

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

THE GENTLE WIND PROJECT,)
ET AL.)
)
Plaintiffs,) Civil Action Docket No. 04-CV-103
)
v.)
)
JUDY GARVEY, ET AL.)
)
Defendants.)

MOTION OF DEFENDANTS JAMES BERGIN
AND JUDY GARVEY FOR SUMMARY JUDGMENT
ON RICO COUNT WITH INCORPORATED MEMORANDUM

Defendants James Bergin (“Bergin”) and Judy Garvey (“Garvey”) move the Court for summary judgment, pursuant to Fed. R. Civ. P. 56, on plaintiffs’ RICO count, as set forth in Count I of the amended complaint, and to dismiss the supplemental state law claims. As discussed in detail below, Bergin and Garvey are entitled to summary judgment in their favor on the RICO count on the grounds that the undisputed material facts demonstrate the absence of a critical element of the claim – there is no “enterprise” separate and distinct from (1) the originally-named defendants or (2) the pattern of racketeering activity. Defendants are therefore entitled to judgment in their favor on Count I. Because Count I is the sole basis for jurisdiction in this Court, the supplemental state law claims should be dismissed.

Memorandum of Law

Factual Summary

Plaintiff The Gentle Wind Project (“GWP”) is a Maine non-profit corporation that claims to be dedicated to emotional and physical healing and well-being. Statement of Material Facts

(“SMF”) ¶ 1. The individual plaintiffs are employees, staff and/or directors of GWP who all live together at 118 Piscataqua Road, Durham, New Hampshire. SMF ¶ 2-3.

Bergin and Garvey are husband and wife and are the sole remaining defendants in the case. They were involved with GWP for many years. SMF ¶ 10. The other defendants named in plaintiffs’ initial complaint were Steve Gamble, Equilibra, Ivan Fraser, The Truth Campaign, Rick A. Ross, Rick A. Ross Institute for the Study of Destructive Cults, Controversial Groups and Movements, Ian Mander, Steven Allan Hassan, and Freedom of Mind Resource Center, Inc.

GWP manufactures “healing instruments,” which it claims “restore human beings to a natural state of existence.” SMF ¶ 4. GWP claims that the instruments it manufactures heal the etheric structure, which is supposedly an invisible energy field around each person and stands about eight feet high and four feet wide. SMF ¶ 5. The six individual plaintiffs themselves are able to see the etheric structure (also referred to as an “aura”), although of course most other people cannot. SMF ¶ 7. The healing technology is communicated in the form of design blueprints through telepathic impressions received by plaintiff John Miller from the “Spirit World.” SMF ¶ 6.

GWP also claims the ability to perform telepathic healings, which it has performed on thousands of people. SMF ¶ 7. Through its telepathic healings and at the direction of the Spirit World, GWP, among other things, “healed” 18 to 20 members of the Soviet Politburo, thereby effecting the fall of the Soviet Union. SMF ¶ 18.

GWP's healing instruments are offered to "Instrument Keepers" for a wide range of suggested donations, including some instruments which exceed more than \$10,000 in price. SMF ¶ 9.

In November, 2003, Garvey, with Bergin's assistance as proofreader, authored a document entitled "Insiders' Stories." SMF ¶ 11. The document describes Garvey's experience with GWP, and, among other things, characterizes GWP as a cult. SMF ¶ 12. "Insiders' Stories" also describes sexual rituals, known to participants as "energy work," in which selected female members of GWP, along with the founder, John Miller, engaged in group sexual activity with the purported purpose of creating GWP's "healing instruments." SMF ¶ 13. Four years after separating from GWP, Bergin and Garvey developed a web site entitled www.windofchanges.org, on which they published "Insiders' Stories." SMF ¶ 14.

Some time after publication of "Insiders' Stories," Bergin, with Garvey's assistance, authored "A Husband's Perspective" describing his experience and perspective of the 17 year relationship he and his wife, Garvey, had with GWP. SMF ¶ 15. "A Husband's Perspective" was and is published on Bergin's and Garvey's Wind of Changes website. SMF ¶ 17. It characterizes GWP as a cult, discusses the effects of the group's sexual rituals on his wife and their marriage and family, and opines that the healing instruments are akin to snake oil. SMF ¶ 16. Plaintiffs allege that Bergin's and Garvey's statements are false, fraudulent and defamatory.

