IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KURYAKYN HOLDINGS, INCORPORATED,

Plaintiff,

v.

OPINION AND ORDER

DAVID C. ABBE, JUST IN TIME DISTRIBUTION COMPANY,

09-cv-702-wmc

Defendant and Counterclaimant,

v.

KURYAKYN HOLDINGS, INCORPORATED, MOTORSPORT AFTERMARKET GROUP, INC., TOM RUDD, and TOM ELLSWORTH,

Counterclaim Defendants.

There are several motions before the court. Of most importance, (1) plaintiff Kuryakyn Holdings, Incorporated ("Kuryakyn") has filed two motions for leave to amend its complaint (dkt. ##38, 123); and (2) the counterclaim defendants Kuryakyn, Motorsport Aftermarket Group, Inc., Tom Rudd and Tom Ellsworth have filed a motion for partial summary judgment on David C. Abbe's counterclaims brought under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.* ("RICO") (dkt. #44). The court will deny plaintiff's motions for leave to amend, because Kuryakyn seeks to add causes of action which are subject to dismissal for various reasons and unduly delayed in seeking amendment (at least as to the first motion). The court will, however, grant the motion for partial summary judgment because (1) the

counterclaim defendant Motorsport Aftermarket Group is not a distinct entity from the alleged enterprise; and (2) Abbe failed to produce sufficient evidence from which a reasonable jury could find a pattern of racketeering activity.

OPINION

I. Kuryakyn's Motions for Leave to Amend the Complaint

A. Background

Kuryakyn filed its complaint against Just in Time Distribution Company ("JIT") on November 17, 2009, alleging claims for breach of contract and unjust enrichment claims, and seeking declaratory judgment that would end its obligation to make royalty payments and revoke the amended agreement between the parties. (Dkt. #1.) A few weeks after Kuryakyn initiated this action, Abbe filed a lawsuit against Kuryakyn in the Southern District of California. *Abbe v. Motorsports Aftermarket Group, Inc.*, No. 09-cv-02764-LAB-RBB (S.D. Cal. Dec. 11, 2009). After Abbe's motion to dismiss Kuryakyn's complaint in this lawsuit for improper venue was denied (dkt. #25), Abbe dismissed his complaint in the California action and filed counterclaims in this case against Kuryakyn, Motorsport Aftermarket Group, Inc., Tom Rudd and Tom Ellsworth (dkt. #27).

In various documents filed in this court and filed in the Southern District of California, Abbe has repeatedly and consistently identified himself as the sole proprietor of defendant JIT:

- "Abbe is engaged . . . in the business of designing and developing motorcycle parts and accessories. Abbe conducts this business as a sole proprietorship under the fictitious business name 'Just In Time Distribution Company' ('JIT')." (Abbe's

Compl., *Abbe v. Motorsports Aftermarket Group, Inc.*, No. 09-cv-02764-LAB-RBB (S.D. Cal. Dec. 11, 2009).)

- "Defendant David C. Abbe ('Abbe') is a California resident conducting business as a sole proprietor who has been improperly named in this action under his fictitious business name, 'Just in Time Distribution Company.'" (Opening paragraph, Def.'s Br. in Support of Mot. to Dismiss (dkt. #8) at 1 (filed Dec. 14, 2009); *see also id.* at 2 ("Abbe has always done business with Kuryakyn under the fictitious name 'Just in Time Distribution Company' ('JIT').") (citing Abbe Decl. (dkt. #13) ¶ 2).)

- "Abbe is an individual, residing in the City of El Cajon, County of San Diego, State of California, doing business as a sole proprietorship under the fictitious business name and style 'Just in Time Distribution Company,' and is a real party in interest in the above-entitled action." (Def.'s Answer (dkt. # 26) at ¶ 2 (filed Mar. 25, 2010).)

Kuryakyn appears to have recognized this basic relationship (if not its legal structure) stating its answer to Abbe's counterclaims that "Counterclaim Defendants admit that Abbe owns Defendant Just in Time Distribution Company ('JIT'), which is involved in designing and developing aftermarket motorcycle parts and accessories." (Counterclaim Defs.' Answer (dkt. #30) at ¶ 1 (filed Apr. 14, 2010).)

Kuryakyn filed its first motion for leave to amend the complaint in August 2010. Before the court had ruled on this motion, the court dismissed this case because of Abbe's notice of bankruptcy. The case has now been reopened and the motion for leave to file a first amended complaint is now properly before the court. In this motion, Kuryakyn seeks leave to (1) add Abbe as a defendant to the first five counts in the complaint presently pled against JIT; (2) add various tort claims premised on Abbe's alleged misrepresentations about the corporate identity of JIT; and (3) add a claim to "pierce the corporate veil" against Abbe with regard to another company Glopar, allegedly also owned by Abbe.

