IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

LINDA SCHUMANN, Administrator of the Estate of Thomas John Schumann, *et al.*, *Plaintiffs*, v. K. CRAIG KENT, *et al.*, *Defendants*.	)	Case No. 3:25-cv-00083-NKM

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) and 12(b)(6)

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This memorandum[1] is filed in support of the motion to dismiss all counts by Defendants K. Craig Kent, MD, Melina Kibbe, MD, Wendy Horton, Pharm.D, MBA, FACHE, and Allan Tsung, MD ("Medical Leader Defendants") pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). As set forth below, the Plaintiffs, Linda Schumann (administrator of estate of Thomas John Schumann), Carrie Finch-Smith (administrator of estate of James Gordon Smith), Jeffery S. Young, MD, Kenan W. Yount, MD, Mark E. Roeser, MD, and John A. Kern, MD, have failed to allege facts sufficient to state any plausible claim for relief against Drs. Kent, Kibbe, Horton, and Tsung, and this Court should grant their motion to dismiss in its entirety and remove them as defendants in this action.

INTRODUCTION

This case is, at best, an aspirational medical malpractice and employment lawsuit dressed up as a RICO action in a vain attempt to get into federal court. The Plaintiffs include two widows ("Widow Plaintiffs") whose husbands died after cardiac surgery at the University of Virginia ("UVA"), and four current or former cardiac or trauma surgeons ("Surgeon Plaintiffs") who objected after UVA leadership began enforcing reasonable quality, safety, professionalism, and productivity metrics in response to documented performance concerns.

The complaint's 105 pages consist of repeated misstatements of facts designed to besmirch the reputations of Drs. Kent, Kibbe, Horton, and Tsung, the institutional defendants, and the other physician defendants in hopes that this Court will confuse repetition for truth and

[1] Pursuant to the Pretrial Order entered in this matter (ECF No. 39), each Defendant is permitted to file briefing not to exceed 25 pages. Collectively, Drs. Kent, Kibbe, Horton, and Tsung are therefore entitled to 100 pages. In the interest of promoting judicial economy and avoiding duplicative filings, the Medical Leader Defendants submit a single omnibus motion within that aggregate limit. Should the Court prefer or require formal leave for this consolidated filing, Defendants will file a motion accordingly.

hyperbole for reason. But facts are stubborn things,[2] and despite Plaintiff's performative sound and fury,[3] Plaintiffs nevertheless fail to allege any specific facts that the Medical Leader Defendants formed or joined a racketeering enterprise or took any actions to advance a racketeering conspiracy. Rather, what is alleged are facts demonstrating that they performed their normal duties attendant to running a large health system (Dr. Kent), a medical center (Dr. Horton), a medical school (Dr. Kibbe), and a department of surgery (Dr. Tsung), each with very distinct roles and responsibilities.

Plaintiffs Complaint is replete with colorful adjectives, but such language fails under applicable law to convert everyday business activity into a racketeering enterprise. The facts as alleged make clear that the Medical Leader Defendants did nothing more than engage in normal employment, compensation, billing, and management practices. The facts pled are insufficient to meet the pleading requirements for a RICO enterprise, which require a distinct enterprise with a common purpose and a pattern of racketeering activity involving properly pleaded predicate offenses. Making outside hires of leaders and faculty in lieu of elevating under-performing internal candidates – and disciplining or counseling those internal candidates after they sabotage those outside hires and fail to meet basic safety and accountability metrics – does not create a racketeering conspiracy under applicable law. Moreover, the only specific economic harm alleged by the Plaintiffs in their RICO claim – the alleged overbilling of federal, state, and private insurers

[2] John Adams, *Argument in Defense of the British Soldiers in the Boston Massacre Trials*, December 4, 1770, quoted in Founders Online, National Archives ("Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.").

[3] William Shakespeare, *Macbeth,* Act 5, Sc. 5. ("It is a tale, Told by an idiot, full of sound and fury, Signifying nothing.").

– shows that neither the Widow Plaintiffs nor the Surgeon Plaintiffs suffered economic harm personally by the alleged racketeering activity.

Plaintiffs' other federal and state law claims similarly fail. The Surgeon Plaintiffs have failed to plead specific facts sufficient to allege that the Medical Leader Defendants were aware of any protected activity or that they retaliated against them for that activity in a concrete way that caused them economic harm. Similarly, Plaintiffs Yount and Kern's defamation claim against Dr. Kibbe fails because their claim is time-barred. Also, Dr. Kibbe's alleged statements are privileged and non-actionable opinions.

For each of these reasons, as set forth fully below, this Court should grant the Medical Leader Defendants' motion dismiss in its entirety.

ARGUMENT

I. LEGAL STANDARDS

A motion under Federal Rule of Civil Procedure 12(b)(6) tests whether a complaint has met the pleading requirements of Fed. R. Civ. P. 8(a) and 9(b). Under Rule 8(a), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678.

A. Federal Rule of Civil Procedure 12(b)(6)

A Rule 12(b)(6) motion tests the sufficiency of a complaint. *Brockington v. Boykins*, 637 F.3d 503, 506 (4th Cir. 2011). "[T]he reviewing court must determine whether the complaint alleges sufficient facts 'to raise a right to relief above the speculative level[,]'" and dismissal is

appropriate only if the well-pleaded facts in the complaint fail to "state a claim that is plausible on its face.'" *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Yet, "[c]onclusory allegations regarding the legal effect of the facts alleged" need not be accepted. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995); *see also E. Shore Mkts., Inc. v. J.D. Assoc. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) ("[W]hile we must take the facts in the light most favorable to the plaintiff, we need not accept the legal conclusions drawn from the facts…. Similarly, we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments."). "Generally, courts may not look beyond the four corners of the complaint in evaluating a Rule 12(b)(6) motion." *Linlor v. Polson*, 263 F. Supp. 3d 613, 618 (E.D. Va. 2017) (citing *Goldfarb*, 791 F.3d at 508).

B. Federal Rule of Civil Procedure 9(b)

Because Plaintiffs' claims are premised on alleged fraudulent conduct under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c), they are subject to Rule 9(b)'s heightened pleading requirements. *See Scott v. WFS Fin., Inc.*, 2007 WL 190237, at *5 (E.D. Va. Jan. 18, 2007) (citing *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989)). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b).

To satisfy these requirements, Plaintiffs must, "at a minimum, describ[e] the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Bunk v. Govt. Logistics*

N.V., 842 F.3d 261, 275 (4th Cir. 2016). "Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9." *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 784 (4th Cir. 1999). Rule 9(b)'s purposes "are to provide the defendant with sufficient notice of the basis for the plaintiff's claim, to protect the defendant against frivolous suits, to eliminate fraud actions where all of the facts are learned only after discovery, and to safeguard the defendant's reputation." *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 586 (D. Md. 2014) (citing *Harrison*, 176 F.3d at 784).

II. THE WIDOW PLAINTIFFS DO NOT HAVE STANDING AND MUST BE DISMISSED FROM COUNTS 1 AND 2.

It is foundational law that a plaintiff must have suffered an injury-in-fact before the Court holds jurisdiction over their claims. The Widow Plaintiffs fail to demonstrate how the alleged fraud scheme concretely harmed them in any way. Rather, as pleaded, this scheme would have only injured third party payors—not the Plaintiffs. Consequently, the Widow Plaintiffs lack standing to bring their RICO claims.

Plaintiffs have the burden of establishing the "irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Standing is "a threshold jurisdictional question" that ensures a lawsuit is "appropriate for the exercise of the [federal] courts' judicial powers." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017). To demonstrate standing, Plaintiffs must show: "(1) an injury in fact; (2) a causal connection between the injury and the alleged misconduct; and (3) a likelihood that the injury will be redressed by a favorable decision." *Carroll v. Washington Gas Light Fed. Credit Union*, 2018 WL 2933412, at *2 (E.D. Va. Apr. 4, 2018) (O'Grady, J.) (quoting *Spokeo*, 136 S. Ct. at 1548). A concrete injury must be "'real,' and not 'abstract." *Id*. In other words, "the plaintiff must have suffered an injury or threat of injury that

is 'credible,' not 'imaginary or speculative.'" *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

The Widow Plaintiffs' indefinite, speculative, and abstract claims of having "suffered injury to their business or property" at the hands of the alleged enterprise do not satisfy this burden. Compl. ¶ 43. Indeed, Plaintiffs do not allege facts demonstrating any injury-in-fact. Instead, they describe their "injuries" in a conclusory and abstract fashion that is not entitled to a presumption of truth. *See Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (explaining that at the pleading stage, conclusory statements and legal conclusions about the alleged injury are not presumed true).

The only claims alleged by the Widow Plaintiffs are in Counts I and II, alleging substantive RICO and RICO conspiracy, supported by underlying predicate offenses of federal mail and wire fraud; federal witness tampering; and Virginia extortion. But theoretical victims of Plaintiff's Complaint would be those who suffered economic harm from the confabulated racketeering conspiracy and its predicate offenses. Such imagined victims are not the Plaintiffs according to their Complaint, but rather the federal, state, and private insurance companies who paid allegedly inflated medical bills.[4] The Widow Plaintiffs' injuries do not relate to overbilling – they relate to lost wages and other economic harm stemming from the unfortunate deaths of

[4] Allegations of fraudulent overbilling of federal health care programs are ordinarily pursued, if at all, through a *qui tam* action under the False Claims Act, which authorizes suit on behalf of the United States and provides for treble damages. *See* 31 U.S.C. §§ 3729–3733. Such actions, however, are subject to the Act's strict first-to-file rule, which bars later-filed actions based on the same alleged fraud. *See* 31 U.S.C. § 3730(b)(5). Plaintiffs' decision not to pursue an FCA claim reflects an understanding that this avenue is unavailable to them, and their effort to repackage an alleged overbilling theory as a civil RICO claim only underscores the absence of a viable FCA pathway and confirms that any alleged economic injury belongs to the payors—not to Plaintiffs.

their husbands. But those deaths are far removed from the racketeering conspiracy and its predicate offenses of fraud, witness tampering, and extortion. The Widow Plaintiffs simply cannot establish RICO standing because their alleged injuries are a derivative result of an alleged scheme to defraud government and private insurers, not the Widow Plaintiffs themselves.[5] *See J.T. v. de Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020) (plaintiffs lacks RICO standing if the injury is derivative of a scheme targeting another victim).

