1996 WL 383135
United States District Court, S.D. New York.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, and **Merrill Lynch** & Co., Inc., Plaintiffs,
v.
Albert YOUNG, John Serino, Robert Fraser, Werner Krebs, Inc., Benjamin Kopf, Werner Krebs, Valerio Bonanno, Alan Silverman, Susan Lamonica, Alan Luchnick, T & T Consultants, Ltd., Commercial Movers, Inc., State Wide Enterprises, Inc., Supreme Coach Corp., Turn Key Operation Corp., TKO Inc., 11th Street Corporation, **Royal**–Prudential Industries, Inc., 1029 East Main Street Partnership, James F. Volpe Electrical Contracting Corp., and Albert Young, Inc., Defendants.

No. 91 Civ. 2923 (CSH).
|
July 09, 1996.

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge:

***1** This action alleging civil liability under the Racketeer Influenced and Corrupt Organizations Act ("**RICO**"), 18 U.S.C. §§ 1961–1963, 1964(c), to which state law claims are appended, has its genesis in an alleged bribery and kickback scheme lasting from approximately 1986 through 1988 involving three individuals employed by plaintiffs **Merrill Lynch**, Pierce, Fenner & Smith and **Merrill Lynch** & Co., Inc. (collectively "**Merrill Lynch**") and various vendors of building services to **Merrill Lynch** during the 1980's.

This Court issued a Memorandum Opinion and Order as to this case on March 15, 1994 (hereinafter "Slip Op."), familiarity with which is assumed for both the factual and legal background of this Opinion. The March 15 Opinion granted in part and denied in part numerous defense motions to dismiss the Complaint; it also granted plaintiffs leave to replead all dismissed claims. Plaintiffs subsequently filed an Amended Complaint, which numerous defendants once again attack with motions to dismiss. This Opinion resolves those motions.

DISCUSSION

I. *Law of the Case*

As noted, this Court has already made rulings in this case. Unless I am convinced that a portion of that ruling was in error, I will adhere to it under the law of the case doctrine.

"Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction § 4478 at 788 (1981). The law of the case doctrine posits that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" unless the decision "is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983). *See Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir.1990) (court adheres to prior decision unless there are "cogent" or "compelling" reasons to do otherwise). Law of the case doctrine is not binding; it "directs a court's discretion, it does not limit the tribunal's power." *Id.*

The pending motions to dismiss challenge the Amended Complaint filed by plaintiffs after this Court's March 15, 1994 ruling. Certain allegations in the Amended Complaint are unchanged from the prior Complaint; others are entirely or partially new. Unless defendants can provide compelling arguments to the contrary, I will deny any motion to dismiss an unchanged allegation which I previously deemed adequate. As to any allegation that I previously ruled to be inadequate, I examine the Amended Complaint to determine whether plaintiffs have cured the former deficiencies.

II. *ROBERT FRASER*

Robert Fraser moves to dismiss the plaintiffs' mail fraud and commercial bribing allegations against him.

A. *Mail Fraud*

Plaintiffs' Amended Complaint alleges that Fraser committed mail fraud in violation of 18 U.S.C. § 1341. ¶¶ 128–29.

***2** As I noted in my prior Opinion, to plead predicate acts of mail or wire fraud, plaintiff must allege that (1) the defendant devised a scheme to defraud; (2) the defendant used the United States mails or interstate wires to further the fraudulent scheme; and (3) the defendant did so with intent to defraud. *See United States v. Wallach*, 935 F.2d 445, 461 (2d Cir.1991); *Qantel Corp. v. Niemuller*, 771 F.Supp. 1361, 1369 (S.D.N.Y.1991). Defendant Fraser argues that plaintiffs' mail fraud claim fails to satisfy Rule 9(b) particularity requirements. I adhere to the legal analysis of this question in my March 15 Opinion:

> "[W]here there are multiple defendants, plaintiffs must identify with particularity the roles of the individual defendants in the mail fraud." *Landy v. Mitchell Petroleum Technology Corp.*, 734 F.Supp. 608, 623 (S.D.N.Y.1990); *see also Mills v. Polar Molecular, supra; Beauford v. Helmsley*, 740 F.Supp. 201, 213 (S.D.N.Y.1990) (**RICO** claim dismissed where fraudulent actions attributed to defendants only collectively).... The vice of group pleading in fraud cases is that no single defendant is sufficiently advised of which fraudulent act he is alleged to have committed, where, when, by what means and its specific form and content.

Slip Op. at 46.

Fraser argues that plaintiffs have not cured the deficiencies of their prior Complaint with regard to the allegations against him. Fraser asserts that the Complaint fails to link any specific communication, transmission or act directly to him, but instead makes allegations against numerous defendants and then sweeps him in with them.