A few days after the court reopened this action, Kuryakyn filed a second motion for leave to file a second amended complaint. This motion seeks to add claims for revocation and rescission of the contract premised on Kuryakyn proposed tort claims asserted in the proposed first amended complaint. Kuryakyn contends that the facts supporting these claims recently came to light based on discovery belatedly produced by Abbe.

B. Discussion

Presently before the court are two motions for leave to amend the complaint by Kuryakyn. The court will consider these motions in light of the more-recently filed, proposed *second* amended complaint.[1]

Typically, leave to amend should be "freely" given. Fed. R. Civ. P. 15(a)(2). "Although the rule reflects a liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile." *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (internal quotation omitted). Here, Kuryakyn's proposed amendments are futile for several

[1] In addition to the causes of action already discussed above, the court notes that the second amended complaint does not contain a claim for deceptive trade practices, pursuant to Wis. Stat. § 100.18(1). Accordingly, the court does not consider Kuryakyn's request to add this claim in the first motion to amend. The second amended complaint does, however, include a cause of action for unjust enrichment, but this claim was not in the original or proposed first amended complaint. Because Kuryakyn has not sought leave to add this particular claim, the court will also not consider whether leave should be permitted as to this claim.

reasons. Moreover, Kuryakyn's representation that it did not delay in filing its first motion to amend is not supported by the record.

i. Futility of Proposed Amendment

1. Misrepresentation Claims (Proposed Counts VI-VIII)

Kuryakyn seeks to add several tort claims against Abbe: misrepresentation (intentional deceit) (Count VI); misrepresentation (strict responsibility) (Count VII); and misrepresentation (negligent misrepresentation) (Count VIII).[2] In support of these claims, Kuryakyn alleges that Abbe made the following misrepresentations:

- During and after November and December 1998, Abbe represented to Tom Rudd of Kuryakyn on multiple occasions that he worked exclusively for, and was an authorized agent of, *a California company* he identified as JIT. (Dkt. #40-2 at ¶ 25 (emphasis added); *see also id.* at ¶ 88.)
- Abbe further represented to Tom Rudd of Kuryakyn that JIT, as *a legally recognized company*, was capable of assigning ownership of the "Hot-Flash" run/brake/turn signal conversion and the JIT-owned "Hot-Flash" mark to Kuryakyn. (*Id.* at ¶ 28 (emphasis added); *see also id.* at ¶ 90.)
- Abbe specifically told Tom Rudd of Kuryakyn that he "owned" JIT. (*Id.* at ¶ 89.)

Kuryakyn's allegations as to Abbe's misrepresentations of his relationship to JIT are at best vague and at worst completely disconnected from any reference to a recognized business form. Indeed, Kuryakyn's allegations appear to be premised on a flawed understanding of the basic law of business forms. "A business owned by a single individual is called a sole proprietorship. The owner of a proprietorship is personally

[2] In the proposed second amended complaint, Kuryakyn has altered the names of the various causes of action, though the substance of the claims remains basically the same. All these claims are premised on alleged false representations by Abbe regarding his relationship with JIT and about JIT's business form.

liable on all business obligations since there is no legal separation between the owner and the business." Robert W. Hamilton & Jonathan R. Macey, *Cases and Materials on Corporations Including Partnerships and Limited Liability Companies* 10 (8th ed. 2003). Similarly, a sole proprietorship is sometimes referred to as a "company" and a sole proprietor certainly "owns" that company. In contrast, other business forms -- like the limited liability company or corporation -- are "separate legal entities" and, as such, operate as a "fictitious person with sole responsibility for its own obligations." *Id.* at 16.[3]

While it is not at all clear what Kuryakyn means by the term "legally-recognized," the alleged representations attributed to Abbe do not *falsely* represent JIT as a "company," nor that Abbe "owned" JIT. Importantly, Kuryakyn does *not* allege that Abbe misrepresented JIT to be a corporation or a limited liability company, both of which would have a separate legal identity. Moreover, the agreement and amended agreement both identify the defendant as "Just in Time Distribution Co. (JIT)" and are signed: "For JIT, David C. Abbe Owner." (Dkt. ##27-2, 20-3.) Abbe willingly concedes -- and has always maintained the position -- that he is the owner of JIT.[4]

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[3] There are numerous reasons a business owner may wish to form a separate legal entity for his business. "If such a business becomes successful, the accompanying risks tend to grow as the business grows. The owner will therefore usually wish to minimize his personal exposure by transferring the business to a wholly owned corporation or limited liability company. . . . The former owner's role therefore changes: He becomes a director, shareholder, and officer of the corporation or the manager of the LLC. In that way, it is unlikely that the proprietor's personal assets will be available to creditors whose claims arise after the transfer takes place." Hamilton & Macey at 10.