III. PLAINTIFFS FAIL TO STATE A VALID RICO CLAIM AND COUNTS 1 AND 2 MUST BE DISMISSED.

Plaintiffs' allegations against Defendants, and particularly against Drs. Kent, Kibbe, Horton, and Tsung, are conclusory, speculative, and fail to meet the pleading standards of Fed. R. Civ. P. 12(b)(6) and 9(b). The Plaintiffs' allegations are exactly the type that the United States Supreme Court has determined to be insufficient under modern pleading standards. *See*, *e.g.*, *Igbal*, 556 U.S. at 678. Plaintiffs have an obligation to provide more than "a formulaic recitation of the elements of a cause of action" as pleadings that present "no more than conclusions" are not "entitled to the assumption of truth." *Id*. at 678-679 (citation omitted).

When evaluating the sufficiency of a complaint, the Court must:

> [C]hoose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should

[5] Although the injuries the Widow Plaintiffs have alleged could arguably support a medical malpractice claim against other Defendants who performed the respective surgeries in question, no such claim has been alleged in this federal lawsuit against the Medical Leader Defendants, nor is there any allegation that the Medical Leader Defendants had anything to do with the care rendered to the decedents of the Widow Plaintiffs. Rather, the Widow Plaintiffs are attempting to convert state medical malpractice claims against unrelated Defendants into a federal RICO action, likely to avoid the strict liability caps under Virginia law. This Court should recognize such a gambit as improper, and the Widow Plaintiffs should be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of standing.

> assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

Bates v. Strawbridge Studios, Inc., 2011 WL 1882419, at *2 (W.D. Va. May 17, 2011). The determination of whether the Complaint states a claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The determination is exceedingly important when RICO is alleged because RICO is "an unusually potent weapon—the litigation equivalent of a thermonuclear device" – and the mere assertion of RICO "has an almost inevitable stigmatizing effect on those named as defendants." *See Moss v. BMO Harris Bank, N.A.*, 258 F. Supp. 3d 289, 297 (E.D.N.Y. 2017).

Many courts follow a three-step process for determining whether complaints state a claim for relief: "(1) consider the elements necessary to state a claim; (2) identify allegations that are merely conclusions and therefore are not well-pleaded factual allegations; and (3) accept any well-pleaded factual allegations as true and determine whether they plausibly state a claim." *Jones v. Crisis Intervention Servs.*, 239 F. Supp. 3d 833, 836 (D. Del.), *aff'd*, 687 F. App'x 121 (3d Cir. 2017); *A.B. By & Through F.B. v. Pleasant Valley Sch. Dist.*, 2018 WL 1960382, at *1 (M.D. Pa. Apr. 25, 2018).

Reviewing Plaintiffs' scattershot allegations in conjunction with these RICO offense elements makes clear that the Complaint does not plausibly state a RICO claim against the Defendants.

A. The Complaint Does Not Allege the Necessary Elements of Civil RICO under 18 U.S.C. § 1962(c).

The "showing required to succeed on a RICO charge in the Fourth Circuit is both demanding and well established." *Baker v. Sturdy Built Mfg., Inc.*, 2007 WL 3124881, at *3 (E.D. Va. Oct. 23, 2007). To properly state a RICO claim under 18 U.S.C. §1962, a plaintiff must properly allege: (1) conduct; (2) of an enterprise; (3) through a pattern (4); of racketeering activity.

Grant v. Shapiro & Burson LLP, 871 F. Supp. 2d. 462 (D. Md. 2012) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). In addition, a plaintiff must demonstrate that their injury was "proximately caused" by the alleged predicate act committed by each defendant(s) in violation of RICO. 18 U.S.C. §1964(c); *Walters v. McMahen*, 684 F.3d 435, 443-444 (4th Cir. 2012).

The Fourth Circuit has consistently urged courts to "exercise caution" in addressing civil RICO claims to insure that "RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damage suits are not brought against isolated offenders for their harassment and settlement value; and that the multiple state and federal laws bearing on transactions…are not eclipsed or preempted." *U.S. Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 317 (4th Cir. 2010). Plaintiffs are attempting to do exactly what the Fourth Circuit counsels against.

In every meaningful sense, Plaintiffs' allegations are "routine" allegations of medical malpractice and employment-related grievances that are well beyond the intended scope of RICO. *Maryland-National Capital Park and Planning Com'n. v. Boyle*, 203 F. Supp. 2d 468, 475 (D. Md. 2002). Congress passed RICO because of concern over long term criminal conduct and, therefore, a plaintiff's allegations must reflect continuous criminal activity, distinct from ordinary fraud, to be properly subject to RICO's heightened penalties. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Plaintiffs' attempts to turn their medical malpractice and employment-related grievances into a claim of ongoing criminal activity would convert ordinary claims into RICO actions in contravention of Fourth Circuit precedent. *HMK Corp. v. Walsey*, 828 F.2d 1071, 1074 (4th Cir. 1987).

B. The Complaint Fails to Sufficiently Allege the Existence of a RICO "Enterprise" Separate and Distinct from the Medical Leader Defendants that Establishes the Requisite Commonality and Duration of a Pattern of Racketeering Activity.

The Complaint does not plausibly allege the existence of an enterprise. To state a civil RICO claim, a plaintiff must plausibly allege an "enterprise" responsible for committing racketeering activity. 18 U.S.C. § 1962(c). A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To constitute an enterprise, there must be an "entity separate and apart from the pattern of activity in which it engages." *Boyle v. United States*, 556 U.S. 938, 943-44 (2009). Proof of each is distinct; proving an entity does not create proof of an enterprise *Id.* (quotation marks and citation omitted). The enterprise is proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Notably, an enterprise is "an entity separate and apart from the pattern of activity in which it engages." *Id.* at 583.

There are "two distinct types of RICO enterprises; a RICO enterprise can exist either as a "legal entity" or "merely a group of individuals associated in fact," commonly referenced as an "association in fact." *United States v. Griffin*, 660 F.2d 996, 999 (4th Cir. 1981); *Turkette*, 452 U.S. at 583. The Complaint fails to allege the existence of either type of RICO enterprise.

1. The Alleged "Kent Enterprise" Is Not Separate and Distinct from the Defendants Alleged to Have Been Involved.

Plaintiffs do not plausibly allege any "enterprise" distinct from the normal business operations of UVA's health system, medical center, and medical school. Instead, Plaintiffs group together a selection of physician and administrative leaders and give them a name – the "Kent Enterprise" – that had never been used before in practice, and which is a wholly artificial creation

of the Plaintiffs' own doing. To properly plead a RICO claim under §1962(c), a plaintiff must allege the existence of an "enterprise" which is separate and distinct from the "persons" alleged to have violated RICO. *Turkette*, 452 U.S. at 583; *Palmetto State Med. Ctr., Inc. v. Operation Lifeline*, 117 F.3d 142, 148 (4th Cir. 1997). "[U]nder the so-called 'distinctness' requirement, a plaintiff must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'persons' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). This rule requires that the "enterprise" be something other than merely an association of the same corporate defendants alleged to be the RICO "persons." *New Beckley Min. Corp. v. Int'l Union, United Mine Workers of Am.*, 18 F.3d 1161, 1163 (4th Cir.1994) (affirming dismissal of complaint where the "persons" were not distinct from the "enterprise" and denying leave to amend); *Myers v. Lee*, 2010 WL 3745632, at *3 (E.D. Va. Sept. 21, 2010); *Gondel v. PMIG 1020 LLC*, 2009 WL 248681 at *3 (D. Md. Jan. 22, 2009).

Essentially, where a group of "persons" are identical to the purported "enterprise," there is no distinctness. *Reves v. Ernst & Young,* 507 U.S. 170, 185 (1993); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America,* 18 F.3d 1161, 1163–64 (4th Cir. 1994); *United States v. Crysopt Corp.,* 781 F.Supp. 375, 381 (D.Md.1991) ("Fourth Circuit precedent is clear that RICO defendants must be legally distinct from the enterprise through which they allegedly conduct racketeering activities."). Here, Plaintiffs have alleged an enterprise that is nothing more than the Defendants by a different name. There are no factual allegations that the affairs of the enterprise are any different from the affairs of the Defendants. *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (holding that "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation

do not form an enterprise distinct from the corporation."); *see also* Compl. ¶ 67 ("At all pertinent times and places, KENT was an employee of UVAHS and UVA acting within the course and scope of his employment."); ¶ 72 (At all pertinent times and places, KIBBE was an employee of UVAHS and UVA acting within the course and scope of her employment."); ¶ 77 ("At all pertinent times and places, HORTON was an employee of UVAHS and UVA acting within the course and scope of her employment."); ¶ 82 (At all pertinent times and places, TSUNG was an employee of UVAHS and UVA acting within the course and scope of his employment.").

Plaintiffs do not allege that the enterprise is a separate entity that exists and operates apart from UVA's routine activities. Instead, Plaintiffs allege that the Physician Defendants collectively constitute an association-in-fact enterprise of "individuals, entities and governing bodies" and that this "enterprise" acted through the institution's committees and operational arms. Compl. ¶¶ 1, 28, 41, 93, 271, 273. There are no allegations that the members of the "Kent Enterprise" were admitted or expelled from the group. And, there are no allegations that members held different roles within a hierarchy, participated in offsite or special meetings, or earned money independently from their UVA compensation. Instead, Plaintiffs define the "enterprise" as being comprised of "individuals, entities and governing bodies" working within UVA institutions. Compl. ¶¶ 92, 271, 273. Functionally, Plaintiffs identify the Defendants by a different, artificially concocted name and conclude an enterprise exists.