In support of its mail fraud allegation against Fraser, plaintiffs' Amended Complaint states that

> Defendants Werner Krebs, Inc., Werner Krebs, Benjamin Kopf, Valerio Bonanno, Young, Serino and Fraser caused the mailings set forth below in that they knew that the use if the mails would follow in the ordinary course of business as a result of their execution of a scheme to defraud **Merrill Lynch** and to induce Young, Serino and Fraser through bribery, to award lucrative **Merrill Lynch** contracts to Werner Krebs Inc. The use of the mails was both reasonably foreseeable and in furtherance of the fraudulent scheme....

¶ 129.

This paragraph does not cure the problems identified in my prior Opinion. There is still no connection of Fraser to any specific check sent, and the catalog of identified communications still "contains not one communication which on its face implicates Fraser." Slip Op. at 57. Additionally, the naming of each defendant individually at the start of the paragraph does not alter the fact that the allegation sweeps them together. As noted in *Landy*, "The lumping together of the defendants in the instant Amended Complaint is confusing as well as insufficient.... [R]ead literally, plaintiffs' pleading states that *all* defendants mailed misleading materials during the entire period of 1983 to 1986. It is just this sort of uncertainty in pleadings of fraud claims that Rule 9(b) was designed to prevent." 734 F.Supp. at 623.

***3** Similar, if not greater, confusion is possible here. Read literally, the Complaint accuses Fraser of causing mailings by knowing that the mails would be used to execute his scheme to induce himself, through bribery, to award contracts to Werner Krebs, Inc. This incoherent meaning emerges from the language in the Amended Complaint melding Fraser's activities with those of the Werner Krebs defendants. This reading could be avoided if the Amended Complaint then distinguished the separate behaviors of the different defendants, but it does not.

I conclude that the Amended Complaint fails to allege mail fraud by Fraser with the particularity required by Rule 9(b).

B. *Common Law Fraud, Breach of Fiduciary Duty, and Commercial Bribery*

Fraser moves the Court to dismiss the Amended Complaint's Sixth, Seventh, and Ninth claims for common law fraud, breach of fiduciary duty, and commercial bribery. I deny these motions under the law of the case doctrine. The allegations in support of these claims in paragraph 55(j)–(l) of the Amended Complaint are identical to the allegations in paragraph 44(j)–(l) of the original Complaint. I found these allegations sufficient in my prior Opinion, Slip Op. at 57–58 and 57 n. 15, and I decline to depart from that ruling now.

C. *Travel Act*

Fraser also challenges plaintiffs' allegation that he violated the Travel Act, 18 U.S.C. § 1952(b). Fraser did not move to dismiss the Travel Act allegations in the original Complaint.

Plaintiffs assert that Fraser waived his right to challenge their Travel Act claims by not moving to dismiss them from the original Complaint. Plaintiffs' Memorandum of Law In Opposition to Defendants' Motions to Dismiss the Revised Amended Complaint ("Plaintiffs' Mem.") at 53. In support of this position, plaintiffs cite a single, unpublished district court decision: *Enercomp, Inc. v. McCorhill Publishing, Inc. et al.*, 85 Civ. 8079 (S.D.N.Y. Nov. 6, 1986) (JMC).

I am not convinced by plaintiffs' argument. *Enercomp* analyzes the waiver of objections to 9(b) fraud pleadings, whereas Travel Act pleadings are governed by Rule 8(a). *Enercomp*, slip op. at 31–32. Furthermore, the *Enercomp* defendants participated in eleven months of discovery and filed two answers before objecting to the plaintiff's fraud pleadings five days before the scheduled trial date. *Id.* at 20. Since none of those circumstances apply to the case at bar, Fraser is free to move the Court to dismiss plaintiffs' Travel Act allegations.

That said, I grant Fraser's motion to dismiss the Travel Act allegations against him. The Amended Complaint alleges that Fraser used the facilities of interstate commerce to facilitate the unlawful activity of commercial bribery. ¶ 126. However, the Amended Complaint alleges that Fraser, a New York citizen, violated commercial bribery laws by agreeing to accept payment from Werner Krebs, Inc., a New York corporation. ¶¶ 124, 13, 9. Since the Amended Complaint does not identify any interstate transactions between these two New York entities, it fails to make even a facial allegation of a Travel Act violation. The Travel Act count against Fraser is therefore dismissed.

***4** In their memorandum of law in opposition to Fraser's motion to dismiss, plaintiffs request leave to replead the Travel Act claim were the Court to dismiss it. Plaintiffs' Mem. at 53. I deny this request. Although I was not required to assess the sufficiency of plaintiffs' Travel Act claim against Fraser in my prior Opinion, that Opinion nonetheless clearly articulated the elements of a valid Travel Act claim in the context of allegations against Fraser's codefendants. Slip Op. at 30–33. Thus plaintiffs cannot credibly claim that they were unaware of what this Court requires, and no leave to replead is warranted.