[4] As such, the complaint will be amended to add Abbe as a named defendant and the caption has been amended to reflect this change.

Perhaps Kuryakyn understood Abbe's representations that JIT was a company to mean that JIT was a legally-separate entity from Abbe. But if that was Kuryakyn's understanding it was Kuryakyn's mistake, not based on any of the intentional or even negligent misstatements by Abbe. Moreover, even if Abbe had somehow represented that JIT was a legally-separate entity, it would not be reasonable for Kuryakyn to rely on such a misrepresentation as somehow providing *more* security, either as to the agreement not being breached or, if breached, as to greater protection against loss. If anything, JIT structured as a sole proprietorship allows the plaintiff to hold Abbe personally liable, not just the assets of the JIT business, which normally would not be the case if JIT were a separate legal entity, such as an LLC or corporation.[5]

2. Economic Loss Doctrine

Kuryakyn's proposed tort claims against Abbe are also barred by the economic loss doctrine. The Wisconsin Supreme Court has stated that the economic loss doctrine is "a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 23, 270 Wis. 2d 146, 162, 677 N.W.2d 233, 242. The general idea behind the doctrine is to prevent dissatisfied parties to a commercial transaction from using tort law to recover

[5] For Kuryakyn's claim of reliance to have any credibility, there would have to have been some evidence of its due diligence into or reason to believe JIT's positive net worth.

losses that were or should have been protected by the parties' contract. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶ 35, 262 Wis. 2d 32, 47, 662 N.W.2d 652, 659.

Kuryakyn contends that the economic loss doctrine does not apply because its claim alleges "fraudulent inducement." Claims arising out of intentional misrepresentations made before the formation of the contract are not barred by the economic loss doctrine "where the fraud is extraneous to, rather than interwoven with, the contract." *Kaloti Enter., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶¶ 30, 42, 283 Wis. 2d 555, 580, 699 N.W.2d 205, 216.[6] A fraud is extraneous to the contract when it "concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract." *Id.*

To determine whether this exception may apply, it is first necessary to identify the specific misrepresentations that Kuryakyn attributes to Abbe. As described above, Kuryakyn alleges three misrepresentations: (1) that JIT was a "California company"; (2) that JIT was a "legally-recognized company"; and (3) that Abbe "owned" JIT.

Next, the court must determine whether the alleged misrepresentations were extraneous to the contract. The Wisconsin Supreme Court first recognized a fraudulent inducement exception to the economic loss doctrine in *Kaloti,* which provides an illustration of a misrepresentation held to be extraneous to the underlying contract under

[6] Kuryakyn's proposed second amended complaint contains allegations of fraud based on recently-discovered evidence about events occurring in 2005 and 2006. (*See* Pl.'s Proposed 2nd Am. Compl. (dkt. #125-1) ¶¶ 30-47.) Since the amended agreement was signed in 1998, these allegations do not support a fraudulent inducement claim in the formation of the contract.

Wisconsin law. Defendant Kellogg sold $124,000 worth of food products to Kaloti, a distributor in the business of buying products from a producer (such as Kellogg) and reselling that product to large grocery stores. 2005 WI ¶¶ 3-7. Kellogg, fully aware of Kaloti's intended use of the products, sold them to Kaloti without mentioning that it had recently begun selling its product directly to the same large stores. *Id.* At the time Kellogg contracted with Kaloti, it knew that Kaloti would no longer be able to resell its products to these stores. Still believing there was a market with the stores, Kaloti signed the purchase agreement. After Kaloti's customers explained that they intended to purchase future Kellogg's products directly from Kellogg, Kaloti attempted to return the purchased products to Kellogg. "Too late," Kellogg effectively replied, refusing to accept the returns or to reimburse Kaloti.

The Wisconsin Supreme Court concluded that Kaloti stated a claim for misrepresentation based on Kellogg's duty to disclose a material change in its marketing strategy that largely closed the markets on which they knew Kaloti relied to sell their products. *Id.* at ¶ 22. Further, the court held this was an extraneous misrepresentation, not barred by the economic loss doctrine, because it did not affect the quality of the product or any other issue contemplated and negotiated in the contract, "nor would one expect [marketing issues] to be dealt with in the contract." *Id.* ¶ 45. Rather, at least according to the Wisconsin Supreme Court, Kellogg's misrepresentation was something that Kaloti could not have anticipated when negotiating the contract. *Id.* at ¶¶ 46-50.

