UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC. **Plaintiff,** **v.** **AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, *et al.*,** **Defendants.**	**Civ. No. 07-1532 (EGS)**

SUPPLEMENTAL MOTION TO DISMISS THE CLAIMS AGAINST ATTORNEYS LOVVORN AND OCKENE, AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Fed. R. Civ. P. 12(b)(6) and LCvR 7, defendants Jonathan Lovvorn and Kimberly Ockene move to dismiss the Amended Complaint ("Complaint"), adopt the arguments submitted in defendants' joint memorandum, and respectfully submit this brief supplemental motion focused on the specific deficiencies in the claims asserted against them.

Lovvorn and Ockene were previously employed by the law firm Meyer, Glitzenstein & Crystal, ("MGC"), and are now employed as attorneys at The Humane Society of the United States ("The HSUS"). The few allegations that even refer to them relate solely to their work as lawyers in the ESA case. The professionally-damaging RICO claims against them plainly overreach the actual facts alleged about them in the Complaint, and provide no plausible basis for inferring that as members of a litigation team they committed or agreed to commit a RICO violation. Although it runs over 150 pages, the Complaint alleges remarkably little about Lovvorn and Ockene, and fails totally to identify what they each allegedly did as employed litigation counsel in the ESA case that could conceivably rise to the level of a RICO violation.

The Complaint impermissibly lumps Lovvorn and Ockene with other defendants in making broad-brush accusations, but nowhere identifies specific conduct of these lawyers that permits even a far-fetched inference that they engaged in, or agreed to, the long-term, extended criminal activity in furtherance of an enterprise that is required for a RICO violation. Without allegations *specific to Lovvorn and Ockene* plausibly showing that their roles as litigation counsel constituted knowing, extended criminality and the conduct of a RICO enterprise, the RICO claims against them fail as a matter of law.[1/]

I. THE COMPLAINT CONTAINS NO ALLEGATIONS SUPPORTING A PLAUSIBLE INFERENCE THAT ATTORNEYS LOVVORN AND OCKENE VIOLATED RICO.

To state a violation of 18 U.S.C. § 1962(c), plaintiff must allege facts showing that the defendant (1) conducted affairs (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima v. Imrex Co.*, 473 U.S. 479, 496 (1985). The Complaint's conclusory statements about Lovvorn and Ockene do not plausibly allege these required elements.

A. The Complaint Identifies No Acts of Racketeering by Lovvorn or Ockene.

Plaintiff impermissibly seeks to make Lovvorn and Ockene RICO defendants without ever specifying for each of them conduct that constitutes acts of racketeering activity. Instead, the Complaint groups these two lawyers together with an array of other defendants, and makes broad, vague, and unspecified allegations of their supposed involvement: that the alleged RICO "scheme" was carried out with Lovvorn and Ockene's "encouragement, advice, or knowledge"

1/ *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ambrosia Coal & Construction v. Morales*, 482 F.3d 1309, 1316-17 (11th Cir. 2007) (dismissing RICO complaint that "was devoid of specific allegations with respect to each defendant" and instead "lumped together all of the defendants in the allegations of fraud"); *Bates v. Northwestern Human Services*, 466 F.Supp.2d 69, 85 (D.D.C. 2006) (dismissing RICO complaint which "generally treats, and refers to, the defendant corporations as if they were a single, undifferentiated mass").

(Complaint at ¶ 28); that they "had knowledge of and participated" in unspecified "payments to Rider" (*id.* at ¶¶ 44, 45); and that Lovvorn and Ockene knew about "statements of fact in pleadings" that were allegedly "false and/or misleading" (*id.* at ¶ 51). Not one of these vague assertions either identifies a single RICO predicate act that Lovvorn or Ockene committed individually, or alleges underlying facts to make that contention plausible.