E. ***RICO*** *Allegations*

Finally, Fraser asserts that plaintiffs' **RICO** claims against him must fail because the plaintiffs have failed to allege two or more predicate acts sufficiently. Plaintiffs respond that they have adequately pleaded, asserting that even if the Court were to reject their mail fraud allegations, the Amended Complaint "should be construed as alleging more than a single commercial bribery claim against Fraser." Plaintiffs' Mem. at 54.[1]

I agree with plaintiffs on this question. Paragraph 124 of the Amended Complaint alleges that from 1986 through 1988 Fraser accepted improper "payments" totaling $169,000. Plaintiffs refer again to multiple "payments" in paragraph 125. Given this language, the Complaint can fairly be read to allege that Fraser received more than one bribe payment, constituting more than one act of commercial bribery. Plaintiffs have therefore alleged two or more predicate acts; the **RICO** allegation is adequately pled.

To sum up: Fraser's motion to dismiss is granted as to plaintiffs' mail fraud and Travel Act allegations, without leave to replead. His motion is denied as to plaintiffs' allegations of common law fraud, breach of fiduciary duty, commercial bribery, and **RICO** violations.

III. *THE WERNER KREBS DEFENDANTS*[2]

The Werner Krebs defendants make numerous challenges to the Amended Complaint. I first consider those defendants' attack on plaintiffs' "enterprise" allegations, since failure to properly plead a **RICO** enterprise would doom plaintiffs' entire Amended Complaint as to these defendants. Should the enterprise contentions survive, however, it will be necessary to consider the sufficiency

of the alleged predicate acts.

A. ***RICO*** *Enterprise*

The Werner Krebs defendants move to dismiss plaintiffs' Amended Complaint for alleged failures in their pleadings concerning the "enterprise" prong of the **RICO** allegations. Plaintiffs allege that the Werner Krebs defendants were members of two **RICO** enterprises as defined by 18 U.S.C. § 1961(4): first, a legitimate enterprise identified as the Facilities Management Group of **Merrill Lynch** ("FMG"), and second, an association-in-fact enterprise made up of defendants Young, Serino, Fraser, Werner Krebs, Inc., Werner Krebs, Benjamin Kopf, and Valerio Bonanno ("YSFWK Enterprise"). ¶¶ 99–100.

***5** "To state a § 1962(c) claim plaintiffs must allege the conduct of an enterprise through a pattern of racketeering activity." *Procter & Gamble v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10, 14–15 (2d Cir.1989), *cert. denied*, 493 U.S. 1022 (1990); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985). The existence of an enterprise is a separate **RICO** element which must be proven by plaintiffs. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

18 U.S.C. § 1961(4) defines a **RICO** enterprise as "any individual, partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." The Supreme Court has ruled that a wholly illegitimate association-in-fact **RICO** enterprise is proved "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583.

The Werner Krebs defendants make two arguments concerning alleged defects in plaintiffs' **RICO** enterprise pleadings. First, they argue that the plaintiffs fail to plead the existence of an association-in-fact enterprise that acts a "continuing unit." The Werner Krebs defendants maintain that the Amended Complaint describes instead a "straightforward, shortlived," "finite goal" solely concerning the construction of **Merrill Lynch's** headquarters. Werner Krebs Mem. at 22–23, citing *Barrett v. U.S. Banknote Corp.*, 806 F.Supp. 1094 (S.D.N.Y.1992) (finding no continuing unit where actions "narrowly directed toward a single continuing goal").

Courts have struggled to assess whether a particular scheme constitutes a "continuing unit." The question is simplified in this case by the Second Circuit's decision in *Procter & Gamble*, 879 F.2d 10. In that case, the defendants were alleged to have participated in "a scheme by a contractor to bilk its customer as to a construction project." *Id.* at 18, *citing* district court opinion, 655 F.Supp. 1179, 1182 (S.D.N.Y.1987). The district court had dismissed the **RICO** complaint for lack of continuity, reasoning that the defendants' construction deal was a "single lawful project of finite scope and duration." 655 F.Supp. at 1184. The court of appeals reversed, rejecting the argument that racketeering acts surrounding a single construction project could not support a **RICO** claim. The court denied the need to allege multiple schemes, requiring instead a showing that "the acts of racketeering were neither isolated nor sporadic." 879 F.2d at 18.[3]

The Amended Complaint in this case alleges that the Werner Krebs defendants were parties to 28 improper contracts with **Merrill Lynch** over a two-year period, received 150 work authorization orders from **Merrill Lynch** over a two-year period, and, with the **Merrill Lynch** employee defendants, engaged in numerous bribes over a two- to three-year period. ¶¶ 107–12. I find that these allegations sufficiently allege an enterprise that acts as a "continuing unit." The acts alleged are numerous, related, and relevant to the alleged misdeeds. I therefore deny the Werner Krebs defendants' motion to dismiss the association-in-fact enterprise allegations.