Consider the allegations Plaintiffs make to attempt to establish a racketeering conspiracy led by Dr. Kent. First, they gave it a name – the "Kent Enterprise." No one before this Complaint has ever heard or used the name "Kent Enterprise."

Second, they allege that Dr. Kent hired other leaders that he had worked with previously and respected professionally, and those leaders similarly hired other leaders and faculty members

they also respected. *See, e.g.,* Compl. ¶¶ 4 and 10. Even assuming the allegations to be true, which they are not, these are ordinary hiring activities that establish nothing beyond the normal activities of health care leaders. The situation is comparable to a football team hiring a new head coach with that coach's assistants then following. Hiring well-qualified people does not establish a racketeering enterprise.

Third, Plaintiffs allege that institutional leadership either refused to promote the Physician Defendants due to their poor performance or adjusted their pay and responsibilities accordingly. *See*, *e.g.*, Compl. ¶¶ 48-51. Plaintiffs' allegations demonstrate typical employment decisions carried out through institutional leadership and employment processes. Although Plaintiffs attempt to characterize the adverse employment decisions they endured as acts of retaliation, *retaliation is not a predicate offense* enumerated in the RICO statute, 18 U.S.C. § 1961(1), and passing one over for promotion or reducing their responsibilities for poor performance or upon request is not a crime. Nor are they facts that support a racketeering conspiracy. It is the consequence of strong and able leadership in pursuit of improving their organization and patient care.

Third, Plaintiffs cite to a series of events that essentially amount to an angry letter-writing campaign by a small group of disgruntled and anonymous physicians who were clearly upset about the implementation of a modern compensation plan based on productivity and safety metrics. *See*, *e.g.*, Compl. ¶ 14 (Dr. Ghaemmaghami's letter to UVA President Jim Ryan); ¶ 15 (UPG Chairperson's letter to President Ryan and UVA Rector Whit Clement); ¶ 21 (UVA physician letter to UVA Provost Ian Baucom); and ¶ 23 (letter of "no confidence" by 128

anonymous UVA physicians).[6] Some of these angry letters led to internal investigations which ultimately found no wrongdoing. *See., e.g.,* Compl. ¶ 21 (independent investigation by UVA Graduate Medical Education Committee); and ¶ 25 (independent investigation by outside law firm, Williams & Connolly LLP). Making reference to (and attaching as exhibits) angry letters do not establish any factual allegation establishing that the activities of the Physician Defendants were anything more than normal activities in the course of their employment with UVA.

Fourth, Plaintiffs present a random mix of false allegations pertaining to the onset of the Covid pandemic, including that Dr. Kent prioritized Covid testing for football players, used Covid tests for his own family, and went on vacation to the Caribbean shortly before the onset of the pandemic. Compl. ¶ 5. In addition to being baseless factual accusations, these are not crimes and cannot form the basis of a racketeering enterprise. Plaintiffs also allege that Dr. Kent furloughed staff, made financial cuts, and accepted transfer patients from regional hospitals in response to decreased patient volume related to the pandemic shutdown. Compl. ¶¶ 6, 7 and 9. Again, these are not crimes – they are actions that mirrored the decisions health system leaders all over the country were making after the onset of the Covid pandemic. Rather than providing any allegations to support an enterprise, Plaintiffs air their personal grievances against Dr. Kent in attempt to undermine his decision-making; however, these allegations simply highlight that Dr. Kent was making necessary decisions within his role as CEO of the University of Virginia Health System ("UVAHS").

[6] To put these letters in context, less than eight percent of the 1,450 faculty physicians signed the letter of no-confidence following administration changes designed to right a previously failing ship. That a small group of faculty faced challenges with this administration change is unsurprising, but should be placed in the appropriate context to understand its significance. Expecting unanimous support from all 18,000 employees of the UVA health system would be unrealistic and might even suggest that leadership was not engaging in the difficult decision-making necessary for organizational progress.

Fifth and finally, Plaintiff allege facts that attempt to establish allegedly poor surgical skill by Drs. Preventza and de la Cruz. *See*, *e.g.*, Compl. ¶ 20. Poor clinical skill, of course, does not establish a crime, and it has nothing to do with a racketeering enterprise.

Clearly none of the factual allegations summarized above establish a racketeering enterprise separate from the persons involved. The "Kent Enterprise" is nothing more than UVA and its employees engaged in running an academic health system. "[E]ntities engaged in ordinary business conduct and an ordinary business purpose do not constitute an enterprise bound by a common purpose under RICO." *Abhari v. Victory Park Capital Advisors*, 2020 U.S. Dist. LEXIS 214383, at *14 (C.D. Cal. Nov. 16, 2020) (cleaned up). "'Courts have overwhelmingly rejected attempts to characterize routine commercial relationships as RICO enterprises.'" *Id.* (quoting *Gomez v. Guthy-Renker*, LLC, 2015 WL 4270042 at *8 (C.D. Cal. July 13, 2015)) (collecting cases). And like here, where "[t]here is a complete overlap between the defendants, their alleged agents, and the enterprise," there is no distinct enterprise. *Myers v. Lee*, 2010 WL 3745632, at *3 (E.D. Va. Sept. 21, 2010) (dismissing RICO complaint for failure to plead a RICO enterprise distinct from the defendants).

Plaintiffs' framing of the purported enterprise illustrates a complete overlap of UVA's normal business operations with the alleged enterprise. *See, e.g.,* Compl. ¶¶ 1, 32, 34, 38, 39, 46, 50, 51, 92, 93, 130, 267. The alleged "enterprise" consists of UVA, together with its officers, employees, departments, and internal committees, performing routine institutional functions, such as committee deliberations, compliance steps, staffing and governance decisions, billing and record communications, carried out along ordinary lines of authority. Within the Fourth Circuit, this deficiency is fatal to Plaintiffs' RICO claim.

The Eastern District of Virginia's decision in *Myers* offers an excellent example. There, the plaintiff alleged that defendants were acting in their roles as managers of the corporation under the moniker "Dahn Organization" and, acting in those roles, established an enterprise to defraud others for the benefit for the enterprise. *Myers*, 2010 WL 3745632, at *4 (E.D. Va. Sept. 21, 2010). The Court found that "nowhere in the Amended Complaint are there any allegations that the affairs of the enterprise are any different from the affairs of the defendants." *Id*. Because the plaintiff's allegations in *Myers* concerning the enterprise were not "distinguishable from the normal day to day activities of these 'persons,'" the Court held that the plaintiff failed to allege a RICO enterprise distinct from the Defendants. *Id*. at *5.

Similarly, in *Gondel*, the plaintiffs' RICO allegations were insufficient where the "enterprise" was not distinct from the "persons." There, plaintiffs alleged that three corporate defendants and their associated agents conspired to defraud plaintiffs through various agents. *Gondel*, WL 248681, at *4. The Court held that "these 'enterprises' are not sufficiently distinct from the alleged 'persons' to be considered separate entities for purposes of § 1962(c)." *Id*. The Court explained that the "'non-identity' rule requires that the alleged 'enterprise' be something other than an association of a corporate defendant with its own employees." *Id.*

The Complaint fails to sufficiently plead an enterprise because – by its terms – the Complaint alleges that the Medical Leader Defendants were acting in their roles at UVAHS and, therefore, were not part of a distinct enterprise. Essentially, where a group of "persons" are identical to the purported "enterprise," there is no distinctness. *Reves v. Ernst & Young,* 507 U.S. 170, 185 (1993); *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America,* 18 F.3d 1161, 1163–64 (4th Cir. 1994); *United States v. Crysopt Corp.,* 781 F. Supp. 375, 381 (D.Md.1991) ("Fourth Circuit precedent is clear that RICO defendants must be legally distinct

from the enterprise through which they allegedly conduct racketeering activities."). Here, Plaintiffs have alleged an enterprise that is nothing more than the Defendants by a different name. There are no factual allegations that the affairs of the enterprise are any different from the affairs of the Defendants. *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (holding that "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation."); *see also* Compl. ¶ 67 ("At all pertinent times and places, KENT was an employee of UVAHS and UVA acting within the course and scope of his employment."); ¶ 72 ("At all pertinent times and places, KIBBE was an employee of UVAHS and UVA acting within the course and scope of her employment."); ¶ 77 ("At all pertinent times and places, HORTON was an employee of UVAHS and UVA acting within the course and scope of her employment."); ¶ 82 ("At all pertinent times and places, TSUNG was an employee of UVAHS and UVA acting within the course and scope of his employment.").

Because the Complaint fails to plead sufficient facts to permit an inference that the Defendants were acting on behalf of a "separate and distinct" enterprise that is "plausible on its face," Plaintiffs' claim fails as a matter of law. *New Beckley Min. Corp.*, 18 F.3d 1161 at 1163; *Iqbal*, 556 U.S. at 678.

2. The Alleged "Kent Enterprise" Does Not Feature a Common Purpose, Defined Relationships Among Associates, and Longevity and Duration Sufficient to Satisfy Heightened RICO Pleading Standards.

As stated in Section II.B., an "association-in-fact enterprise must have at least three structural features: a purpose, [defined] relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *United States v. Pinson*, 860 F.3d 152, 161 (4th Cir. 2017) (quotation omitted). The Complaint does not

allege any facts showing that this group of individuals and entities "function[ed] as a continuing unit," *Turkette*, 452 U.S. at 583, let alone one with "a purpose" and "longevity." *Pinson*, 860 F.3d at 161.

