA VENETA S.A., BOTTEGA VENETA, INC., YVES SAINT LAURENT AMERICA, INC., LUXURY GOODS INTERNATIONAL (L.G.A.) S.A., and KERINGS S.A.,

Plaintiffs,

-against-

ALIBABA GROUP HOLDING LTD., et al.,

Defendants.

----------x

15-cv-3784 (PKC)

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

Plaintiffs Gucci America, Inc. ("Gucci"), Balenciaga, S.A. and Balenciaga America, Inc. ("Balenciaga"), Bottega Veneta International S.A. and Bottega Veneta Inc. ("Bottega Veneta"), Yves Saint Laurent America, Inc. and Luxury Goods International (L.G.I.) S.A. ("YSL"), and Kering S.A. ("Kering") (collectively, "Plaintiffs"), commenced this action in May 2015 against defendants Alibaba Group Holding Ltd., Alibaba.com Hong Kong Ltd., Alibaba.com Ltd., Alibaba (China) Technology Co., Ltd., Taobao China Holding Ltd., and Taobao (China) Software Co., Ltd., (collectively, "Alibaba"), Alipay.com Co., Ltd. ("Alipay" and together with Alibaba, the "Alibaba Defendants"), and 14 merchants who contracted with and utilized the services of the Alibaba Defendants to market, distribute, and finance the sale of their goods (the "Present Merchant Defendants").[1] Plaintiffs assert claims pursuant to the

[1] A default judgment was entered against 17 merchant defendants in a separate action (the "Former Merchant Defendants"). Gucci America, Inc. v. Alibaba Group Holding Ltd., No. 14 cv 5119 (PKC). The Former Merchant Defendants, together with the Present Merchant Defendants, are collectively referred to as the "Merchant Defendants."

Lanham Act, 15 U.S.C. § 1051 et seq., the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and New York state law. The Alibaba Defendants now move pursuant to Rule 12(b)(6) to dismiss the Sixth and Seventh Causes of Action of Plaintiffs' Second Amended Complaint ("SAC"), which allege a substantive RICO claim and a RICO conspiracy claim. (Dkt. No. 42.) For the following reasons, the Alibaba Defendants' motion is granted.

BACKGROUND

For the purposes of this motion, all non-conclusory factual allegations are accepted as true, and all inferences are drawn in favor of the plaintiffs, as the non-movant. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

1. The Plaintiffs

Plaintiffs manufacture, market, and distribute luxury products under the Gucci, Balenciaga, Bottega Veneta, and YSL brands. (SAC ¶ 1.) Such products include shoes, handbags, wallets, watches, and clothing. (SAC ¶¶ 61, 67, 72, 77.) In connection with the sale of their products, Plaintiffs own and use various trademarks that are registered with the United States Patent and Trademark Office ("Plaintiffs' Marks"). (SAC, Ex. 1-4.) Plaintiffs' Marks "have become famous and highly valuable, possessing strong secondary meaning among consumers and both commercial and conceptual strength." (SAC ¶ 56.)

2. The Alibaba Defendants

The Alibaba Defendants consist of seven corporate entities that each play a distinct role in the operation of the online marketplaces Alibaba.com, Taobao.com, and AliExpress.com (the "Alibaba Marketplaces"). (SAC ¶¶ 85-86.) The Alibaba Marketplaces are online platforms through which merchants primarily located in China can connect with

consumers from around the world to sell their products. (Id.) Alibaba.com was created "'to help small exporters engaged in manufacturing and trading, primarily located in China, to reach global buyers.'" (SAC ¶ 85 (quoting Alibaba Group Holding Limited Form F-1 Registration Statement, filed May 6, 2014 ("F-1"), at 70).) Taobao.com is a "consumer-to-consumer ('C2C') online marketplace," which also operates the Mobile Taobao App, "China's most popular mobile commerce app and most profitable e-commerce app." (SAC ¶ 87.) AliExpress.com is another online platform "that enables consumers worldwide to purchase products directly from manufacturers and wholesalers in China." (SAC ¶ 88.)

The six Alibaba entities operate and profit, directly and indirectly, from the Alibaba Marketplaces. The remaining Alibaba Defendant, Alipay, is a related but distinct entity that processes credit card transactions and provides escrow services for buyers and sellers in the Alibaba Marketplaces. (SAC ¶¶ 36, 97.) In addition, Alipay compiles sales data that enables Alibaba to improve, among other things, their marketing and security efforts. (SAC ¶ 276.)