"Insiders Stories" and "A Husband's Perspective" have been published on or linked to websites operated by the other original RICO defendants. SMF ¶¶ 19, 22, 25, 28, 31. Bergin and Garvey had limited and sporadic email communications with these defendants. *Id.* Bergin and Garvey have had no legal connection, organization, agreement or exchange of money or anything of value with any of the other defendants. SMF ¶¶ 20, 23, 26, 29, 33.

Discussion

I. THE RICO CLAIM FAILS BECAUSE PLAINTIFFS HAVE NOT ALLEGED, AND THE UNDISPUTED FACTS DO NOT SUPPORT, THE EXISTENCE OR IDENTITY OF AN ENTERPRISE DISTINCT FROM THE ORIGINALLY-NAMED DEFENDANTS

Count I of the amended complaint asserts a claim for treble damages and attorneys fees for violation of § 1962(c) of The Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961, *et seq.* RICO was designed to combat organized crime, and not to federalize every alleged conspiracy to engage in fraud. *Cf. Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991) (noting danger of federalizing common-law fraud cases through expansive application of RICO). Indeed, because this is the law’s purpose, the First Circuit has observed, “The mere assertion of a RICO claim consequently has an almost inevitable stigmatizing effect on those named as defendants. In fairness to innocent parties, courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.” *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). The time is ripe to flush out plaintiffs’ RICO claim here.

In order to narrow the scope of RICO to conform to the limited goal of organized crime prevention, Congress drafted it to require a “person” to conduct or participate “in the conduct of the ‘enterprise’s affairs,’ not just [his or her] *own* affairs,” in order to be held liable. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original). *See* 18 U.S.C. § 1962(c) (2000).¹ Thus, to state a claim under § 1962(c), plaintiffs must allege the existence of “an ‘enterprise’ that is not simply [a defendant] referred to by a different name.” *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). Although RICO has been interpreted to apply to various enterprises that do not fit the usual definition of organized crime, courts

¹ This section reads: “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.”

consistently have recognized that the statute does not go so far as to federalize any general fraud or conspiracy to engage in fraud absent a separate “enterprise.” Instead, the First Circuit and other courts have found that the failure “to identify any enterprise, distinct from a named person defendant, is fatal under RICO.” *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 191 (1st Cir. 1996). As the First Circuit has explained,

The person or persons alleged to be engaged in racketeering activity must be entities distinct from the enterprise. *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23 (1st Cir.1988) (per curiam). In other words, because the racketeer and the enterprise must be distinct, *Miranda [v. Ponce Federal Bank]*, 948 F.2d [41,] 45 [(1st Cir. 1991)], the enterprise must be an entity separate from the named defendants who are allegedly engaging in unlawful activity.

Libertad v. Welch, 53 F.3d 428, 442 (1st Cir. 1995).

Plaintiffs’ RICO Count fails to meet this requirement that it allege an enterprise distinct from the named defendants. Moreover, now that discovery has concluded, there is no genuine issue of material fact on this issue: the undisputed facts establish that plaintiffs’ alleged “enterprise” is not distinct from, but rather is one and the same as, the RICO defendants named in the complaint and amended complaint.² Consequently, Bergin and Garvey are entitled to judgment in their favor on Count I.