As instructed by the Supreme Court in *Iqbal*, 556 U.S. at 678, the Court can identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Here, the principal issue with Plaintiffs' allegations concerning the enterprise is that there are no allegations of fact concerning the roles of the alleged members of the "enterprise" separate and apart from the alleged racketeering activity. Instead, Plaintiffs present a self-serving legal conclusion – that these Defendants constitute a RICO enterprise – that is not entitled to the presumption of truth. *Baldino's Lock & Key Serv., Inc. v. Google, Inc.*, 88 F. Supp. 3d 543, 549 (E.D. Va. 2015) ("While the Court, for purposes of a motion to dismiss, accepts all facts alleged in the complaint as true, the Court is not bound to accept 'a legal conclusion couched as a factual allegation.'") (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Fourth Circuit law presently requires that "the association exist [ ] separate and apart from the pattern of racketeering activity in which it engages." *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) (citing *Turkette,* 452 U.S. at 583). This can be shown through evidence that the enterprise had "an existence beyond that which was necessary to commit the predicate crimes." *Id.* at 631.

Critically, the Complaint's allegations fail to establish defined relationships among the Defendants. There are no allegations detailing the role and responsibilities of each person involved in the alleged enterprise. There are no allegations detailing any involvement in the formation, existence, or management of the alleged "enterprise" itself. *Reves v. Ernst & Young,* 507 U.S. 170, 179–81(1993). And there are no allegations outlining any system of governance, hierarchy, or any systems one would expect to find within an enterprise. *See Limestone Dev.*

Corp. v. Vill. of Lemont, 520 F.3d 797, 804–05 (7th Cir. 2008) (dismissing complaint for lack of factual allegations as to a system of governance, hierarchy, management or direction, headquarters or other indicator of a legal or illegal enterprise); *Davis v. Hudgins,* 896 F. Supp. 561, 567 (E.D. Va. 1995) (finding no enterprise on motion to dismiss where no management role was alleged). Instead, Plaintiffs simply allege that individuals working for UVA are somehow part of a RICO enterprise. But who founded the enterprise? Who was its recruiter? Who was its enforcer? Who kept track of the enterprise's proceeds? Who kept track of and doled out pay? Who expelled members who violated the rules? Who organized meetings and kept records of those meetings? These questions make sense for an organized crime enterprise, but they are nonsensical when applied to the "Kent Enterprise" – because calling the "Kent Enterprise" a criminal organization is absurd.

In short, there are no factual allegations in the Complaint to suggest that Defendants "perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity." Indeed, "[i]f RICO imposed liability on a corporation for the ordinary conduct of its agents and employees, every claim of corporate fraud would automatically become a violation of RICO." *In re ClassicStar Mare Lease Litig*., 727 F.3d 473, 490 (6th Cir. 2013) (citation omitted).

Even when Plaintiff makes allegations about the specific individuals involved, Plaintiff alleges nothing more than the ordinary conduct of those entities recast with an unsupported specter of malfeasance. *See*, *e.g.*, Compl., ¶ 141 ("TSUNG, Chair of Surgery…actively blocked faculty committees from investigating credentialing concerns; halted morbidity and mortality reviews into his co-conspirators; and facilitated sham disciplinary proceedings against whistleblowers.") and ¶ 142 ("False ['Be Safe'] reports were filed strategically to create a pretext

for administrative discipline and to prevent the promotion of whistleblowers and others the Kent Enterprise wished to remove from [UVA].") These are mundane statements with colorful words like "sham" and "pretext" sprinkled in try to concoct a RICO claim. But well-settled law requires the Plaintiffs to plead facts showing participation in the operation and management of the alleged enterprise. *Reves,* 507 U.S. at 179-181.

As the Fourth Circuit has cautioned, due to RICO's heightened penalties, courts should "not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims." *Flip Mortgage Corp. v. McElhone,* 841 F.2d 531, 538 (4th Cir. 1988). Despite the clear requirement, the Complaint fails to plausibly allege, much less establish, a common purpose among the Defendants as evidenced by the failure to detail any formation, management, or operation of the alleged enterprise.

With respect to the "relationships" alleged, Plaintiffs do not lay out the relationship among those associated with the "enterprise." While Plaintiffs provide a visual chart reflecting how Drs. Kent and Horton overlapped at prior medical institutions, Compl. ¶ 95, there are no factual allegations establishing how any of the Defendants collaborated with one another to further the enterprise. The Complaint is rife with innuendo, but no specific allegations are made about how the Medical Leader Defendants or Drs. Ourania Preventza and Kim de la Cruz (the "Surgeon Defendants") worked together or even talked with one another on a regular basis. Indeed, as Drs. Kent and Kibbe operated organizationally multiple levels above the Surgeon Plaintiffs in the UVA organization, they rarely interacted with these surgeons at all, and Dr. Horton, working on the operations and business side, had virtually no interaction with them either. In the Complaint,

mostly the Surgeon Plaintiffs complain about their direct supervisor, Dr. Ourania Preventza, but unhappiness with one's boss does not make a viable RICO case.[7]

As for "longevity," Plaintiffs rely on conclusory allegations that the alleged enterprise is an "ongoing" and "continuing" enterprise. Compl. ¶¶ 38; 93; 274. The allegations concerning this structural element lack any plausibility. Plaintiffs' allegations make Dr. Kent a key player in the alleged enterprise with his name appearing almost three hundred times in the Complaint. Yet, Plaintiffs acknowledge that Dr. Kent left UVA voluntarily in February 2025. Compl. ¶ 259. There is no plausible explanation for how the "enterprise" continues without Dr. Kent.

In sum, the Complaint does not allege sufficient facts to make it "plausible on its face" that Medical Leader Defendants managed and operated an enterprise with a common purpose, relationships among the associates, and longevity separate and apart from the typical and assigned leadership responsibilities of their employment at UVA.

C. The Complaint Fails to Sufficiently Allege At Least Two Predicate Acts of Racketeering Under 18 U.S.C. 1961(1).

The RICO statute relies on "predicate acts" – specific, statutorily enumerated federal or state criminal offenses – to support liability for racketeering activity. Accordingly, a plaintiff bringing a civil RICO action must identify at least two predicate offenses to state a valid claim

[7] Given the sheer size and structure of UVA Health, it is not surprising that senior executives such as Drs. Kent and Kibbe had little to no direct involvement in individual employment disputes or disciplinary matters. UVA Health is a major academic health system employing more than 18,000 individuals, including nearly 1,900 physicians and advanced practice providers. It encompasses multiple hospitals with over 1,000 beds, more than 150 outpatient locations, and an annual surgical volume exceeding 50,000 procedures, in addition to operating a School of Medicine, a School of Nursing, and two physician practice organizations. In this context, it is neither unusual nor suspicious that senior leaders rarely interacted with the individual plaintiffs or were unaware of their complaints. Leadership at this level necessarily involves decisions intended to serve the broader institution, which may not always align with the preferences of every faculty member. Plaintiffs' theory, which hinges on attributing knowledge and retaliatory intent to executives several layers removed from day-to-day clinical operations, lacks the factual specificity and plausibility required to sustain a RICO claim.

for relief. *See Walters v. McMahen*, 684 F.3d 435, 437 (4th Cir. 2012). Plaintiffs generally allege that "repeated predicate acts of fraud and extortion, conducted via mail and wire," form the basis for the RICO claim against the Medical Leader Defendants. Compl. ¶ 40. Plaintiffs later specifically cite the following federal and state offenses as predicate acts of racketeering: (1) mail fraud, in violation of 18 U.S.C. § 1341; (2) wire fraud, in violation of 18 U.S.C. § 1343; (3) health care fraud, in violation of 18 U.S.C. § 1347; (4) extortion, in violation of Virginia Code Annotated §§ 18.2-59 and 18.2-26(3); and (5) obstruction of justice and witness tampering, in violation of 18 U.S.C. § 1512(b)–(d). Yet Plaintiffs offer no factual allegations to specifically identify the wrongful acts leading to these offenses.

1. Plaintiffs' Mail, Wire, and Health Care Fraud Allegations Fail to Meet Rule 9(b)'s Heightened Particularity Requirement

Mail and wire fraud are "indictable" offenses under federal law that can serve as a predicate act for a RICO claim. *See* 18 U.S.C. § 1961(1)(B). Mail and wire fraud require two essential elements: (1) the existence of a scheme to defraud, and (2) the use of mail or wire communications in furtherance of the scheme. *See United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012); *see also United States v. Pasquantino,* 336 F.3d 321, 332 n.5 (4th Cir. 2003) (recognizing that, "[b]ecause the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses"). Health care fraud contains the same elements in the context of a scheme to defraud a health care benefit program.[8] 18 U.S.C. § 1347.

When RICO allegations sound in fraud, the plaintiff must meet the heightened pleading standard under Federal Rule of Civil Procedure 9(b). *Chambers*, 43 F. Supp. 3d at 586 ("[A]llegations of fraud—which Plaintiff raises in both her RICO and state law claims—are

[8] Notably, Plaintiffs admit that health care fraud is not a predicate act under RICO. Compl. ¶ 275 n.3030 ("[H]ealth care fraud under 18 U.S.C. § 1347 is not itself enumerated as a RICO predicate act under 18 U.S.C. § 1961(1)…").

subject to a heightened pleading standard under Rule 9(b).”). Under Rule 9(b), the plaintiffs must “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). These circumstances include “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015) (quotation omitted).

Here, Plaintiffs do not allege fraud by the Medical Leader Defendants with particularity. Indeed, there are no substantive details about the alleged acts undertaken by them to further the “fraudulent scheme to increase revenues and minimize financial losses,” which is a common business strategy. Compl. ¶ 276. Instead, the “fraudulent scheme” is described with vague, generalized allegations against all Defendants rather than the who, when, where, and how specific to each Defendant as required by Rule 9(b). Plaintiffs make no mention of specific dates, specific surgeries, or other details that adequately put Defendants on notice and enable them to defend themselves.

