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)**

REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS THE CLAIMS AGAINST ATTORNEYS LOVVORN AND OCKENE

The Amended Complaint in this action was filed after years of related litigation, with thousands of pages of discovery, dozens of depositions, a multi-day hearing about Tom Rider, and a six-week trial. Despite this wealth of information, the Complaint fails to allege sufficient facts to support RICO claims against defendants Lovvorn and Ockene for their role as counsel in the ESA litigation. Plaintiff's opposition to the motion to dismiss does not seek to show how its allegations support a claim, but instead improperly seeks to alter the contents of the Complaint to justify the claims, and even that effort fails. These claims should now be dismissed with prejudice.[1/]

I. THE COMPLAINT NEITHER ASSERTS NOR SUPPORTS PLAINTIFF'S NEW THEORY THAT LOVVORN AND OCKENE HAVE VICARIOUS CRIMINAL LIABILITY FOR THE ALLEGED ACTS OF OTHERS.

As explained in their motion to dismiss, the Complaint impermissibly lumps Lovvorn and Ockene in with other defendants "as if they were a single, undifferentiated mass," *Bates v.*

[1/] Lovvorn and Ockene also adopt and incorporate the arguments made in defendants' joint Reply in support of their Motion To Dismiss.

Northwestern Hum. Serv., 466 F.Supp.2d 69, 85 (D.D.C. 2006), and fails to plead facts showing *these two individuals* engaged in the long-term pattern of criminal activity required to support a RICO violation. *See Ambrosia Coal & Constr. Co v. Morales*, 482 F.3d 1309 (11th Cir. 2007). Having no viable response based on the actual allegations in the Complaint, plaintiff seeks to advance a new and sweeping theory of vicarious liability for Lovvorn and Ockene: that the Complaint adequately alleges they committed predicate acts because they "are responsible for most (if not all) of what MGC and WAP did." Pl. Br. at 2. That argument fails for at least three reasons.

First, plaintiff's new theory of criminal vicarious liability fails because it is not pled in the Complaint. It is well-established that revisionist briefs cannot repair flawed complaints. *See, e.g.*, *Henthorn v. Dep't of Navy*, 29 F.3d 682, 687-88 (D.C. Cir. 1994) (denying plaintiff's request to consider allegations in briefs, and emphasizing "[t]he purpose of a motion to dismiss is to assess the validity of the *pleadings*"); *Assoc. Press v. All Headline News*, 608 F.Supp.2d 454, 464 (S.D.N.Y. 2009) ("Conclusory assertions in a memorandum of law are not a substitute for plausible allegations in a complaint."). Plaintiff has not cited one allegation in the Complaint that Lovvorn and Ockene committed predicate acts based on vicarious liability for the acts of others. The adequacy of the Complaint is what is at issue on this Rule 12(b)(6) motion; the attempt to extend those allegations in motion papers should be rejected by the Court.

Second, plaintiff's argument badly botches the law by conflating civil and criminal vicarious liability concepts. A defendant can violate section 1962(c) of RICO only by committing a pattern of crimes specified in the statute. Plaintiff was required to plead facts providing a plausible inference that Lovvorn and Ockene *themselves* committed such crimes, and, because fraud was alleged, to do so with specificity. *See Bates*, 466 F.Supp.2d at 85*; Slattery v. Costello*, 586 F. Supp. 162, 164 (D.D.C. 1983) ("Had the Congress not intended civil RICO plaintiffs to prove the same elements which the Government must prove in a criminal case, it undoubtedly would not have

defined a civil violation with specific reference to a criminal one."). Yet, strangely, plaintiff's entire discussion of the issue focuses on the *civil* concept of "joint and several liability" which has no bearing whatsoever on the sufficiency of allegations of *criminal* predicate acts. Because there is no such thing as "joint and several" criminal liability, it is not surprising that plaintiff cites only cases involving vicarious *civil* liability, which plainly miss the mark. *See* Pl. Br. at 2-4.[2/] Plaintiff's repeated references to theories of civil vicarious liability simply fail to address the key requirement of criminality.[3/]

