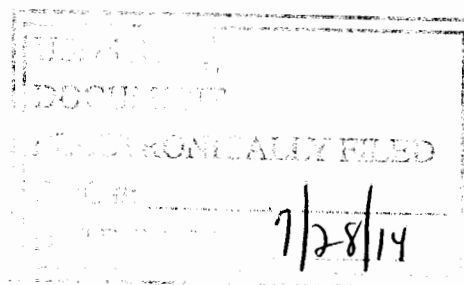


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



MADISON 92nd STREET ASSOCIATES, LLC,

Plaintiff,

-against-

No. 13 Civ. 291 (CM)

COURTYARD MANAGEMENT CORPORATION,
MARRIOTT INTERNATIONAL, INC., HOST
HOTELS & RESORTS, INC., DIAMONDROCK
HOSPITALITY CO., and NEW YORK HOTEL &
MOTEL TRADES COUNCIL, AFL-CIO,

Defendants.

**MEMORANDUM DECISION AND ORDER GRANTING
DEFENDANTS' MOTIONS TO DISMISS**

McMahon, J.:

Plaintiff Madison 92nd Street Associates brought this action against Defendants Courtyard Management Corp., Marriott International, Inc., Host Hotels & Resorts, Inc., DiamondRock Hospitality Co., and the New York Hotel & Motel Trades Counsel, AFL-CIO (the "Union"), asserting claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961 *et seq.*; the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*; the Donnelly Act, N.Y. GEN. BUS. LAW §§ 340 *et seq.*; and New York common law.

Currently before the Court are four motions to dismiss, brought by (1) Courtyard and Marriott, (2) Host, (3) the Union, and (4) DiamondRock. For the following reasons, the motions are granted, and Madison's First Amended Consolidated Complaint (the "Complaint") is dismissed—its federal claims with prejudice, and its state-law claims without prejudice.

BACKGROUND

The following facts are taken from the Complaint and are presumed to be true for purposes of this motion.

A. The Parties

Plaintiff Madison is a Delaware limited liability company with its principal place of business in New York, New York. (Compl. ¶ 17.) Madison was formed in 2001 for the purpose of developing a hotel on the Upper East Side of Manhattan, at 410 East 92nd Street, known as the “Upper East Side Courtyard by Marriott” (the “Hotel”). (Compl. ¶¶ 1, 84.)

Defendant Courtyard is a Delaware corporation with its principal place of business in Bethesda, Maryland. Courtyard is a hotel-management company and manages a number of prominent hotels in New York City, including the Fifth Avenue Courtyard and the Third Avenue Midtown Courtyard. (Compl. ¶ 18.)

Defendant Marriott is a Delaware corporation with its principal place of business in Bethesda, Maryland. Marriott is a hotel-management company and operates more than 3,700 properties in 74 countries under its broad brand portfolio, including Courtyard by Marriott. (Compl. ¶ 19.)

Defendant Host is a Maryland corporation with its principal place of business in Bethesda, Maryland. Host spun off from Marriott in 1993 and currently owns, among other properties, six hotels in New York City, including the Marriott Marquis and the New York Marriott Downtown, formerly known as the Marriott Financial Center. Both hotels are operated and managed by Marriott under a long-term management agreement between Host and Marriott. (Compl. ¶ 20.)

Defendant DiamondRock is a Maryland corporation with its principal place of business in Bethesda, Maryland. DiamondRock spun off from Marriott in 2005 and currently owns, among

other properties, four hotels in New York City, including the Courtyard Manhattan Midtown East and Courtyard Manhattan Fifth Avenue, both of which are operated and managed by Marriott under a long-term management agreement between DiamondRock and Marriott. (Compl. ¶ 21.)

Defendant the Union is organized under the laws of the State of New York and has its principal place of business in New York, New York. The Union represents approximately 30,000 non-managerial hotel employees in the New York City metropolitan area. (Compl. ¶ 22.)

B. Factual History

In early 2001, after purchasing the Hotel, Madison entered into negotiations with Marriott and Courtyard for the latter company to manage the Hotel under the “Courtyard by Marriott” brand name. (Compl. ¶ 85.) One of the principal reasons that Madison chose Marriott/Courtyard was Marriott’s well-established reputation as an “anti-union” operator and its successful track record of resisting unionization at the hotels it managed, especially in New York City. (Compl. ¶ 88.) Although the Union had a collective bargaining agreement (the “IWA”) with a majority of Manhattan hotels, by the fall of 2001, few prominent Marriott properties were signatories. (*Id.*)

During the parties’ management negotiations, Madison informed Marriott and Courtyard that because labor costs are by far the largest single expense for a hotel, and unionized hotel labor can significantly increase a hotel’s operating costs, it considered low labor costs at the Hotel to be critically important. (Compl. ¶ 88.) In response, Marriott and Courtyard represented to Madison that they were anti-union companies and that they would resist unionization at the Hotel in the same manner in which Marriott had successfully resisted unionization at other Marriott-managed hotels in New York City. (Compl. ¶ 194(a).) Marriott explained to Madison that it had successfully kept the Union out of many of its New York City hotels by, among other

things, offering Marriott employees union-scale wages. (Compl. ¶ 88.) Marriott told Madison that it planned to do the same with the Hotel. (*Id.*)