The Complaint contains no allegations tying any of the Medical Leader Defendants to any alleged billing fraud. That the CEO of the health system, the dean of the school of medicine, the leader of the flagship medical center, would be at all involved with the individual coders or physicians that produce these bills is absurd. Moreover, the chair of the department of surgery oversees dozens of surgeons who collectively use hundreds of billing codes. There are no facts in the Complaint to infer that leadership was involved in either of these two isolated instances. Ultimately, the coding for an individual procedure, whether it be as a co-surgeon or for trauma care, is the responsibility of the individual physician that provides that care in conjunction with

the individual coders assigned to those physicians – not a group of leaders that are organizationally uninvolved.[9]

Without any of these specifics, Plaintiffs' fraud allegations fail to meet Rule 9(b)'s particularity requirement.

2. Plaintiffs' Obstruction of Justice and Witness Tampering Allegations Also Fail.

Plaintiffs also aver that the predicate acts that "directly and proximately caused Plaintiffs' injuries" including alleged violations of 18 U.S.C. 1512(b)-(d). Section 1512(b) makes it a crime to "knowingly" intimidate, threaten, corruptly persuade, or engage in misleading conduct against another person with the intent to influence, delay, or prevent testimony in an official proceeding. Similarly, § 1512(c) targets those who "corruptly" alter, destroy, mutilate, or conceal a record to obstruct, influence, or impede an official proceeding. And § 1512(d) makes it a crime to "intentionally" harass another person with the intent to hinder, delay, prevent, or dissuade such person from participating in an official proceeding. Plaintiffs' conclusory references to obstruction of justice and witness tampering under 18 U.S.C. § 1512(b)–(d) do not satisfy the heightened pleading standards required for RICO predicate acts.

To qualify as a predicate act under RICO, a plaintiff must allege facts showing the commission of a statutorily defined criminal offense. Plaintiffs allege that "[a]cting in concert, [the enterprise] engaged in witness tampering and obstruction in violation of 18 U.S.C. 1512(b)-

[9] The Complaint alleges fraud under the purported misuse of modifiers -62 and -82 and Current Procedural Terminology (CPT) code 99291 but provides no further specifics as to the alleged misuse. *See*, *e.g.*, Compl. ¶¶ 143 and 170. Plaintiffs fail to specify for which patients such purported overbilling occurred; which physicians operated on those patients and when; why the listed modifiers were not appropriate in the cases where they were allegedly used; whether the co- and assistant surgical claims were ultimately accepted and paid out by state, federal, or private insurers; what the amount of purported overpayment came to; and whether the Medical Leader Defendants or Surgeon Defendants (collectively, the "Physician Defendants") benefitted financially from the purported overpayment, and by how much.

(d)." Compl. ¶¶ 48-51. While they use the statutory buzzwords of "intimidation" and "harassment," Plaintiffs do not identify any communications, threats, inducements, or attempts to corruptly persuade any witness with the intent to influence testimony or prevent cooperation with a federal proceeding, as required by 18 U.S.C. § 1512. Nor do they specify who was allegedly tampered with, what testimony or evidence was allegedly influenced, or how any Defendant's conduct was "knowingly" or "corruptly" intended to obstruct a federal investigation or judicial proceeding. Section 1512(b)-(d) criminalizes specific conduct taken "with intent to" influence testimony, cause withholding or alteration of evidence for an "official proceeding," or hinder communications to federal law enforcement or a federal judge; mere employment consequences or managerial rhetoric do not bridge that gap.

The Fourth Circuit has routinely held that vague allusions to obstruction or intimidation, without factual detail regarding the underlying conduct, cannot state a viable predicate act under RICO. See *Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, 155 F.3d 500, 507 (4th Cir. 1998) (noting that RICO allegations must meet the heightened pleading standard of Rule 9(b) for fraud-based predicate acts). There are no factual allegations identifying a federal court, grand jury, or federal agency that would qualify as an "official proceeding" under § 1512. Instead, Plaintiffs describe reports to internal systems and committees that affect hospital policies and professional hierarchies, which are not sufficient to demonstrate intent to affect an official proceeding. Plaintiffs' own narrative makes evident that no activity is tied to any "official proceeding." Rather, the allegations concern internal governance, staffing, scheduling, promotions, and credential decisions before, during, and after reports to internal committees. Plaintiffs' generic assertion that certain Defendants engaged in obstruction or tampering is devoid

of any facts to establish the statutory elements of the offense, including intent, knowing action, or a connection to an actual or anticipated federal proceeding.

Plaintiffs allege that they repeatedly reported concerns, escalated their fears to leadership, triggered an external investigation, and signed a public no-confidence letter. Compl. ¶¶ 13-15, 19-27, 32-35, 94, 97-99, 117, 121-124, 140, 146-153, 169, 172, 190-191, 195-196, 204-206, 221, 246-253, 258-264. These allegations undercut any claim that the purported "harassment" or "intimidation" thereby hindered or prevented any Surgeon Plaintiffs' reporting or participation in any investigation. To the extent Plaintiffs claim to have disclosed information to federal law enforcement officials, they do not allege that Drs. Kent, Kibbe, Horton, or Tsung were aware of such disclosures to officials before the alleged acts of obstruction and tampering.

Without factual allegations identifying specific acts, persons involved, timing, or intent to obstruct justice within the meaning of the statute, Plaintiffs have failed to plead any of the essential elements of a violation of § 1512(b)-(d) and thus, they have failed to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Accordingly, these allegations cannot support RICO liability and must be dismissed.

3. Plaintiffs' Extortion Allegations Also Fail.

Finally, Plaintiffs aver that the predicate acts that "directly and proximately caused Plaintiffs' injuries" are the alleged violations of Virginia Code Annotated §§ 18.2-59 and 18.2-26(3). Plaintiffs' reliance on Virginia Code §§ 18.2-59 and 18.2-26(3) as predicate acts of racketeering likewise fails to support their civil RICO claim. To state a viable claim for extortion under § 18.2-59, a plaintiff must plead that a defendant maliciously threatened injury to the reputation, person, or property of another, with the intent to extort money, property, or a pecuniary benefit. Additionally, to invoke § 18.2-26(3) for attempted extortion, the complaint must set forth

facts demonstrating a specific intent to commit extortion and an overt act in furtherance of that attempt.

Here, Plaintiffs do not plead a single instance in which any Defendant explicitly or implicitly threatened reputational or physical harm for the purpose of securing money, property, or any other form of value. For example:

- Plaintiffs do not identify who made any specific threat, when it was made, or to whom.
- There is no allegation that any Defendant demanded money or property from Plaintiffs, or suggested any adverse consequences unless such a demand was met.
- Plaintiffs do not allege that they transferred anything of value under duress, nor that Defendants attempted to induce them to do so.
- There is no factual link between the alleged "threats" and the statutory requirement that such threats were made with extortionate intent for personal or institutional gain.

At most, Plaintiffs describe workplace disputes, internal performance criticisms, and negative employment decisions—none of which resemble criminal extortion as defined by Virginia law. Courts routinely reject efforts to transform employment-related grievances into criminal extortion without concrete factual support. *See*, *e.g.*, *United States v. Jackson*, 180 F.3d 55, 70 (2d Cir. 1999) (rejecting claim that internal pressure or reputational damage amounts to extortion absent a demand for something of value under threat).

Even assuming arguendo that Defendants made reputationally harmful statements about Plaintiffs, which is denied, Plaintiffs allege no circumstances in which those statements were linked to a demand for money or property. Nor do Plaintiffs describe any overt act intended to advance an extortionate scheme, as required to plead a criminal attempt under § 18.2-26(3).

In short, Plaintiffs' vague references to "retaliation," "bullying," or professional marginalization lack the specificity and factual substance required to plead extortion. Because Plaintiffs do not articulate any actionable extortion or attempted extortion by any Defendant, these allegations fail as a matter of law and cannot support a RICO predicate act.

D. The Complaint Fails to Sufficiently Allege a "Pattern" of "Racketeering Activity."

Plaintiffs bringing a civil RICO claim "must adequately plead at least two predicate acts of racketeering that form a 'pattern of racketeering'" under 18 U.S.C. § 1961. *Al–Abood v. El–Shamari,* 217 F.3d 225, 238 (4th Cir. 2000); s*ee also* 18 U.S.C. § 1961(5). "Racketeering activity" is defined in § 1961(1) by a categorical list of felonies that includes mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and tampering with an informant (18 U.S.C. § 1512), among many others. The Fourth Circuit is "cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice." *Al-Abood*, 217 F.3d at 238 (quotation omitted). "This caution is designed to preserve a distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity." *Id.*

1. Plaintiffs Fail to Allege "Related" and "Continuing" Predicate Acts.

A pattern of racketeering requires at least two predicate acts. *See* 18 U.S.C. § 1961(5). However, simply proving two or more predicate acts is insufficient for Plaintiffs to succeed; instead, Plaintiffs must also show that the predicate acts are related and that they constitute or pose a threat of continued criminal activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 237-39 (1989). The pattern requirement has two elements: (1) relatedness – "the predicate acts must be related," and (2) continuity – they "must be part of a continuous criminal endeavor." *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987). In relatedness or continuity,

the Fourth Circuit takes a "'commonsensical, fact-specific approach to the pattern requirement.'" *Lyon v. Campbell*, 28 F.3d 1210 (4th Cir. 1994) (quoting *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989)). The pattern requirement "acts to ensure that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions" and serves to weed out the allegations of wrongdoing that do not amount to "widespread fraud." *Menasco*, 886 F.2d at 683. RICO "is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity." *U.S. Airline Pilots Ass'n v. Awappa, LLC,* 615 F.3d 312, 317 (4th Cir. 2010) (quotation omitted).