In contrast, the fraudulent inducement exception does not apply where the alleged misrepresentation relates to subject matter of the contract. *Below v. Norton*, 2008 WI 77,

¶ 398, 310 Wis. 2d 713, 733-34, 751 N.W.2d 351, 361. In such cases, the parties could have protected themselves through contract negotiations. *Id.* (holding that vendor's failure to disclose existence of broken sewer line to home owner was not extraneous to the contract for sale of home, and thus, the fraudulent inducement exception to the economic loss doctrine did not apply); *see also Taurus IP, LLC v. DaimlerChrysler Corp.*, 519 F. Supp. 2d 905, 928 (W.D. Wis. 2007) (holding that misrepresentations as to the scope of a settlement were made to induce the defendant to enter into a patent licensing agreement, but could have addressed in the contract and, therefore, were interwoven with the agreement).

While the distinctions between the scenario in *Kaloti* versus *Below* and *Taurus* are open to debate,[7] the court believes that Kuryakyn's allegations of misrepresentation would be found under Wisconsin law to be interwoven with, and not extraneous to, the asset purchase agreement. The identity of the contracting party and the integrity of that party -- Kuryakyn seems to imply that JIT as a separate legal-entity would somehow be a more credible business partner -- are core elements of the contract. If important, Kuryakyn could have sought corporate papers, financial disclosures, and other information from Abbe and JIT to better understand the identity of the contracting party and manage any risks associated with it. This is not a situation like in *Kaloti*, where one party was harmed by risks it could not have anticipated.

[7] *See* Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 Marq. L. Rev. 921, 936 (Summer 2007) ("Clearly, the narrow exception has only been marginally adopted and is difficult to apply.").

On the contrary, even the materiality of these misrepresentations is in doubt. If the legal status of JIT (or, indeed, its independent financial from Abbe) were at all material to the transaction, there should at least be some indication that Abbe or someone else on the JIT side misrepresented it, much less that Kuryakyn inquired about it. The fact that Kuryakyn offers none -- and indeed fails to articulate its importance at the time of the transaction -- is strong evidence that the representations are nothing but make weights, manufactured after the contract's failure. Were this not so, surely the ability of JIT and/or Abbe to stand behind commitments would have been part of the parties' negotiations and Kuryakyn's due diligence.

Regardless, because Kuryakyn could have used its contract to protect itself against the risks and damages at issue in this case, application of the economic loss doctrine is appropriate. *See Superl Sequoia Ltd. v. The C.W. Carlson Co., Inc.*, 535 F. Supp. 2d 931, 953 (W.D. Wis. 2008) (holding that where "contract law gives defendant adequate opportunity to protect itself against the risks at issue, application of the economic loss doctrine is appropriate.").

3. Piercing the Corporate Veil Claim

Kuryakyn also seeks to add a claim for "Piercing the Corporate Veil Against Abbe." Specifically, it seeks a "judgment that Glopar was the mere instrumentality and/or alter ego of Abbe, such that Abbe is liable for Glopar's unlawful conduct because an inequitable result will occur if Abbe is allowed to use Glopar to circumvent his and JIT's legal obligations to Kuryakyn." (Dkt. #40-2 at count X & ¶ 134.) The immediate

problem with this request is that Glopar, LLC is not a party to this action and the court is not going to add them at this late stage. Therefore, Glopar cannot be found liable for any harm to Kuryakyn in this lawsuit. If and when Abbe is found liable, Kuryakyn can take appropriate steps to collect on any judgment at that time, including pursuing Glopar on a "piercing" theory under Wisconsin law.

ii. Undue delay

In addition to concerns about the merits of Kuryakyn's proposed amendments, the court finds Kuryakyn's representations suspect as to the timeliness of its first motion to amend. In its opening brief in support of this motion, Kuryakyn claims to be "filing this Motion shortly after it became aware of the information supporting the Amended Complaint." (Kuryakyn's Br. (dkt. #39) 9; *see also id.* at 7 (describing recent discovery activities).) But this representation is simply not supported by the record. In its reply brief, Kuryakyn states that "it became aware that JIT was a fictitious entity when Abbe alleged as such in his Complaint in the California Action." (Dkt. #58 at 8.) The complaint in the California Action, *Abbe v. Motorsports Aftermarket Group, Inc.*, No. 09-cv-2764 LAB RBB (S.D. Cal. Dec. 11, 2009), was filed on December 11, 2009, less than one month after the November 18, 2009, filing of this action, and almost nine months before Kuryakyn filed the motion to amend. Kuryakyn offers no reason for its delay in filing the first motion, which constitutes a separate basis for denying leave to amend.

The court's decision to deny the first motion for leave to amend the complaint to add various tort claims effectively moots Kuryakyn's second motion.[8] The proposed claims in Kuryakyn's second motion are premised on tort claims the court has denied leave to add. Accordingly, Kuryakyn may pursue a claim for revocation and rescission based on the contract claims, but not based on rejected tort claims.