The only description in the Amended Complaint of an alleged RICO enterprise is contained in ¶ 136, which reads, in its entirety, “The Count I Defendants conspired together, were organized and associated in fact and acted as an enterprise as defined by 18 U.S.C. §

² For purposes of the distinctness analysis, the proper comparison is between the “enterprise” alleged by plaintiffs and the group of defendants named in plaintiffs’ original and amended complaints. Here, there simply is no “entity separate from the named defendants who are allegedly engaging in unlawful activity,” as *Libertad* required. 53 F.3d at 442. The fact that some of the defendants initially named by plaintiffs as persons or entities conducting racketeering activity have now settled or been dismissed from the case, particularly on jurisdictional grounds, cannot save plaintiffs’ attempt to cast those defendants as a RICO enterprise. The distinctness requirement would be a hollow formality if plaintiffs could allege an enterprise identical to -- doing “double duty” as -- the named defendants, but then claim that a separate, distinct enterprise came into being solely by virtue of a defendant settling or being dismissed from the case.

1961(4) when they violated 18 U.S.C. § 1343.”³ This paragraph attempts to equate the persons being sued with the enterprise required under RICO simply by invoking the language in the definition of “enterprise” under RICO: “any... group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). However, courts have repeatedly rejected this bootstrapping maneuver where the plaintiff does not allege or prove the existence of an enterprise distinct from the persons conducting its affairs. The First Circuit has “consistently interpreted the statutory requirement that a culpable person be ‘employed by or associated with’ the RICO enterprise as meaning that *the same entity cannot do double duty as both the RICO defendant and the RICO enterprise.*” *Miranda*, 948 F.2d at 44 (1st Cir. 1991) (emphasis added); *see also City of New York v. Cyco.net, Inc.*, 2005 U.S. Dist. LEXIS 1028 at *61-62 (S.D.N.Y. 2005) (“the enterprise must meet the distinctness requirement, i.e., that other entities in the enterprise are not defendants”); *Manhattan Telecomms. Corp. v. DialAmerica Mktg.*, 156 F. Supp. 2d 376, 382 (S.D.N.Y. 2001) (“the enterprise cannot merely consist of the named defendants”). Yet Plaintiffs here seek to make the set of RICO defendants do precisely such double duty as both RICO “persons” individually and as a RICO enterprise collectively.

Previous RICO decisions have considered the distinctness requirement in four main categories of cases, none of which involve facts like those in this case. The first arises when a plaintiff attempts to sue a corporation, which is also alleged to be the RICO enterprise. In such cases, the RICO “person” and the enterprise are by definition one and the same, and courts have uniformly dismissed such attempts to transform RICO into an alternative basis for liability for the activities of corporations, without more. *See, e.g., Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23 (1st Cir. 1988).

³ The original complaint contains an identical paragraph, ¶ 134.

The second category involves claims that a corporation is the RICO enterprise, but, unlike the first category of cases, the corporation's employees, not the corporation itself, conduct the illegal activities and are named as defendants. The Supreme Court recently held that such allegations meet the requirements of RICO because an employee is a legally distinct entity from the corporation, with different rights and responsibilities. *Cedric Kushner Promotions*, 533 U.S. at 163.

The third set of cases alleges enterprises that are "associations in fact" among organized groups as well as individuals; the most prominent of these cases involve RICO claims against anti-abortion protesters. The First Circuit has recognized such associations-in-fact as enterprises only to the extent that they are actually "[entities] separate from the named defendants who are allegedly engaging in unlawful activity." *Libertad v. Welch*, 53 F.3d 428, 442 (1st Cir. 1995).

The final category of cases concern associations in fact among individuals, such as street gangs. While cases of this type have not had occasion to directly address the requirement that the enterprise be distinct from the defendants, they have upheld findings of a RICO enterprise in contexts where the enterprise was composed of numerous individuals in addition to the named defendants and, significantly, where all were part of an "ongoing organization" where "various associates function as a continuing unit." *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1981)).⁴

In the instant case, the named defendants and the alleged "enterprise" are one and the same, are doing "double duty," and therefore fail to satisfy the enterprise element of the claim.

The closest, but still quite dissimilar, parallel between this case and the various categories of

⁴ Among the facts in *Patrick* that established the existence of an enterprise well beyond the two named defendants were that the gang "had older members who instructed younger ones, its members referred to the gang as family," and it conducted meetings that included members other than the defendants where important decisions were made. 248 F.3d at 19.

previous RICO decisions that have reached this issue is with the abortion protester cases, exemplified by *Libertad*.⁵ These cases concern associations in fact where no external association is clearly named or identifiable. But *Libertad* demonstrates why plaintiffs' enterprise allegations and proof are not sufficient as a matter of law.