3. The Present Merchant Defendants

The Present Merchant Defendants consist of 14 separate companies that sold counterfeit products bearing Plaintiffs' Marks in the Alibaba Marketplaces. Five of the Present Merchant Defendants, Brand Bag Boutique, Yun Mi's Store, Luxury2000, Burberritti Fashion Plaid Bag, and Sunny Home Store, operated on AliExpress.com. (SAC ¶¶ 38-42.) Six of the Present Merchant Defendants, Kou Kou Dai, Amy Luxury Goods, Europe and E News, Picasso Trend, Lehui Textile Behalf, and Yao Ming and Tracey, operated on Taobao.com. (SAC ¶¶ 43-48.) The remaining three Present Merchant Defendants, Guangzhou Feiteng Junye Gifts Manufacturing Co., Ltd., Shenzhen Lin Jun Leather Co., Ltd., and Yiwu Wirbest E-Commercial Firm, were listed as "Gold Suppliers" on Alibaba.com. (SAC ¶¶ 49-51.) To become a Gold

Supplier, a merchant must pass Alibaba's "onsite check and pay a membership fee." (SAC ¶ 104.) Once a Gold Supplier, the merchant may "display the 'Gold Supplier' icon in the Alibaba Marketplace so that Alibaba.com can vouch for the merchant's alleged authenticity and communicate to consumers that it has investigated the merchant and confirmed that goods sold by the merchant are lawful and legitimate." (Id.) Guangzhou Feiteng Junye Gifts Manufacturing Co., Ltd. was also listed on Alibaba.com as an "Assessed Supplier," which is a Gold Supplier "that ha[s] been inspected onsite by a third-party inspection company." (SAC ¶¶ 51, 106.) "Alibaba.com uses the designation 'Assessed Suppliers' to communicate to consumers that it has investigated such merchants and to confirm that the goods sold by 'Assessed Suppliers' are lawful and legitimate." (Id.)

4. The Alibaba "Ecosystem"

Alibaba has developed an "ecosystem" around the Alibaba Marketplaces that "'includes buyers, sellers, third-party service providers, strategic alliance partners, and investee companies.'" (SAC ¶ 91 (quoting F-1 at 1). While the Alibaba Marketplaces are "the nexus of this ecosystem," all participants within the Marketplaces, it is alleged, are invested in its continued success. (SAC ¶ 91(a) (quoting Alibaba Group Holding Limited Form 20-F Annual Report for year ended March 31, 2015, filed June 25, 2015 ("20-F"), at 90); see also SAC ¶ 91(d).) That is because the Alibaba ecosystem has "'strong self-reinforcing network effects that benefit [its] marketplace participants.'" (SAC ¶ 91(b) (quoting 20-F at 54).) As more merchants participate in the Alibaba Marketplaces, additional consumers are attracted to the Marketplaces, which in turn attracts more merchants. (SAC ¶ 91(c).) Furthermore, the different Alibaba Marketplaces "are 'interconnected in that many buyers and sellers on one marketplace also

participate in the activities on [Alibaba's] other marketplaces, thereby creating a second-order network effect that further strengthens [Alibaba's] ecosystem.'" (Id. (quoting F-1 at 4, 139).)

Within the ecosystem, Alibaba provides various services to help merchants advertise, deliver, and otherwise sell their products. Alibaba offers marketing services on its online marketing platform, Alimama, through which merchants can purchase "'keywords that match product or service listings appearing in search or browser results" and "display positions on Alibaba's Marketplaces.'" (SAC ¶ 99 (quoting F-1 at 123); see also SAC ¶ 93.) In addition, merchants can take advantage of Alibaba's "logistics platform and information system to help facilitate the reliable delivery of their online merchants' products to consumers." (SAC ¶ 93.) Alibaba also provided loan financing, and "provides certain merchants with 'Trade Assurance,' a program that refunds to purchasers payments made to merchants who fail to honor the terms of the supply contract." (SAC ¶¶ 93-94.)