II. Kuryakyn's Motion for Summary Judgment of Abbe's RICO Counterclaims

Also pending before the court is Kuryakyn's motion for partial summary judgment of Abbe's RICO claims. For the purposes of that motion, the court finds the following undisputed facts:

A. Undisputed Facts[9]

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[8] In his response brief to Kuryakyn's second motion for leave to amend, Abbe complains that Kuryakyn balked at his proposal that both parties be allowed leave to amend. Absent some motion from Abbe, the court will not consider whether Abbe should be granted leave to amend his counterclaims, though he will face a similar hurdle for any undue delay.

[9] Many of the facts submitted by Kuryakyn Holdings are not material to Abbe's RICO claim; others are arguably relevant, but the court does not recount them given the opinion's focus on two elements of the claim -- namely, the requirement that there be a "person" distinct from the "enterprise" and that there be a pattern of racketeering activity. Accordingly, the court recounts only those facts material to the court's holdings. Abbe moves to strike an affidavit submitted by one of Kuryakyn's attorneys, arguing that the affidavit does not satisfy the requirements of Federal Rule of Civil Procedure 56(e) because Attorney Wiltrout lacks personal knowledge of most of the documents attached to her affidavit (Abbe's Mot. to Strike (dkt. #73); Opp'n Br. (dkt. #74) 5-7), the court need not consider most of the documents attached to Wiltrout's affidavit since they are not material to these elements. Moreover, in response to the motion to strike, Kuryakyn resubmitted a number of the documents via affidavits of Kuryakyn employees with personal knowledge of the exhibits and properly authenticated others via interrogatory responses. Because the court grants Kuryakyn's motion for other reasons, it need not wade further into these documents, nor into Abbe's motion to strike them. In an

i. The Parties

Kuryakyn Holdings, Inc. is a Wisconsin corporation with its principal place of business in Somerset, Wisconsin. Motorsport Aftermarket Group ("MAG") is a Delaware corporation with its principal place of business in Irvine, California. MAG is the parent corporation of Kuryakyn. Tom Rudd serves as President of Kuryakyn; Tom Ellsworth serves as the Director of Product Management and Development for MAG. As previously discussed, David Abbe is the sole proprietor and doing business as "Just In Time Distribution Company."

ii. The Amended Agreement

On or about December 12, 1998, Kuryakyn and JIT entered into an amended agreement. As part of this agreement, JIT agreed to "[d]evelop motorcycle accessory products as requested or directed by [Kuryakyn]." (Wiltrout Aff., Ex. 2 (dkt. #47-2) para. 1(a).) JIT further promised to assign Kuryakyn "all design, patent and trademark rights resulting from such development," and to assist Kuryakyn with "product instructions, [and] sales and marketing support" as requested by Kuryakyn. (*Id.* at para. 1(b), 1(d).)

In exchange, Kuryakyn agreed to pay a royalty fee of 5% "for the life of each product sold by [Kuryakyn] that uses JIT-developed designs." (*Id.* at para. 2(a).) Rudd negotiated the initial agreement and the Amended Agreement on behalf of Kuryakyn.

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apparent tit for tat, Kuryakyn also moves to strike Abbe's affidavit submitted in opposition to the motion for summary judgment (dkt. #89), which the court denies as moot given its decision to grant summary judgment.

The royalty payments began sometime around January 1999 and continued each month through November 2009. Abbe contends, and counterclaim defendants' dispute, that Kuryakyn failed to pay Abbe certain royalty payments due under the terms of the amended agreement. Specifically, Abbe contends that beginning in 2006, Kuryakyn reduced the number of unit sales for each and every product subject to royalties by 10%, rounded to the nearest unit and that, accordingly, Abbe's royalty payments were correspondingly reduced by 10%. Abbe also contends that beginning in 2009, Kuryakyn redesigned JIT products to avoid having to pay royalties under the parties' amended agreement. Kuryakyn disputes both of these allegations.

iii. Evidence of a Pattern

In an effort to demonstrate a pattern of racketeering activities, Abbe alleges in his counterclaims that defendants "caused Kuryakyn to defraud Abbe, [and other designers] Benjamin Kern and Anthony Bendetti of compensation due them under either written or oral agreements for designs they created for Kuryakyn." (Counterclaim (dkt. #27) ¶ 33; *see also id.* at ¶¶ 71-86.) In support of Kuryakyn's motion, Anthony Bendetti submitted an affidavit in which he avers that "[o]n behalf of [his company] Iron Braid, I have done business with Kuryakyn since December 21, 1994 and continue to do so today." (Affidavit of Anthony Bendetti (dkt. #50) ¶ 3.) Bendetti further avers that "[t]hroughout this entire period of time Kuryakyn has always conducted itself in good

faith," and that "[n]either myself nor Iron Braid has ever been defrauded by Kuryakyn." (*Id.* at ¶¶ 4-5.)[10]

