

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT ON RICO COUNT

In their principal memorandum, defendants James Bergin and Judy Garvey demonstrated that they are entitled to summary judgment on plaintiffs’ RICO Count because (i) there is no enterprise separate and distinct from the originally-named defendants themselves and (ii) there is no enterprise separate and distinct from the alleged pattern of racketeering activity. Plaintiffs’ efforts to overcome these two fatal flaws in their RICO claim are not supported by the record and are without merit. Bergin and Garvey are entitled to summary judgment.

a. No Association-in-Fact Enterprise Distinct From Named Defendants

Plaintiffs do not dispute that the First Circuit has held that the references in the RICO statute to an “enterprise” and a separate “person” demonstrate Congress’s intent that the two should be distinct entities. *Libertad v. Welch*, 53 F.3d 428, 442 (1st Cir. 1995); *see* 18 U.S.C. § 1962(c) (2000). Instead, plaintiffs first point to the statutory definitions of “person” under 18 U.S.C. § 1961(3) (able to hold a legal or beneficial interest in property) and of an associated-in-fact “enterprise” under 18 U.S.C. § 1961(4) (an association that cannot hold any interest in property) and contend that, because natural persons can own property and associations cannot, an alleged association-in-fact RICO enterprise is by definition always distinct from a group of individual defendants. Plaintiffs’ Opposition (“Opp.”) at 6-7. Under this theory, all a plaintiff

ever would need to do to establish a RICO enterprise is show the activity of two or more defendants who made up the entirety of the purported “enterprise.”

Such a reading of the distinct-enterprise requirement necessarily ignores the context of *Libertad*. Even though that decision addressed an association-in-fact of anti-abortion organizations and individuals, 53 F.3d at 444, a context where plaintiffs (Opp.at 6) assert that “the enterprise is by statutory definition separate and distinct from the person,” the First Circuit nevertheless cautioned that:

we have consistently held that the same entity cannot do "double duty" as both the RICO defendant and the RICO enterprise.... The person or persons alleged to be engaged in racketeering activity must be entities distinct from the enterprise.... In other words, because the racketeer and the enterprise must be distinct,...*the enterprise must be an entity separate from the named defendants who are allegedly engaging in unlawful activity.*

53 F.3d at 442 (internal citations omitted) (emphasis added). Plaintiffs’ interpretation would effectively nullify the *Libertad* requirement that “the enterprise must be an entity separate from the named defendants.” 53 F.3d at 442.¹

Second, beyond their statutory definition argument, plaintiffs contend that the distinct-enterprise requirement applies *only* in cases where a single defendant, but not multiple defendants, is also alleged to constitute the enterprise.² Significantly, plaintiffs cite no cases from the First Circuit to support their remarkable assertion that the distinct-enterprise requirement cannot apply when more than one defendant is involved.³ Worse, they ignore the clear language of the controlling First Circuit authority, *Libertad*, which plainly contemplates the need for even multiple defendants to be separate and distinct from the asserted enterprise: “The

¹ It also would alter RICO’s scope from “persons employed by or associated with any enterprise,” 18 U.S.C. § 1962(c), to nothing more than “two or more persons.” “In construing a statute we are obliged to give effect, if possible, to every word Congress used.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

² See Opp. at 5 (“While Defendants gloss over the distinction between a *single defendant* doing ‘double duty’ as the RICO enterprise and *multiple defendants* doing so, the distinction is critical...”) (emphasis in original) and 8, n. 6 (criticizing defendants’ argument that “the same ‘double duty’ analysis applies to one defendant as to many....”)

³ Rather, Plaintiffs cite cases from other circuits and a Massachusetts district court. See Opp. at 7-8.

person *or persons* alleged to be engaged in racketeering activity must be entities distinct from the enterprise.... [T]he enterprise must be an entity separate from the named *defendants* who are allegedly engaged in unlawful activity.” 53 F.3d at 442 (emphasis added). The court’s deliberate use of the plural in framing the level of distinctness required under the RICO statute cannot be squared with the strained interpretation of that requirement urged by plaintiffs.