Third, plaintiff's newfound theory is based on the unsupported (and incorrect) assertion that Lovvorn and Ockene were general partners of Meyer, Glitzenstein & Crystal ("MGC"). Under D.C. law, a partnership is formed when two or more people "carry on as co-owners of a business for profit" (D.C. Code § 33-102.02), and its existence is determined by looking "for the presence or absence of the attributes of co-ownership, including profit and loss sharing, control, and capital

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[2/] The financial liability of general partners for the obligations of the partnership under D.C. law has no bearing on criminal liability. *See* D.C. Code § 33-102.02. *BCCI Holdings v. Clifford*, 964 F. Supp. 468 (D.D.C. 1997), did not hold that a partner is vicariously liable for his partners' criminal predicate acts under RICO. The partners at issue were not sued under RICO, but under various tort theories (*id.* at 472), and the court simply held a partner could be liable for his partners' tortious conduct (*id.* at 486). *Cox v. Administrator*, 17 F.3d 1386, 1406-08 (11th Cir. 1994) and *United States v. Philip Morris USDA Inc.*, 449 F. Supp. 2d 1, 892-93 (D.D.C. 2006), both concern liability of a corporation for the actions of its employees, and find that corporations – which *only* act through their employees – may be liable under RICO based on *respondeat superior*. That has no bearing on the criminal liability of individuals. And *131 Main St. Assocs. v. Manko*, 897 F. Supp. 1507, 1534 (S.D.N.Y. 1995), addressed only the issue of civil vicarious liability of general law partners, a theory which is not pled in the Complaint here.

[3/] *See U.S. v. Bainbridge Mgmt., Inc.*, 2002 WL 538777 (N.D.Ill. Apr. 11, 2002) ("A partnership's criminal conduct is insufficient to impute liability to an individual partner."); *Dodd v. Infinity Travel*, 90 F.Supp.2d 115, 117 (D.D.C. 2000) (dismissing RICO claim against husband and daughter that argued vicarious liability for predicate acts committed by their wife/mother); *Lerwick v. Kelsey*, 150 Fed.Appx. 62, 64 (2nd Cir. 2005) (RICO complaint must show "how defendants' statements or actions constituted *criminally-punishable* acts") (emphasis in original); *Dayton Monetary Assocs. v. Donaldson, Lufkin, & Jenrette Sec. Corp.*, No. 91 Civ. 2050, 1995 WL 43669, *4 (S.D.N.Y. Feb. 2, 1995) ("[W]hether one commits 'racketeering activity' depends on whether one is criminally liable for a given act, not on whether one is civilly liable.").

contributions." *Beckman v. Farmer*, 579 A.2d 618, 627 (D.C. Ct. App. 1990). No fact alleged in the Complaint creates an inference that either Lovvorn or Ockene met this ownership test. Nor could such facts be added within the constraints of Fed. R. Civ. P 11, because they were in fact *non-equity* employees, *not* general partners. *See In re Mercedes-Benz Antitrust Litig.*, 226 F.Supp.2d 552 (D.N.J. 2002) (non-equity partners are different than "the traditional equity partner, in which each member is the general agent of the others"); *In re Labrum & Doak, LLP*, 227 B.R. 391 (Bankr. E.D. Pa. 1998) ("unlike non-equity partners," partners who share in profit-distribution are subject to partnership liabilities).[4/]

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

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

The Complaint alleges no contact or communications between Lovvorn or Ockene and Tom Rider, no payments by them to Mr. Rider, and no specific fraudulent or misleading communication by them to anyone. Instead, the Complaint improperly relies on generic allegations of collective wrongdoing against all defendants, and the contention that these two lawyers *must be guilty* because they were employed by other defendants. To address this defect, plaintiff offers a series of purported "predicate acts" that either (i) are not alleged in the Complaint, or (ii) utterly fail to state the required elements of criminality.