Here, Plaintiffs' allegations, even if taken as true, describe isolated personnel and administrative decisions, not organized crime. The supposed predicate acts—such as negative performance evaluations, internal investigations, and the handling of patient complaints—are scattered instances of workplace supervision and institutional governance. For example:

- Plaintiffs allege that Dr. Kibbe sent a letter in October 2023 criticizing Drs. Yount and Kern, which they claim was defamatory and retaliatory (Compl. ¶¶ 186, 324), but this is a single, discrete event, not part of a larger fraudulent scheme.
- Plaintiffs also claim that their administrative duties were changed or curtailed and that they were passed over for certain leadership roles (*id.* ¶¶ 152–153, 168–171), yet these are one-off employment decisions, not evidence of repeated or continuing misconduct.
- There are references to individual internal investigations or complaints—such as the examination of surgical complications or mortality rates (*id.* ¶¶ 121–127)—but these are professional accountability measures, not criminal conduct.

- The alleged acts are largely confined to a short time frame spanning late 2022 to mid-2023, with no indication that the conduct continues or poses a future threat of criminal activity.

Critically, there is no allegation that any Defendant benefited financially from these acts or engaged in them as part of an ongoing criminal enterprise. Plaintiffs do not allege that similar actions were taken against other individuals outside the Surgeon Plaintiffs, nor do they describe any long-running scheme that could satisfy the continuity prong. At most, the Complaint reflects workplace discord and isolated professional grievances—not a "continuous criminal endeavor."

The pattern requirement is meant to cabin RICO's reach and avoid converting routine disputes into federal racketeering claims. As the Fourth Circuit has stated, RICO "does not cover all instances of wrongdoing" but targets "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *Menasco*, 886 F.2d at 683. Plaintiffs' failure to plead both relatedness and continuity is fatal to their RICO claim.

E. Plaintiffs Fail to Plausibly Plead Either a Cognizable Injury, or that Such Injury was Proximately Caused by the Alleged RICO Violation.

To plead an injury "by reason of" predicate acts of mail and wire fraud, "a plaintiff must *plausibly* allege both that he detrimentally relied in some way on the fraudulent mailing or wire and that the mailing or wire was a proximate cause of the alleged injury to his business or property." *American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 233 (4th Cir. 2004) (quoting *Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 336 (4th Cir. 1996)) (internal quotations marks omitted) (emphasis in original). "An allegation of personal injury and pecuniary losses occurring therefrom are not sufficient to meet the statutory requirement of injury to 'business or property.'" *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) (affirming dismissal of the complaint and its "absurd" claim of a RICO violation and awarding sanctions

against the plaintiff) (quotation marks and citations omitted). Moreover, "[i]njury to… 'intangible property interests' is not injury that may support standing to bring RICO claims." *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 730 (8th Cir. 2004) (harm to bank's position as a bankruptcy creditor was not an actionable RICO injury).

Plaintiffs' Complaint contains no allegations of harm to a proprietary interest. Instead, Plaintiffs describe a variety of workplace and reputational harms—removal from administrative posts, alleged denials of promotions, exclusion from internal communications, critical internal evaluations, changes to their job responsibilities, and, in some cases, resignations from employment—which they attribute to Defendants' conduct. They also allege reputational damage, embarrassment, and emotional distress arising from statements made during internal investigations or in an October 2023 letter that was sent confidentially and directly to these individuals with a copy to those in attendance at the meeting and HR personnel.

These allegations, even if taken as true, amount to personal and professional grievances, not business or property injuries within the meaning of the RICO statute. Plaintiffs do not allege that they owned private businesses or medical practices that were harmed, nor do they identify any contractual rights, tangible assets, or proprietary interests that were impaired. Courts have uniformly rejected efforts to bootstrap personal or reputational injuries into RICO standing, even when they result in lost wages or career setbacks. *See*, *e.g.*, *Doe v. Roe*, 958 F.2d 763, 770 (7th Cir. 1992) (holding that reputational harm and loss of employment do not constitute cognizable RICO injuries).

Because Plaintiffs have not plausibly alleged an injury of their "business or property" as required under 18 U.S.C. § 1964(c), their RICO claims should be dismissed.

IV. PLAINTIFFS FAIL TO STATE A VALID RETALIATION CLAIM UNDER THE FALSE CLAIMS ACT AND VIRGINIA RETALIATION STATUTES AND THUS COUNTS 3, 4, AND 5 MUST BE DISMISSED.

A. Plaintiffs Fail to Plead a Valid Retaliation Claim Under the False Claims Act.

To plead a viable retaliation claim under the False Claims Act (FCA), a plaintiff must plausibly allege that: (1) they engaged in protected activity, (2) their employer knew about that protected activity, and (3) the employer took adverse action against them because of it. *See United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190, 200 (4th Cir. 2018). The Complaint fails on each prong.

First, Plaintiffs do not allege with specificity that they engaged in protected activity within the meaning of the FCA. Vague references to "raising concerns" or "speaking up" about alleged conduct are insufficient. The Complaint lacks any particularized allegation that any Plaintiff took action "in furtherance of" a potential or actual FCA claim or that they investigated matters in a way that would give rise to such a claim.

Second, there are no well-pleaded facts indicating that any of the named Defendants—Drs. Kent, Kibbe, Tsung, or Horton—knew that Plaintiffs were engaged in protected whistleblowing activity. Knowledge is a required element of an FCA retaliation claim, and here, Plaintiffs merely speculate that Defendants must have known, without identifying who allegedly knew, when they knew it, or what specific activity they supposedly knew about.

Third, the Complaint does not identify any qualifying adverse employment action taken because of alleged whistleblowing. None of the Plaintiffs were terminated. Instead, the allegations include resignations, modifications to responsibilities, and denial of promotions—none of which are *per se* adverse actions under the FCA.[10] Courts have consistently held that such changes in

[10] Plaintiff Dr. John Kern still works at UVA as a cardiac surgeon.

employment status must be objectively material and causally connected to protected activity, and Plaintiffs fail to plead either.

Accordingly, Count 3 must be dismissed.

B. Plaintiffs Fail to Plead a Retaliation Claim under VFATA.

Count 4 of the Complaint asserts a retaliation claim under the Virginia Fraud Against Taxpayers Act (VFATA), Va. Code Ann. § 8.01-216.8. Because VFATA is patterned directly after the federal False Claims Act, courts apply the same substantive and pleading standards to retaliation claims brought under it. As with the federal statute, a plaintiff must allege facts showing that they engaged in protected activity, that the employer was aware of this protected activity, and that the employer took adverse action against them because of it. *United States ex rel. Oldham v. Centra Health, Inc.*, 548 F. Supp. 3d 568, 575 (W.D. Va. 2021) (*citing United States ex rel. Grant v. United Airlines, Inc.*, 912 F.3d 190, 200 (4th Cir. 2018)). Both the FCA and VFATA require plaintiffs to plead and prove but-for causation. *Id.* at 577 (*citing United States ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 177 (4th Cir. 2018)).

Plaintiffs fail to meet this standard. The Complaint is devoid of factual allegations demonstrating that any Plaintiff engaged in protected activity within the meaning of VFATA. Instead, it relies on broad and conclusory statements about alleged workplace concerns without identifying specific fraudulent conduct reported or investigated under the statute. Likewise, Plaintiffs do not allege that any Defendant had knowledge of any protected conduct, nor do they allege facts that would plausibly support an inference that any adverse action—assuming one occurred—was caused by or connected to that activity.

The VFATA retaliation claim rests entirely on generalized grievances and speculative conclusions. Courts routinely dismiss such threadbare allegations at the pleading stage, and this Court should do the same here. Count 4 must be dismissed.

C. Plaintiffs Failed to Plead a Valid Retaliation Claim under FAWPA.

Virginia's Fraud and Abuse Whistle Blower Protection Act (FAWPA) provides that "[n]o employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower whether acting on his own or through a person acting on his behalf or under his direction." Va. Code. § 2.2-3011(A). An "employee" is defined as "any person who is regularly employed full time on either a salaried or wage basis…whose compensation is payable…in whole or in part, by a governmental agency." *Id.* § 2.2-3010 (emphasis added). An "employer" is defined as "a person supervising one or more employees…a superior of that supervisor, or an agent of the governmental agency." *Id.* The term "governmental agency" refers to "instrumentalit[ies] of state government" and some local governmental authorities. *Id.* § 2.2-3010 (emphasis added).

The purpose of the FAWPA is to allow "citizens of the Commonwealth and employees of governmental agencies [to] be freely able to report instances of wrongdoing or abuse committed by governmental agencies or independent contractors of governmental agencies." Va. Code. Ann. § 2.2-3009 (emphasis added). The purpose of the FAWPA is not, however, to allow a plaintiff to plead a backdoor wrongful termination claim by characterizing unrelated complaints to supervisors as whistleblowing activity.

Notably, the FAWPA only applies to government agencies or persons that supervise people compensated by a government agency. *See* Va. Code § 2.2-3010; *see also Silverman v. Town of Blackstone*, 843 F. Supp. 2d 624, 627 (E.D. Va. 2011) ("Clearly, the FAWBPA only provides protection to employees of state agencies."); *Richardson v. Prince William Cnty.*, 2018 WL 548666, at *3 (E.D. Va. Jan. 24, 2018) (holding that plaintiff was not covered by FAWPA because they were not compensated by a government agency). The Complaint does not allege that the Surgeon Plaintiffs were paid by a government agency. The Complaint does not allege that any Defendants are a government agency. Instead, the Complaint simply concludes that, "Plaintiffs

have been subjected to retaliatory actions for conduct as whistleblowers, which is protected under Virginia Code § 2.2-3011." Compl. ¶ 308. The Surgeon Plaintiffs have not alleged that they are covered "employees" as defined by FAWPA. Because the Complaint contains no allegations establishing a "governmental agency," the Surgeon Plaintiffs have also not alleged that Drs. Kent, Kibbe, Horton, or Tsung are "employers" as defined by FAWPA.