In *Libertad*, a group of anti-abortion protesters called the Pro-Life Rescue Team (PLRT) was alleged to have "blockaded" an abortion clinic on several occasions, using violence, intimidation, and a variety of tactics to prevent the clinic from operating and to hinder the police from arresting them. 53 F.3d at 433-34. At one of these "blockades," a few other anti-abortion groups and individual defendants also allegedly took part. *Id.* at 434. Because it concluded that this latter "blockade" was the only "ephemeral gathering" in which all the defendants participated, the district court found that there was no enterprise under RICO. *Id.* at 442. On appeal, however, the First Circuit noted a press release issued by one of the other anti-abortion groups, Rescue America, referring to PLRT as an "affiliated group" and declaring that PLRT's leader was representing Rescue America as its "regional director." *Id.* at 443. Furthermore, PLRT's leader regularly shared manuals, videos, and pamphlets with Rescue America, among others. *Id.* Based on this clear evidence of voluntary association and organization well beyond the named defendants, the court concluded that an association in fact existed that was sufficiently distinct from these defendants to constitute a separate enterprise. *Id.* at 442-44. Plaintiffs do not allege, and the undisputed facts establish that there is not, any such organization or set of associates in this case other than the defendants alleged to be illegal actors in Plaintiffs' original

⁵ The cases in the first category, involving only corporations, primarily involve issues of agency inapplicable to natural persons. Those in the second category concerning employees are inapposite because the unique relationship of employment is absent here. The street-gang cases, while involving associations-in-fact of individuals, roughly the sort of "enterprise" plaintiffs allege here, involve clear, ongoing organizations that are quite distinct from the named individual defendants and so have had no reason to address the distinctness issue.

complaint. Accordingly, plaintiffs have not established, and cannot, establish the existence of the requisite separate and distinct enterprise, and their RICO claim fails as a matter of law.

II. PLAINTIFFS HAVE NOT ALLEGED, AND
THE UNDISPUTED FACTS DO NOT SUPPORT,
THE EXISTENCE OF AN ENTERPRISE SEPARATE
FROM THE ALLEGED PATTERN OF RACKETEERING

The Supreme Court has long held that a RICO enterprise “is not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern of activity in which it engages.” *United States v. Turkette*, 452 U.S. 576, 583 (1981). Interpreting *Turkette*, the First Circuit has listed three criteria for an alleged association-in-fact enterprise to satisfy the requirement that it include some purpose or relationship other than the mere commission of a pattern of racketeering acts: (1) “that those associated in fact function as an ongoing unit and [(2)] constitute an ongoing organization...[and] [(3)] that its members share a common purpose.” *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004) (quotation marks omitted). Plaintiffs’ allegations and the summary judgment record fail to satisfy the first two criteria: that the defendants function as an ongoing unit or constitute an ongoing organization.⁶

The only allegations in plaintiffs’ amended complaint that relate to the relationship between the alleged enterprise and the pattern of alleged activity in which it allegedly engaged are the following:

- “Defendants engaged (and continue to engage) in a smear campaign to destroy Gentle Wind’s reputation and ruin its ability to conduct its activities.” ¶ 1
- Bergin and Garvey published their “Reports” to several of the other defendants, ¶¶ 39-40

⁶ While defendants do not believe plaintiffs have adequately alleged the third element, shared common purpose, for purposes of this argument only we will assume that the allegations of common purpose element are sufficient.