Alipay also "operates as an integrated part of the Alibaba 'ecosystem.'" (SAC ¶ 278.) Alipay "provides 'substantially all of the payment processing and escrow services' for buyers and sellers on" the Alibaba Marketplaces. (SAC ¶¶ 98, 270 (quoting F-1 at 23).) Alipay was established in 2004, and it is now "critically involved in the majority of purchases made through the Alibaba Marketplaces." (SAC ¶¶ 271-272.) Alipay also compiles "valuable consumer data, free of charge, that . . . Alibaba . . . use[s] for [its] 'data management platform, audience targeting, credit analysis, and detecting, monitoring and investigating traffic hijacking and fraudulent activities.'" (SAC ¶ 276 (quoting F-1 at 203).)

5. RICO Allegations

Plaintiffs allege that the Alibaba Defendants and Merchant Defendants, along with unidentified co-conspirators, "joined together to form an enterprise in fact whose purpose is

to sell and profit from the sale of counterfeit goods." (SAC ¶ 375.) The Merchant Defendants knowingly manufactured and sold counterfeited products bearing Plaintiffs' Marks "using the Alibaba Marketplaces and the Alibaba Defendants' services to effect such sales." (Id.) In turn, the Alibaba Defendants knowingly provided the Merchant Defendants with services "to facilitate the sale of counterfeit goods, including marketing, shipping, financing, and payment and/or escrow services that allowed the Merchant Defendants to transact their illegal sales of the Counterfeit Products, and the Alibaba Defendants derived substantial profits from such sales." (Id.) The Alibaba Defendants profited from these sales in a number of ways, including by (1) selling "Gold Supplier" and "Assessed Supplier" statuses to merchants selling counterfeited products (SAC ¶¶ 104, 128), and (2) selling keywords and search terms that include common misspellings of Plaintiffs' Marks and terms such as "replica" and "knockoff." (SAC ¶¶ 15-17, 99.)

Plaintiffs allege that the Alibaba Defendants provided services to the Merchant Defendants even though they knew or should have known that the Merchant Defendants sold counterfeit goods. For example, Merchant Defendant Yiwu Wirbest E-Commercial Firm offered to sell a handbag bearing Plaintiffs' Marks for $3.00 to $15.00 per unit, with a capacity to sell 10,000 units per week. (SAC ¶ 125.) The handbag, which usually retails for $1,250, was advertised as a "popular imitation handbag" made of synthetic leather. (SAC ¶¶ 123, 125.) Despite offering to sell large quantities of products bearing Plaintiffs' Marks at a price vastly below retail price, Alibaba certified Yiwu Wirbest E-Commercial Firm as a "Gold Supplier," meaning that Alibaba "can vouch for the merchant's alleged authenticity and communicate to consumers that it has investigated the merchant and confirmed that goods sold by the merchant are lawful and legitimate." (SAC ¶¶ 104, 127.) In another example, Merchant Defendant Brand

Bag Boutique sold handbags bearing Plaintiffs' Marks on AliExpress.com. (SAC ¶ 228.) The handbag was advertised as "luxury guchi tote bag bucket brand designer handbag," and was displayed in response to a search for "guchi." (Id.) The handbag was verified to be counterfeit by Plaintiffs' investigator, who purchased it from Merchant Defendant Brand Bag Boutique on multiple occasions for $18.99, even though the handbag retails for $1,250. (SAC ¶¶ 227-30.)

By operating in the Alibaba ecosystem, the Alibaba Defendants and Merchant Defendants "each contributed to the 'ecosystem' with the purpose of selling Counterfeit Products." (SAC ¶ 376.) Plaintiffs allege that the defendants:

> [H]ave organized their activities into a cohesive group with specific and assigned responsibilities and division of tasks, operating in the United States, China, and elsewhere. Merchants including the Merchant Defendants have manufactured the goods for wholesale and retail distribution through the Alibaba Marketplaces. The Alibaba Defendants have developed their self-described "ecosystem" comprising various entities responsible for data collection and online marketing, financing, shipping, and payment processing services to promote and facilitate the sale of counterfeit goods. While the membership of this Enterprise has changed over time, and its members may have held different roles at different times, the Enterprise has generally been structured to operate as a unit in order to accomplish the goals of the criminal scheme, profiting from the promotion and sale of counterfeit goods.

(Id.)