Further, "FAWPA defines 'Whistle Blower' as 'an employee' who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of 'wrongdoing' to one of the employee's supervisors or an appropriate authority." *Redwine v. Rector & Visitors of Univ. of Virginia*, 2025 WL 3296298, at *4 (W.D. Va. Nov. 26, 2025) (quoting Va. Code § 2.2-3010). Yet, Plaintiffs provide neither factual allegations concerning what "good faith reports" were made nor that the disclosure were made to an "appropriate authority" as contemplated under FAWPA. Plaintiffs' conclusory statements concerning "good faith" and "misuse of federal and state funds" are not well-pled factual allegations that identify wrongdoing, good faith reports, the appropriate authority, or how these acts qualify under the FAWPA.

Beyond the statutory definitions, a plaintiff must allege that his employer "discharged, threatened, discriminated, or retaliated against him for being a whistle blower." *Morrison v. George Mason Univ.*, 2025 WL 2832119, at *4 (Va. Ct. App. Oct. 7, 2025). Here, Plaintiffs provide no factual allegations supporting constructive discharge based on their alleged whistleblower status. Pleading causation demands more than labels and conclusions. *West v. City of Charlottesville*, 2025 WL 3143464, at *7 (W.D. Va. Nov. 10, 2025) (dismissing FAWPA claim where plaintiff failed to allege a single fact supporting an inference that he was terminated because of his whistleblowing activity, or that the complaints themselves were at all a motivating factor in his discharge). Even accepting the individual narratives of each Plaintiff as true, the

Complaint does not allege any facts that adverse actions were imposed on the Plaintiffs by Drs. Kent, Kibbe, Horton, and Tsung because of a good faith report on alleged wrongdoing to the appropriate authority. Rather, Plaintiffs rely on naked assertations of retaliation without factual basis. *See, e.g.,* Compl. ¶ 312 (stating "In retaliation for their protected disclosures…"). There are no facts tying any specific protected report to any specific adverse action by a specific individual that qualifies under FAWPA.

For these reasons, Plaintiffs' claim of retaliation under FAWPA fail as a matter of law.

V. THE COMPLAINT DOES NOT STATE A CLAIM OF NEGLIGENT HIRING AND RETENTION AGAINST THE MEDICAL LEADER DEFENDANTS IN COUNT 6, BUT EVEN IF IT DID, THAT CLAIM WOULD FAIL.

Negligent hiring and retention claims under Virginia law generally requires a plaintiff to allege a physical injury. *See Wolf v. Fauquier Cty. Bd. of Supervisors*, 555 F.3d 311 (4th Cir. 2009); *Ingleson v. Burlington Med. Supplies, Inc.*, 141 F. Supp. 3d 579 (E.D. Va. 2015). Here, only the Surgeon Plaintiffs are named in Count 6, and no allegation of physical injuries to them are included in this Count. Compl. ¶ 315-321. Since Plaintiffs only allege "reputational damage, emotional distress, lost income," and other economic harms, their claims are insufficient to support Count 6.

Furthermore, Plaintiffs' negligent hiring and negligent retention claims are asserted solely against the Entity Defendants. *See* Compl. ¶¶ 315-321. The Complaint specifically pleads that "the Entity Defendants and their governing officials were responsible for hiring and supervising" the relevant physicians and that the failure to exercise reasonable care in both the initial selection and continued retention of certain physicians caused the alleged harms. *Id.* Consistent with the nature of an employer-directed tort, Plaintiffs do not state a negligent hiring or negligent retention

claim against Drs. Kent, Kibbe, Horton, or Tsung in their personal capacities.[11] *See Le Doux v. W. Express, Inc.*, 126 F.4th 978, 988 (4th Cir. 2025) ("The tort of negligent hiring imposes direct liability on the employer…"); *Se. Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 260 (1999) (explaining that the tort of negligent hiring is based on the employer's conduct). Instead, Plaintiffs attribute the hiring and retention responsibilities to the Entity Defendants alone.[12]

VI. PLAINTIFFS FAIL TO STATE A VALID CLAIM FOR DEFAMATION, LIBEL, AND SLANDER AND THUS COUNT 7 MUST BE DISMISSED.

Finally, Plaintiffs' claims for defamation, libel, and slander fail and must be dismissed in their entirety. In Count 7, Plaintiffs Dr. Yount and Dr. Kern allege the Dr. Kibbe's statements, in an October 2023 letter placed in each their human resources files, stated that "your actions represented a blatant act of defiance, insubordination, disrespectful behavior, unprofessional behavior, and a lack of accountability to authority. These actions are also concerning with respect to patient care, as oversight of the clinical mission is the responsibility of the Chief and the Chair. With you demonstrating such blatant defiance and insubordination against both your Chief and Chair, I have concerns that you may not follow requests that could impact the care of patients." Compl. ¶ 325. Count 7 is therefore directed only to Dr. Kibbe, and thus it fails as to Drs. Kent, Tsung, or Horton, for lack of any alleged defamatory, libelous, or slanderous statements.

[11] Plaintiffs may attempt in a future pleading to allege that the Medical Leader and Physician Defendants acted in their personal, not official, capacities—but labeling such actions as "personal" does not make it so. The factual allegations make clear that every action taken by an Individual Defendant was clearly and completely within their official capacities as employees of UVA.

[12] To the extent that the Court disagrees, however, Drs. Kent, Kibbe, Horton, and Tsung adopt and incorporate by reference any arguments asserted in the UVA and UPG Entity Defendants' Motions to Dismiss and Memorandums in Support, seeking to dismiss Count 6, to the extent those arguments are applicable here.

As to the lone statement attributed to Dr. Kibbe, that statement is protected by qualified privilege and is non-actionable opinion under Virginia law, and in any event, Count 7 is also time-barred under the one-year statute of limitations.

A. Defamation, Libel, and Slander Claims Under Virginia Law

In asserting a claim of defamation under Virginia law, Plaintiffs must plead facts showing "(1) publication of (2) an actionable statement with (3) requisite intent." *Nestler v. Scarabelli*, 77 Va. App. 440, 453 (2023) (quoting *Jordan v. Kollman*, 269 Va. 569, 575 (2005)); *see also Theologis v. Weiler*, 76 Va. App. 596, 605 (2023) ("Not all false and disparaging statements about a person are defamatory."). Under Virginia law, a false statement is not, by itself, "actionable." *Zarrelli v. City of Norfolk*, 2014 WL 2860295, at *9 (E.D. Va. June 23, 2014). Rather, the statement must not only be a false statement of *fact* – not opinion – but it must also "make the plaintiff appear odious, infamous, or ridiculous," since "[m]erely offensive or defamatory statements do not suffice." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993). Plaintiffs must show that the defendant "published, with malintent, a false statement containing defamatory sting" and may not rely on "mere conclusory allegations." *Nestler*, 77 VA. App. at 455. Whether a statement is actionable as defamatory is a question of law that the trial court must resolve. *Chapin*, 993 F.2d at 1092.

B. Statute of Limitations Bars Any Defamation Claim

Virginia's one-year statute of limitations operates to bar any defamation claim based on the alleged defamatory statements contained in Dr. Kibbe's October 2023 letter. Because Plaintiffs filed this action on October 3, 2025, a claim based on any defamatory statements made more than one year prior to this date are barred by Virginia's one-year statute of limitations. Va. Code Ann. § 8.01-247.1. In Virginia, a tortious cause of action arises on the date the injury is sustained, or, in the case of a defamation cause of action, on the date of publication. *See* Va. Code.

§ 8.01–230; *Jordan v. Shands*, 255 Va. 492, 498 (1998) ("Any cause of action that the plaintiff may have had for defamation against any of the defendants accrued on…the date she alleges…that the defamatory acts occurred."). It follows, therefore, that Plaintiffs' claims based on the statements in the October 2023 letter are barred as they were made more than one year – indeed, approximately two years – prior to the filing of this action.

To the extent Plaintiffs attempt to avoid the limitations bar by invoking a republication theory, their claim is unavailing. Virginia adheres to the *single publication rule*, under which a defamation claim accrues only once—upon the original publication of the allegedly defamatory material—and not upon each subsequent communication or "republication" of the same content. In *Dragulescu v. Virginia Union University*, the Eastern District of Virginia explained that "[u]nder Virginia law, 'the single publication rule provides that any form of mass communication or aggregate publication…is a single communication and can give rise to only one action for libel.'" 223 F. Supp. 3d 499, 508 (E.D. Va. 2016) (quoting *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988)). "Subsequent distributions of the original publication do not restart the statute of limitations period unless the material is republished in a manner that is intended to and actually reaches a new audience."

Here, Plaintiffs do not allege that Dr. Kibbe's October 2023 letter was republished to a new audience or altered in substance after its initial internal and confidential distribution. Absent a materially distinct republication—such as issuing a revised version or intentionally disseminating the letter to new recipients—the statute of limitations began to run on the date of the original communication. Accordingly, the defamation claim is barred under Virginia's one-year limitations period and must be dismissed.

C. Qualified Privilege Applies to the Alleged Defamatory Statements.

In any event, while Dr. Kibbe disputes that the alleged statements are defamatory, the statements are nevertheless privileged and inactionable. As alleged by the Plaintiffs, the statement at issue was made during the course of an internal investigation and was not disseminated beyond the individuals necessary to that process outside the Entity Defendants. *See* Compl. ¶ 324. The qualified privilege "extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation." *Isle of Wight Cty. v. Nogiec*, 281 Va. 140, 152 (2011) (citing *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 590 (1961)).