***6** The Werner Krebs defendants attack plaintiffs' claims concerning the alleged legitimate FMG enterprise on other grounds. The Amended Complaint states that the Werner Krebs defendants and the employee defendants, among others, "conducted and participated in the affairs of the Facilities Management Group through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c).[4] Werner Krebs argues that this allegation fails in light of the Supreme Court's ruling that § 1962(c) applies only to those who "participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

Reves instructs that an alleged **RICO** conspirator must have some part in directing, conducting, or controlling the alleged **RICO** enterprise to be liable under § 1962(c). *Id.* at 179, 183–84. The Werner Krebs defendants argue that the Amended Complaint is defective because it alleges no such control by them; they reason that "it would stretch credulity to allege that Werner Krebs, Valerio Bonanno or Werner Krebs, Inc., officers of an independent construction company located on Vireo Avenue in the Bronx, and the company itself, took part in *directing* the affairs of the Facilities Management Group of one of the largest brokerage firms in the entire United States."

Werner Krebs Mem. at 20 (emphasis in original).

Of course, the question for the Court at this stage is not the feasibility of such a scenario, but whether plaintiffs have properly alleged its existence. The Amended Complaint includes several conclusory assertions that the defendants were "conducting" the two alleged enterprises, ¶¶ 101–04, but it makes no factual allegations is support of those statements. Plaintiffs plead no facts which indicate that the Werner Krebs defendants controlled or directed the FMG. Rather, the Amended Complaint alleges that the Werner Krebs defendants made their bribe payments "to influence Young, Serino and Fraser in the conduct of **Merrill Lynch's** affairs and the operation of the Facilities Management Group...." ¶ 113. This statement clearly implies that control lay outside the hands of the Werner Krebs defendants, who sought to influence those who were in control.

Plaintiffs attempt to save the Amended Complaint by reference to the *Reves* Court's explicit extension of the scope of § 1962(c) beyond an enterprise's "insiders." *Reves*, 507 U.S. at 185. *Reves* holds that "[a]n enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery." *Id.* at 184. Plaintiffs contend that their allegation that the Werner Krebs defendants paid Young, Serino and Fraser over $590,000 in bribes sufficiently establishes that the Werner Krebs defendants participated in directing FMG.

I cannot accept that contention. The Amended Complaint simply does not allege facts that support a theory that the Werner Krebs defendants controlled the FMG. If anything, the Complaint paints a picture of Werner Krebs (and all the other outside defendants) vying for the attention of the employee defendants, who parceled out the contracts to the highest bidders. The Amended Complaint repeats time and again, with reference to all of the defendants, that they paid bribes to Young, Serino and Fraser for the purpose of inducing them to award contracts to them. *See, e.g.* ¶¶ 73, 63–73, 107–13, 143–47. Plaintiffs would have the Court believe that these payments by the numerous defendants gave each defendant a controlling interest in the FMG.

***7** But where plaintiffs see allegations of control by many, I see an allegation of control by three. I read the Complaint to allege that Young, Serino and Fraser used the FMG to elicit bribes from contractors in exchange for valuable contracts. There are no factual allegations to support the claim that the Werner Krebs defendants controlled the FMG. Defendants' motion to dismiss is granted as to the legitimate FMG enterprise.

B. *Predicate Acts—Mail Fraud, Commercial Bribing and Travel Act*

Since I hold that the Amended Complaint adequately alleges an association-in-fact enterprise as to the Werner Krebs defendants, I must now consider whether the Complaint alleges predicate acts adequate to support a **RICO** case. In my prior Opinion, I granted the Werner Krebs defendants' motion to dismiss all claims against them. Slip Op. at 44–47. I now consider whether the plaintiffs have cured the deficiencies of their original Complaint.

To survive this second motion to dismiss, the Amended Complaint must include specific new allegations of fact that identify the involvement of individual defendants in acts of fraud and commercial bribery. The new allegations cannot be conclusory; they cannot simply cite the legal standards. *See United States v. Weisz*, 914 F.Supp. 1050, 1053 (S.D.N.Y.1996) (Haight, J.) (a pleading's legal conclusions and characterizations not binding on a district court for Rule 12 purposes).

The Amended Complaint does not cross the threshold for these defendants. The bulk of the new pleadings as to the Werner Krebs defendants differ from the prior pleadings only by naming the defendants individually, and by adding conclusory allegations as to some of the defendants. A comparison of two representative paragraphs from the original and Amended Complaints demonstrates the revisions. The original Complaint alleged that:

> Upon information and belief, in 1986 the Werner Krebs Defendants in violation of New York Penal Law § 180.03 (Commercial Bribing in the First Degree) and 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud) issued checks, made payable to T & T Consultants, Limited, totalling $98,700 for Young's benefit which were sent to a bank account that Young had established in the Bahamas.