Thus, the Complaint alleges no contact by Lovvorn or Ockene with Tom Rider, no payments they made to Mr. Rider, and no fraudulent or misleading communication by them to anyone. No facts (as opposed to vague and conclusory accusations) are alleged that even suggest that Lovvorn or Ockene played any role at all other than as employed attorneys working on a litigation matter for their superiors and clients. The Complaint does not even state *when* these attorneys' alleged criminal conduct is supposed to have taken place, or *where* they were employed when it allegedly happened.[2/] Nor do any factual allegations support a plausible inference that in their role as lawyers and employees they formed a specific intent to defraud, obstruct, bribe, or launder funds in furtherance of the alleged scheme.[3/] Signing a complaint and

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[2/] Plaintiff does not state whether Lovvorn and Ockene are named as defendants based on their past employment with MGC, or based their current employment as in-house attorneys for The HSUS – an organization that is not even a party to the underlying ESA case.

[3/] *See, e.g., United States v. Coughlin*, 610 F.3d 89, 97-98 (D.C. Cir. 2010) (to commit mail fraud "the defendant must have fraudulent intent at the time of the charged mailing: that is, he must both have a fraudulent scheme in mind and intend that the mailing further that scheme"); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1119 (D.C. Cir. 1991) (obstruction of justice requires a "specific intent to impede the administration of justice") (internal cites omitted); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404-05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange*" for the desired act) (emphasis in original); *United States v. Boyd*, 149 F.3d 1062, 1067 (10th Cir.1998) (money laundering requires specific intent to launder proceeds from a known unlawful activity).

serving as employed counsel are *not* RICO predicate acts. Finally, no allegations even attempt to state how any acts *by Lovvorn or Ockene* defrauded plaintiff or caused it injury.[4/]

Plaintiff's vague accusations of criminal conduct by two lawyers who served as members of a litigation team are unconscionable and abusive. The claims against Lovvorn and Ockene should be dismissed.

B. There Are No Allegations Creating a Plausible Inference that These Two Employed Lawyers "Directed" the Affairs of the Alleged RICO Enterprise.

RICO's language makes plain that "Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise," so that "one is not liable under that provision unless one has participated in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 183-84 (1993). For each RICO defendant, "*some* part in directing the enterprise's affairs is required." *Id.* at 179 (emphasis in original). It is insufficient to rest on allegations that a defendant was involved in an enterprise, or even performed tasks helpful to the enterprise. *See United States v. Viola*, 35 F.3d 37, 41 (2nd Cir 1994) ("Since *Reves*, it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is

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[4/] *See Murray v. Mulgrew*, 704 F.Supp.2d 45, 48 (D.D.C. 2010) ("a plaintiff in a civil RICO action must show some direct relation between the injury asserted and the injurious conduct alleged") (internal cites omitted); *Williams v. Martin-Baker Aircraft*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (complaint alleging fraud must state, among other things, "what was retained or given up as a consequence of the fraud") (internal cites omitted). In order to state a RICO claim, "the pleader [must] specify *what* [fraudulent] statements were made and in what context, *when* they were made, *who* made them, and the manner in which those statements were misleading.'" *Intex Recreation Corp. v. Team Worldwide Corp.*, 390 F. Supp.2d 21, 24 (D.D.C. 2005) (emphasis added). Requiring defendants "to guess amongst themselves which one is responsible for the instances of mail and wire fraud alleged by the plaintiffs" is not permissible. *Bates*, 466 F. Supp.2d at 92.

insufficient...."). "[T]he test is not involvement but control." *Dep't of Econ. Dev. v. Arthur Andersen*, 924 F. Supp. 449, 467 (S.D.N.Y. 1996).

The Court will search in vain through the more than 350 paragraphs of the Complaint for factual allegations plausibly showing that these two lawyers participated in the management of a RICO enterprise. The bare allegation that each defendant had a "distinct" role (Compl. ¶ 285), is insufficient to meet the *Reves* standard. *See VanDenBroeck v. Commonpoint Mortg. Co.*, 22 F.Supp.2d 677, 684 (W.D.Mich. 1998) ("naked allegation" that defendants "participated in the conduct of the affairs of the enterprise" was insufficient to state a RICO claim).