LEGAL STANDARD

Rule 12(b)(6) requires a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In assessing the sufficiency of the complaint, a court must disregard legal conclusions, because they are not entitled to the presumption of truth. Id. Instead, the Court must examine the well-pleaded factual allegations "and then determine whether they plausibly give rise to an entitlement to relief." Id. at 679.

"Dismissal is appropriate when 'it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.'" Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 208-09 (2d Cir. 2014) (quoting Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 86 (2d Cir. 2000)).

A court reviewing a Rule 12(b)(6) motion "does not ordinarily look beyond the complaint and attached documents in deciding a motion to dismiss brought under the rule." Halebian v. Berv, 644 F.3d 122, 130 (2d Cir. 2011). A court may, however, "consider 'any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference . . . and documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.'" Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 100 (2d Cir. 2015) (quoting Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)).

DISCUSSION

1. RICO Claim Pursuant to Section 1962(c)

The Alibaba Defendants move to dismiss Plaintiffs' Sixth Cause of Action, which alleges a substantive RICO claim in violation of 18 U.S.C. § 1962(c). Under 18 U.S.C. § 1962(c), it is "unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." To state a civil claim for relief under this section, a plaintiff "must allege the existence of seven constituent elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." Moss v. Morgan Stanley Inc., 719 F.2d 5, 17 (2d Cir. 1983). The Alibaba

Defendants challenge the sufficiency of the factual allegations for two elements of Plaintiffs' substantive RICO claim. First, the Alibaba Defendants contend that Plaintiffs failed to allege the existence of a RICO enterprise. Second, even if Plaintiffs alleged the existence of a RICO enterprise, they failed to allege that the Alibaba Defendants "participated" in that enterprise within the meaning of RICO.

A RICO enterprise is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As the statute suggests, the enterprise need not have traditional business-like characteristics, such as "a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." Boyle v. United States, 556 U.S. 938, 948 (2009). Rather, individuals may constitute an association in fact enterprise if those individuals "'share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.'" First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir. 2004) (quoting First Nationwide Bank v. Gelt Funding Corp., 820 F. Supp. 89, 98 (S.D.N.Y.1993), aff'd, 27 F.3d 763 (2d Cir. 1994)); see also United States v. Turkette, 452 U.S. 576, 583 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.").

Plaintiffs have alleged the existence of a single RICO enterprise comprised of the Alibaba Defendants, the Merchant Defendants, and other unidentified co-conspirators, who "have joined together to form an enterprise in fact whose purpose is to sell and profit from the sale of counterfeit goods." (SAC ¶ 375.) The SAC details in great length the alleged relationship between each Merchant Defendant and the Alibaba Defendants. It describes how

the Merchant Defendants manufactured and sold counterfeit goods in the Alibaba Marketplaces, and how the Alibaba Defendants knowingly aided the sale of those counterfeit goods by providing a plethora of services to the Merchant Defendants. (SAC ¶¶ 93-94, 99, 375-76.) The Alibaba Defendants contend that these allegations amount to nothing more than a classic "hub-and-spokes" association, where one central actor—the hub—forms bilateral and independent relationships with several independent actors—the spokes. The Alibaba Defendants argue that a "hub-and-spokes" association cannot constitute a RICO enterprise, because while the Alibaba Defendants (i.e., the hub) may associate with each Merchant Defendant (i.e., the spokes), the Merchant Defendants did not work together to achieve a common purpose. (Defs.' Br. 11-15.) Plaintiffs disagree, arguing that the RICO enterprise requirement is not so limiting, and even if it is, a relationship between and among the Merchant Defendants can be inferred from the fact that they operate in the Alibaba ecosystem.

Prior to Boyle v. United States, courts largely found "hub-and-spokes" association to be insufficient to constitute a RICO enterprise. See First Nationwide Bank, 820 F. Supp. at 98 (holding that a "series of discontinuous independent frauds is no more an 'enterprise' than it is a single conspiracy"), aff'd, 27 F.3d 763 (2d Cir. 1994); Cedar Swamp Holdings, Inc. v. Zaman, 487 F. Supp. 2d 444, 451 (S.D.N.Y. 2007) ("[A]n allegation that the perpetrator of a series of independent fraudulent transactions used a different accomplice to aid each transaction is insufficient to justify a conclusion that the perpetrator and the accomplices together constituted an ongoing organization or functioned as a continuing unit."); New York Auto. Ins. Plan, No. 97 cv 3164 (KTD), 1998 WL 695869, at *5 (S.D.N.Y. Oct. 6, 1998). In Boyle, however, the Supreme Court held that a RICO enterprise need not have any particular hierarchical structure or chain of command. 556 U.S. at 948. The enterprise may make decisions in any number of ways,

and members may perform different roles during the course of the enterprise's existence. Id. At the same time, the Court emphasized that every RICO enterprise "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. at 946. The Court explained:

> That an "enterprise" must have a purpose is apparent from meaning of the term in ordinary usage, *i.e.*, a "venture," "undertaking," or "project." The concept of "associat[ion]" requires both interpersonal relationships and a common interest. Section 1962(c) reinforces this conclusion and also shows that an "enterprise" must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had "affairs" of sufficient duration to permit an associate to "participate" in those affairs through "a pattern of racketeering activity."

Id. (internal quotations and citations omitted). Importantly, the Court noted that inherent in the concept of an association is the need for both a "common interest" and "interpersonal relationships." Id. Where several individuals "independently and without coordination, engaged in a pattern of crimes listed as RICO predicates . . . [p]roof of these patterns would not be enough to show that the individuals were members of an enterprise." Id. at 947 n.4.

Boyle explicitly rejects the need for any particular structure to support a RICO enterprise, while also recognizing that every RICO enterprise must have certain structural features. Courts have subsequently disagreed whether "hub-and-spokes" association could satisfy RICO's enterprise requirement. At least one court has held that the particular "hub-and-spokes" association alleged, if proven, would amount to a RICO enterprise. See Schwartz v. Lawyers Title Ins. Co., 970 F. Supp. 2d 395, 405 (E.D. Pa. 2013). But the majority of courts within this Circuit have found the "hub-and-spokes" associations alleged in the complaints before them were insufficient to constitute a RICO enterprise. Neiman Marcus Grp., Inc. v.

Dispatch Transp. Corp., No. 09 cv 6861 (NRB), 2011 WL 1142922, at *7 n.11 (S.D.N.Y. Mar. 17, 2011) (observing that allegations of a "hub-and-spokes" association, "assuming they were sufficiently alleged, do not satisfy the enterprise element of a RICO claim."); In re Trilegiant Corp., Inc., 11 F. Supp. 3d 82, 98-99 (D. Conn. 2014) ("This Court finds that a classic 'hub-and-spoke' formation in which the spokes are separate, distinct and unassociated and whose actions are uncoordinated does not possess the requisite structure to constitute a RICO enterprise, even as that notion was expanded by Boyle, because there is no concerted effort or organized cooperation between the spokes."); Conte v. Newsday, Inc., 703 F. Supp. 2d 126, 135 (E.D.N.Y. 2010) ("These 'hub and spokes' allegations are insufficient to support a conclusion that the various defendants were associated with one another for a common purpose.").

In Elsevier Inc. v. W.H.P.R., Inc., Judge McMahon acknowledged the "breadth" of the RICO enterprise under Boyle, but observed that plaintiffs must still allege "something more than parallel conduct of the same nature and in the same time frame by different actors in different locations." 692 F. Supp. 2d 297, 306-07 (S.D.N.Y. 2010). In Elsevier, plaintiffs alleged that an association in fact enterprise existed among individuals who fraudulently sold periodical subscriptions. Id. at 306. Each individual involved in the fraud would purchase academic journal subscriptions at an "individual rate," a rate lower than if an institution were to purchase the subscriptions "as a library copy (i.e., accessible to persons other than the purchaser)." Id. at 301. The individuals then improperly sold their individual copies to institutions for use as library copies. Id. But while one individual was alleged to have been the "leader of the fraud," the other individuals involved in the fraud were not alleged to have any relationship with one another. Id. at 301-02. Judge McMahon held that plaintiffs failed to adequately allege a relationship among the individuals to constitute RICO enterprise. Id. at 306-

07. Importantly, the district court concluded that "not a single fact is pleaded tending to show that the various sets of named defendants . . . had any interpersonal relationships. . . . Nothing in the Complaint explains how these particular people, located in different parts of the country, came to an agreement to act together—or even how they knew each other." Id. at 307.