B. Discussion

The RICO Act makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, 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 or collection of unlawful debt." 18 U.S.C. § 1962(c). The Seventh Circuit has repeatedly cautioned against the practice of private citizens bringing RICO claims for basic state law fraud and contract actions. *See, e.g.*, *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 523 (7th Cir. 1995) ("Our RICO jurisprudence is replete with examples of failed attempts to dress up state fraud claims as suave RICO cases using the expansive definitions of mail and wire fraud."). To establish a violation of § 1962(c), a party must demonstrate (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *See Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985); *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d

[10] Abbe moves to strike Bendetti's affidavit on the basis that it is "conclusory and includes no specific facts." (Abbe's Mot. to Strike (dkt. #73); Opp'n Br. (dkt. #74) 7.) Given that Bendetti is stating that he has *not* been defrauded by Kuryakyn, additional detail of the *lack* of fraudulent activity is not required, though it obviously carries less weight without a description of his underlying reasons for this flat statement (*e.g.,* due diligence, instances of Kuryakyn going the extra mile, etc.). Bendetti's affidavit appears to be based on personal knowledge -- his experience with Kuryakyn -- and is sufficiently specific to meet the requirements of Federal Rule of Civil Procedure 56(e). In any event, Bendetti's affidavit merely throws down the gauntlet, as does Kuryakyn's motion for partial summary judgment, for Abbe, as plaintiff, to come forward with affirmative proof of fraud.

389, 399 (7th Cir. 2009). It is proof of the second and third elements the court finds lacking here.

i. Distinct Entities Requirement

First, to establish liability under the RICO Act, a plaintiff must prove the existence of two distinct entities: (1) a "person"; and (2) an "enterprise" that is not simply the same "person" referred to by a different name." *Cedric Kushner Promotions, Ltd. v. Don King*, 533 U.S. 158, 161 (2001); *see also Baker v. IBP, Inc.*, 357, F.3d 685, 691-92 (7th Cir. 2004) ("Without a difference between the defendant and the "enterprise" there can be no violation of RICO."). Under the RICO Act, an "enterprise" may 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" and a "person" may be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3), (4); *see also Boyle v. United States*, 556 U.S. 938, (2009) (holding that "an association-in-fact enterprise must have at least three structural features: a purpose, relationship among those associated with the enterprise, and longevity sufficient to permit those associates to pursue the enterprise's purpose"). A plaintiff must show that the named defendants "conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 398 (7th Cir. 2009) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185, (1993)) (emphasis in *Reves*).

The Supreme Court has held that the separate and distinct requirement may be met by showing "a legally different entity with different rights and responsibilities due to . . . different legal status." *Kushner*, 533 U.S. at 161. Under this view, a corporation's owner/employee may be considered separate and distinct from the corporate enterprise, regardless of whether the employee is acting within or outside of the scope of its corporate authority. *See id.* at 163-66. Importantly, however, a plaintiff cannot allege the same RICO claim against both the corporate enterprise and its employees; rather, "plaintiffs must choose between the corporation and its constituents as persons liable." *Langley v. Am. Bank of Wis.*, 738 F. Supp. 1232, 1242 (E.D. Wis. 1990) (finding that a bank, together with its executive officers and employees, is not a separate and distinct entity from the bank itself); *see also Bachman v. Bear, Stearns & Co.*, 329 F.3d 923, 934 (7th Cir. 1999) (holding that a corporation, together with its employees or subsidiaries, is not an enterprise separate and distinct from the corporation itself).

In the instant case, Abbe contends that Kuryakyn (the subsidiary company) is the separate and distinct "enterprise" through which MAG (the parent company of Kuryakyn), Ellsworth (Director for MAG) and Rudd (President of Kuryakyn) operate racketeering activity. Thus, the court must determine whether Kuryakyn is an "enterprise" that is separate and distinct from (1) its parent, MAG, and (2) their employees, Ellsworth and Rudd.

As to MAG's liability, the Seventh Circuit has indicated that when a parent company simply exercises power inherent in its ownership of its subsidiaries, the subsidiary is not a separate and distinct enterprise giving rise to liability for the parent

company under the RICO Act. *See Emery*, 134 F.3d at 1324 (finding no RICO liability for a parent company that simply used its subsidiary to conduct illegal acts through the regular corporate hierarchy); *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 934 (7th Cir. 2003) (reviewing Seventh Circuit precedent and reasoning that a parent and its subsidiaries do not have sufficient distinctiveness to trigger RICO liability unless the enterprise's decision to operate through subsidiaries somehow facilitated its unlawful activity). Accordingly, it is not sufficient for a plaintiff to simply state that the parent company directed the subsidiary's fraudulent acts. *Id.*

Here, Abbe has failed to put forth *any* evidence that MAG's role extended beyond the powers inherent in its ownership of Kuryakyn. Recognizing this, Abbe urges the court to reject Seventh Circuit precedent, namely the *Buckley* case, as wrongly decided. This court has neither the authority, nor inclination to do so.