Alleged acts of bribery. Plaintiff asserts Lovvorn and Ockene committed acts of bribery and illegal witness gratuities because they "knew of" and "participated in" allegedly "procuring

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[4/] The contention that Lovvorn and Ockene are criminally liable for alleged conduct by the Wildlife Advocacy Project ("WAP") (Pl. Br. at 2-3) is even more bizarre. WAP was neither their employer nor their client. The notion that a conclusory allegation that WAP was *MGC's* alter ego could make MGC *employees* criminally liable for alleged acts of WAP is plainly wrong, and, for that reason, is unsupported by any citation.

Rider's absence from the contempt hearings [sic] in 2008." Pl. Br. at 4. Bribery requires a corrupt payment by the defendant to a witness specifically for the purpose of influencing or preventing testimony. *See* 18 U.S.C. § 201(b)(3-4); *U.S. v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999). The portions of the Complaint cited by plaintiff in support of its argument (¶¶ 231-34) contain no allegations that could conceivably constitute bribery by Lovvorn or Ockene. Rather, they allege that "Meyer, Glitzenstein, Crystal, Ockene and Lovvorn *refused to accept a subpoena* for Rider" (¶ 231, emphasis added), that payments were made to Rider by "WAP with money provided by one or more of the other organizational plaintiffs" (¶¶ 231-32), and that these payments *by WAP* "were made corruptly with the intent to influence Rider to absent himself" (¶ 233). The only allegations that allude to conduct by Lovvorn or Ockene are that they refused to accept a subpoena for Rider, which does not even approach being a crime. There is no basis pled for attributing alleged payments vicariously to Lovvorn and Ockene, and the mere allegation that they "knew of" payments made by others and in some vague sense "participated" in Rider's absence is insufficient to charge them with violating section 201.[5/]

Nor is there any merit to plaintiff's assertion that the Complaint adequately alleges Lovvorn engaged in bribery because he "participated in the planning and execution of the Rider payments," and "personally made at least four of them himself." Pl. Br. at 5 (citing Compl. ¶¶ 44, 160). The Complaint alleges no such facts, in the portions cited by plaintiff or anywhere else. The Complaint alleges only that Lovvorn "*had knowledge of and participated in discussions*" with his employers concerning such payments, and in some unstated respect "*participated*" in payments made by them.

[5/] Significantly, the general federal conspiracy provision, 18 U.S.C. § 371, is not a designated RICO predicate offense. *See* 18 U.S.C. § 1961(1). Accordingly, even if plaintiff pled that Lovvorn and Ockene conspired with others to violate 18 U.S.C. § 201, which is not alleged in the Complaint, it would do nothing to advance the RICO claim against them.

Compl. ¶¶ 44, 160. There are no allegations that Lovvorn ever himself made or funded any payment to Rider (which he did not), or that Lovvorn ever discussed with Rider his testimony or participation in the case (which he also did not). Without factual allegations providing a plausible inference that Lovvorn personally paid Rider, or caused Rider to be paid, with the corrupt specific intent to influence testimony, no valid bribery charge is alleged.

Alleged obstruction of justice. Equally flawed is plaintiff's argument that it adequately alleged Ockene obstructed justice because she was "*involved in*" and had "*knowledge of*" allegedly "misleading and/or false interrogatory answers," and "defended" a deposition where a witness allegedly "gave false deposition testimony." Pl. Br. at 4. Obstruction of justice requires acts that impede the administration of justice corruptly and with specific intent. *See* 18 U.S.C. § 1503(a); *Pyramid Secs. Ltd. V. IB Resolution, Inc.*, 924 F.2d 1114, 1119 (D.C. Cir. 1991).

Once again, the portions of the Complaint plaintiff cites (¶¶ 192-205, ¶¶ 223-230, ¶¶ 206-216) provide no support for this criminal charge. None of the cited paragraphs even mentions Ockene, much less pleads facts showing she committed a felony. Rather, they contain generic allegations that "*ASPCA, AWI, FFA/HSUS, WAP, MGC, and Rider* attempted to cover up" payments to Rider with false and misleading discovery answers (¶¶ 192-205); that "*Rider submitted* his initial response to FEI's interrogatories" with "false answers" and a lawyer *other than Ockene* "signed Rider's responses" (¶¶ 223-230); and that "*AWI testified* . . . that it was not aware that AWI was sharing Rider's expenses," and this was false (¶¶ 206-16). The only alleged conduct *by Ockene* involves allegations made for the first time in plaintiff's brief (not in the Complaint), and even so does not support any obstruction of justice charge. The assertion that she "was involved" in an unspecified way in supposedly false interrogatory answers made by others (Pl. Br. at 4) does not approach stating a crime. And the statement that she "defended" a deposition in which the deponent allegedly gave false testimony (*id.*) likewise alleges no criminal conduct – a lawyer does not

