

FISHER & PHILLIPS LLP
3200 N. Central Avenue, Suite 1550
Phoenix, Arizona 85012-2487
(602) 281-3400

Brian L. Bradford, NV Bar No. 9518
FISHER & PHILLIPS LLP
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101
Telephone: (702) 252-3131
Fax: (702) 252-7411
bbradford@fisherphillips.com

Pavneet Singh Uppal, AZ SBN 016805 (*Admitted Pro Hac Vice*)
Kris Leonhardt, AZ SBN 026401 (*Admitted Pro Hac Vice*)
Alanna R. Brook, AZ SBN 028015 (*Admitted Pro Hac Vice*)
FISHER & PHILLIPS LLP
3200 N. Central Avenue, Suite 1550
Phoenix, Arizona 85012-2487
Telephone: (602) 281-3400
Fax: (602) 281-3401
puppal@fisherphillips.com
kleonhardt@fisherphillips.com
abrook@fisherphillips.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NAVAJO HEALTH FOUNDATION – SAGE
MEMORIAL HOSPITAL, INC. (doing
business as “Sage Memorial Hospital”); an
Arizona non-profit corporation,

Plaintiff,

v.

RAZAGHI DEVELOPMENT COMPANY,
LLC; a Nevada limited liability company
(doing business as “Razaghi Healthcare”),
AHMAD R. RAZAGHI; individually, TAUSIF
HASAN; individually, DOES 1-10; ROES A-Z;

Defendants.

Case No. 2:19-cv-00329-GMN-EJY

DEFENDANTS’ RESPONSE TO PLAINTIFF’S OBJECTION TO REPORT AND RECOMMENDATION AND ORDER OF THE UNITED STATES MAGISTRATE JUDGE STAYING DISCOVERY AND RECOMMENDING DENIAL OF PLAINTIFF’S MOTION FOR LEAVE TO AMEND ITS COMPLAINT

Defendants Razaghi Development Company, LLC, Ahmad R. Razaghi, and Tausif Hasan
(hereinafter collectively “Defendants”), by and through their undersigned counsel, respectfully
submit their response to Plaintiff’s Objection to Report and Recommendation and Order of the

FISHER & PHILLIPS LLP
 3200 N. Central Avenue, Suite 1550
 Phoenix, Arizona 85012-2487
 (602) 281-3400

United States Magistrate Judge Staying Discovery and recommending Denial of Plaintiff's Motion for Leave to Amend Its Complaint (ECF No. 120). Defendants oppose Plaintiff's objections and request the Court adopt the Magistrate's Report and Recommendation and Order as otherwise set forth in Defendant's Partial Objection to Magistrate's Order and Report and Recommendations Re: Plaintiff's Motion for Leave to File First Amended Complaint filed contemporaneously herewith at ECF No. 121.

This Motion is more fully supported by the following Memorandum of Points and Authorities, all pleadings and papers on file in this action, and such matters as may be introduced at the hearing on this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RESPONSE TO PLAINTIFF'S PROCEDURAL BACKGROUND

Defendants assert that the pleadings referenced speak for themselves, and Defendants deny that Plaintiff's summary of the content of each pleading referenced in Plaintiff's Procedural Background chart is necessarily accurate or inclusive.

II. ARGUMENT

For the reasons more fully stated below, Defendants deny that Magistrate Youchah made the errors of law as outlined by Plaintiff in its Objection.

Further, as an initial matter, Defendants object to Plaintiff's attempt to solicit *advisory opinions* from this Court regarding the sufficiency of their proposed, but unfiled amended allegations of invoice fraud and jurisdictional allegations to support the Nevada civil RICO claims. *See* ECF No. 120, p. 11:4-21 & 15:9-13. Plaintiffs are "*not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies.*" *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 784 (6th Cir. 2000) (quoting and affirming district court order denying leave to amend complaint). "[A]ny ruling as

1 to the legitimacy of a step not yet taken would be tantamount to an advisory opinion.” *Calderon*
 2 *v. U.S. Dist. Court for N. Dist. of California*, 134 F.3d 981, 989 (9th Cir. 1998) (ruling on
 3 legitimacy of amended petition not yet filed would be an impermissible advisory opinion). For
 4 this reason, this Court must deny Plaintiff’s request for it to render an opinion regarding whether
 5 its proposed amendments would be sufficient under the circumstances.

6 **A. Magistrate Youchah’s Finding that the Intrastate Telephone Calls Fail the**
 7 **Interstate Requirement Was Not Contrary to Law.**

8 First, Defendants note Plaintiff’s admission that the telephone calls at issue in Magistrate
 9 Youchah’s report “are not being relied upon by Plaintiff as predicate acts to support its allegations
 10 of wire fraud.” Plaintiff further admits “these calls are not alleged as predicate acts.” Plaintiff
 11 makes these statements despite Plaintiff’s allegations in the proposed First Amended Complaint
 12 at ECF No. 76-1, 87(g) that:

13 Hasan verbally directed Hardy (an accounting clerk) during a telephone
 14 conversation to pay the invoice in the amount of \$10,855,134.15... Indeed,
 15 recognizing this fact, Hasan expressed urgency to Hardy that the invoice be paid...
 16 When he verbally directed her via a telephone conversation to process the
 \$10,855,134.15 she believed she was required to follow his directive.

17 Defendant takes Plaintiff’s statements as admissions that Plaintiff does not assert these alleged
 18 conversations between Hasan and Hardy were predicate acts in furtherance of the purported
 19 fraudulent scheme. Plaintiff should be estopped from arguing to the contrary in the future.

20 Despite the above admissions, Plaintiff attempts to dismiss the fact that these purported
 21 conversations were inherently intrastate communications, upon which a claim of interstate wire
 22 fraud cannot be based, by claiming the telephone conversations travelled from one “sovereign to
 23 another” between Arizona and “Navajoland.” Plaintiff raises this argument for the first time in its
 24 objection and did not assert this argument in support of its claim that the emails sent within
 25 Arizona were interstate wires. Plaintiff further fails to support this contention with any binding or
 26 persuasive legal authority stating communications between individuals located in the same state,
 27
 28

1 but where one party is located on Native American reservation, are inherently “interstate”
2 communications under federal RICO law. Defendants have been unable to locate any such legal
3 authority.

4 Plaintiff’s argument also ignores the ultimate issue with Plaintiff’s allegations of invoice
5 fraud in general; that Plaintiff has not sufficiently alleged *where* any of these purported acts took
6 place. For example, it is entirely possible that both Hasan and Hardy were located at Sage (on the
7 Navajo Nation) when the call(s) or emails took place or were sent. Sage has not alleged otherwise.
8 As such, even if on sovereign land and outside of the technical jurisdiction of the state of Arizona,
9 the phone conversations would still be intrastate within the Navajo Nation. Issues of jurisdiction
10 and the interstate nature of the communications can truly only be addressed to the extent that
11 Plaintiff sufficiently repleads its allegations with particularity regarding the location of the
12 purported acts as required by Rule 9. *WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F.
13 Supp. 2d 1180, 1187–88 (D. Nev. 2010) (“[t]he Ninth Circuit has interpreted Rule 9(b) to mean
14 that the pleader must state the time, place, and specific content of the false representations as well
15 as the identities of the parties to the misrepresentation”). Either way, Magistrate Youchah’s
16 finding that these telephone calls have not been sufficiently pled is not contrary to law and need
17 not be disturbed.
18
19

20 **B. The Proposed First Amended Complaint’s Allegations of Invoice Fraud Are**
21 **Subject to Dismissal.**

22 Plaintiff’s allegations of purported invoice fraud in the proposed First Amended
23 Complaint have not been pled with sufficient particularity. Among other deficiencies, and despite
24 its 30 pages of allegations, Plaintiff’s proposed First Amended Complaint fails to identify the
25 location and/or other key information relating to the purportedly fraudulent acts, and it
26 systemically fails to attribute involvement between Defendants with regard to these purportedly
27 fraudulent acts. Without sufficient allegations relating to the time, place, and specific content of
28

FISHER & PHILLIPS LLP
 3200 N. Central Avenue, Suite 1550
 Phoenix, Arizona 85012-2487
 (602) 281-3400

1 the purported acts of mail or wire fraud, Plaintiff cannot satisfy the necessary pleading
 2 requirements of Rule 9. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)
 3 (applying “the particularity requirements of rule 9(b) to RICO claims”). Further, “Rule 9(b) does
 4 not allow a complaint to merely lump multiple defendants together but requires plaintiffs to
 5 differentiate their allegations when suing more than one defendant and inform each defendant
 6 separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG*
 7 *LLP*, 476 F.3d 756, 764–65 (9th Cir. 2007) (internal citation and quotation omitted).

8
 9 Without citation to *any* legal authority, Plaintiff asserts that it has sufficiently pled its
 10 allegations of invoice fraud by providing a “sample” of fraudulent invoices and generally alleging
 11 the purported RDC procedure in submitting and processing invoices for payment. Plaintiff asserts
 12 that it is not required to provide the specifics, such as who and where, of each alleged predicate
 13 act of invoice fraud. Plaintiff’s argument on this point is in direct contravention of established
 14 Ninth Circuit precedent. For example, in *Swartz*, the Ninth Circuit stated that Rule 9 “required
 15 more specificity including an account of the ‘time, place, and specific content of the false
 16 representations as well as the identities of the parties to the misrepresentations.’” *Id.* at 764
 17 (citation omitted). Further, *Swartz* held that conclusory allegations that defendants knew others
 18 were making false statements, that the defendants were “acting in concert” or “were acting as
 19 agents” with other defendants, and/or that defendants “were ‘active participants in the conspiracy’
 20 without any stated factual basis are insufficient as a matter of law.” *Id.*

21
 22 As evidence of *why* this type of pleading fails to meet the requirements of Rule 9, Plaintiff
 23 *admits* that Mr. Hasan was not *actually* involved in the transmission, approval, or payment of *over*
 24 *half* of the invoices despite generally alleging in the proposed First Amended Complaint that Mr.
 25 Hasan *was* involved in such purported acts of fraud. ECF No. 120, p. 11:9-13 (“For other invoices
 26 described in paragraph 85 during a time period when Hasan was not employed by [RDC], i.e.,
 27
 28

FISHER & PHILLIPS LLP
 3200 N. Central Avenue, Suite 1550
 Phoenix, Arizona 85012-2487
 (602) 281-3400

September – December 2017 and after August 2018, and if the transmitter is not known or a mere ministerial employee, each invoice will be specified as caused and directed by Razaghi only.”) Plaintiff further *admits* that, despite its current *30 pages* of invoice fraud allegations, it does not possess sufficient facts to satisfactorily amend the claims so that they are pled with particularity as to the location and identities of the parties to the purported misrepresentations. ECF No. 120, p. 11:5-14 (“For each invoice, there will be language that ‘Defendant Razaghi caused and directed Hasan to transmit’ the particular invoice ... if the transmitter is not known or a mere ministerial employee, each invoice will be specified as caused and directed by Razaghi only.”) Plaintiff provides no legal authority to support its position that it may meet the Rule 9 pleading requirements by merely stating a Defendant “directed” or “caused” an action to occur without otherwise identifying the parties to the misrepresentations and the role of each Defendant. More importantly, Plaintiff seeks to avoid the inclusion of the additional details of each transaction because these details would expose Plaintiff’s claims as implausible on their face and demonstrate that Plaintiff does not have a viable civil RICO claims with regard to these invoices.¹

For these reasons, Defendants assert that Plaintiff’s claims of invoice fraud are improperly pled and that the proposed amendments suggested in Plaintiff’s objections (to the extent they are considered) do not remedy the deficiencies.

C. Magistrate Youchah’s Report Does Not Necessarily Misstate the Legal Requirements of Standing, Although Defendants Disagree Plaintiff Possess Standing to Request Recovery of the \$10.8M Termination Fee.

The Ninth Circuit in *Canyon County* examined whether allegations in a plaintiff’s complaint met the requirements of civil standing to support a civil RICO claim in order to survive

¹ For example, upon information and belief, the invoices involved in the allegations of invoice fraud from June 2017 to August 2018 were sent to, reviewed, and/or approved by Sage’s current CEO Christi El-Meligi. It would be implausible for Plaintiff to assert “Sage Memorial did not have the ability to meaningful[ly] review the Monthly Invoices or investigate and identify the Fraudulent Expenses” when such invoices were sent to its current CEO for review and approval. ECF No.76-1, ¶ 80.

FISHER & PHILLIPS LLP
 3200 N. Central Avenue, Suite 1550
 Phoenix, Arizona 85012-2487
 (602) 281-3400

1 dismissal pursuant to Rule 12(b)(6). *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 974-75
 2 (9th Cir. 2008). In doing so, the Court held that allegations of “[f]inancial loss alone, however,
 3 [are] insufficient.” *Id.* at 975. Specifically, the Court found that financial loss without the
 4 accompanying “harm to a specific business or property interest” would not sufficiently confer
 5 standing upon a plaintiff to bring a civil RICO action. *Id.* Citing to *Reiter v. Sonotone Corp.*, 442
 6 U.S. 330, 342 (1979), the Ninth Circuit observed that “[i]n the ordinary context of a commercial
 7 transaction, a consumer who has been overcharged can claim an injury to her property, based on
 8 a wrongful deprivation of her money.” *Id.* at 976.

9
 10 But, the Ninth Circuit distinguished the circumstances in *Canyon County* and held that the
 11 plaintiff Canyon County (a political subdivision of the State of Idaho) did not have a property
 12 right to recover “millions of dollars for health care services and criminal justice services” it
 13 purportedly spent for the benefit of illegal aliens employed by defendants in violation of federal
 14 law. In making this holding, the Court distinguished between the County acting as a market
 15 participant who has been overcharged by defendant’s fraud and the County acting as a government
 16 entity enforcing laws and promoting general welfare. *Id.* at 976. In the latter circumstance, the
 17 Ninth Circuit held that the County was not injured in its property by the expenditure of its funds.
 18 *Id.*

19
 20 The takeaway from *Canyon County* is that a plaintiff must not only have financial loss
 21 associated with the actions alleged under RICO, but the plaintiff must *also* have a property right
 22 to recover these funds. Although this is not typically an issue in a commercial transaction, here,
 23 Defendants assert that Plaintiff does not have a continuing property right in the \$10.8M
 24 termination fee because this fee was otherwise owed to Defendant RDC under the parties’
 25 contract. Thus, although Plaintiff asserts a loss in the amount of \$10.8M, Plaintiff does not have
 26 standing to assert the return of this money because Plaintiff no longer has a property right in the
 27
 28

1 funds. For this reason, and for the reasons otherwise asserted in Defendant's Objection, Plaintiff
 2 lacks standing to bring its civil RICO claim for the return of the \$10.8M termination fee.

3 **D. Plaintiff's Nevada RICO Claims Do Not Meet the Applicable Pleading Standards,**
 4 **and Plaintiff's Proposed Amendments Also Fail to Satisfy These Requirements.**

5 "In Nevada, a civil RICO action must be plead with the same degree of specificity that is
 6 called for in a criminal indictment or information." *Copper Sands Homeowners Ass'n, Inc. v.*
 7 *Copper Sands Realty, LLC*, No. 2:10-CV-00510-GMN, 2011 WL 1300192, at *2 (D. Nev. Mar.
 8 31, 2011) (citing *Hale v. Burkhardt*, 764 P.2d 866, 869 (Nev.1988)). "A civil RICO pleading
 9 must, in that portion of the pleading which describes the criminal acts that the defendant is charged
 10 to have committed, contain a sufficiently 'plain, concise and definite' statement of the essential
 11 facts such that it would provide a person of ordinary understanding with notice of the charges."
 12 *Id.* The Nevada Supreme Court held in *Cummings* that Nevada civil RICO claims "must be pled
 13 with specificity" and "specify with particularity what conduct is complained of and when and
 14 where the conduct occurred." *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 646,
 15 896 P.2d 1137, 1141 (1995). Further, in order to fall under the scope of the Nevada statutory
 16 authority, Plaintiff must plead facts to show a defendant "resides or has committed any act which
 17 subjects him or her to criminal or civil liability" in Nevada (NRS 207.470(3)) and otherwise meets
 18 one of the criteria under NRS 194.020.

19
 20
 21 As stated by Magistrate Youchah, "Plaintiff's Nevada civil RICO and civil RICO
 22 conspiracy claims fail to be 'pleaded with specificity' and, at this time, the actions alleged fall
 23 outside the scope of Nevada statutory authority." ECF No. 117, p. 21:20-21 (citing *Morris v.*
 24 *Green Tree Serv., LLC*, Case No. 2:14-cv-01998-GMN-CWH, 2015 WL 4113212, at *13 (D.
 25 Nev. July 8, 2015)). It is perplexing why Plaintiff would assert it is not required to allege its
 26 Nevada RICO claims with specificity, including the location of where each purported act took
 27 place and how Defendants should be subject to Nevada statutory authority when all parties and
 28

actions occurred in Arizona. Defendants deny that simply adding a conclusory phrase that Plaintiff “will likely show that one of the defendants committed any act which subjects him to criminal or civil liability in Nevada” satisfies Plaintiff’s obligation to plead its claims with specificity and subjects Defendants to potential liability under Nevada statutes. Further, as stated herein, Plaintiff has no good faith basis to make such assertion under Rule 11, given the facts of this case. Instead, in order to meet the applicable pleading requirements, Plaintiff must provide factual allegations regarding where the purportedly fraudulent acts took place and provide some basis why the Defendants’ actions fall within the scope of Nevada statutory authority.

III. CONCLUSION

For the reasons stated herein, Defendants oppose Plaintiff’s objections and request the Court adopt the Magistrate’s Report and Recommendation and Order as otherwise set forth in Defendant’s Partial Objection to Magistrate’s Order and Report and Recommendations Re: Plaintiff’s Motion for Leave to File First Amended Complaint filed contemporaneously herewith at ECF No. 121.

RESPECTFULLY SUBMITTED this 12th day of February 2021.

FISHER & PHILLIPS LLP

By: /s/ Kris Leonhardt, Esq.

Brian L. Bradford, Esq.
300 S. Fourth Street, Suite 1500
Las Vegas, Nevada 89101

Pavneet Singh Uppal (*Admitted Pro Hac Vice*)
Kris Leonhardt (*Admitted Pro Hac Vice*)
Alanna R. Brook (*Admitted Pro Hac Vice*)
FISHER & PHILLIPS LLP
3200 N. Central Avenue, Suite 1550
Phoenix, Arizona 85012-2487
Attorneys for Defendants

FISHER & PHILLIPS LLP
3200 N. Central Avenue, Suite 1550
Phoenix, Arizona 85012-2487
(602) 281-3400

CERTIFICATE OF SERVICE

This is to certify that on February 12, 2021 the undersigned, an employee of Fisher & Phillips LLP, electronically filed the Defendants' Response To Plaintiff's Objection To Report And Recommendation And Order Of The United States Magistrate Judge Staying Discovery And Recommending Denial Of Plaintiff's Motion For Leave To Amend Its Complaint with the U.S. District Court, and a copy was electronically transmitted from the court to the e-mail address on

file for:

Kathleen Bliss, Esq.
KATHLEEN BLISS LAW, PLLC
1070 West Horizon Ridge Parkway, Suite 202
Henderson, NV 89012
kb@kathleenblisslaw.com

David Joel Stander
LAW OFFICE OF DAVID J. STANDER LLC
10112 Burton Glen Drive
Potomac, MD 20850
dstanderlaw@gmail.com

Paul S. Padda, Esq.
PAUL PADDA LAW, PLLC
4560 South Decatur Blvd., Suite 300
Las Vegas, NV 89103
psp@paulpaddalaw.com

Douglass A. Mitchell, Esq.
JENNER & BLOCK
1099 New York Ave, NW
Suite 900
Washington, DC 20001-4412
dmitchell@jenner.com

/s/ Kris Leonhardt
An employee of Fisher & Phillips LLP

FISHER & PHILLIPS LLP
3200 N. Central Avenue, Suite 1550
Phoenix, Arizona 85012-2487
(602) 281-3400