- Original defendant Steven Hassan’s website links to Bergin and Garvey’s website as well as those of other defendants, ¶ 43
- Bergin received a message left with Hassan, ¶ 44
- Several defendants published Bergin and Garvey’s “Reports” on their websites, ¶¶ 50, 78, 83
- Bergin and Garvey’s website links to those of the other defendants, ¶ 51
- Bergin and Garvey posted two messages from defendant Fraser on their website, ¶¶ 53-54
- Garvey stated she had contributed to a description of GWP on defendant Hassan’s website, ¶ 57
- Garvey accidentally sent an e-mail allegedly intended for defendants Gamble and Fraser to another individual, ¶ 58-59
- On information and belief, defendants Gamble, Equilibra, Fraser, and Truth Campaign contributed to Garvey’s “Report,” ¶¶ 78, 99
- Defendant Ross’s website links to that of Bergin and Garvey, ¶ 119
- Defendant Mander’s website links to that of Bergin and Garvey, ¶ 131
- “The Count I Defendants... were organized... when they violated 18 U.S.C. § 1343.” ¶ 136
- “In their conduct of the enterprise, the Count I Defendants committed multiple violations of 18 U.S.C. § 1343, all of which had the same or similar purposes, results, participants, victims and/or methods of commission. In committing such violations, the Count I Defendants acted with the intent to deprive Gentle Wind of money or property; to harm Gentle Wind by fraudulently inducing Gentle Wind supporters to stay away from Gentle

Wind; and to benefit themselves by promoting the need for their own products and services and encouraging third parties to purchase such products and services.” ¶ 139

First, the amended complaint fails to make any but the most conclusory allegations that the defendants function as a continuing unit and constitute an ongoing organization. *See Turkette*, 452 U.S. at 583. As this Court has recognized, bare averments of legal conclusions such as the assertion in paragraph 136 of the amended complaint do not satisfy the plaintiffs’ pleading obligations in a RICO case. *Miller Hydro Group v. Popovitch*, 793 F. Supp. 24, 28 (D. Me. 1992) (Carter, J.) (citing *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 42 n. 7 (1st Cir. 1991)).⁷

Second, the evidence demonstrates that plaintiffs’ inadequate “enterprise” allegations are not supported by the summary judgment record. There has been no organization, agreement or exchange of money or anything of value between the other defendants and Bergin and Garvey. Rather, the only connection is the publication of, or link to, “Insiders’ Stories” and “A Husband’s Perspective” by websites operated by the defendants, and limited email correspondence between them. Simply put, plaintiffs cannot produce evidence that would establish that the defendants either function as an ongoing unit or constitute an ongoing organization. Indeed, the evidence is undisputed that there simply is no “enterprise” apart from the alleged wire fraud “racketeering activity” alleged by plaintiffs. The insufficiency of plaintiffs’ allegations, when judged against the actual facts, demonstrates the failure of the RICO claim:

1. The allegations that defendants other than Bergin and Garvey contributed to their “Reports” are made on information and belief, and therefore cannot even support the allegation of an enterprise in light of the heightened pleading requirements for RICO claims based on fraud

⁷ Similarly, “[b]are conclusions seldom are entitled to weight in the summary judgment calculus.” *Johnson v. Gordon*, 409 F.3d 12, 22 (1st Cir. 2005).

pursuant to Fed. R. Civ. P. 9(b). *See Hart Enters.*, 1999 U.S. Dist. LEXIS 23377, at *21.

Contrary to the plaintiffs' "information and belief," Bergin and Garvey authored "Insiders' Stories" and "A Husband's Perspective" alone. *See SMF* ¶¶ 11, 15.

2. Plaintiffs' amended complaint itself is premised on the theory that the defendants' publishing of the Bergin and Garvey "Reports" on their websites is the very conduct alleged to constitute wire fraud under 18 U.S.C. § 1343. Amended Complaint ¶ 135. By definition, these alleged acts of wire fraud "racketeering activity" cannot also create the separate "enterprise" required by 18 U.S.C. § 1962(c).

3. The handful of e-mail contacts alleged between the defendants and shown by the undisputed facts does not and cannot demonstrate the sort of "organization" required by *Cianci* and *Libertad*. These contacts plainly are far less extensive than those undertaken by those defendants in *Libertad* whose dismissal from the case was sustained by the First Circuit on appeal.