The only conduct of Lovvorn or Ockene alleged with any specificity is that each served as employed counsel representing clients in a single case. Plaintiff alleges that Lovvorn and Ockene signed the complaint in the ESA case (Compl. ¶¶ 44-45), and that Ockene issued a subpoena to a witness (*id.* ¶ 256). These certainly are no more than the "performance of tasks that are 'necessary or helpful' to the enterprise." *Viola*, 35 F.3d at 41.

Since *Reves* was decided, the courts have repeatedly made it clear that alleged conduct of attorneys limited to the provision of legal services to clients – which is all that is specified as to Lovvorn and Ockene – does not rise to the level of "directing the enterprise's affairs" (*Reves*, 507 U.S. at 179). *See, e.g., Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (pleading that fails to show that attorneys providing legal services had "some part in directing" the affairs of the enterprise is insufficient to survive motion to dismiss); *Nolte v. Pearson*, 994 F.2d 1311, 1317 (8th Cir. 1993) (attorneys who prepared false letters and memoranda did not engage in "operation or management" of the enterprise); *Baumer v. Pachl*, 8 F.3d 1341, 1342 (9th Cir. 1993) (no RICO liability for attorneys who prepared letters to state officials "to forstall and cover-up the fraud by minimizing or mischaracterizing the [enterprise's] allegedly improper

activities"); *Nastro v. D'Onofrio*, 542 F.Supp.2d 207, 217-18 (D. Conn. 2008) (lawyers offering professional services not liable under RICO even if "they had knowledge of the alleged enterprise's illicit nature" because they did not manage or operate the enterprise); *Morin v. Trupin*, 832 F. Supp. 93, 98 (S.D.N.Y. 1993) (law firm providing legal services to client does not satisfy the *Reves* conduct of affairs requirement); *Biofeedtrac, Inc. v. Kolinor Optical Enterprises & Consultants,* 832 F. Supp. 585, 591 (S.D.N.Y. 1993) (where lawyer's role is confined "to providing legal advice and legal services," the *Reves* standard is not satisfied); *Gilmore v. Berg*, 820 F.Supp. 179, 183 (D.N.J. 1993) (attorney who allegedly prepared false private placement memoranda regarding limited partnership did not conduct affairs of enterprise because he did not "direct[ ] the legal entities he represented to engage in particular transactions").

No allegation in the Complaint even suggests how Lovvorn or Ockene were involved in directing the affairs of the alleged RICO enterprise, and it is apparent that in their capacity as employees of MGC or The HSUS they were not in a position to do so. The RICO claim against them should be dismissed on that basis.

C. The Complaint Alleges No Pattern of Racketeering by Lovvorn or Ockene.

As set forth in the joint memorandum, plaintiff's attempt to plead a RICO claim to recover attorneys' fees incurred in association with payments to a *single* witness in a *single* lawsuit fails to allege a pattern of racketeering activity as a matter of law. *See Western Associates Ltd. Partnership v. Market Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001). In an effort to plead around this defect, plaintiff adds allegations about various legislative and executive branch advocacy activities, vainly trying to create a pattern of activity where there was none. But because the Complaint never alleges that Lovvorn or Ockene participated in any of

these other alleged activities, those allegations cannot possibly overcome plaintiff's inability to allege a pattern of activity *as to them* in connection with a single, now-completed litigation. Accordingly, since the allegations against Lovvorn and Ockene involve *solely* their involvement in the ESA litigation, with no threat of repetition, the RICO claims against them should be dismissed for lack of the required pattern of racketeering activity.