Similarly, in City of New York v. Chavez, the City of New York alleged the existence of a RICO enterprise between online cigarette sellers and those sellers' suppliers. 944 F. Supp. 2d 260 (S.D.N.Y. 2013), vacated on other grounds, City of New York v. Bello, 579 F. App'x 15, 18 (2d Cir. 2014).[2] In Chavez, online cigarette sellers were alleged to have purchased cigarettes from multiple suppliers outside of New York only to resell them to buyers within New York in violation of the Contraband Cigarette Trafficking Act. Id. at 262-63. The City also alleged that the online cigarette sellers and all of their suppliers constituted a RICO enterprise and conspired to violate RICO. Id. One of the supplier defendants moved for summary judgment, arguing that no RICO enterprise existed because the City's evidence only "proved separate and parallel vertical, bilateral relationships between one central actor and several independent actors one level removed from the central actor in the scheme." Id. at 271. That is to say, the relationships between the online cigarette sellers and each supplier "were separate, uncoordinated, and entirely independent." Id. In a well-reasoned opinion, Judge Forrest agreed, concluding that "[a]ll the City can prove is the profit-maximizing, fraudulent, and potentially illegal actions of several individuals essentially acting independently of one another, although all acting centrally through Israel Chavez." Id. at 277. The court specifically considered whether a

[2] The Second Circuit reversed and remanded on the grounds that genuine issues of material fact remained on Plaintiffs' RICO conspiracy claim. The Second Circuit held that the appellant-defendants could have agreed to commit substantive RICO violations, even if they could not commit those substantive violations themselves. Bello, 579 Fed. App'x at 18.

"hub-and-spokes" association could constitute a RICO enterprise in light of Boyle. After surveying pre- and post-Boyle cases, Judge Forrest extracted the following principles:

> [A]n "enterprise" must have "ongoing organization"; the enterprise must "function as a continuing unit"; it must "have a common purpose of engaging in a course of conduct"; its members must be in certain ways "dependent" on one another; its members must be in certain ways "joined together as a group"; its members must act in certain ways "to benefit" one another; its members must contribute to the association's goals and purposes in some "necessary and symbiotic" manner; its members' activities must in some manner "rely" on other members' activities. Contrawise, when all the evidence shows is a series of similar but essentially separate frauds carried out by related entities—when those frauds are independent of one another; can be effective without the perpetration of any of the other frauds proven; provide no benefit or assistance to the perpetration of any of the other frauds proven; and in no way require coordination or collaboration among the actors perpetuating the fraud—then no RICO enterprise exists. The difference can really be boiled down to a simply-stated distinction: If each act of fraud is equally effective without the perpetration of any other act of fraud—even if perhaps effective to a far lesser or different magnitude—then there is no RICO enterprise. If each act of fraud is not effective without the other acts of fraud, then a RICO enterprise exists.

Id. at 275. Like Boyle, Chavez emphasized the importance of interpersonal relationships among members of the alleged enterprise, and flatly rejected the idea that coterminous, independent parallel conduct is sufficient to establish a RICO enterprise. The court concluded that the City could not prove that anything more than "a 'hub-and-spokes' association ever existed in this case," which it found to be "insufficient to make out a RICO violation as a matter of law." Id. at 278.

The Third Circuit has also concluded that allegations of parallel conduct by individuals alleged to be part of an enterprise are insufficient to support a RICO enterprise. In re Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010). There, plaintiffs alleged the existence of several RICO enterprises, each comprised of a single insurance broker who entered

into agreements with multiple insurers to impermissibly steer business to those insurers for commission payments. Id. at 374. Plaintiffs did not allege, though, that the insurers coordinated their efforts in any respect. Id. The Third Circuit held that without alleging anything more than parallel conduct by each insurer, plaintiffs could not "support the inference that the insurers 'associated together for a common purpose of engaging in a course of conduct.'" Id. (quoting Turkette, 452 U.S. at 583). Holding otherwise would mean that "competitors who independently engaged in similar types of transactions with the same firm could be considered associates in a common enterprise," which would be counter to Boyle's definition of a RICO enterprise. Id. at 375. Comparatively, the court found that a separately alleged association in fact did constitute a RICO enterprise, where the insurers (i.e., the spokes) were required to coordinate their efforts before submitting rigged insurance bids to a broker (i.e., the hub). The court concluded that the allegations of "bid rigging provide[d] the 'rim' to the [broker]-centered enterprise's hub-and-spoke configuration, satisfying Boyle's requirements." Id.