commit the felony of obstructing justice merely by representing a witness who allegedly gives false testimony at a deposition. Plaintiff does not, and cannot, cite a case holding otherwise.

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

Plaintiff's opposition to the motion to dismiss refers solely to the alleged involvement of Lovvorn and Ockene in four litigation-related events, which plaintiff subdivides into 13 purported predicate acts.[6/] In doing so, plaintiff makes it clear that the claims against Lovvorn and Ockene concern alleged conduct in the course of a *single* lawsuit, and thus fail to allege a pattern of racketeering activity as a matter of law. *See Edmondson v. Alban Towers*, 48 F.3d 1260, 1263 (D.C. Cir. 1995). In an effort to plead around this defect, plaintiff padded its Complaint with allegations about legislative and executive advocacy of certain defendants. But those allegations have no bearing on the claims against Lovvorn and Ockene because they are not alleged to have played any role in those activities – their only alleged role was as lawyers in one lawsuit.

Plaintiff's opposition to the omnibus motion to dismiss grasps at a different straw – arguing that conduct by the defendant organizations in connection with "fundraising" provides the necessary pattern. This alteration in course has no effect on Lovvorn and Ockene, however, because the Complaint fails to allege they had any involvement in fundraising activities.

Because the allegations against Lovvorn and Ockene involve solely their work in a single litigation, with no threat of repetition, the RICO claim against them fails because no pattern of

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[6/] The supposed "six separate acts by Ockene and seven by Lovvorn" touted by plaintiff (Pl. Br. at 4) are actually four examples of alleged conduct during the underlying litigation – Rider's non-appearance and supposed false testimony, and allegedly false interrogatory responses and deposition answers by persons other than Lovvorn or Ockene. Plaintiff's transparent attempt to subdivide this conduct artificially into 13 acts in an effort to create the appearance of a pattern of activity is ineffectual. *See, e.g., Western Assocs. v. Market Square*, 235 F.3d 629, 635 (D.C. Cir. 2001) (rejecting "a vain attempt to make a RICO claim seem more viable by parsing one scheme into multiple schemes").

racketeering activity is alleged. *See Edmondson*, 48 F.3d at 1264 (RICO pattern requires plaintiff to plead facts showing "far more than a hypothetical possibility of further predicate acts"). This very argument was used successfully by plaintiff's law firm to defend against a RICO claim for alleged conduct during a single litigation. *See* Brief for Appellees in *Hatteberg v. Adair Enterprises, Inc.*, Case No. 00-50074, 2000 WL 34029837 at*17-18 (5th Cir. filed June 12, 2000) (arguing RICO claim against Fulbright & Jaworski was properly dismissed because the alleged acts occurred during a single dispute to accomplish a discrete goal); *Hatteberg v. Adair Enterprises, Inc.*, Case No. 00-50074, 2000 WL 1741573 (5th Cir. Nov. 8, 2000) (affirming judgment for defendants).

C. The Complaint Does Not Plead Facts Showing These Litigation Counsel Had "Some Part in Directing the Enterprise's Affairs."

The Lovvorn and Ockene motion to dismiss pointed out that plaintiff improperly relies on the theory that "knowledge" and "involvement" in a RICO enterprise triggers RICO liability, even though this is the exact theory rejected by the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) ("Congress could easily have written 'participate, directly or indirectly, in [an] enterprise's affairs,' but it chose to repeat the word 'conduct.' We conclude, therefore, that … 'conduct' requires an element of direction."). Plaintiff's opposition nevertheless continues to contend that the mere participation of two lawyers in litigation as counsel for clients satisfies RICO's "conduct of affairs" requirement. *See* Pl. Br. at 6 (contending that acting "as counsel of record in the ESA case" while knowing about the alleged payments satisfies the conduct of affairs standard).