4. The only remaining group of allegations upon which plaintiffs could rely to support the existence of an enterprise independent of the alleged pattern of racketeering activity concerns the hyperlinking from various defendants' websites to others. A finding that the mere use of informational hyperlinks between websites could establish the existence of a separate RICO enterprise would be unprecedented. It is a core, fundamental feature of the Internet and the World Wide Web that websites link to other websites. It is utterly commonplace that people and websites with common interests link to one another so that a visitor to one site can access further sources of information.⁸ Indeed, websites often link to one another without their creators having

⁸ Groups of people with similar interests sometimes even construct "web rings," or organized sites linked sequentially so that one may go from one site for fans of the Beatles, say, to other Beatles fan sites easily and without necessarily knowing ahead of time at which sites one will end up. *See* Wikipedia, "Web rings," at http://en.wikipedia.org/wiki/Web_ring (last visited August 11, 2005).

met, had any contact or communication, or even knowing one another's identity. And in many, perhaps most, cases, people will post such links without reviewing all of the "linked" content directly. They may link to another site for any number of reasons – to recommend it, to comment on or criticize it, or to denounce it. In fact, Bergin and Garvey's website to this day links to the web site of GWP, so that visitors can compare its statements with those made by Bergin and Garvey. See www.windofchanges.org ("Gentle Wind Project leaders' own websites" in "Links"). Moreover, in several widely-publicized recent occurrences, groups of webbloggers or "bloggers," by linking to each other and collectively sharing and exposing certain documents and information, have made dramatic impacts as watchdogs of journalists, politicians, and other public figures. See, e.g., Howard Kurtz, *In the Blogosphere, Lightning Strikes Thrice*, WASHINGTON POST, Feb. 13, 2005, at D1.

The possibility that a group of individuals could be adjudged a RICO enterprise and subjected to RICO liability based on the everyday act of linking to one another's websites because they express similar opinions or make similar statements would, as a matter of law, present an extraordinary chilling effect on First Amendment-protected speech. The First Circuit in *Libertad* raised similar concerns:

Furthermore, we are mindful of the Supreme Court's admonition in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930-932, 102 S.Ct. 3409, 3434-36, 73 L.Ed.2d 1215 (1982), that liability for mere membership in an association, particularly when that association is ideological, may conflict with the First Amendment. See also [*NOW v.*] *Scheidler*, 510 U.S. at [263-64], 114 S.Ct. at 807 (Souter, J., concurring) (discussing possible First Amendment issues raised by RICO actions against protest groups). In light of these constitutional concerns, it is particularly important that Appellants present sufficient evidence, beyond the Appellees' similarity of viewpoint, rhetoric and strategy, to show an enterprise.

53 F.3d at 443.

These First Amendment concerns are amplified dramatically in this case for two reasons. The first is the fundamental importance of hyperlinking to the very operation of the World Wide Web itself. The second is the ideological subject matter of the defendants' websites and speech: shining light on and exposing the potential financial, social, and psychological damage of a group like the Gentle Wind Project. Although GWP denies it is a cult, the six individual plaintiffs live together (with three sharing the same last name as the founder, John Miller), communicate with the "Spirit World," and sell healing instruments – for many thousands of dollars – which heal etheric structures that only they can see. Taken together, these factors should require that plaintiffs make a strong showing of "sufficient evidence, beyond [defendants'] similarity of viewpoint, rhetoric and strategy, to show an enterprise." *Libertad*, 53 F.3d at 443. Instead, the undisputed evidence is entirely to the contrary.

Several contrasting examples of RICO decisions by the First Circuit demonstrate how lacking are the allegations and evidence of a "racketeering enterprise" distinct from the alleged pattern of racketeering in this case.

First, in *Cianci*, where the mayor of Providence, RI and some of his associates engaged in a widespread corruption scheme involving bribery and extortion, among other crimes, the court easily found the existence of such a distinct enterprise. *See* 378 F.3d at 77. The criminal enterprise had a clear and ongoing structure, with Cianci at the top and other defendants facilitating a variety of crimes in particular areas using various municipal entities as criminal instrumentalities. *Id.* at 85-86. Ongoing organization was established almost inherently by the structure of municipal government, *see id.* at 85, and the fact that the corruption continued for eight years with substantially the same personnel made clear that the enterprise was a continuing unit, *see id.* at 86. The members of the *Cianci* enterprise had frequent personal and professional

contacts, and conducted their operations in large part to secure contributions for Cianci's campaign. *See id.* at 80-81.