In reliance on these and other representations, Madison executed a management contract with Courtyard (the “Management Agreement”) on October 7, 2002. (FAC ¶ 89 & Ex. A.) The Management Agreement provided, in part:

The operation of the Hotel shall be under the exclusive supervision and control of [Courtyard] which, except as otherwise specifically provided in this Agreement, shall be responsible for the proper and efficient operation of the Hotel. . . . In fulfilling its obligations under this Agreement, [Courtyard] will act as a reasonable prudent operator of the Hotel, having regard for the status of the Hotel and maintaining System Standards, and shall have discretion and control, free from interference, interruption or disturbance, in all matters relating to the management and operation of the Hotel

(Compl. Ex. A § 1.02(C).) The Management Agreement also obligated Courtyard to “manage the Hotel under standards comparable to those prevailing in other hotels [under the Courtyard trade name], including all activities in connection therewith which are customary and usual to such an operation.” (*Id.* § 1.02(B).) Madison interprets this provision as requiring Courtyard to manage the Hotel in the same manner as and with the same benefits afforded to other Marriott-managed hotels, including protection against unionization as purportedly promised by Marriott and Courtyard. (Compl. ¶¶ 88, 89, 122.) However, the Management Agreement plainly gives Marriott “discretion and control, free from interference, interruption, or disturbance, in all matters relating to the management and operation of the Hotel,” including “absolute discretion with respect to all personnel employed at the Hotel.” (Compl. Ex. A §§ 1.02(C) & 1.04(A).) This clear and unambiguous language cannot be varied by parol evidence of a prior side arrangement between Madison and Marriott that the Hotel would remain “Union-free”—all the more so in light of the Agreement’s integration clause. (*See id.* § 11.25.)

According to the Complaint, while Madison and Marriott were negotiating the Management Agreement, Marriott was secretly meeting with Host to resolve a management dispute that had arisen between the two companies in connection with Marriott's management of Host-owned hotels. (Compl. ¶ 63.) As part of these negotiations, Marriott and Host agreed that, in exchange for Marriott's assistance in convincing the Union to protect two Host-owned hotels from unionization, Host would retain Marriott as the manager of both properties, and would sign additional long-term management agreements with Marriott for the management of other Host hotels. (Compl. ¶ 64.)

After resolving its differences with Host, Marriott began what Madison describes as "secret" negotiations with the Union. On November 5, 2002, less than a month after Madison and Courtyard entered into the Management Agreement, Marriott sent the Union an executed version of a letter agreement in which Marriott agreed that certain of its New York City hotels would be bound by the "Neutrality/Card Check Agreement as incorporated into the 2001 IWA." (Compl. Ex. C.) Under this provision of the IWA, (1) hotel owners and managers were required to grant the Union access to hotel property and were prohibited from influencing their employees' decision whether to unionize, and (2) a majority vote automatically resulted in recognition of the Union as the exclusive representative of a group of employees at the voting hotel. (Compl. ¶ 57.) This process gave the Union a superior organizing mechanism as compared to NLRB-administered elections, through which Marriott had managed to resist unionization at many of its key properties. (Compl. ¶¶ 55, 68.)

The November 2002 letter agreement between Marriott and the Union, which Madison calls the "Secret Agreement," specifically excluded from its scope the LaGuardia Marriott, the New York Marriott Marquis, the New York Marriott Financial Center, the New York Midtown

East Courtyard by Marriott, as well as “any properties owned, managed, or operated by Marriott prior to July 2001,” the effective date of the 2001 IWA. (*Id.*) In the Complaint, Madison refers to these excluded hotels as the “Preferred Hotels,” and all other Marriott properties as the “Non-Preferred Hotels.”

Madison alleges that the Defendants’ conspiracy extended beyond the Secret Agreement, and included a pattern of conduct by Marriott, Courtyard, and the Union to guarantee unionization at the Non-Preferred Hotels and to keep the Preferred Hotels union-free. According to the Complaint, Marriott pledged to provide the Union any assistance it needed to organize and receive favorable treatment at the Non-Preferred Hotels, in exchange for the Union’s abandonment of efforts to unionize the Preferred Hotels. (Compl. ¶¶ 74-82, 115.) This assistance included hiring only pro-Union employees at the Non-Preferred Hotels and transferring existing Union employees from other Marriott hotels. (Compl. ¶ 115.)

Notwithstanding its asserted aversion to union labor, in January 2003, Madison applied for a construction loan from the Union Labor Life Insurance Company (“ULLICO”), a labor-owned insurance and investment company that provides mortgages for union-related projects. On January 27, 2003, Madison sent Courtyard a portion of the ULLICO loan application and asked whether it could represent to ULLICO that the Hotel was subject to a neutrality agreement, which was a requirement for obtaining a loan from ULLICO. (Declaration of Christopher P. Hall dated Oct. 4, 2013 (“Hall Decl.”), Ex. 9.) Specifically, Madison wanted to know whether it could represent, as required by ULLICO, that the “operator” or “manager” of the Hotel (*i.e.*, Marriott/Courtyard) would “refrain from expressing directly or indirectly its support or opposition to the union and from actively campaigning in opposition to the designation of such union as the representative of [its] employees [*i.e.*, the employees of the “operator” of the

Hotel—the hotel employees].” This required representation conformed to the “Neutrality/Card Check agreement” described above; in other words, it required both Madison (as owner) and Marriott/Courtyard (as operator) to give the Union the very “superior organizing mechanism” that Madison now claims it was trying to avoid and to refrain from campaigning against unionization at the Hotel.