Third, the fundamental flaw in plaintiffs’ position is that it mischaracterizes defendants’ distinctness argument: “Defendants’ attack is misguided because an ‘enterprise’ may consist of a number of defendants as opposed to simply one of them.” Opp. at 5. Defendants have never contended otherwise. Multiple defendants certainly may be part of a properly pled RICO enterprise, but what is essential – and what plaintiffs’ repeatedly overlook – is that those defendants cannot be the entirety of the claimed enterprise. In other words, the enterprise must be something more than, something distinct from, just the defendants themselves. *See Libertad*, 53 F.3d at 442. Yet the plain language of the Amended Complaint (¶ 136) asserts precisely that “The Count I Defendants... acted as an enterprise... when they violated 18 U.S.C. § 1343.” This linguistic slip belies the conflation of persons and enterprise being attempted here by plaintiffs. Although plaintiffs now assert that defendants were “associated in fact,” neither the Amended Complaint nor any facts they have produced actually identify any association as an enterprise other than the named defendants. The problem with plaintiffs’ claimed association-in-fact as an enterprise is not that it happens to include all the original defendants, but that *it has no distinct existence apart from the defendants themselves*.

b. No Enterprise Distinct From Alleged Racketeering Activity

Plaintiffs do not dispute that they must establish an entity with an existence beyond that necessary to commit the acts alleged to constitute a pattern of racketeering, one with an existence

in the “intervals” between such acts. Opp. at 11.⁴ In the two cases on which they rely, the courts make precisely this point. *See U.S. v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (marijuana smuggling enterprise had a distinct organizational existence between acts of smuggling, by running restaurant and purchasing equipment); *Chisholm v. Charlie Falk Auto Wholesalers*, 851 F. Supp. 739 (E.D. Va. 1994) (enterprise engaged in mail fraud scheme involving nefarious collection practices ran a legitimate car sales and financing business during those time periods other than when the predicate acts occurred). The law in the First Circuit is quite clear that a plaintiff must prove the continuing existence of an association that is an “ongoing organization” with a “common purpose” that functions as a “continuing unit.” *Libertad*, 53 F.3d at 441; *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004). Plaintiffs’ proffered evidence utterly fails to do so; as a matter of law, plaintiffs have not shown the requisite separate enterprise.

The best plaintiffs can do is to assert that “Defendants’ enterprise *did things* other than engage in a pattern of racketeering activity.” Opp. at 9 (emphasis added). But the “things” asserted by plaintiffs are a far cry from the “ongoing organization” and “continuing unit” required under RICO. All of the allegations of “activities aside from [defendants’] racketeering activities” are found in paragraph 23 of plaintiffs’ statement of additional material facts. As defendants note in their Reply SMF, 12 of the 19 supporting subparagraphs must be stricken. The seven remaining allegations of “activities aside from” the defendants’ racketeering activity are grounded on emails between some, but not all, of the defendants. In those emails, some defendants discuss articles they have read, recite jokes, extend birthday, wedding, holiday and family best wishes, and discuss politics. SAMF and Reply SMF ¶ 23(a), (n), (o), (p), (q), (r) and

⁴ In light of plaintiffs’ protestations to the contrary, and to be clear, defendants deny, and consistently have denied, that they were part of an association-in-fact enterprise. *See* Amended Complaint ¶ 136 (alleging association in fact); Answer ¶ 136 (denying allegation in its entirety).

(s). This is idle chit-chat, not evidence of continuity beyond that activity necessary to conduct the alleged racketeering activity.⁵ *See Libertad*, 53 F.3d at 444.

Plaintiffs also seem to assert that an ongoing racketeering enterprise is shown by evidence that Garvey and Bergin contacted the Internal Revenue Service and the Maine Attorney General's Office; forwarded to the AG's Office complaints they received from people in England, Wales, Ireland and Canada; and communicated with their elected Senators and Representative. Opp. at 12; SAMF ¶ 22(g)-(i), 22(p). This is a remarkable claim, made all the more remarkable by the fact that this is the bulk of the evidence plaintiffs cite for their assertion that defendants "planned for and advocated the harm and destruction of Gentle Wind." Opp. at 12. Plaintiffs cite no authority to suggest that reporting suspected fraudulent and illegal conduct to law enforcement and elected representatives can somehow be twisted into evidence of a continuing, ongoing racketeering enterprise, and it is difficult to conceive of any. The public policy objections to such an argument are obvious and substantial.⁶