Second, the First Circuit in *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), found an "ongoing organization" where "various associates function as a continuing unit" (quoting *Turkette*, 452 U.S. at 583), given that the RICO enterprise, a street gang, "was ongoing and identifiable: it changed its name from Adidas to the IVP, it had colors and signs, it had older members who instructed younger ones, its members referred to the gang as family, and it had "sessions" where important decisions were made, including decisions about taking action against rival drug dealers." 248 F.3d at 19.

Third, in contrast, the court in *Libertad* held that some of the defendants were not part of an enterprise that was separate and distinct from the pattern of racketeering. As to those defendants, there was no evidence of association with the enterprise formed by PLRT and Rescue America beyond that activity necessary to conduct the alleged racketeering activity. 53 F.3d at 444. Several of these defendants had come to Puerto Rico only to conduct the one "blockade," and had not been in contact with enterprise members except to arrange and coordinate the demonstration. *Id.*; *see Libertad v. Welch*, 854 F. Supp. 19, 27-28 (D.P.R. 1993). Even though these defendants had clearly coordinated with members of the RICO enterprise found by the First Circuit, the lack of a linkage to an ongoing organization acting as a continuing unit indicated that they had done nothing apart from the alleged pattern of racketeering, and so they were dismissed. 53 F.3d at 444. On the other hand, for the RICO enterprise that was upheld, the court found it crucial that PLRT and Rescue America had overlapping leadership, declared themselves to be "affiliated," and shared information regularly; these factors were deemed to be highly probative of the fact that these groups functioned as a continuing unit, as

required by the RICO statute. 53 F.3d at 443-44. Furthermore, Rescue America issued a press release more than a year after the “blockades” that promised to “continue” anti-abortion action including “all methods... necessary to save the lives of the innocent unborn,” thereby giving rise to a strong inference that an ongoing organization was in place. *Id.*

These highly probative factors are totally absent here. When compared to the clear but informal organizations established in *Cianci* and *Patrick* and the affiliated groups in *Libertad*, the undisputed facts in this case demonstrate a complete lack of the ongoing organization of a continuing unit as to the alleged enterprise and cannot, as a matter of law, be considered to be separate from the alleged pattern of racketeering. At most, plaintiffs allege and the undisputed facts show that Bergin and Garvey have communicated with the other defendants on a few occasions and that they linked to one another’s websites. There are no facts that would show that the defendants communicated often, or over many years, or to coordinate their alleged racketeering activity, as in *Cianci*, nor have the defendants described themselves as “affiliated” or exhibited any sort of leadership, let alone shared leadership, as in *Libertad*. Bergin and Garvey have engaged in nothing more than the commonplace practice of linking to a variety of similar web sites, including those of the other defendants, sometimes with descriptions or words of approval. None of this leads to even the remote inference of the organization and continuity necessary to constitute an enterprise apart from the alleged pattern of racketeering activity, as required under *Turkette*. Because the Plaintiffs have not alleged, and the undisputed facts do not show, the existence of a RICO enterprise “separate and apart from the pattern of [racketeering] activity,” *Turkette*, 452 U.S. at 583, defendants are entitled to summary judgment on Count I of the amended complaint.

Conclusion

For the reasons discussed above, judgment should be entered in favor of James Bergin and Judy Garvey on Count I of the amended complaint. There being no diversity of citizenship, and with judgment being granted on the sole federal law claim, the remaining counts of the amended complaint should be dismissed.

DATED: August 17, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2006, I electronically filed this motion for summary judgment with incorporated memorandum with the Clerk of Court using CM/ECF system which will send notification of such filing(s) to the following: James G. Goggin, Esq. and Daniel Rosenthal, Esq.

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