On February 28, 2003, Dottie Ingalls of Marriott sent the following email to John Leshner of Madison:

As you requested, I am sending this email to confirm our approval of the following language which was contained in the fax you sent to me on February 12, 2003:

“Borrower and operator will have to recognize the rights of its employees to choose its bargaining representative without interference or coercion from their employer. Accordingly, the borrower, manager or operator shall refrain from expressing directly or indirectly its support or opposition to the union and from actively campaigning in opposition to the designation of such union as the representative of such employees.”

Because Marriott International, Inc. is already a signatory to a card-check neutrality agreement with the New York Hotel-Motel Trades Council, AFL-CIO, we approve the use of the above language in connection with the Courtyard under development at 92nd Street and 1st Avenue in New York, New York.

(Compl. ¶ 195(e)(i); Hall Decl., Ex. 10.) It is noteworthy that Marriott’s card-check agreement was represented to be with the Defendant Union, which represents people who work in hotels and motels, not construction workers, or teamsters, or other building trades.

Although Madison alleges that it “sought information” from Marriott about this card-check/neutrality agreement in “early 2003,” Madison affirmatively alleges that it never actually asked to see a copy of Marriott’s agreement with the Union until April 2009. (Compl. ¶¶ 194(b), 194(i).)

The Hotel opened in August 2006. On October 4, 2006, the Impartial Chairperson, following a card count, certified the Union as the representative of certain employees at the

Hotel. (Compl. ¶¶ 102, 195(j)(ii).) In early 2007, Marriott and Courtyard negotiated a Union-friendly work rules agreement, which was executed in March 2007 and was specific to the Hotel. (Compl. Ex. B.) This agreement limited the Hotel's ability to reduce staff and granted the Union major concessions, including:

- All Union employees absent on disability would be replaced at nearly double the cost, whether or not there was replacement work to be performed;
- A new position of "General Clean Mechanic" was created to clean guest rooms and make repairs, functions already performed by housekeeping and maintenance staff;
- Union doormen were paid two hours overtime every day to compensate them for hailing taxis on First Avenue, regardless of whether they actually did so; and
- Maintenance and housekeeping staff were compensated an extra \$25 per day for tasks such as sweeping leaves and delivering food to conference rooms.

(Compl. ¶ 104.) Madison alleges that these work rules were implemented to protect existing Union employees and create more jobs for the Union at the Hotel, and that the Hotel's staffing level thereafter rose 40%, from approximately 50 employees at opening to over 70 in late 2008, despite contemporaneous declines in occupancy and revenue at the Hotel. (Compl. ¶ 105.)

Madison further alleges that when Madison questioned why staffing levels continued to rise in 2007, Marriott and Courtyard falsely claimed that the increased headcount was necessary to meet occupancy levels that were exceeding projections at the time. (Compl. ¶ 195(l)(ii).) In reality, the Complaint alleges, Marriott and Courtyard were simply buying goodwill with the Union by sacrificing the Hotel.

Apart from the Secret Agreement, Madison also alleges that Courtyard failed to abide by the “prudent operator” standard of the Management Agreement and engaged in numerous acts of gross mismanagement, including:

- Failing to pursue measures to generate business for the Hotel (Compl. ¶¶ 135-139);
- Violating zoning laws and the Hotel’s certificate of occupancy by allowing a guest to obtain statutory residency (Compl. ¶¶ 148-152);
- Abusing the “Marriott Rewards” program to the benefit of Courtyard and Marriott at the Hotel’s expense (Compl. ¶¶ 155-177);
- Abusing Marriott and Courtyard’s status as a Worker’s Compensation self-insurer, to the financial detriment of Madison, for their own benefit (Compl. ¶¶ 178-186); and
- Changing its accounting practices to artificially inflate its management and other fees (Compl. ¶¶ 187-190).

In 2009, the Hotel’s gross revenue dropped by over \$6 million, but operating costs, comprised in large part of labor expenses, were not correspondingly adjusted downward by Courtyard. The Hotel’s net operating profit sunk to under \$2.5 million per year, which was over \$4 million off Marriott’s pro forma calculations. (Compl. ¶ 376.)

C. Procedural History

On September 4, 2009, Madison filed a complaint against Courtyard in New York Supreme Court (the “Original State-Court Complaint”), asserting claims for, among other things, breach of the Management Agreement and breach of fiduciary duty. (Hall Decl., Ex. 1.) Later that month, following a third-party subpoena from Madison, the Union produced a copy of the Secret Agreement. (Compl. ¶ 113.)

On April 28, 2011, Courtyard moved for partial summary judgment on Madison’s remaining claims relating to (1) unionization/staff headcount, (2) the Rewards Program, and (3)

the workers compensation program. On August 16, 2011, the day after briefing was complete, Madison filed a petition for bankruptcy, and Courtyard's motion was taken off of the state court's calendar.

In Madison's bankruptcy, the company's broker marketed the Hotel both with and without Courtyard as the manager. After many months, Madison accepted an \$82 million offer for the Hotel without the Management Agreement. (Compl. ¶ 381.) The sale closed on May 30, 2012, and the Management Agreement was terminated. (*Id.*)

On January 4, 2013, after remand from the Bankruptcy Court, Madison filed its amended complaint in its state-court action (the "State-Court Amended Complaint"). (Hall Decl., Ex. 2.) Days later, on January 13, 2013, Madison filed a complaint in this Court (the "Original Federal-Court Complaint") based on the same factual allegations, but adding parties (Marriott, Host, DiamondRock, and the Union) and alleging RICO and antitrust violations. (Hall Decl., Ex. 3.)

At a March 22, 2013 status conference, this Court concluded that the case would be stayed pending the completion of Madison's state-court action against Courtyard. Later that day, Courtyard moved to dismiss the State-Court Amended Complaint. On March 28, 2013, Madison sought leave to amend the State-Court Amended Complaint to add all of the parties and claims from the Original Federal-Court Complaint, as well as a claim for negligent misrepresentation against Courtyard and Marriott. (Hall Decl., Ex. 4.) On June 7, 2013, Defendants removed the State-Court Amended Complaint to this Court. On August 9, 2013, Madison filed the current Complaint. (Hall Decl., Ex. 5.)

All defendants join in each others' arguments.

DISCUSSION

I. Standard for Determining the Motion

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court assumes the truth of facts asserted in the complaint and draws all reasonable inferences from those facts in favor of the plaintiff. *Global Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 154 (2d Cir. 2006). To survive a motion to dismiss, “a complaint must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “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.* (citing *Twombly*, 550 U.S. at 556).

In deciding a motion to dismiss, the Court may consider the full text of documents that are quoted in or attached to the Complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit. *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000) (citing *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991)); *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808 (2d Cir. 1996). The Court may also take judicial notice of “court documents and public records.” *Mejia v. New York City Health & Hospitals Corp.*, No. 13-cv-2434 (WHP), 2014 WL 2115109, at *2 (S.D.N.Y. May 19, 2014).

II. Madison’s Sherman Act Claim (Count 7) Is Dismissed.

Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. To establish a violation of § 1, a plaintiff must show (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) constituted an unreasonable restraint of trade either *per*

se or under the rule of reason. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 95-96 (2d Cir. 1998).

Defendants argue that the Complaint fails to allege an unreasonable restraint of trade under either test. The Court agrees.

A. The Secret Agreement Is Not a *Per Se* Unreasonable Restraint of Trade.

When an alleged restraint of trade “is among that small class of actions that courts have deemed to have ‘such predictable and pernicious anticompetitive effect, and such limited potential for precompetitive benefit,’ it will be unreasonable *per se*.” *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 29 (2d Cir. 2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). “Agreements within the scope of § 1 may be either ‘horizontal,’ *i.e.*, ‘agreement[s] between competitors at the same level of the market structure,’ or ‘vertical,’ *i.e.*, ‘combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors.’” *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)).

As to horizontal agreements, a “classic example[]” of a *per se* violation of § 1 is an “agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.” *Topco Assocs., Inc.*, 405 U.S. at 608. Non-price vertical agreements, by contrast, “are generally judged under the ‘rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.’” *Anderson News*, 680 F.3d at 182 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)).

In support of its claim that the alleged agreements in this case qualify as *per se* unlawful, Madison offers only the truism that “an agreement which horizontally divides the market and eliminates competition constitutes a *per se* violation of antitrust law.” Pl. Opp. at 54. Madison

attempts to shoehorn the Secret Agreement into this category by alleging that it “secured for the Union a market for its unionized non-material labor” and “secured for the remaining Defendants a market for non-unionized non-managerial labor”—all while eliding the crucial distinction that the Union was *selling* its labor and the remaining Defendants were *buying* it. *See id.*; *see also Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988) (“Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.”).

Paragraph 70 of the Complaint makes the vertical nature of the Secret Agreement clear: it alleges that the agreement “ensured Host that the Marriott Marquis and Marriott Financial Center would not be unionized,” “secured for Marriott the continued management of those brand-enhancing hotels,” and “guaranteed the Union thousands of new dues-paying members and the market power necessary to obtain extremely favorable job protection and benefits for its members.” The agreement, in other words, provided benefits to Host, as *owner* of the hotels, to Marriott, as *manager* of the hotels, and to the Union, as the *provider of labor services* to the hotels. In paragraph 81 of the Complaint, Madison again admits that the Secret Agreement was a vertical agreement by describing it as “an unlawful alliance between the Union, itself a combination of competitors, and Marriott, an employer, for the purpose of restraining competition and changing the terms and conditions of employment for workers in the hotel industry.”