Finally, the Seventh Circuit has held that the enterprise itself may not be found liable under § 1962(c). *See Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1251 (7th Cir. 1989); *United States v. Dicaro*, 772 F.2d. 1314, 1319-20 (7th Cir. 1985). Thus, regardless of whether Abbe can demonstrate liability for Ellsworth, Rudd and MAG, Kuryakyn -- Abbe's alleged "enterprise" -- is not a proper defendant in Abbe's RICO claim, a point Abbe concedes, but for some reason Kuryakyn continues to press in its briefs.

As to the liability of Ellsworth and Rudd, it is clear that, when a corporation is the alleged enterprise, the individual people managing that corporation may be considered separate and distinct from the corporation itself, and therefore liable under § 1962(c). *See Kushner*, 533 U.S. at 161 (holding that the president and sole owner of a corporation

is distinct from the corporation itself); *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir. 1994) (reviewing 7th Circuit cases recognizing that a corporation is a separate and distinct enterprise from the people managing it). When a plaintiff seeks to hold corporate employees liable under the RICO Act, however, the plaintiff must show that the named defendants actually controlled and directed the corporation's fraudulent activity, rather than simply carried out the acts constituting the illegal activity as part of their hierarchal corporate role. *See Emery*, 134 F.3d at 1324-25 (finding that defendants who did not control the corporation, division or some "other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their own little bailiwick," but rather merely carried out acts of fraud for the corporation, were not separate and distinct from the corporate enterprise). The Seventh Circuit has explicitly rejected the notion that "if a corporation engages in a pattern of racketeering activity, RICO liability falls on whoever in the corporation committed the acts constituting the illegal activity." *Id.* Thus, to survive summary judgment as to the liability of Ellsworth and Rudd, Abbe must demonstrate that these individuals did more than simply carry out Kuryakyn's alleged illegal acts; Abbe must show that these individuals actually controlled and directed the fraudulent activities.

At summary judgment, Abbe has failed to put forth any evidence that Ellsworth and Rudd actually controlled and directed the fraudulent activities, rather than simply operated as employees carrying out the enterprise's illegal acts. To the contrary, Abbe simply rests on his allegations in his counterclaim that "Rudd is alleged to be the president of Kuryakyn, Ellsworth is alleged to be an employee of MAG, and MAG is

alleged to be the parent of Kuryakyn." (Abbe's Opp'n (dkt. #74) (citing Counterclaim ¶¶ 2-5, 30).) These proposed findings of fact fail to demonstrate that Rudd and/or Ellsworth controlled and directed the fraudulent activities.

ii. Pattern Requirement

Even it Abbe's offer of proof were sufficient to permit a finding that Rudd or Ellsworth controlled alleged non-payment of Kuryakyn's royalties or copying of JIT's designs so as to avoid royalty payments, his RICO claims against them still fail because he proffers insufficient evidence of a "pattern" of racketeering activity.[11]

To establish liability under the RICO Act, a plaintiff must prove that defendants engaged in a "pattern of racketeering activity," which consists, at the very least, of two predicate acts of racketeering activity committed within a 10-year period. *See* 18 U.S.C. § 1961(5); *Jennings v. Auto Meter Prods.*, 495 F.3d 466, 472 (7th Cir. 2007). The pattern analysis is intended to reach "a natural and commonsense result" consistent with "Congress' concern with long-term criminal conduct." *Id*. at 473. RICO is *not* intended to apply to brief instances of fraud, in which there is only one identifiable victim who suffered one articulable injury. *See id.* at 476.

To fulfill the pattern requirement, plaintiffs must satisfy the "continuity plus relationship," consisting of two prongs: (1) "relationship," which requires that the predicate acts be related to one another, and (2) "continuity," which requires that the predicate acts pose either an open or closed threat of continued criminal activity. *Id.* at

[11] The court assumes, without deciding, for purposes of considering the pending motion only that the allegations constitute "racketeering activity."

473 (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Predicate acts are "related" if they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are not isolated events." *H.J. Inc.*, 492 U.S. at 239 (quoting 18 U.S.C. § 1373(e)).

"Continuity" may be open- or closed-ended. *See id.* at 241. Open-ended continuity refers to criminal behavior that, despite existing for only a short duration, demonstrates a threat of continued criminal activity in the future. It may be shown by "specific threat of repetition extending indefinitely into the future" or by predicate acts that "are part of an ongoing entity's regular way of doing business." *Id* at 242.