Courts have routinely applied this privilege in the context of employee discharge or disciplinary matters holding that statements made during those internal proceedings and discussions are privileged. *See Larimore v. Blaylock*, 259 Va. 568, 572 (2000) (collecting cases). The protection of a qualified privilege is afforded in these contexts because:

> [p]ublic policy and the interest of society demand that in cases such as this an employer, or his proper representatives, be permitted to discuss freely with an employee, or his chosen representatives, charges affecting his employment which have been made against the employee to the employer. There is a privilege on such occasions and a communication made under such circumstances, within the scope of the privilege, without malice in fact, is not actionable, even though the imputation be false, or founded upon erroneous information. The question is not as to the truth or falsity of the communication, or whether the action taken by the defendant with reference thereto or based thereon was right or wrong, but whether the defendant in making the publication acted in good faith or was inspired by malice.

Larimore, 259 Va. at 573 (quoting *Chesapeake Ferry Co. v. Hudgins*, 155 Va. 874, 906-907 (1931)). As the Supreme Court of Virginia has established, "employment matters are occasions of privilege in which the absence of malice is presumed." *Larimore*, 259 Va. at 574.

Here, the alleged statements were made within a corporate entity regarding employee performance where the people who received those statements had some duty or interest in the relevant disciplinary action. Dr. Kibbe, in particular, had a duty to generally inform management of improper or concerning actions regarding lack of professionalism and corresponding risk to patients by Drs. Yount and Kern, and Defendants, on the whole, had the duty to investigate and make decisions regarding continued employment of Drs. Yount and Kern. This is the typical intra-organizational employment scenario in which Virginia courts apply the qualified privilege. *See, e.g., Blaylock*, 528 S.E.2d at 122 ("[E]mployment matters are occasions of privilege in which the absence of malice is presumed."); *Cashion v. Smith*, 286 Va. 327, 337-339 (2013) (finding that statements made between doctors in an operating room concerning patient care were qualifiedly privileged); *Southeastern Tidewater Opp. Project, Inc. v. Bade*, 246 Va. 273, 274 (1993) (holding that qualified privilege attached to a termination letter of an employee); *Oberbroeckling v. Lyle*, 234 Va. 373, 381 (1987) (evaluating whether malice was sufficiently demonstrated to rebut qualified privilege asserted regarding a letter accusing an employee of mismanagement of funds); *Chalkley v. Atlantic Coast Line R.R. Co.*, 150 Va. 301, 335 (1928) (holding that a defamatory statement made to a fellow employee-typist was qualifiedly privileged).

D. Plaintiffs' Fail to Allege Any Actionable Statements.

As noted above, "[t]o be actionable, the statement must be both false and defamatory." *Jordan*, 269 Va. at 575; *see also Schaecher v. Bouffault*, 290 Va. 83, 91 (2015). "Defamatory words are those 'tend[ing] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Schaecher*, 290 Va. at 91-92 (quoting Restatement (Second) of Torts § 559). "A false statement must have the requisite defamatory 'sting' to one's reputation." *Id.* at 92. "Characterizing the level of harm to one's reputation required for defamatory 'sting,'" the Supreme Court of Virginia has "stated

that defamatory language 'tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame, or disgrace upon him, or which tends to hold him up to scorn, ridicule, or contempt, or which is calculated to render him infamous, odious, or ridiculous.'" *Id.* (quoting *Moss v. Harwood*, 102 Va. 386, 392 (1904)).

It is well-settled that expressions of pure *opinion* are not actionable as defamation. *Lewis v. Kei*, 281 Va. 715, 725 (2011). "When a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion." *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46 (2009). In determining whether a statement is one of fact or opinion, the court must consider the statement as a whole, rather than isolating one portion of the statement from another. *Id.* Here, Dr. Kibbe's statements are clearly statements of opinion. The statement implies that a discussion, not captured within the Complaint, occurred between Dr. Kibbe and Drs. Yount and Kern respectively. Compl. ¶ 327. Based on that discussion, Dr. Kibbe expressed personal concern over the Plaintiffs' professionalism and ability to fulfill their duties to patients. *Id.* These are subjective statements and depend largely on Dr. Kibbe's perspective – they are not statements capable of being proven true or false. As such, these statements are mere opinion and not actionable.

VII. AS A SEPARATE BASIS FOR DISMISSAL, THE ELEVENTH AMENDMENT BARS ALL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES.

To the extent Plaintiffs assert claims against the Medical Leader Defendants, Drs. Kent, Kibbe, Horton, and Tsung, in their official capacities as agents of the UVA, those claims must be dismissed under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The Eleventh Amendment to the United States Constitution bars suits in federal court against a state or its instrumentalities unless the state has consented or Congress has validly abrogated immunity. Neither exception applies here.

A. Sovereign Immunity Bars the RICO Claims Against the Individual Defendants in Their Official Capacities.

The Fourth Circuit and courts within this district have repeatedly held that Congress did not abrogate sovereign immunity in enacting the RICO statute. See *Conte v. Virginia*, , 2023 WL 3121220, at *6 (W.D. Va. Apr. 27, 2023) ("RICO contains no unequivocal textual waiver of state sovereign immunity."). Accordingly, RICO claims may not be brought against a state entity or its officials acting in their official capacities. See *Wilson v. Univ. of Va.*, 663 F. Supp. 1089, 1092 (W.D. Va. 1987) (holding UVA to be an arm of the state entitled to Eleventh Amendment immunity).

The Complaint concedes that Drs. Kent, Kibbe, Horton, and Tsung held senior leadership roles within UVA Health and the UVA School of Medicine, and that all allegedly wrongful conduct arose from internal decision-making within those roles. Compl. ¶¶ 6-7; 9-10; 16-17; 29; 44-45; 66-67; 71-72; 76-77; 81-82; 93-95; 100; 102-106; 109; 111-112; 142; 167-169; 175; 187-190; 196; 198-201; 205-206; 212-218; 223-224; 231; 235; 245; 263; 265. Plaintiffs do not allege that these individuals acted in a personal capacity or outside the scope of their employment. The RICO claims (Counts I and II), therefore, amount to claims against the Commonwealth of Virginia itself and are barred.

B. Sovereign Immunity Also Bars the Non-RICO Claims Against the Individual Defendants in Their Official Capacities.

Sovereign immunity similarly forecloses Plaintiffs' state and federal non-RICO claims to the extent they are brought against the Individual Defendants in their official capacities. This includes the claims for FCA retaliation (Count 3), VFATA and FAWPA retaliation (Counts 4 and 5), negligent hiring and supervision (Count 6), and defamation-related torts (Count 7).

The Eleventh Amendment bars both federal and state law claims for retrospective relief brought against state officials in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159,

169 (1985); *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1987). Plaintiffs seek damages and declaratory relief against individuals solely for actions taken in the course and scope of their UVA responsibilities. As such, the Eleventh Amendment applies to bar all claims that are effectively directed at the Commonwealth.

Importantly, courts within this Circuit have also held that the Eleventh Amendment bars pendent state law claims—including tort and employment-based claims—where the state or its instrumentalities are defendants. *See Weihua Huang v. Rector & Visitors of Univ. of Va.*, No. 3:11-cv-00050, 2011 WL 6329755, at *12 (W.D. Va. Dec. 19, 2011) ("The Eleventh Amendment to the Constitution trumps § 1367(a); it bars not just federal claims asserted against a state in federal court but pendent state law claims as well.").

Because Plaintiffs' allegations focus entirely on UVA's institutional operations and conduct undertaken by Defendants in their official roles, sovereign immunity applies to bar each of these claims.

VIII. THE INDIVIDUAL DEFENDANTS ARE ALSO ENTITLED TO QUALIFIED IMMUNITY.

Finally, even if the Court were to conclude that Plaintiffs have adequately alleged claims against Drs. Kent, Kibbe, Horton, and Tsung in their individual capacities (which they have not), those claims must be still dismissed on the basis of qualified immunity. Under well-established law, government officials performing discretionary functions are immune from civil liability for federal claims so long as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

A. Plaintiffs Do Not Allege the Violation of Any Clearly Established Right.

Plaintiffs' claims—spanning alleged retaliation, negligent hiring, and workplace speech—fail to identify any clearly established constitutional right that was violated by the individual defendants. The Complaint does not allege that Drs. Kent, Kibbe, Horton, or Tsung personally took adverse action in response to protected whistleblowing activity, nor does it allege that they engaged in constitutionally prohibited conduct. At most, Plaintiffs complain about internal leadership decisions and professional disagreements, none of which rise to the level of a constitutional deprivation.

Notably, courts have held that employment-related decisions—such as modifications of responsibilities, denials of promotion, or even departures by resignation—do not, without more, support a claim of constitutional retaliation. *See Ridpath v. Bd. of Governors*, 447 F.3d 292, 316–17 (4th Cir. 2006) ("[T]he doctrine of qualified immunity protects public officials from liability for civil damages insofar as their conduct does not violate clearly established rights.").

B. The Individual Defendants Acted Within the Scope of Their Professional Discretion.

Each of the individual defendants held a high-level leadership or administrative role at UVA Health or the School of Medicine. The allegations attributed to them—such as participating in employment evaluations, expressing concerns about colleagues' clinical or academic performance, or overseeing institutional responses to personnel issues—are paradigmatic examples of discretionary functions within a university medical system. Plaintiffs have not and cannot allege that these officials acted outside the scope of their authority or violated clearly established law in doing so. Accordingly, qualified immunity bars all claims for monetary damages brought against them in their individual capacities.

CONCLUSION

For all the reasons stated herein, this Court should grant the motion to dismiss all counts filed against Defendants K. Craig Kent, Melina Kibbe, Wendy Horton, and Allan Tsung.

Respectfully submitted this 9th day of January 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2026, I filed a true and correct copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send an electronic notice of such filing to all counsel of record.

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