Complaint at ¶ 65A(c). The Amended Complaint restates the matter this way:

> Upon information and belief, from in or about 1985 through October 31, 1987, Werner Krebs, Inc. in violation of New York Penal Law § 180.03 (Commercial Bribery in the First Degree) and 18 U.S.C. § 1341 (mail fraud) issued checks signed by Kopf to T & T Consultants, Limited, totalling $98,700 for Young's benefit which were sent to a bank account that Young had established in the Bahamas. Upon information and belief, the sources for which are in part admissions made by Werner Krebs in federal district court in New York on January 23, 1992, Benjamin Kopf and Werner Krebs, in violation of New York Penal Law § 180.03 (Commercial Bribery in the First Degree) and 18 U.S.C. § 1341 (mail fraud) authorized and participated in the making of this bribe, which was paid for the purpose of inducing Young to award lucrative **Merrill Lynch** contracts to, and not to cancel existing contracts with, Werner Krebs, Inc., including the contracts described in paragraph 106.

***8** Amended Complaint at ¶ 109.

These amendments are cosmetic; they add no new factual allegations. Plaintiffs have merely split the term "Werner Krebs defendants" into its composite parts and asserted that the two individual defendants authorized and participated in the misdeeds. This conclusory language cannot cure the previously inadequate allegations.[5] The Amended Complaint includes numerous such changes throughout paragraphs 107–12, but those changes do not save it.

The only other significant new allegation with regard to the Werner Krebs defendants is at paragraph 46 of the Amended Complaint. Paragraph 46 highlights some aspects of a "Supplemental Statement of Facts" that was marked as an exhibit at the plea proceeding in *United States v. Krebs*, 92 Cr. 13 (PKL). Since the supplemental statement of facts is not attached to the Amended Complaint or quoted in full, nor do the plaintiffs provide a proper case citation, I do not deem it to be incorporated into the Complaint and I will not consider its allegations. *See Goldman v. Beldman*, 754 F.2d 1059, 1066 (2d Cir.1985) ("limited quotation does not constitute incorporation by reference").

I hold, therefore, that the Amended Complaint has not cured the defects of the original Complaint with regard to the allegations of mail fraud or commercial bribing against the Werner Krebs defendants. Without the commercial bribing claim, no Travel Act claim can stand; without predicate acts, no **RICO** claim can stand. Claim Two of the Amended Complaint is therefore dismissed as to Werner Krebs, Inc., Werner Krebs and Valerio Bonanno. Additionally, I grant defendants' motion to deny plaintiffs leave to replead. The plaintiffs in this case have had two bites at the apple; I will not allow them a third.

IV. *THE **ROYAL**–PRUDENTIAL DEFENDANTS*[6]

Plaintiffs' amended allegations against the **Royal**–Prudential defendants face similar problems.

A. ***RICO** Enterprise*

As to the alleged legitimate **RICO** enterprise, I dismiss plaintiffs' allegations for the same reasons articulated above in reference to the Werner Krebs defendants. The Amended Complaint provides no factual support for the claim that the **Royal**–Prudential defendants controlled or directed the FMG as required by *Reves;* it alleges rather that the **Royal**–Prudential defendants attempted to influence the employee defendants holding the reins of the FMG. I therefore dismiss the plaintiffs' legitimate enterprise allegations. The association-in-fact enterprise allegations remain viable.

B. *Predicate Acts—Mail Fraud*

The mail fraud allegations against defendants 1029 East Main Street Partnership ("1029") and Silverman are uncured by the additions to the Amended Complaint because the amendments are generally cosmetic, not substantive. In my prior Opinion, I dismissed plaintiffs' mail fraud claims for failure to allege the fraudulent scheme with specificity:

> the Complaint fails to plead with the requisite particularity a context in which a duty to disclose may have arisen. Inferences and allusions to contracts and transactions establishing a relationship in which a general duty to disclose may arise do not withstand Rule 9(b) scrutiny. Each defendant is entitled to be told specifically the contract or contracts tainted by bribery which that defendant fraudulently failed to disclose.

***9** Slip Op. at 24.

The Amended Complaint does not cure this deficiency with respect to 1029 and Silverman. The Amended Complaint does identify five contracts between **Royal**–Prudential Industries, Inc. and **Merrill Lynch**. But as to the other two defendants, the Amended Complaint provides no new factual information substantiating the claim that those two defendants had a duty to disclose information concerning a specific contract; a cumulative, conclusory allegation to that effect will not suffice. Amended Complaint at ¶ 159. Plaintiffs' theory that 1029's and Silverman's duty to disclose arose from their status as agents or "alter egos" of **Royal**–Prudential, Inc., Plaintiffs' Mem. at 21–25, is also of no assistance because the Amended Complaint includes no new facts in support of such a theory.

Plaintiffs again argue that the Amended Complaint incorporates by reference the criminal informations, plea allocutions, and sentencing memoranda from other cases involving some of the defendants. These documents are not cited formally and are not attached to the Amended Complaint and they cannot easily be obtained by parties or by the Court.[7] Contrary to plaintiffs' assertions, this case is not analogous to *National Ass'n of Pharmaceutical Mfrs. v. Ayerest Lab.*, 850 F.2d 904, 910 n. 3 (2d Cir.1988), where the court of appeals deemed incorporated by reference a document outside the pleadings because the complaint referred to the document and the plaintiffs quoted its entire text in their memoranda of law. In the pleading at bar, many of the documents are entirely unavailable, some have been provided in part, and one attached document appears to be complete. This case thus more closely resembles *Goldman v. Beldman*, 754 F.2d 1059, 1066 (2d Cir.1985) in which the Court declared that "limited quotation does not constitute incorporation by reference". I find that the documents referred to in the Amended Complaint at ¶ 5 are not incorporated into the pleading by reference, and I will not consider any of the factual allegations in the documents attached to the Silberberg Affidavit.

In addition to plaintiffs' failure to plead the fraudulent scheme with sufficient particularity as it relates to these two defendants' duty to disclose, the mail fraud allegations also fail to identify the specific acts of mail fraud undertaken by those defendants in furtherance of the alleged fraudulent scheme. In my prior Opinion, I noted that "of the communications identified in ¶ 75(q), none is alleged to have been made specifically" by the defendants. Slip Op. at 25. I ruled that "the sweeping allegation that 'the **Royal**–Prudential Defendants' caused the listed communications to be made impermissibly collectivizes the defendants, failing to inform each of these defendant of the specific communications it is alleged to have made or caused to be made in furtherance of the fraudulent scheme." *Id.*

Plaintiffs' Amended Complaint does not redress this deficiency. The Amended Complaint alleges that all the **Royal** Prudential defendants, this time listed individually by name, "caused the mailings set forth below in that they knew that the use of the mails would follow in the ordinary course of business" as a result of their activities. ¶ 161. The mailings specifically listed in paragraph 163, however, are the same mailings that were listed in the original Complaint at paragraph 75(q), none of which name 1029 or Silverman. The allegations of 75(q) were inadequate in the prior Complaint, and they remain inadequate. An amendment adding language exactly tracking the requirements identified in *United States v. Bortnovsky*, 879 F.2d 30, 36 (2d Cir.1989), does not remedy the absence of factual allegations connecting 1029 and Silverman to the listed mailings. The amendments do not cure the impermissibly collective nature of the allegations. Concerning the factual support for allegations concerning specific acts, the Amended Complaint is effectively indistinguishable from the Complaint. Plaintiffs' mail fraud allegations are therefore dismissed as to defendants 1029 and Silverman, without leave to replead.

C. *Predicate Acts—Obstruction of Justice*

***10** The **Royal**–Prudential defendants also allege that plaintiffs have failed to plead with particularity the **RICO** predicate act of Obstruction of Justice in violation of 18 U.S.C. § 1503. I agree, for the simple reason that the Amended Complaint does not identify—with even the

threshold specificity required by Rule 8(a)—the individual role of any of the defendants. The Amended Complaint alleges that "after receiving a grand jury subpoena in connection with an investigation being conducted by the United States Attorney, a corporate employee of defendant **Royal** Prudential Industries in violation of 18 U.S.C. § 1503 was instructed to recharacterize the prior payment of $50,000 ... as a loan." ¶ 148. This paragraph fails to specify in any way *who* instructed the employee to recharacterize the prior payment, and the conclusory allegation that Silverman "authorized and participated in the unlawful acts alleged in paragraphs 143–148 and 151–155" provides no insight into the matter. As noted in my prior Opinion, "[e]ven Rule 8(a) pleading requires plaintiffs to identify the specific defendant charged with committing a particular predicate act...." Slip Op. at 35. Defendants' motion to dismiss the obstruction of justice claim against them is granted, without leave to replead.

The **RICO** allegations against 1029 and Silverman survive the motion to dismiss, however, because I have previously ruled that the commercial bribing allegations against them are viable. Slip Op. at 27–30.

V. *THE COMMERCIAL MOVERS DEFENDANTS*[8]

The Commercial Movers defendants move to dismiss plaintiffs' allegations on grounds similar to those of their codefendants.

A. ***RICO*** *Enterprise*

As to the alleged legitimate **RICO** enterprise, I dismiss plaintiffs' allegations for the same reasons articulated above in reference to the Werner Krebs and the **Royal**–Prudential defendants. The Amended Complaint provides no factual support for the claim that the Commercial Movers defendants controlled or directed the FMG as required by *Reves;* it alleges rather that the Commercial Movers defendants attempted to influence the employee defendants controlling the FMG. I therefore dismiss the **RICO** allegations based upon the legitimate enterprise theory.