Closed-ended continuity refers to criminal behavior that has come to a close, but endured for a substantial period of time. *Id.* The duration of the alleged racketeering activity is "perhaps the most important element of RICO continuity," and the Seventh Circuit has "not hesitated to find that closed periods of several months to several years did not qualify as 'substantial' enough to satisfy continuity." *Roger Whitmore's Auto. Servs. v. Lake County*, 424 F.3d 659, 673 (7th Cir. 2005); *see also Jennings,* 495 F.3d at 474-75 (reviewing a number of cases that found insufficient duration to establish a pattern). The Seventh Circuit offers the following factors to assess continuity: "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

With regards to the number and variety of acts, the Seventh Circuit has repeatedly rejected RICO claims that rely heavily on mail and wire fraud to establish a

pattern. *See Jennings*, 495 F.3d at 475; *see also Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1024-25 (7th Cir. 1992) ("[M]ail and wire fraud allegations are unique among predicate acts because multiplicity of such acts may be no indication of the requisite continuity of the underlying fraudulent activity. Consequently, we do not look favorably on many instances of mail and wire fraud to form a pattern."). Moreover, courts have been unwilling to find a "pattern" within the context of the RICO when there is only one victim, one scheme and one resultant injury. *See Jones v. Lampe*, 845 F.2d 755, 757-59 (7th Cir. 1988) (reviewing a number of cases dismissing RICO claims for failure to establish a sufficient pattern).

Here, Abbe's submissions fail to support a finding of "continuity," whether premised on an open or closed threat of criminal activity. In "proving" a patter, Abbe would rely entirely on his allegation that Kuryakyn's treatment of him reflects its "regular way of doing business," and that Kuryakyn engaged in "repeated, similar efforts to defraud designers of royalties on the basis of false representations." (Abbe's Opp'n (dkt. #74) 18-19.) Abbe, however, offers *no* support at summary judgment to bolster this allegation, even in the face of an affidavit from Anthony Bendetti -- one of the individuals Abbe contends was similarly defrauded -- in which Bendetti avers that he has never been defrauded by Kuryakyn.[12] Except for filing a motion to strike Bendetti's

[12] In this way, and others, Abbe's opposition brief reads more like a response to a motion to dismiss than an opposition to a motion for summary judgment. The party opposing summary judgment is required to provide support for his factual positions. *See* Fed. R. Civ. P. 56(c); *see also AA Sales & Assocs., Inc. v. Coni-Seal, Inc.*, 550 F.3d 606, 612-13 (7th Cir. 2008) (describing summary judgment as the "put up or shut up" phase of the lawsuit).

affidavit, Abbe fails to place this fact in dispute and also fails to offer any proof that the only other alleged victim, designer Benjamin Kern, was actually a victim of Kuryakyn's fraud. Nor does Abbe make any argument that alleged repeated acts of fraud against him alone constitute by themselves distinct, multiple injuries sufficient to develop a pattern of racketeering activity.

Given that Abbe's proof concerns mail and wire fraud allegations involving only "one victim, one scheme and one injury," the court concludes that Abbe has failed to put forth sufficient evidence from which a jury could find "continuity" and thus a pattern of racketeering activity. On the contrary, Abbe's claim, at best, is for a garden variety breach of contract. Accordingly, the court will grant summary judgment to Kuryakyn on Abbe's RICO counterclaims.

ORDER

IT IS ORDERED that:

1) plaintiff Kuryakyn Holdings' motions for leave to amend its complaint (dkt. ##38, 123) are DENIED;

2) plaintiff Kuryakyn Holdings' motion for partial summary judgment of Abbe's counterclaims (dkt. #44) is GRANTED;

3) defendant and counterclaimant David C. Abbe's motion to strike (dkt. #73) is DENIED;

4) plaintiff Kuryakyn Holdings' motion to strike Abbe's declaration (dkt. #89) is DENIED as moot;

5) defendant and counterclaimant David C. Abbe's motion to expedite trial and/or leave to take Rule 27(c) deposition to perpetuate testimony (dkt. #134) and his renewed motion (dkt. #14) are DENIED IN PART AS MOOT AND RESESRVED IN PART; the motion to expedite trial is mooted by the upcoming scheduling conference;

6) Abbe's motion to file a reply brief to his motion to expedite trial and/or leave to take a Rule 27(c) deposition (dkt. #139) is GRANTED;

7) The court will hold a telephonic conference on March 14, 2013, at 9:00 a.m. to set a trial date and other pretrial deadlines. In that hearing, the court will also hear argument on any outstanding issues with regard to Abbe's motion for leave to take a Rule 27(c) deposition to perpetuate testimony (dkt. ##134, 140) and Abbe's motion for protective order (dkt. #129).

Entered this 4th day of March, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge