4 F.3d 1153, 26 Fed.R.Serv.3d 1468, RICO Bus.Disp.Guide 8379, 38 Fed. R. Evid. Serv. 902
(Cite as: 4 F.3d 1153)

United States Court of Appeals,
Third Circuit.
LIGHTNING LUBE, INC.; Laser Lube, a New Jersey Corporation
v.
WITCO CORPORATION; Avis Service, Inc.; Avis Lube, Inc.; Avis Enterprises, Inc., Defendants/Third Party Plaintiffs,
v.
Ralph VENUTO, individually and d/b/a Laser Lube, Lightning Lube, and Automotive Management Systems; Carol Venuto, his wife, individually; Automotive Management Systems, Inc., a New Jersey Corporation, Third Party Defendants,
Witco Corporation, Appellant.
LIGHTNING LUBE, INC.; Laser Lube, a New Jersey Corporation
v.
WITCO CORPORATION; Avis Service, Inc.; Avis Lube, Inc.; Avis Enterprises, Inc., Defendants/Third Party Plaintiffs,
v.
Ralph VENUTO, individually and d/b/a Laser Lube, Lightning Lube, and Automotive Management Systems; Carol Venuto, his wife, individually; Automotive Management Systems, Inc., a New Jersey Corporation, Third Party Defendants,
Lightning Lube, Inc., t/a Laser Lube, Appellant.

Nos. 92-5476, 92-5543.
Argued July 20, 1993.
Decided Sept. 10, 1993.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

* * * * *

***1161** These appeals arise from a civil action brought in the United States District Court for the District of New Jersey, in which a quick-lube franchisor, Lightning Lube, Inc. t/a Laser Lube (Lightning Lube), obtained a jury verdict for approximately $11.5 million in compensatory damages and $50 million in punitive damages against its motor oil supplier, Witco Corporation (Witco). Lightning Lube accused Witco of breaching its supply agreement and destroying Lightning Lube's relationship with its franchisees to benefit a competing quick-lube business that Witco had started with Avis Services, Inc. (Avis). Witco's actions allegedly caused Lightning Lube's existing franchisees either to abandon it or to hold back payment of royalty fees and resulted in large numbers of prospective franchisees never opening Lightning Lube centers. As a result, Lightning Lube lacked the cash flow necessary to continue operating and its owner, Ralph Venuto, was forced to sell its assets to another company for far less than their true worth.

Lightning Lube asserted six claims against Witco, but at the end of the trial, only four remained in the case: (1) breach of contract; (2) fraud and misrepresentation; (3) intentional interference with contracts and prospective contractual advantage; and (4) punitive damages. At the conclusion of a three-month trial, the jury returned a verdict of liability on all four counts, though not on every claim within each count. The jury, however, found in favor of Witco on counterclaims to recover payment for unpaid charges for equipment and oil. Thereafter Witco moved for judgment as a matter of law or, in the alternative, for a new trial. The district court granted the motion in part and denied it in part in a comprehensive opinion dated September 2, 1992. *See* *Lightning Lube, Inc. v. Witco Corp.*, 802 F.Supp. 1180 (D.N.J.1992). In its opinion, the district court granted judgment and, alternatively, a new trial, on two of the fraud claims on which separate verdicts for $1.0 million each had been returned and on the punitive damages claims, but denied Witco judgment or a new trial on Lightning Lube's third fraud claim, on which no damages had been awarded, and on Lightning Lube's claims of tortious interference with economic relations and breach of contract. The court, therefore, left intact approximately $9.5 million of the approximately $61.5 million that the jury originally had awarded to Lightning Lube.

Witco now appeals from the district court's order of September 2, 1992, to the extent it denied Witco's motion as to the tortious interference and breach of contract claims. Lightning Lube cross-appeals from the district court's grant of judgment and a conditional new trial to Witco on Lightning Lube's fraud and punitive damages claims. It also appeals from the district court's pretrial order of February 19, 1991, granting summary judgment to Witco on Lightning Lube's RICO claims.[FN1] For the reasons discussed ***1162** below we will affirm the district

court's orders in their entirety.

> FN1. The notices of appeal are stated more broadly but we confine our description of them to the matters actually in issue. Lightning Lube's First Amended Complaint contained claims of unfair competition and price and service discrimination under the Robinson-Patman Act. The district court granted Witco a judgment as a matter of law with respect to these claims on April 3, 1992, and Lightning Lube does not appeal from this order. Likewise, Lightning Lube does not challenge the district court's pretrial dismissal of its claims against Avis, Inc.

We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (the RICO claims) and 1332 (all other claims). The parties are in agreement that New Jersey law governs the state law claims.

I. BACKGROUND

A. FACTUAL HISTORY

To the extent that the facts at trial were in dispute we state them in the light most favorable to the verdict winner, *i.e*, Lightning Lube on the complaint and Witco on its counterclaim for nonpayment for equipment and oil. From late 1985 until 1989, Lightning Lube was a quick-lube franchisor. Consumers go to a quick-lube center to have oil changes and related services performed on their vehicles in approximately ten minutes. As part of its franchise agreements, Lightning Lube agreed to provide oil, equipment, site-selection assistance, training, and marketing assistance to its franchisees in exchange for royalty and advertising fees. Lightning Lube grew out of the business of third-party defendant Automotive Management Systems, Inc., a franchisor of transmission and brake and muffler facilities run by the third-party defendant Ralph Venuto. Venuto and another person founded Lightning Lube in 1985, but in June 1986, Venuto bought out his partner's interest, and became the sole owner of the company.

From June 1986 to August 1987, Witco,[FN2] through a division called Kendall Refining Company,[FN3] sold motor oil to Lightning Lube and provided Lightning Lube franchisees with oil dispensing equipment. The Kendall division refines petroleum from its own wells and from other sources for use as automotive motor oil. Witco instituted a program for quick-lube national accounts and independent quick-lube operators, whose participants could purchase Kendall oil at a discount. Under this program, Witco would supply a quick-lube operator with lubrication dispensing equipment on loan, free of charge, on the condition that the operator sold Kendall oil through the equipment in a specified minimum quantity. Witco could repossess the equipment if the operator did not adhere to the minimum-use requirement.

> FN2. Prior to June 1986 Witco had sold motor oil and equipment to Lightning Lube franchisees on an ad-hoc basis. However, after June of that year the sales were pursuant to the agreement involved in this case.

> FN3. Kendall is a Pennsylvania corporation with its principal place of business in Bradford, Pennsylvania. Witco is a Delaware corporation, with its principal place of business in New York, New York. Lightning Lube and Automotive Management Systems are New Jersey corporations, with their principal places of business in that state. Ralph Venuto is a citizen of New Jersey. Curiously, in the caption to its amended complaint, Lightning Lube lists Witco and Avis, but not Kendall, as defendants, but in its jurisdictional statement, the complaint discusses the citizenship of Kendall, yet omits any discussion of Witco's citizenship. At oral argument, however, the parties agreed that Witco, not Kendall, is the defendant in this action. Accordingly, for convenience sake we will refer to Kendall and Witco collectively as Witco.

In April and May 1986, Ralph Venuto met with representatives of Witco to discuss the possibility of Lightning Lube becoming a Witco quick-lube national account. At these meetings Venuto inquired whether Witco, in a departure from the industry norm, would consider loaning Lightning Lube money to purchase the lube equipment instead of loaning Lightning Lube the equipment itself. Venuto desired to buy his own equipment because he did not want to be obligated to use Kendall oil at a fixed price and quantity. At the time of his discussions with Witco, Venuto also was negotiating with another oil refiner, Valvoline Oil Co. (Valvoline). According to Venuto, Valvoline ultimately offered to lend him $15,000 per center, to be repaid at 10% interest within 5 years, so that ***1163** he could buy equipment and supply oil to his franchisees.

Eventually, however, when Witco agreed to Venuto's

proposal that it loan him the money to buy equipment, Venuto decided to go with Witco rather than Valvoline. As Venuto explained at trial, Witco promised him real estate financing as well as a better interest rate on the money it lent him for the equipment and what he regarded as a better quality of oil-100% Pennsylvania crude oil-than Valvoline offered.

On May 9, 1986, Venuto and Witco reached an agreement providing for Witco to lend Venuto money to purchase his own equipment, which he agreed to repay within five years, at six percent interest. Witco would retain ownership of the equipment during the payout period. Lightning Lube would be billed directly for the oil and then in turn would bill its franchisees for the product they purchased. Witco promised that it would charge Lightning Lube the lowest available price for the oil, which would be 100% Pennsylvania crude oil. Finally, Witco agreed to share the cost of signs promoting both Kendall oil and Lightning Lube. The benefit for Venuto under this agreement was that once Lightning Lube paid for the equipment it would not be obligated to purchase any particular amount of Kendall oil, and thus could purchase product from other suppliers.

Under its agreements with its franchisees, after it received the equipment from Witco, Lightning Lube rented the equipment to its franchisees at $35 per week for five years on the condition that the franchisees sell only oil products purchased from Lightning Lube. The agreements provided that Lightning Lube would retain ownership of the equipment. In addition, Lightning Lube was to receive 7% of the gross sales of each Lightning Lube franchise as a royalty fee and 4% of its gross sales as an advertising fee.

In June 1986, Witco began supplying Lightning Lube's franchisees with oil and equipment. The franchisees placed orders for motor oil with Lightning Lube which Witco distributors delivered directly to the franchisees. Soon after it commenced, however, the relationship between Witco and Lightning Lube began to dry up. In the first place, although Venuto made a request for a payback schedule for the equipment, Witco failed to provide a complete schedule for more than a year. Venuto complained that without such a schedule he could not pay for the equipment or prove to the franchisees that Lightning Lube had purchased the equipment, rather than rented it.

Disputes also arose between the two companies over the payments for oil and equipment. At various times during 1986 and 1987, Lightning Lube fell more than 90 days behind in its oil payments. As a result, in November 1986, Witco placed Lightning Lube on a one-month product hold, during which Lightning Lube could not buy motor oil from Witco, though Lightning Lube's franchisees could purchase oil directly from Witco at the same national account price Witco charged Lightning Lube. Lightning Lube's repeated failures to pay for its oil on time resulted in further product holds in 1987. Furthermore, in January 1987, when Lightning Lube became delinquent in its equipment payments, Witco advised Venuto that Lightning Lube would have to pay in advance for equipment installed at new locations.

During the period of the Witco-Lightning Lube relationship, numerous franchisees that had opened quick-lube shops either terminated their relationships with Lightning Lube or held back royalty payments, and others that had purchased Lightning Lube franchises decided not to open at all. From 1985 to 1987, Lightning Lube sold over 170 franchises. Yet, in total only between 30-40 franchisees actually opened. Ultimately, the failure of these franchisees either to open or to continue with Lightning Lube led to a cash shortage that crippled Lightning Lube's business. The reason that these franchisees and prospective franchisees ended their relationship with Lightning Lube was the critical issue at trial.

According to evidence presented by Witco, the franchisees terminated their relationship with Lightning Lube because Lightning Lube failed to honor its advertising obligations, did not assist in locating sites, and did not provide promised financial assistance. ***1164** Some of these franchisees filed suits against Lightning Lube charging it with fraud, violations of the New Jersey Consumer Fraud Act, breach of contract, and other misdeeds.

Lightning Lube, however, presented evidence that Witco was responsible for the dissatisfaction and defection of the franchisees. Lightning Lube attributed its difficulties in servicing its franchisees to a cash shortage caused by franchisees terminating their agreements and demanding refunds or by their underpaying royalty fees. In Lightning Lube's view, Witco, by failing to provide a complete equipment payback schedule for more than a year, caused the franchisees to doubt whether Lightning Lube owned the equipment. Witco salespersons fanned these doubts by informing the franchisees that Witco, and not Lightning Lube, owned the equipment and that Witco would confiscate the equipment unless the franchisees agreed to defect from Lightning Lube. Rumors that Lightning Lube did not own the equipment and that its franchisees could

lose their equipment were repeated at franchisee meetings in September and December 1986, and they led to several defections immediately after these meetings. Lightning Lube further claimed that Witco salespersons also destroyed franchisee confidence in Venuto by offering them free equipment and cheaper oil than Lightning Lube sold and by telling them that Venuto was "ripping them off."

Given his problems with Witco, as early as February 1987, Venuto began negotiating with Valvoline to lend him money for his payments to Witco and to replace Witco as Lightning Lube's supplier. Lightning Lube and Valvoline did not reach an agreement, and sometime in the middle of 1987, Venuto began negotiating with P & M Oil, an Exxon distributor. In August 1987, Venuto terminated his relationship with Witco and began using Exxon oil. As a consequence, the remaining Lightning Lube franchisees began selling Exxon's product. Nevertheless, Witco did not remove its equipment from the Lightning Lube franchises.

According to Lightning Lube, the arrangement for Exxon oil came too late to cure the damage committed by Witco. As a consequence of Witco's actions, Lightning Lube lacked the capital to service those franchises still under contract, which in turn led to more franchisee dissatisfaction. Finally, what Lightning Lube regarded as its "death blow" came in October 1987 when, in response to Lightning Lube's filing this suit against it, Witco filed several counterclaims, one of which alleged that Lightning Lube had defrauded both Witco and its own franchisees by selling Kendall oil at a price in contravention of its agreement with Witco. Lightning Lube claims that Witco knew this claim had no factual basis. Nonetheless, Lightning Lube believed that it was required to disclose the allegation of fraud to prospective franchisees, a revelation which made it impossible for Lightning Lube to sell any more franchises. By July 1988, Lightning Lube's sales manager resigned due to the futility of trying to attract new franchisees. In the fall of 1989, Venuto sold Lightning Lube's remaining assets to Shamrock Energy Corporation for a price allegedly far below their true value.

According to Lightning Lube, Witco had two motives for trying to destroy Lightning Lube: first, Witco wanted to bypass Venuto to ensure that the franchisees purchased only Kendall oil; second, Witco wanted to benefit a new venture that it had started with one of Lightning Lube's competitors. In December 1986, Avis and Witco announced that they had reached an agreement providing that Witco, through a new subsidiary, Witco Realty Company, would form a partnership with a subsidiary of Avis, Avis Lube, Inc., a quick-lube competitor of Lightning Lube. The partnership, K & A Lube Properties, would finance the purchase of real estate and building construction for Avis Lube sites. The sites then would be leased to Avis Lube franchisees. Those Avis Lube centers which accepted Witco financing would be obligated to use Kendall oil and assorted products for 90% of their needs. In essence, then, Witco would be financing quick-lube centers which would compete with Lightning Lube. Throughout the trial, Witco maintained that negotiations between Witco and Avis did not begin until August 1986, and that the agreement was reached only in December of that year. Lightning Lube, however, contended ***1165** that Witco and Avis had reached an informal agreement as early as April 1986, before Witco and Lightning Lube reached their agreement.

The timing of the Avis-Witco agreement was a key to Lightning Lube's case, because if the agreement had been reached prior to the Witco-Lightning Lube agreement, it could explain Witco's conduct toward Lightning Lube. Lightning Lube believed that Witco knew all along that it would form a partnership in the quick-lube business with Avis. Yet, it was very expensive to start a quick-lube franchise chain from the ground up. Accordingly, Lightning Lube believed Witco and Avis conspired to steal Lightning Lube's franchisees to save on the start-up costs. Thus, Lightning Lube contended that Witco in furtherance of this goal entered into its agreement with Lightning Lube in May 1986 in order to discover Lightning Lube's trade secrets and to gain access to its franchisees, whom it eventually could strip away.

B. PROCEDURAL HISTORY

On August 10, 1987, Lightning Lube filed this suit against Witco and Avis in the United States District Court for the District of New Jersey, asserting that they had engaged in a corporate campaign and conspiracy to destroy Lightning Lube. The complaint, as amended on May 8, 1989, alleged that Witco: (1) breached its agreement to provide Lightning Lube with motor oil, equipment, reimbursement for joint signs, and a payback schedule for the money Witco loaned Lightning Lube to purchase its equipment; (2) committed fraud by misrepresenting its intent to fulfill its contract with Lightning Lube, misrepresenting the source and quality of the oil it supplied, and failing to disclose that it intended to compete against Lightning Lube through a partnership with Avis; (3) intentionally interfered with Lightning Lube's relations with its franchisees and prospective franchisees; (4) unfairly competed against Lightning Lube through its partnership with Avis; (5) conspired with Avis to violate the Racketeer

Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(a)-(d); and (6) committed price discrimination in violation of the Robinson-Patman Amendment to the Clayton Act, 15 U.S.C. § 13. In addition to the RICO allegations, the complaint included Avis as a defendant to all the other causes of action on the basis of its status as Witco's "partner, principal and joint venturer." The complaint sought compensatory, punitive, and treble damages as well as interest, costs, attorney's fees, and injunctive relief.

Witco filed an answer which denied liability and asserted counterclaims and third-party claims against Lightning Lube, Ralph and Carol Venuto, and Automotive Management Services, Inc. for the nonpayment for oil and equipment delivered to Lightning Lube.[FN4] Significantly, the counterclaims also included a charge that Lightning Lube had defrauded its franchisees by overcharging them for oil it purchased from Witco. Avis also filed an answer.

> FN4. Witco also asserted counterclaims and third-party claims alleging, *inter alia*, that Lightning Lube and Venuto tortiously interfered with Witco's relations with Lightning Lube's franchisees and prospective franchisees; infringed Witco's trademark in Kendall oil, by allowing Lightning Lube franchisees to dispense non-Kendall oils from equipment containing Kendall trademarks; and defrauded Witco.

By an opinion and order dated November 27, 1990, the district court granted summary judgment to Avis on all the non-RICO claims. On February 19, 1991, the court granted Witco's and Avis's motion for summary judgment on the RICO claims and dismissed Avis from the case. The remaining claims against Witco were tried before a jury between February 3, 1992, and May 1, 1992. At the close of Lightning Lube's case, Witco moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). The district court granted Witco's motion only with respect to the unfair competition and Robinson-Patman discrimination claims. At the close of all the evidence, Witco renewed its motion for judgment, and the district court reserved decision.

On May 4, 1992, the jury returned a verdict for Lightning Lube on almost all of its remaining claims. Specifically, in response to comprehensive interrogatories, the jury ***1166** awarded Lightning Lube $2.5 million for breach of contract based on Witco's failure to provide an equipment payback schedule; $18,340 for breach of contract based on Witco's failure to provide advertising and sign allowances; $1 million for fraud based on Witco's failure to disclose its intention to enter the quick-lube market as a competitor of Lightning Lube; $1 million for fraud based on Witco's intention not to honor the agreement at the time it was entered; and $7,045,500 for tortious interference with Lightning Lube's relations with its franchisees and prospective franchisees. The jury also determined that Witco had committed fraud by misrepresenting that it would supply Lightning Lube with 100% Pennsylvania crude oil, but found that Lightning Lube sustained no injury from this misrepresentation. The jury further found that Witco did not breach its contractual obligation to sell motor oil to Lightning Lube at the lowest available price. The jury also awarded Lightning Lube punitive damages of $50 million on the fraud and tortious interference claims without a breakdown between them. However, the jury found for Witco on its counterclaim that Lightning Lube was indebted to it for payments due for equipment and oil.[FN5]

> FN5. The court entered judgment on the verdict in favor of Witco for $442,655.50 for equipment and $57,542.21 for motor oil. Lightning Lube does not appeal from this judgment.

Witco filed a posttrial motion for judgment as a matter of law or, in the alternative, for a new trial. On September 2, 1992, the district court granted Witco's renewed motion for judgment as a matter of law on the two fraud claims, for which the jury had awarded damages, and the punitive damages claim. *See Lightning Lube, Inc. v. Witco Corp.*, 802 F.Supp. at 1203. In the alternative, the district court conditionally granted Witco a new trial on these fraud and punitive damage claims so that if its judgment as a matter of law were reversed there would be a new trial on those claims. *Id.* The district court, however, denied Witco's motion for judgment or a new trial on the tortious interference and breach of contract claims and also denied Witco's motion on Lightning Lube's claim of misrepresentation of the source and quality of the oil. *Id.* Witco appeals from the partial denial of its motion except as to the portion dealing with the source and quality of the oil. Lightning Lube cross-appeals, requesting that we reinstate the jury verdict on the fraud and punitive damage claims and reinstate the RICO claims on which the district court granted Witco summary judgment. Lightning Lube does not appeal from the district court's orders dismissing Avis from the case.

II. STANDARD OF REVIEW

We exercise plenary review of an order granting or denying a motion for judgment as a matter of law and apply the same standard as the district court. *Wittekamp v. Gulf & Western Inc.*, 991 F.2d 1137, 1141 (3d Cir.1993). Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. *Id.* In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir.1992), *cert. denied*, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993). Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1238 (3d Cir.1993). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir.1978) (citation omitted) (quotation omitted). Thus, although the court draws all reasonable and logical inferences in the nonmovant's favor, we must affirm an order granting judgment as a matter of law if, upon review of the record, it is apparent that the verdict is not supported by legally sufficient evidence.

***1167** [5][6] We review the district court's order ruling on a motion for a new trial for abuse of discretion unless the court's denial is based on the application of a legal precept, in which case the standard of review is plenary. *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir.1992). Finally, we exercise plenary review of the order granting summary judgment to Witco on Lightning Lube's RICO claims. *Coar v. Kazimir*, 990 F.2d 1413, 1416 (3d Cir.1993), *petition for cert. filed*, 62 U.S.L.W. 3060 (U.S. July 9, 1993) (No. 93-62).

* * * * *

B. RICO

We consider next the propriety of the district court's dismissal of Lightning Lube's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, for failing to satisfy the statute's pleading requirements. Under 18 U.S.C. § 1964(c), any person injured in its business or property by reason of a violation of section 1962 may recover treble damages and attorney's fees. In order to recover under section 1964(c) a plaintiff must plead (1) a section 1962 violation and (2) an injury to business or property by reason of such violation. *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1164 (3d Cir.1989).

In its amended complaint and RICO Case Statement, Lightning Lube alleged that Witco violated sections 1962(a)-(d) by conspiring with Avis to steal confidential information from Lightning Lube and by misrepresenting to Lightning Lube's franchisees that Lightning Lube did not own their equipment to persuade them to leave Lightning Lube. With respect to the confidential information, Lightning Lube claims that during Venuto's negotiations with Witco, Richard Glady, Witco's Quick-Lube Director, asked him for copies of his personal financial statements, and all of Lightning Lube's Operating and Training manuals which Venuto had prepared for the franchisees. Venuto testified that if he had known that Witco was setting up a competing venture with Avis, he never would have surrendered these materials; and thus Witco obtained them through fraud.[FN18]

> FN18. At trial, the district court, in granting judgment as a matter of law to Witco on Lightning Lube's unfair competition claim, found that Lightning Lube adduced no evidence showing that the information obtained by Witco rose to the level of trade secrets or that Witco even used this information in its joint venture with Avis. Because this finding was not made in connection with the same claims at issue here, and because the court's earlier dismissal of the RICO claims was predicated only on the face of the pleadings, it would be unfair for us to find that the trade secret portion of Lightning Lube's RICO claims should have been dismissed in any case because of the district court's findings with respect to the unfair competition claim. Instead, we restrict our scrutiny to the sufficiency of Lightning Lube's pleadings.

Lightning Lube avers that the RICO "enterprise" is comprised of (1) the quick-lube joint venture between Avis and Witco; (2) the Avis/Kendall partnership known as K & A properties; (3) Witco and its Kendall Refinery Division; and (4) Avis. RICO Case Statement at 58-59. Lightning Lube names as the "persons" who violated the RICO statute: Witco, Kendall, and Avis. The purported predicate acts are mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and extortion in violation of 18 U.S.C. § 1951 and N.J.Stat.Ann. § 2C:20-5 (West 1982). We will address the sufficiency of Lightning Lube's allegations under each of

the subsections of 1962 in turn.

1. *Section 1962(a)*

Section 1962(a) provides in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, ***1188** any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
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> 18 U.S.C. § 1962(a).

"This provision was primarily directed at halting the investment of racketeering proceeds into legitimate businesses, including the practice of money laundering." *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir.1991) (quoting 11 Cong.Rec. 35,199 (1970) (remarks of Rep. St. Germain) and 116 Cong.Rec. 607 (1970) (remarks of Sen. Byrd)). Under this section, a plaintiff must allege: (1) that the defendant has received money from a pattern of racketeering activity; (2) invested that money in an enterprise; and (3) that the enterprise affected interstate commerce. *Shearin*, 885 F.2d at 1165. Furthermore, the plaintiff must allege an injury resulting from the investment of racketeering income distinct from an injury caused by the predicate acts themselves. *Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir.1991); *Banks v. Wolk*, 918 F.2d 418, 421 (3d Cir.1990); *Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir.1989). This allegation is required because section 1962(a) "is directed specifically at the use or investment of racketeering income, and requires that a plaintiff's injury be *caused by the use or investment of income* in the enterprise." *Brittingham*, 943 F.2d at 303 (emphasis added); *see also Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.1989) (recognizing that section 1962(a) "does not state that it is unlawful to *receive* racketeering income ... [rather] the statute prohibits a person *who has received* such income *from using or investing it* in the proscribed manner" (emphasis in original)), *cert. denied*, 493 U.S. 820, 110 S.Ct. 76, 107 L.Ed.2d 43 (1989).

In this case, the RICO Case Statement alleges:

> The enterprises, Kendall/Witco; the Avis-Kendall/Witco fast lube joint venture; K & A Properties, Inc; and the Avis defendants, have received the income derived from the pattern of racketeering activity in the instant matter.
>
> The income which the enterprises have derived from their pattern of racketeering activity is the elimination of the plaintiff as a competitor in the fast lube market. Additionally, the enterprises have gained confidential and trade information possessed by the plaintiff as a fast lube franchisor that was used by the enterprises to compete directly against the plaintiff in the fast lube market. The destruction of the plaintiff as a fast lube competitor and the extraction of confidential and trade information from the plaintiff was utilized to facilitate the growth and success of the enterprises.

RICO Case Statement at 71-72. The district court held that these allegations did not satisfy section 1962(a)'s pleading requirements because they failed to explain how Lightning Lube was injured by the use or investment of racketeering income as opposed to the racketeering acts themselves. Instead, Lightning Lube's 1962(a) allegations merely repeat the crux of its allegations in regard to the pattern of racketeering; namely, that the defendants lied to the franchisees and stole Lightning Lube's trade secrets to eliminate Lightning Lube as a competitor. We agree with the district court's ruling in this regard.

According to Lightning Lube, Witco's theft of its trade secrets constitutes racketeering income and the investment of that income injured Lightning Lube because Witco used these stolen trade secrets to build a competing business which then hurt Lightning Lube's sales. In essence, then, Lightning Lube contends that the use of "income"-*i.e.*, the trade secrets-stolen from Lightning Lube through fraud permitted Witco to establish its "enterprise." However, we have recognized repeatedly that this type of allegation-that the use and investment of racketeering income keeps the defendant alive so that it may continue to injure plaintiff-is insufficient to meet the injury requirement of section 1962(a). In such situations, we have held that the fact that a plaintiff claims that the injury allegedly perpetrated on it would not have occurred without the investment of funds from the initial racketeering activity does not change the fact the plaintiff's alleged injury stems from the pattern of racketeering, and not from the investment of funds by the defendant.

***1189** For example in *Brittingham v. Mobil Corp.*, 943 F.2d at 304-05, we affirmed the district court's dismissal of section 1962(a) claims by consumers who bought

garbage bags based on misrepresentations that they were biodegradable. The complaint claimed injury from the use or investment of racketeering income because the money derived from the sale of the garbage bags permitted the enterprise to continue its operations. We held that such an allegation did not state an injury cognizable under section 1962(a); rather it merely alleged the same injury caused by the pattern of racketeering. In so holding, we stated that if the mere reinvestment of racketeering income

> were to suffice [as an injury under section 1962(a)], the use-or-investment injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation. RICO's pattern requirement generally requires long-term continuing criminal conduct. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Over the long term, corporations generally reinvest their profits regardless of the source. Consequently, almost every racketeering act by a corporation will have some connection to the proceeds of a previous act. Section 1962(c) is the proper avenue to redress injuries caused by the racketeering acts themselves. If plaintiffs' reinvestment injury concept were accepted, almost every pattern of racketeering by a corporation would be actionable under § 1962(a) and § 1962(c) would become meaningless.
>
> 943 F.2d at 305.

Similarly, in *Glessner v. Kenny*, 952 F.2d at 708-10, we held that a complaint failed to state a section 1962(a) claim where the plaintiffs, a class of consumers who purchased allegedly defective residential oil furnaces from the defendant manufacturer, claimed an investment injury because the manufacturer was allowed to continue in business as a consequence of income derived from earlier frauds. Again, we found such an injury merely resulted from the reinvestment of funds obtained from the pattern of racketeering and thus more appropriately was remedied by section 1962(c), rather than section 1962(a). As we pointed out, "[i]f investment injury is construed as broadly as plaintiffs suggest, the distinction between sections 1962(a) and 1962(c) would be blurred." *Id.* at 709; *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3d Cir.), *cert. denied*, 501 U.S. 1222, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991).

Lightning Lube seeks to circumvent these cases by distinguishing between the reinvestment of monies obtained by fraud and the reinvestment of proprietary information obtained through misappropriation. However, we see no principled basis to draw such a distinction. In both situations, the real injury to the plaintiff is the theft of its property-whatever form it is in-and not the investment of that property in an otherwise legitimate business.

Therefore, we agree with the reasoning of the district court in *R.E. Davis Chemical Corp. v. Nalco Chemical Co.*, 1991 WL 212180, at *5 (N.D.Ill. Oct. 7, 1991), which addressed the issue of whether the misappropriation of proprietary information by a competitor satisfies the investment injury requirement of section 1962(a), but reached a conclusion opposite from that suggested by Lightning Lube. The district court in *R.E. Davis* concluded that the actual injury of which complaint was made was the act of misappropriation, and not the use of the information by the competitor, and that, as with the taking of money through fraud, the appropriate remedy was under section 1962(c), not section 1962(a). As we agree with *R.E. Davis*, we will affirm the district court's dismissal of Lightning Lube's claim under section 1962(a).

2. *Section 1962(b)*

Under section 1962(b), it is unlawful

> for any person through a pattern of racketeering activity or through a collection of a unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

***1190** 18 U.S.C. § 1962(b). In order to recover under this section, a plaintiff must show injury from the defendant's acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts. *Banks v. Wolk*, 918 F.2d at 421; *Helman v. Murry's Steaks, Inc.*, 742 F.Supp. 860, 882 (D.Del.1990); *Leonard v. Shearson Lehman/American Express, Inc.*, 687 F.Supp. 177, 181 (E.D.Pa.1988): "Such an injury may be shown, for example, where the owner of an enterprise infiltrated by the defendant as a result of racketeering activities is injured by the defendant's acquisition or control of his enterprise." *Casper v. Paine Webber Group, Inc.*, 787 F.Supp. 1480, 1494 (D.N.J.1992). In addition, the plaintiff must establish that the interest or control of the RICO enterprise by the person is as a result of racketeering. *Banks v. Wolk*, 918 F.2d at 421. It is not enough for the plaintiff merely to show that a person engaged in racketeering has an otherwise legitimate interest in an enterprise. Rather, it must be established firmly that there is a nexus between the interest and the alleged racketeering activities.

In its RICO Case Statement, Lightning Lube alleged that Witco violated § 1962(b) because:

> [b]oth defendants Kendall/Witco and the Avis defendants maintain an interest or control in the enterprise of the Avis-Kendall/Witco fast lube joint venture. The joint venture enterprise is an enterprise that is engaged in interstate commerce through the nation-wide marketing and sale of Avis Lube fast lube franchises. Kendall/Witco provides financing and through its Kendall Refining Division, technical support to Avis Lube franchisees. The Avis defendants market and franchise Avis Lube as the franchisor....
>
> The entity 'Kendall/Witco,' under Section 1962(b), is both the liable 'enterprise' and the 'person'. Kendall/Witco is the 'person' conducting its affairs. Its employees are committing the illegal acts and those acts are for the ultimate benefit of the corporation.
>
> RICO Case Statement at 72-73.

Noting that Lightning Lube had alleged that the corporate defendants were both "persons" and "enterprises" under section 1962(b), the district court dismissed the claim because it found it "difficult to understand how a corporation can acquire or maintain an interest in itself through a pattern of racketeering activity." Opinion at 9. Thus, the district court held that section 1962(b) requires that the defendant "person" and "enterprise" be distinct entities.

We previously have held that the "person" charged with a violation of section 1962(c) must be distinct from the "enterprise," *Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir.1984), but that there is no such requirement under section 1962(a). *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1360 (3d Cir.1987). In *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 907 (3d Cir.1991), we stated in passing that "[w]here, as here, a corporate 'person' is also the 'enterprise' through which the alleged racketeering activity occurred, liability can arise only under sections 1962(a) or (b)." Yet, inasmuch as the plaintiff in that case advanced claims only under sections 1962(a), (c), and (d), our reference to section 1962(b) was dicta. Thus, notwithstanding any suggestion by *Genty* that we are not inclined to require a distinction between the "enterprise" and "person" liable under section 1962(b), the issue still remains open in this circuit.

Other courts of appeal have split on this issue. The Courts of Appeal for the Seventh Circuit and Ninth Circuit have held that section 1962(b), unlike section 1962(c), permits a corporation to act as both the "person" liable and the alleged RICO enterprise. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir.1987), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989); *Schreiber Distrib. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1397-98 (9th Cir.1986). The Court of Appeals for the Second Circuit has indicated that it is inclined to reach the opposite result. *See Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 668 (2d Cir.1989) ("In sum, the district court was correct in dismissing outright the claims against Kable insofar as they were based on § 1962(c). Although we suggest ***1191** the same conclusion would follow, for similar reasons, with respect to a claim against Kable based on § 1962(b), on the complaint before us, we cannot make that distinction."); *see also Jacobson v. Cooper*, 882 F.2d 717, 719 (2d Cir.1989) (assuming, without deciding, that "enterprise" and "person" must be separate for purposes of section 1962(b)).

We need not resolve this issue now, however, because even if we held that the district court erred in holding that Witco could not be both the person and enterprise under section 1962(b),[FN19] we would not change the district court's result as it is clear that in any case Lightning Lube has failed to state a section 1962(b) claim. We can affirm a correct decision on a ground different than that relied on by the district court. *Wittekamp v. Gulf & Western, Inc.*, 991 F.2d at 1143. Therefore, although it was not a reason for the district court's decision, we will affirm its order granting summary judgment to Witco on the section 1962(b) claim on the basis of Lightning Lube's failure to allege how the "acquisition of interest" and "control" of the enterprise by Witco injured Lightning Lube.

> FN19. We note that the district court granted summary judgment on Lightning Lube's section 1962(b) claim on February 19, 1991, several months before we issued our opinion in *Genty*.

As stated above, a well-pled complaint under section 1962(b), just as with section 1962(a), requires the assertion of an injury independent from that caused by the pattern of racketeering. Here, Lightning Lube alleges in terms of a section 1962(b) injury that the employees of Witco are engaged in a pattern of racketeering. RICO Case Statement at 73. Such an allegation clearly is insufficient because it merely parrots the same injury that section 1962(c) is

meant to remedy and fails to explain what additional injury resulted from the person's interest or control of the enterprise.

Furthermore, Lightning Lube's RICO pleadings fail to "allege a specific nexus between control of any enterprise and the alleged racketeering activity, as is required under section 1962(b)." *Banks v. Wolk*, 918 F.2d at 421; *see also Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d at 1168 n. 2. Instead, Lightning Lube merely avers that Witco and Avis maintain an interest in themselves and the joint venture. RICO Case Statement at 73. This allegation does not explain how such an interest is the result of racketeering as opposed to an interest derived from Witco and Avis's legitimate activities, and is thus insufficient. We therefore will affirm the district court's dismissal of Lightning Lube's section 1962(b) claim.

3. *Section 1962(c)*

[53] Section 1962(c) prohibits:

> 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.

18 U.S.C. § 1962(c). Just as with its pleading with respect to section 1962(b), Lightning Lube has alleged that the enterprise and the person are the same entity with respect to section 1962(c). RICO Case Statement at 62. As stated above, this court has required that the "person" liable be distinct from the enterprise for the purposes of recovering under section 1962(c). *Hirsch v. Enright Refining Co., Inc.*, 751 F.2d at 633. Accordingly, the district court correctly ruled that Lightning Lube failed to satisfy section 1962(c)'s person/enterprise separateness requirement and that its claim must fail.

4. *Section 1962(d)*

[54] Under section 1962(d), "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient. *Leonard v. Shearson Lehman/American Express, Inc.*, 687 F.Supp. at 182. Inasmuch as Lightning Lube has not established a viable claim under any of those subsections, its section 1962(d) claim must also fail.

* * * * *

V. CONCLUSION

For all of the foregoing reasons, we will affirm the judgment orders of September 2, 1992, and February 19, 1991. The parties will bear their own costs on this appeal.

C.A.3 (N.J.),1993.
Lightning Lube, Inc. v. Witco Corp.
4 F.3d 1153, 26 Fed.R.Serv.3d 1468, RICO Bus.Disp.Guide 8379, 38 Fed. R. Evid. Serv. 902