However, the plaintiffs' association-in-fact enterprise allegations are adequately pleaded. Amended Complaint at ¶ 56. The Commercial Movers defendants identify defects in "an allegation that the Commercial Movers Defendants, *without Young*, constitute an association-in-fact enterprise." Commercial Movers Mem. at 8 (emphasis added). Specifically, the Commercial Movers defendants argue that a corporation and its principals cannot form a **RICO** enterprise separate from the corporate defendant. I need not decide the validity of this perceived defect, however, since the plaintiffs' Complaint does not exclude defendant Young, but rather expressly includes him. Amended Complaint at ¶ 56.

The Commercial Movers defendants also attack the plaintiffs' association-in-fact enterprise allegations as failing to allege the existence of a "continuing unit." I reject this contention: the numerous bribes alleged in paragraphs 63–86 allege sufficiently continuous improper behavior by the Commercial Movers defendants to meet the "continuing unit" standards.

B. *Predicate Acts—Mail Fraud*

***11** In my prior Opinion I ruled that it was "questionable" whether plaintiffs had sufficiently pled the alleged fraudulent scheme by the Commercial Movers defendants. Slip Op. at 36. I reasoned that the Complaint alluded to general business dealings and certain letters and invoices, but identified no specific contract or transaction. *Id.* Rather than ruling on that question, however, I grounded my dismissal of the claims on the Complaint's failure to allege with Rule 9(b) specificity any acts of communication by mail in furtherance of the fraudulent scheme. *Id.* at 37.

Plaintiffs have not cured this latter defect with regard to the Supreme Coach Corp. or State Wide Enterprises. Paragraph 92 of the Amended Complaint mirrors the language I have already deemed inadequate with regard to other defendants in this case. It lists no new mailings attributed to either defendant, and thus adds no factual support to the fraud claims. Rather, paragraph 92 makes conclusory allegations that simply track the language of the *Bortnovsky* case. 879 F.2d at 36. This does not remedy the Complaint's prior defects.

Similarly, the Amended Complaint includes no new facts concerning mailings made by Luchnick and Commercial Movers, Inc., and plaintiffs' agency or alter ego theories are of no more assistance to them than they were to the **Royal**–Prudential defendants. *See supra* at 18. The Amended Complaint repeats, in paragraphs 63–73, the unsupported allegation that Luchnick and Commercial Movers, Inc. "authorized and participated in" various acts. As I have already discussed in my prior Opinion and in this one, that language is inadequate to cure plaintiffs'

defective pleading. Therefore, the Commercial Movers defendants' motion to dismiss the mail fraud claims is granted, without leave to replead.

Plaintiffs' **RICO** allegations against most of the Commercial Movers defendants remain viable, however, because commercial bribing allegations can be deemed predicate acts for **RICO** purposes. Slip Op. at 26–27. I have already deemed adequate under Rule 8(a) the commercial bribing allegations against all the Commercial Movers defendants except Commercial Movers, Inc. Slip Op. at 40. I therefore dismiss the first claim of the Amended Complaint only as to defendant Commercial Movers, Inc.

VI. *SUSAN LAMONICA*

The original Complaint alleged that defendant Susan Lamonica aided and abetted the other defendants in their misdeeds, specifically defendant Young. Because Lamonica was not alleged to have engaged in fraudulent conduct herself or to have aided and abetted the fraudulent scheme, I ruled that Rule 9(b) did not govern the claims against her. Slip Op. at 50 ("Rule 9(b) does not govern the pleading of aiding and abetting these non-fraud predicate acts.") Rule 8(a) therefore applies to the aiding and abetting claims against Lamonica in the Amended Complaint.[9]

In Claims One and Three of the Amended Complaint, plaintiffs alleged that Lamonica violated 18 U.S.C. 1962(c). ¶¶ 57, 137. As explained *supra*, a 1962(c) claim can survive only if a plaintiff alleges the conduct of an enterprise through a pattern of racketeering activity, the existence of the enterprise being a separate **RICO** element which must be proven by the plaintiff. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985); *United States v. Turkette*, 452 U.S. 576, 583 (1981); *Procter & Gamble v. Big Apple Industrial Buildings, Inc.*, 879 F.2d at 14–15. Aiding and abetting the commission of two predicate acts by another can violate **RICO** § 1962(c), but only if "all of **RICO's** other requirements are also satisfied." *Petro Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356 (3rd Cir.1987). Thus plaintiffs must allege all **RICO** elements against Lamonica.

***12** Plaintiffs do not allege that Lamonica was a member of an association-in-fact enterprise or a legitimate enterprise. Amended Complaint at ¶¶ 56, 135. They allege that other defendants, "aided and abetted" by Lamonica, "conducted and participated in" the affairs of the alleged legitimate and association-in-fact enterprises. ¶¶ 57, 137.