Plaintiffs refer to evidence that defendants communicated with one another after this lawsuit was filed or threatened and "prepared for a legal battle with Gentle Wind." Opp. at 12. Again, of course, there are significant policy considerations against the notion that jointly discussing a defense to a common RICO lawsuit, whether filed or threatened, can somehow constitute evidence of the ongoing, separate existence of a racketeering enterprise. Moreover, any such legal discussions plainly were undertaken in response to threats by and actions of the plaintiffs; it would be absurd to suggest that plaintiffs themselves can bring about conduct that

⁵ The emails discussing extraneous issues like weddings and politics also address topics related to GWP, thereby demonstrating that there is no difference between this activity and the alleged predicate acts. *See, e.g.*, SAMF ¶ 23(n); Reply SMF ¶ 23(n)(Garvey extends birthday wishes to Gamble, who responds: "You psychic? Can you give me a soul reading and karmic review?...NOT").

⁶ As discussed in detail in defendants' Reply SMF, these communications are protected by a conditional privilege, which plaintiffs do not even approach being able to overcome.

they then characterize as ongoing, coordinated activity of a racketeering enterprise. Plaintiffs cite no authority for this novel assertion.

Plaintiffs concede that the only sorts of “things” defendants did that “did not directly focus on Gentle Wind,” and therefore that arguably might show some continuing enterprise beyond the alleged pattern of racketeering, were that they “ran their businesses, communicated about the general topic of cults, and talked about politics and their families.” Opp. at 12. Of course, purely unilateral activities, such as individual defendants running their *own* businesses, cannot possibly prove anything about the existence of a broader, ongoing racketeering unit or enterprise. Nor, under any sensible reading of RICO, can the occurrence of generic conversations about politics or families, and no case has so held. Moreover, plaintiffs’ assertion that defendants “supported and advised each other” (Opp. at 12), appears to consist essentially of defendants on some occasions expressing encouragement, approval or congratulations to one another. These facts support only an inference that defendants shared a common view of Gentle Wind, and reflect precisely the sort of activities as to which the First Circuit has reiterated the Supreme Court’s admonishment that “liability for mere membership in an association, particularly when that association is ideological, may conflict with the First Amendment,” and cautioned that, therefore, “it is particularly important that [plaintiffs] present sufficient evidence, beyond [defendants’] *similarity of viewpoint, rhetoric and strategy*, to show an enterprise.” *Libertad*, 53 F.3d at 443 (emphasis added).

Ultimately, all that remains of plaintiffs’ attempts to show the continuing existence of an ongoing enterprise activity apart from the alleged pattern of racketeering is the claim that Bergin and Garvey had “substantial communications” with the other original defendants. Opp. at 12. First Circuit precedent makes clear that mere communications are not sufficient to establish the

required “ongoing organization” and “continuing unit” separate from the alleged racketeering. In *Libertad*, the court found the fact that one appellant, Sanchez, “communicate[d]... as often as every day” with a leader of the association-in-fact enterprise about their groups’ activities was insufficient to conclude that Sanchez “function[ed] with them as part of a continuing unit.” 53 F.3d at 444. Although *Libertad* found that sharing information was one factor relevant to determining affiliation, it was hardly sufficient standing alone.⁷ Instead, *Libertad* rejected involvement in the enterprise by Sanchez, who had frequent communications, but found the existence of a separate enterprise for other defendants in light of additional proof of overlapping leadership and a public declaration by one of the groups declaring its association with the other and promising further coordinated illegal acts. 53 F.3d at 443-44.

Significantly, Plaintiffs do not cite a single case where facts even remotely close to those proffered here were found sufficient to establish the existence of an ongoing enterprise apart from the alleged pattern of racketeering. The summary judgment evidence here not only stands in stark contrast to the facts in controlling First Circuit cases – *Libertad*, *Cianci* and *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), but also to the facts in *Tillette* and *Chisolm*, on which they rely. The failure of plaintiffs to meet the requirement of demonstrating the existence of an ongoing, continuing enterprise that is distinct from the alleged pattern of racketeering activity is conclusively demonstrated by a comparison of the facts proffered by plaintiffs with those in any of the First Circuit or other cited cases. The motion should be granted.

DATED: October 11, 2005

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⁷ Plaintiffs themselves acknowledge that “sharing information” only “tends toward” finding a separate enterprise, and concede that faxing and mailing of materials was only one part of the basis for finding an enterprise in *Libertad*. Opp. at 11. In fact, *Libertad* made clear that information sharing was only a factor it considered “in addition” to the primary elements of shared leadership and publicly acknowledged affiliation. 53 F.3d at 443.

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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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