The courts, however, have made clear that 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 (2d 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 insufficient…."); *Dep't of Econ. Dev. v. Arthur Andersen*, 924 F. Supp. 449, 466 (S.D.N.Y.

1996) ("[T]he test is not involvement but control."). More specifically, the courts have made it clear that providing legal services to clients engaged in a RICO enterprise does not constitute "directing the enterprise's affairs," as *Reves* required (507 U.S. at 179).[7/]

Plaintiff's opposition does not identify a single allegation that Lovvorn or Ockene exercised the requisite role in "directing the enterprise's affairs" beyond the provision of ordinary legal representation. To the contrary, the conduct plaintiff points to in support of its claim – the refusal of a subpoena, defending a deposition, and work on interrogatory responses – is precisely the mere provision of legal services to a client that the courts have held does *not* satisfy the *Reves* conduct of affairs standard. *See* Pl. Br. at 5.

Nor can Plaintiff sidestep the required showing of "direction" by suggesting that an allegation of "fraudulent litigation" trumps the statutory requirement found in *Reves*. *See* Pl. Br. at 7-8. Whatever the alleged nature of misconduct, a RICO claim requires factual allegations showing the defendant took part in "directing the enterprise's affairs." There is no basis in the statute for a "litigation" exception to that rule.

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

As explained in the Lovvorn and Ockene Motion to Dismiss (at 8), a conspiracy claim under 18 U.S.C. § 1962(d) must allege grounds to infer that defendants: (1) knew about, and agreed to the

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[7/] *See Nolte v. Pearson*, 994 F.2d 1311, 1317 (8th Cir. 1993) (attorneys who prepared letters did not engage in "operation or management" of the enterprise); *Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993) (no RICO liability for attorneys who prepared letters which helped the enterprise); *Walter v. Drayson*, 538 F.3d 1244, 1248 (9th Cir. 2008) (attorneys providing legal services does not constitute "some part in directing" the enterprise). *Accord Azrielli v. Cohen Law Offices*, 21 F.3d 512 (2d Cir. 1994); *Lippe v. Bairnco Corp.*, 218 B.R. 294, 304 (S.D.N.Y. 1998); *Mruz v. Caring, Inc.*, 991. F. Supp. 701, 719-20 (D.N.J. 1998); *Morin v. Trupin*, 832 F. Supp. 93, 97-98 (S.D.N.Y. 1993); *Gilmore v. Berg*, 820 F. Supp. 179, 182-83 (D.N.J. 1993); *Sassoon v. Altgeld, 777, Inc.*, 822 F. Supp. 1303, 1306-07 (N.D. Ill. 1993).

commission of, the predicate offenses; (2) knew that these crimes were part of a pattern of racketeering activity; (3) understood the essential nature and scope of the enterprise; and (4) with this knowledge, agreed to participate in a collective venture directed toward a common goal.

Plaintiff makes no attempt to point to allegations in the Complaint that satisfy these requirements, and there are none. The Complaint never alleges who reached agreement with whom, how the agreement was manifested, when it occurred, or its contents. *See Elsevier Inc. v. W.H.P.R., Inc.*, 692 F.Supp.2d 313 (S.D.N.Y. 2010). Plaintiff's argument that Lovvorn and Ockene "clearly" joined a RICO conspiracy because they "were counsel of record in the ESA case" (Pl. Br. at 9) does not approach meeting these standards. By arguing that mere involvement with an alleged enterprise is sufficient to state a RICO conspiracy, plaintiff reveals the overreaching nature of its entire theory. The "RICO conspiracy provision should not be used by the courts 'to criminalize mere association with an enterprise.'" *Goren v. New Vision Int'l*, 156 F.3d 721, 731-32 (7th Cir. 1998).

Conclusion

For all of these reasons, as well as those set forth in the joint memorandum, the Complaint should be dismissed with prejudice as to defendants Lovvorn and Ockene.

Respectfully submitted,

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