As discussed *supra*, the Supreme Court has ruled that 1962(c) applies only to those who "participate in the operation or management of the enterprise itself," *Reves*, 507 U.S. at 183, and that "some part in directing the enterprise's affairs is required." *Id.* at 179. The Court specifically held that "participating" has a narrower meaning in the 1962(c) context than the term "aiding and abetting." *Id.* at 178. Although this decision does not necessarily conflict with the viability of an aiding and abetting **RICO** violation, *see Fidelity Fed. Savings and Loan v. Felicetti*, 830 F.Supp. 257, 261 (E.D.Pa 1993), it does require plaintiffs in this case to demonstrate that Lamonica's conduct not only satisfies the aiding and abetting standard, but also constitutes participation in the operation or management of the enterprise.

The plaintiffs have not made that demonstration. Nothing in the Amended Complaint even implies that Lamonica operated or controlled the named enterprises. Lamonica is alleged to have aided and abetted Young through three acts: (1) "accepting a 'no show' job as a 'consultant' from Defendant Statewide Enterprises, Inc. in which it was understood she would not be expected or required to render services;" (2) "purchasing at three different New York area banks three certified bank checks; and (3) "sending $50,000 plus $8,625 in interest to Defendant World Wide Real Estate Consultants, which she characterized as the repayment of a 'loan.' " Amended Complaint at ¶ ¶ 95(a), 95(b), 164.

These allegations in no way claim that Lamonica controlled or directed enterprises which are alleged to have engaged in systematic racketeering activity over several years, defrauding **Merrill Lynch** out of hundreds of thousand of dollars. ¶ 1. Plaintiffs' only response is to assert that their allegation that Lamonica aided and abetted Young by returning a $50,000 bribe "more than suffices to show that Lamonica had participated in operating the alleged enterprises." I cannot agree. The Amended Complaint fails to allege that Lamonica directed or operated the alleged **RICO** enterprises and it therefore fails, as a matter of law, to allege a **RICO** violation under § 1962(c). Defendant Lamonica's motion to dismiss the claims against her is granted.

CONCLUSION

The mail fraud allegations in plaintiffs' Amended

Complaint are dismissed with regard to defendants Fraser, Lamonica, 1029, Silverman, all the Werner Krebs defendants, and all the Commercial Movers defendants. Plaintiffs' **RICO** claims survive as to Fraser, 1029, Silverman, Luchnick, State Wide Enterprises, Inc., and Supreme Coach Corporation. Plaintiffs' **RICO** claims are dismissed as to Lamonica, Commercial Movers, Inc., and all the Werner Krebs defendants.

***13** Pursuant to my prior Opinion, I decline to exercise pendent jurisdiction over the state and common law claims as to Lamonica, Commercial Movers, Inc., and all the Werner Krebs defendants.

Counsel for the parties are directed to attend a status conference at 2:30 p.m. on September 20, 1996, in Courtroom 17C, at 500 Pearl Street.

It is SO ORDERED.

All Citations

Not Reported in F.Supp., 1996 WL 383135, RICO Bus.Disp.Guide 9085

Footnotes

1 I have already noted that commercial bribing can be a **RICO** predicate act. Slip Op. at 27.

2 The "Werner Krebs defendants" are Werner Krebs, Inc., Werner Krebs, and Valerio Bonanno.

3 *See also* this Court's prior discussion of the continuity of defendants' acts as it related to the "pattern" element of plaintiffs' **RICO** allegation. Slip Op. at 60–68.

4 18 U.S.C. § 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

5 As I noted my prior Opinion with regard to one of the Commercial Movers defendants:

> The Complaint does not allege that Luchnick made a particular bribe, it merely states that Luchnick "authorized and participated in the unlawful acts alleged in this complaint." Complaint at ¶ 34. This nebulous allegation which does not particularize which actions Luchnick authorized or offer facts to support his specific involvement in those actions is exactly the sort of pleading which is prohibited by Rule 9(b).

Slip Op. at 39.

6 The "**Royal**–Prudential defendants" are **Royal** Prudential Industries, Inc., 1029 East Main Street Partnership, and Allen Silverman. World Wide Real Estate Consultants is no longer a defendant in this case.

7 Certain of these documents, or portions of them, were provided to the Court as exhibits attached to an affidavit submitted by plaintiffs' counsel in conjunction with plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss. Others of these documents have not been made available to the Court.

8 The "Commercial Movers defendants" are Commercial Movers, Inc., Alan Luchnick, State Wide Enterprises, Inc., and Supreme Coach Corporation.

9 Rule 9(b) does apply to the new mail fraud claim against Lamonica in the Amended Complaint. Amended Complaint at ¶ 92. However, given my view on the threshold question concerning Lamonica's involvement with the alleged **RICO** enterprises, I need not decide whether the fraud claim against her is pleaded with particularity.