Boyle requires that an association in fact have certain structural features to constitute a RICO enterprise. While not every "hub-and-spokes" association will necessarily fail to constitute a RICO enterprise, Boyle requires allegations of something more than parallel conduct by associates of an alleged enterprise. Parallel conduct does not demonstrate that individuals acted in a coordinated manner, or that they "associated together for a common purpose of engaging in a course of conduct." Turkette, 452 U.S. at 583.

Plaintiffs have failed to plausibly allege that the Merchant Defendants engaged in anything but independent conduct, without coordination and for their own economic self-interest. Indeed, the Merchant Defendants' relationships with one another are not alleged to be any different from their relationships with the millions of other merchants operating on the Alibaba

Marketplaces. True, the SAC alleges that each Merchant Defendant—and not legitimate merchants—engaged in fraudulent conduct with the purpose of profiting from the sale of counterfeit products, but it does not allege that they "'associated together for a common purpose of engaging in a course of conduct.'" Boyle, 556 U.S. at 946 (quoting Turkette, 452 U.S. at 583). Nor does the SAC plausibly allege that these competing Merchants "work[ed] together to achieve such purposes." Cruz v. FXDirectDealer, LLC, 720 F.3d 115, 120 (2d Cir. 2013) (internal quotations omitted). The fraud perpetrated by each Merchant Defendant could be accomplished without any assistance from any other Merchant Defendant. The Merchant Defendants all operate from China and happen to sell counterfeit goods bearing Plaintiffs' Marks. But there is no indication that the Merchant Defendants, "located in different parts of the country, came to an agreement to act together—or even how they knew each other." Elsevier, 692 F. Supp. 2d at 307. Plausibly read, the SAC alleges only that each Merchant Defendant engaged in a pattern of racketeering activity "independently and without coordination." Boyle, 556 U.S. at 947 n.4.

Plaintiffs argue that the existence of a relationship between and among the Merchant Defendants can be inferred from the Merchant Defendants participation in the Alibaba ecosystem. Plaintiffs contend, for instance, that the Merchant Defendants were aware of each other's existence by virtue of operating within the Alibaba ecosystem. But the Alibaba Marketplaces consist of "millions of merchants." (20-F at 54.) Moreover, the Merchant Defendants operated on different Alibaba Marketplaces—some operate on Alibaba.com, and others operate on Taobao.com or AliExpress.com. (SAC ¶¶ 38-51.) In any event, a generalized awareness of the existence of a competitor does not establish the existence of an "interpersonal relationship" as described in Boyle, 556 U.S. at 946.

Plaintiffs also argue that the Merchant Defendants' awareness of one another is evident from the fact that some Merchant Defendants sold counterfeit raw materials (i.e., leather emblazoned with Plaintiffs' Marks), which they contend other Merchant Defendants could purchase to produce counterfeit products. (Pls.' Opp'n Br. 16 (citing SAC ¶¶ 128-31).) But nowhere in the SAC do Plaintiffs allege that those raw materials were marketed to other Merchant Defendants. Nor do Plaintiffs allege that other Merchant Defendants' purchased those raw materials. In fact, the SAC asserts that the two Merchant Defendants who sold raw materials indicated that North America was one of their "main markets," rather than other producers in China. (SAC ¶¶ 129, 131.) Alleging that the Merchant Defendants were aware of one another based on the fact that Merchant Defendants *could* have sold or purchased raw materials from another Merchant Defendant, especially where all the Merchant Defendants did not operate in the same Alibaba Marketplace, amounts to little more than a "'naked assertion' devoid of 'further factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557) (alteration omitted).

Nor does the fact that all the Merchant Defendants obtained common benefits from the Alibaba ecosystem demonstrate that a relationship existed between and among the Merchant Defendants. (Pls.' Opp'n Br. 14-15.) The Merchant Defendants obtained the benefits of the Alibaba ecosystem—such as marketing and shipping services—from the Alibaba Defendants, not from one another. While such allegations may imply a relationship between each Merchant Defendant and the Alibaba Defendants, one cannot infer that the Merchant Defendants acted in a coordinated manner by receiving common benefits. The Merchant Defendants did not "act in certain ways 'to benefit' one another," rely on one another to accomplish their activities, or otherwise "function as a continuing unit." Chavez, 944 F. Supp.