II. THE COMPLAINT FAILS TO ALLEGE FACTS NECESSARY TO SUPPORT A RICO CONSPIRACY CLAIM AGAINST LOVVORN OR OCKENE.

The RICO conspiracy claim should be dismissed because the Complaint fails to include any allegations plausibly supporting the conclusory charge that attorneys Lovvorn and Ockene agreed to violate RICO. To state a conspiracy claim for a violation of 18 U.S.C. § 1962(d), plaintiff must allege the defendants actually agreed to all elements of a substantive RICO violation. *See Salinas v. United States*, 522 U.S. 52, 65 (1997) (RICO conspirator "must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense"); *Barlow v. McLeod*, 666 F.Supp. 222, 225 (D.D.C. 1986) (RICO conspiracy requires "the assent of each defendant to the conspiracy").

It is not enough to allege mere association with an enterprise; plaintiff must state with specificity an agreement that encompasses all of the required aspects of a RICO violation. *See Elsevier Inc. v. W.H.P.R., Inc.*, No. 09-6512, 2010 WL 710786, at *14 (S.D.N.Y. Feb. 19, 2010) (RICO conspiracy allegations "may not be conclusory, but must set forth specific facts tending to show that each of the defendants entered into an agreement *to conduct the affairs of a particular, identified enterprise through a pattern of racketeering activity*") (emphasis in original). To enter into such an agreement, the defendant must (1) know about, *and agree to the commission of*, the predicate offenses, *Baumer*, 8 F.3d at 1346 ("a defendant who did not agree to the commission of

crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise") (internal cites omitted); (2) know that these predicate offenses "were part of a pattern of racketeering activity," *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991) (affirming dismissal for failure adequately "to allege the conspiracy elements of agreement and knowledge that the defendants' acts were part of a pattern of racketeering activity"); (3) understand "the essential nature and scope of the enterprise and intend[] to participate in it," *Howard v. America Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (quoting *Baumer*, 8 F.3d at 1346); *accord Morin v. Trupin,* 711 F. Supp. 97, 111 (S.D.N.Y. 1989); and (4) with this knowledge, "agree[] to participate in what he knew to be a collective venture directed toward a common goal." *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 413 (S.D.N.Y. 1984) (quoting *United States v. Martino*, 664 F.2d 860, 876 (2d Cir. 1981)).

In this case, no facts are alleged showing that either Lovvorn or Ockene agreed to a scheme to use racketeering activity in furtherance of the enterprise alleged by plaintiff. Plaintiff never even attempts to allege who reached agreement with whom, how the agreement was manifested, when it occurred, or the substance of its content. Apart from a conclusory conspiracy charge, which is insufficient,[5/] the Complaint contains no allegations that allow a plausible inference that Lovvorn or Ockene reached a meeting of minds with other defendants to proceed with all of the elements that comprise a RICO violation. Plaintiff's attempt to lump

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5/ RICO conspiracy claims must plead "specific facts" supporting the alleged agreement. *See Doe I v. State of Israel*, 400 F. Supp. 2d 86, 120 (D.D.C. 2005); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 950 (11th Cir. 1997) (plaintiff must provide "sufficient facts to infer" defendant's agreement to enter into a RICO conspiracy and to commit the alleged predicate acts); *see also* Rakoff et al., *RICO Civil & Criminal Law* § 1.06 (2009) ("If a plaintiff merely submits conclusory allegations that fail to demonstrate each defendant's agreement to the commission of two or more predicate acts by some member of the conspiracy, or that each defendant knew that these predicates were part of a pattern of racketeering, the complaint is subject to dismissal.").

Lovvorn and Ockene in with "all defendants" for the conspiracy claim (Compl. ¶¶ 289-292), is nothing more than a recital of blanket legal conclusions, which is plainly inadequate. *Murray*, 704 F.Supp.2d at 46, 48 (a "pleading that offers 'labels and conclusions' or a formulaic recitation of the elements of a cause of action will not do").

Conclusion

For these reasons, as well as those set forth in the joint memorandum, the claims against Lovvorn and Ockene should be dismissed. In light of plaintiff's ample opportunity to gather information in discovery and a multi-day magistrate hearing in the earlier ESA litigation, the dismissal should be with prejudice.

Respectfully submitted,

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