Furthermore, as Defendants point out, the Secret Agreement would remain a vertical agreement even if one ignored the presence of the Union. Because Madison concedes that (1) Marriott and Courtyard constitute a “single enterprise for antitrust purposes,” and (2) neither

Host nor DiamondRock is an employer of hotel labor at its Marriott-managed hotels, the 2003 Union Letter Agreement, even without the Union, could not be considered a horizontal agreement between employers of non-managerial hotel labor. *See* M/C Reply Br. at 4; Pl. Opp. at 45, 59.¹

B. Madison Has Not Alleged an Unreasonable Restraint of Trade Under the Rule of Reason Because It Has Failed to Allege a Proper Relevant Market.

Where, as here, a plaintiff fails to allege a restraint of trade that is unreasonable *per se*, its claim will be analyzed under the “rule of reason,” which “seeks to determine if the alleged restraint is unreasonable because its ‘anticompetitive effects outweigh its procompetitive effects.’” *E & L Consulting*, 472 F.3d at 29 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990)).

To state a claim under § 1 of the Sherman Act, “a plaintiff must allege a plausible relevant market in which competition will be impaired.” *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 155 (2d Cir. 2011). This proposed relevant market must include “all products reasonably interchangeable by consumers for the same purposes.” *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (internal quotation marks omitted). The plaintiff carries the burden of defining the relevant product market. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 411 (N.D.N.Y. 2000). When a plaintiff “fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual

¹ To the extent that Madison’s opposition brief could be construed as arguing that the Secret Agreement is horizontal in nature because it has horizontal *effects* on the Relevant Market, this line of argument has been explicitly rejected by the Supreme Court. *See Bus. Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n.4 (1988).

inferences are granted in [the] plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 238 (2d Cir. 2008).

Madison's Sherman Act claim fails because its Complaint defines the "Relevant Market" in this case as "labor services provided by non-managerial hotel employees working or seeking work in *Marriott-managed hotels* . . . in New York City." (Compl. ¶ 298 (emphasis added).) "[C]ourts have consistently held that a brand name product cannot define a relevant market." *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 482-83 (S.D.N.Y. 2001). In *Mathias*, my colleague Judge Marrero rejected a proposed market definition of "home delivery subscriptions of the [New York Daily] News," concluding that "at a basic level, the *Daily News* is a newspaper, functionally interchangeable with many others, that competes in a market for readers of the news." Similarly, in *Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701 (S.D.N.Y. 1997), then-Judge Sotomayor rebuffed the plaintiff's attempt to define the relevant market as "tickets for travel on TWA between certain city pairs" by citing distinguishing features of TWA tickets such as flight times, dates, and mileage:

The plaintiff's argument is analogous to a contention that a consumer is "locked into" Pepsi because she prefers the taste, or NBC because she prefers "Friends," "Seinfeld," or "E.R." A consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network.

Id. at 704-05.

Perhaps recognizing the difficulty in defining a Relevant Market by reference to a single brand name, Madison alleges in the Complaint that "labor services outside the Relevant Market are not interchangeable with the labor services within the Relevant Market." (Compl. ¶ 299.) This is so, Madison alleges, because owners of Marriott-managed hotels "are locked in to

management contracts with Marriott,” which delegate personnel decisions to Marriott and which allow owners to terminate only under certain narrowly defined circumstances. (*Id.*; see Compl. Ex. A §§ 1.04(A), 2.02, 2.03.)

But in this Circuit, a plaintiff cannot rely on a “lock-in” theory to limit its relevant market to a single brand when that alleged lock-in depends on restrictions to which the plaintiff has contractually agreed. See *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 85 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). In *Hack*, the Second Circuit considered a Sherman Act claim brought by a group of students who challenged Yale University’s policy of requiring unmarried freshman and sophomore students under the age of 21 to live in co-ed college dormitories. *Id.* The court rejected the plaintiffs’ § 2 monopolization claim because its alleged relevant market focused on a “a contractually created class of consumers.” *Id.* Although the court acknowledged that concerns could arise where a plaintiff was “locked in” to his investment in housing “because of an abrupt change in policy,” it observed that Yale’s housing policies had been “fully disclosed long before plaintiffs applied for admission,” and that the plaintiffs therefore had no “lock-in costs.” *Id.* at 87.

Here, Madison argues that its Relevant Market definition is a proper one, even in light of *Hack*, because Marriott never disclosed its intention to “deprive Madison of access to non-unionized labor.” Madison misreads the law. Although Madison alleges in the Complaint that “the Secret Agreement and Defendants’ conspiracy” prevented it from accessing the market for non-union labor, what locked Madison into the use of *Marriott-provided hotel labor* was its original Management Agreement, which gives Marriott “absolute discretion with respect to all personnel employed at the Hotel.” (Compl. Ex. A § 1.04(A).) Madison’s Relevant Market definition—“labor services provided by non-managerial hotel employees working or seeking

work in Marriott-managed hotels . . . in New York City”—therefore focuses on a “contractually created class of consumers,” just like the market at issue in *Hack*. Because this contractual lock-in was created, not by any “abrupt change in policy,” but by the parties’ original contractual arrangement, Madison’s Relevant Market definition is insufficient, and its Complaint fails to state a claim under the Sherman Act.

III. Madison’s RICO Claims (Counts 1 and 2) Are Dismissed.

A. Madison’s RICO Claims Are Time-Barred.

The limitations period for a civil RICO action is four years. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The Second Circuit has applied a “discovery accrual rule” in RICO cases, under which the limitations period begins to run “when the plaintiff discovers or should have discovered the RICO injury.” *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 361 (2d Cir. 2013) (quoting *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998)). A RICO claim can accrue even when “the full extent of the RICO scheme is not discovered until a later date, so long as there were ‘storm warnings’ that should have prompted an inquiry.” *Koch v. Christie’s Int’l PLC*, 785 F. Supp. 2d 105, 114 (S.D.N.Y. 2011), *aff’d*, 699 F.3d 141 (2d Cir. 2012) (quoting *World Wrestling Entm’t, Inc. v. Jakks Pac., Inc.*, 328 F. App’x 695, 697 (2d Cir. 2009) (summary order)).

Where, as here, a RICO claim is based on allegations of fraud, the limitation period commences when the plaintiff is “placed on notice of facts which should arouse suspicion.” *In re Integrated Res., Inc. Real Estate Ltd. Partnerships Sec. Litig.*, 851 F. Supp. 556, 567 (S.D.N.Y. 1994). For statute of limitations purposes, the issue is not whether a plaintiff obtains all of the facts regarding the alleged fraud, but rather whether he or she had “constructive notice of facts sufficient to create a duty to investigate further into the matter.” *Id.* (internal quotation marks omitted). “[T]he date on which knowledge of a fraud will be imputed to a plaintiff can

depend on the plaintiff's investigative efforts. If the plaintiff makes no inquiry once the duty to inquire arises, 'knowledge will be imputed as of the date the duty arose.'" *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 361-62 (2d Cir. 2013) (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005)).

Here, Madison learned, on February 28, 2003, that its as-yet-unbuilt Hotel was *already* subject to a card-check agreement. In January of that year, Madison had asked Marriott if it could represent to ULLICO that the manager and operator of the Hotel (*i.e.*, Courtyard) would refrain from expressing, directly or indirectly, either support for or opposition to a union, or from actively campaigning against the designation of a union to represent the employees. This representation was to be made in connection with a construction loan for "the Courtyard under development at 92nd Street and 1st Avenue in New York, New York." On February 28, Marriott told Madison that it could make the necessary representation to ULLICO because "Marriott International, Inc. is already a signatory to a card-check neutrality agreement with the New York Hotel-Motel Trades Council, AFL-CIO" (*i.e.*, the union that represents *hotel workers*).

At that point, Madison was on notice that Marriott had already given the Union what Madison now calls a "superior organizing mechanism" with respect to its Hotel. Once it learned that Marriott was already bound by a card-check agreement covering Madison's property (an agreement that was, ironically, a prerequisite to getting the project built!), Madison was on notice—*actual* notice—of the facts that would give rise to its alleged injuries. That Madison later discovered further "villainy" when it read the so-called "Secret Agreement"—Marriott's agreement with the Union to hold back its most-favored hotels from unionization while allowing the Union to employ a "superior organizing mechanism" at others—makes not a whit worth's of difference for statute-of-limitations purposes, because nowhere in the Complaint does Madison

ever allege that this secret arrangement caused it any injury over and above the injury caused by the Hotel's unionization. And by February 28, 2003, Madison *knew* that Marriott was not going to actively campaign against unionization at the Hotel, because it knew that Marriott had signed a card-check agreement that bound it to neutrality.

Because Madison received actual notice in February 2003 of what *mattered*—that, despite Marriott's assurances about opposing a Union workforce, its Hotel was *already* subject to a card-check agreement with the Union that bound Marriott to neutrality—any RICO claim that Madison had concerning the impact of the card-check agreement accrued at that time, and expired in February 2007.

Alternatively, even if the “secret” part of Marriott's card-check agreement (the “preferred versus non-preferred” hotel arrangement) injured Madison in some independent way, Madison was still on inquiry notice of such a claim in February 2003. Upon hearing Marriott's admission that the Hotel was subject to a card-check agreement, a reasonably intelligent person would have recognized the inconsistency between that statement and Marriott's prior “repeated” assurances that it was a “non-union company” and its representation that it would “resist unionization.” At that point, if Madison had actually asked to see a copy of the agreement to which Marriott represented it was subject—i.e., the letter described at paragraph 69 in the Complaint—Madison would have discovered what it (erroneously) considers to be the “smoking gun”: that Marriott had made a deal with the Union to protect its favored hotels from unionization while offering up less-favored properties (like Madison's) as sacrificial lambs for the Union's taking. And if Marriott had refused to provide the agreement, Madison would at least have been aware that something was fishy, and needed further examination.

But Madison by its own admission never asked to see the card-check agreement.

The allegations in Madison’s Complaint of its “due diligence” in pursuing discovery of its RICO claim based on the “Secret Agreement” consist almost entirely of conversations (in-person and telephonic) between Madison and Marriott in which Madison “sought (and received) confirmation” of two things: (1) Marriott was “an anti-union company” that would resist unionization at the Hotel, and (2) Marriott’s pro-forma projections and underlying staffing models would remain valid even if the Hotel were unionized. (*See* Compl. ¶¶ 194(a)-194(g).)² But once it became aware of the card-check agreement that was applicable to its property, Madison was required to “do more than . . . simply rely on reassurances by the defendant” in order to investigate its claim, *see In re Merrill Lynch Ltd. Partnerships Litig.*, 7 F. Supp. 2d 256, 274 (S.D.N.Y. 1997), *aff’d*, 154 F.3d 56 (2d Cir. 1998)—particularly where the “assurances” it is alleged to have received were both vague (Marriott was “anti-Union”) and not inconsistent with unionization (the Hotel’s financial projections would hold even if the Hotel unionized).

Madison is in the same position as the plaintiffs in *In re Merrill Lynch*. There, plaintiffs alleged that they had shown reasonable diligence in pursuing discovery of their RICO claims by relying on sales materials and “written communications” with the defendants about the status of their investments, and that the defendants had “discouraged” the plaintiffs from making further inquiries. *Id.* at 275. Judge Mukasey rejected this argument, holding that the plaintiffs had not satisfied their duty to inquire “merely by reading information they receive from defendants and relying on defendants’ reassurances.” *Id.* This was especially so, he added, because the

² These assurances are not inconsistent with Marriott’s signing a card-check agreement—nothing prohibits an “anti-union” company from signing a card check agreement, and according to the Complaint, the specific “manner” in which Marriott had “successfully resisted unionization” at other hotels involved paying union-scale wages, not refusing to sign card-check/neutrality agreements.

plaintiffs had not alleged that “they made any specific inquiries of defendants,” or “when such inquiries were made, to whom, regarding what, and with what responses.” *Id.*

Here, Madison was told that it could represent to ULLICO that its Hotel fell under the “card-check neutrality agreement with [the Union].” The Complaint alleges that Madison asked, in “early 2003,” for “information” about this card-check agreement. (Compl. ¶ 194(b).) Instead of information, Madison received only vague reassurances that it need not worry, because Marriott was “an anti-union company and would resist unionization at the Hotel in the same manner that it had traditionally and successfully resisted unionization at several other Marriott-managed hotels in New York City.” (Compl. ¶ 194(c)). Madison never pressed for more details; it never asked to see the agreement.

In an attempt to show that its requests nevertheless discharged its duty to inquire, Madison points to *Hemmerdinger Corp. v. Ruocco*, 976 F. Supp. 2d 401, 410-11 (E.D.N.Y. 2013). In *Hemmerdinger*, the plaintiff, after being placed on inquiry notice, requested competitive bids to verify the defendants’ “seemingly excessive” invoices—bids that later turned out to have been forged by the defendants to look like they came from other companies. Because the bids were “seemingly authentic” and “did not reveal any information from which the [fraud] could have reasonably been discovered,” my Eastern District colleague Judge Kuntz concluded that the plaintiff had discharged its duty to investigate and that it was not required to “continue to pursue some possible, lingering suspicion of fraud.” *Id.* at 412.

Madison uses *Hemmerdinger* to claim that the “seemingly-valid assurances” it received—that Marriott was an “anti-union company” and that it would “resist unionization”—discharged its duty to investigate. But Madison papers over the crucial difference between that case and this one—in *Hemmerdinger*, when the plaintiff made *specific* requests for *quantifiable*

information, it was provided with forgeries containing fabricated information—not assurances that everything was just fine. The *Hemmerdinger* plaintiff could be excused from further inquiry given the seemingly authentic nature of the material it was sent. Madison, by contrast, cannot be so excused.

All Madison had to do was ask to see a copy of the agreement to which Marriott said it was subject, and Madison would have uncovered Defendants’ entire “conspiracy.” Instead, it waited until April 2, 2009—over six years later, and well outside the RICO limitations period—to do so. (*See* Compl. ¶ 194(i).) Nowhere in its Complaint or its motion papers does Madison attempt to explain this six-year gap between its learning of the existence of Marriott’s card-check/neutrality agreement with the hotel workers’ union and actually asking to see a copy of it—or insisting on hard information rather than pablum about Marriott’s being an anti-union company (which it very well may have been).

Because Madison made no reasonable investigative efforts when its duty to inquire arose, its RICO claim accrued in February 2003 and expired in February 2007.³

B. Defendants’ Purported Fraudulent Concealment Does Not Save Madison’s RICO Claims.

Madison argues that the accrual of its RICO claim was tolled until October 2009 by Defendants’ “ongoing concealment of their fraudulent scheme and anticompetitive conspiracy.” Pl. Opp. at 102. “Under the doctrine of fraudulent concealment, the statute of limitations will be tolled if the plaintiff pleads, with particularity, the following three elements: (1) wrongful concealment by the defendant, (2) which prevented the plaintiff’s discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing discovery of the claim.”

³ Because Madison’s RICO claim expired in February 2007, the Court need not decide whether Madison’s RICO allegations in its current Complaint relate back to the September 2009 filing date of its Original State-Court Complaint.

Butala v. Agashiwala, 916 F. Supp. 314, 319 (S.D.N.Y. 1996). The doctrine “is designed for application in cases where a plaintiff is unaware of his cause of action because of defendant’s fraudulent conduct.” *Koch v. Christie’s Int’l PLC*, 785 F. Supp. 2d 105, 117 (S.D.N.Y. 2011), *aff’d*, 699 F.3d 141 (2d Cir. 2012). The key inquiry is “not whether the plaintiff had all the information available to him, but whether plaintiff knew enough to sue.” *Ruso v. Morrison*, 695 F. Supp. 2d 33, 47 (S.D.N.Y. 2010) (internal quotation omitted).

Madison also alleges that Defendants’ statute of limitations arguments fail under New York’s equitable estoppel doctrine, “which is similar, but not identical, to the federal doctrine of equitable tolling. Equitable estoppel prevents a defendant from pleading the statute of limitations if plaintiff refrained from filing a timely action because of defendants’ affirmative acts of misrepresentation or concealment.” *Astor Holdings, Inc. v. Roski*, No. 01-cv-1905 (GEL), 2002 WL 72936, at *15 (S.D.N.Y. Jan. 17, 2002). A plaintiff pleading equitable estoppel must allege that it exercised due diligence and reasonable care in ascertaining facts that might have led to discovery of its claim. *Id.*; *see also Ladow v. Wachovia Sec., LLC*, 966 F. Supp. 2d 106, 130 (E.D.N.Y. 2013) (rejecting plaintiff’s claim to equitable tolling because he “did not act with reasonable diligence during the limitations period”).

For the reasons detailed above, Madison failed to exercise due diligence in pursuing discovery of its RICO claim. No facts are alleged that suggest concealment on Marriott’s part—it flat out told Madison that the Courtyard would be subject to a card-check agreement, with all that that implied (i.e., neutrality during union organizing). Frankly, what was happening at other properties does not appear to have been any of Madison’s business. However, if unionization doomed Madison’s Courtyard, as alleged in the Complaint, Madison cannot claim that Marriott concealed the matter.

The ultimate irony in this case, of course, is that *Madison*, not Marriott, chose to finance its project using a Union-affiliated lender—one that would not lend into a project that management intended to operate in an anti-union manner. It does not lie in Madison’s mouth to complain about Marriott’s dealings with the Union. Madison cannot rely on either fraudulent concealment or equitable estoppel to salvage its claims.

C. Madison Fails to State a RICO Claim Based on the Secret Agreement.

Defendants have also moved to dismiss Madison’s RICO claims for failure to state a claim. That motion should be granted, because whether or not Madison’s RICO claims are time-barred, Madison has a rather obvious *Twombly* problem.

Unless a plaintiff’s well-pleaded allegations have “nudged [its] claims across the line from conceivable to plausible, [the plaintiff’s] complaint must be dismissed.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Nowhere in the Complaint does Madison allege *any* facts from which it can plausibly be concluded that the *secret* part of the “Secret Agreement”—Marriott’s understanding with the Union that the Preferred Hotels would remain safe from unionization—caused any injury to Madison over and above whatever injury was caused by the Hotel’s own unionization. That other, more favored hotels escaped the fate that purportedly befell Madison’s property is completely irrelevant to what happened at the Hotel.

The part of the “Secret Agreement” that allegedly doomed the Hotel was subjecting it to a card-check/neutrality agreement, thereby inexorably leading to unionization. But it was Madison’s choice to obtain a construction loan from ULLICO that made such an agreement, and Marriott’s neutrality, *a necessary condition to the Hotel’s construction!* Without giving the Union the very “superior organizing mechanism” that Madison claims doomed its investment, there would never have been any hotel at all.

This Court will not entertain complaints from Madison predicated on an agreement that Madison itself requested. Madison's RICO claims are dismissed.

IV. The Court Declines to Exercise Supplemental Jurisdiction Over Madison's Remaining State-Law Claims.

Both Madison and the Union are domiciled in New York (Compl. ¶¶ 17-22), which means that the only basis for this Court's jurisdiction over Madison's state-law claims is supplemental jurisdiction. Under 28 U.S.C. § 1367(c)(3), a court may decline to exercise supplemental jurisdiction over state-law claims if the court has "dismissed all claims over which it has original jurisdiction." Because Madison's RICO and Sherman Act claims are dismissed, this Court exercises its discretion to decline supplemental jurisdiction over Madison's remaining state-law claims. Those claims are therefore dismissed without prejudice to re-filing in the New York State Supreme Court.

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss are granted. Madison's Sherman Act and RICO claims are dismissed with prejudice, and Madison's remaining state-law claims are dismissed without prejudice. The Clerk of the Court is directed to remove Docket Nos. 80, 83, 88, and 92 from the Court's list of pending motions and to close the file.

Dated: July 28, 2014



U.S.D.J.

BY ECF TO ALL COUNSEL