2d at 275. Nothing about receiving benefits from the same source makes "it plausible that the Court is confronted with something more than parallel conduct of the same nature and in the same time frame by different actors in different locations." Elsevier, 692 F. Supp. 2d at 306-07.

Plaintiffs also argue that the Merchant Defendants benefited from one another as a result of "self-reinforcing network effects that benefit" all participants in the Alibaba Marketplaces. (Pls.' Opp'n Br. 14 (quoting SAC ¶ 91(b).) The Merchant Defendants benefit, Plaintiffs argue, through "online retail clustering because . . . 'more merchants attract more consumers, and more consumers attract more merchants.'" Id. (quoting SAC ¶ 91(c)). But the benefit that the Merchant Defendants received from one another as a result of selling counterfeit goods is no greater or different than the benefit that merchants selling genuine goods receive by operating in the Alibaba Marketplaces. Furthermore, these allegations still fail to show that the Merchant Defendants engaged in anything more than parallel conduct. Two stockbrokers, for example, both of whom engage in similar acts of securities fraud, are not bound by an interpersonal relationship just because their conduct targeted the same stock on the New York Stock Exchange. Cf. In re Ins. Brokerage Antitrust Litig., 618 F.3d at 375 ("Were the rule otherwise, competitors who independently engaged in similar types of transactions with the same firm could be considered associates in a common enterprise."). Boyle's relationship requirement demands more—it demands plausible allegations that individuals operating within the ecosystem coordinated their conduct to accomplish a common purpose. Boyle, 556 U.S. at 947 n.4. Such allegations are missing in the present case.

For the first time in their Response in Opposition to the Alibaba Defendants' Motion to Dismiss, Plaintiffs assert that even if the Court were to determine that a RICO enterprise was not sufficiently pled, additional unpled enterprises are supported by the factual

allegations in the SAC. Plaintiffs were given an opportunity to amend their complaint—and did, indeed, amend their complaint—in response to the Alibaba Defendants' Premotion Letter. (Dkt. No. 31.) Plaintiffs were subsequently asked by this Court whether they wished to further amend their SAC, but they chose to "stand on the pleadings that we have." (Pretrial Conference Tr. 6, dated Sept. 25, 2015.) Accordingly, the Court will not consider the sufficiency of unpled alternative enterprises.

2. RICO Conspiracy Claim Pursuant to Section 1962(d)

The Alibaba Defendants also move to dismiss the Seventh Cause of Action, which alleges a conspiracy to commit a RICO violation in violation of 18 U.S.C. § 1962(d). Plaintiffs' RICO conspiracy charge is premised on the substantive RICO violation that they allege in their Sixth Cause of Action. (SAC ¶ 402 ("Defendants have . . . conspired . . . together and with others to violate 18 U.S.C. § 1962(c), as described above in Plaintiffs' Sixth Cause of Action, in violation of 18 U.S.C. § 1962(d).").) Plaintiffs' failure to state a claim for their substantive RICO violation warrants dismissal of their RICO conspiracy claim. Penguin Bros. v. City Nat. Bank, 587 F. App'x 663, 669 (2d Cir. 2014) ("The failure to state a claim for a substantive RICO violation . . . is fatal to plaintiffs' RICO conspiracy claim under § 1962(d)." (quoting First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 182 (2d Cir. 2004))). As noted above, Plaintiffs failed to plausibly allege that the Merchant Defendants were aware of each other's existence. Therefore, the Alibaba Defendants necessarily could not have agreed with the Merchant Defendants "to commit further acts that, had they been carried out, would have satisfied the RICO elements that were deficient with respect to the substantive RICO counts." Jus Punjabi, LLC v. Get Punjabi US, Inc., 640 F. App'x 56, 59 (2d Cir. 2016).

Accordingly, Plaintiffs failed to allege the existence of a conspiracy to violate 18 U.S.C. § 1962(c) between and among the Alibaba Defendants and Merchant Defendants.

CONCLUSION

For the foregoing reasons, the Alibaba Defendants' motion to dismiss Plaintiffs' Sixth and Seventh Causes of Action (Dkt. No. 42) is GRANTED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
August 4, 2016