IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARSHALL WOLF AUTOMATION, INC., an Illinois corporation; and HANS J. WOLF, **Plaintiffs,** **v.** **MITSUBISHI ELECTRIC AUTOMATION, INC., a Delaware corporation; GEORGE KOSTOPOULOS, JR.; CYNTHIA V. KOSTOPOLOUS; and KIM FORTNEY,** **Defendants.**	**Hon. Blanche M. Manning** **Case No. 01 C 5101**

MEMORANDUM AND ORDER

Plaintiffs Marshall Wolf Automation, Inc. ("Marshall Wolf') and Hans J. Wolf's ("Wolf') brought this action against Defendants George Kostopoulos, Jr. ("GK") and Cynthia V. Kostopoulos ("CK') (collectively, "Kostopoulos"), under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, 1964, and Illinois state law, stenuning from an alleged extortion scheme. The present matter comes before this Court on the Kostopoulos 'Motion to Dismiss Counts l,2,4,9, and lO of Plaintiffs 'Complaint.[1] Forthe following reasons, Defendants' motion is DENIED.

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1 Plaintiffs' Complaint contains a total of twelve counts. Prior to the filing of the instant motion, Plaintiffs settled the other counts with Defendants Mitsubishi Electric Automation and Kim Fortney.

BACKGROUND[2]

Marshall Wolf, an Illinois corporation, was formed in 1984 and shortly thereafter began distributing products for Mitsubishi Electric Automation, Inc. ("MEAU"). GK worked as a Regional Sales Manager for MEAU. His duties included managing the relationship between MEAU and Marshall Wolf In 1995, MEAU changed its business practices and began entering into direct relationships with customers rather than providing its products and services through distributors, such as Marshall Wolf After this change went into effect, GK approached Wolf and told him that if Marshall Wolf or Wolf made "kickback" payments of $ 1 000 per week, GK would ensure that MEAU did not attempt to make direct sales to Marshall Wolf's customers and would protect Marshall Wolf from MEAU's new distribution practice. If Wolf refused this offer, however, GK told him that MEAU would begin soliciting business from Marshall Wolf's customers and would otherwise interfere with Marshall Wolf's customer relations. GK also told Wolf that if Wolf reported GK's demands to MEAU's senior management or to law enforcement, he would accuse Wolf of bribery, thereby exposing him to criminal prosecution and would ensure that MEAU would cancel Marshall Wolf's distributorship.

Because Wolf believed GK's threats and because MEAU's products constituted the bulk of Marshall Wolfs business, Wolf agreed to make the extortion payments. After receiving 1 0,000, GK directed Wolf to put CK on Marshall Wolf s payroll and thereafter make the payments to her as if they were paychecks. GK told Wolf that making the payments in the form of paychecks would make them appear legitimate.

Wolf thereafter made the payments to CK as if she were an employee of Marshall Wolf. CK, however, was never actually a Marshall Wolf employee, in that she never did any work. In

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2 The facts set forth in the Background section are taken from Plaintiffs' Complaint.

all, between 1995 and 1998, CK received a total of $113,230 from Marshall Wolf.

In 1998, GK began making additional demands for payments. While attending a MEAU conference in Las Vegas, GK demanded $10,000 in gambling money from Wolf, which Wolf refused. Later that year, GK demanded that Wolf increase its payments to $1500 per month or MEAU would compete directly with Marshall Wolf for the business of Marshall Wolf's largest account, M&R Printing.

After Wolf refused this demand, GK caused Marshall Wolf to provide its customers substandard service and began marketing MEAU's products directly to M&R Printing. As a result, Wolf immediately ceased making any payments to the Kostopoulos Defendants.

In November, 1998, at a meeting with GK and MEAU's national sales manager, Co- Defendant Kim Fortney, Wolf told Fortney of the extortion scheme. Fortney, however, brushed off Wolf's complaints and told Wolf and GK to resolve their differences themselves. Thereafter, Wolf alleges that MEAU, GK, and Fortney engaged in the following retaliatory acts: (1) eliminated special pricing between Marshall Wolf and MEAU; (2) made direct sales to Marshall Wolf s customers at lower prices; (3) recommended that Marshall Wolf s customers make their purchases through other MEAU distributors; (4) entered into a distributor arrangement with, another company in Marshall Wolf s territory; (5) changed credit, order cancellation, and return policies with respect to Marshall Wolf-, (6) prohibited MEAU employees other than GK from communicating with Wolf or Marshall Wolf; and (7) informed Marshall Wolf s customers that MEAU was on the verge of terminating Marshall Wolf's distributorship.

In the summer of 1999, Wolf sought assistance from an MEAU Vice President, James Krill, who supervised both Fortney and GK. Like Fortney, Krill told Wolf to work out his problems with GK himself. In December, 1999, Wolf again complained to Fortney. Fortney,

however, refused to assist hi 'm and again told him to work out his differences with GK.

Based on these conversations, Wolf believed that, in order to continue as a MEAU distributor, he would have to resume making payments. Wolf also believed that he could not bring his problem to the attention of law enforcement personnel or take any other action without GK making good on his threat to falsely accuse Wolf of bribery.

After Wolf stopped making the payments, by fall of 2000, GK's actions had so damaged Marshall Wolfs business that Wolf felt he had little left to lose, so he wrote to Kyosuke Akasofu, MEAU's CEO, detailing GK's conduct. MEAU conducted an investigation, but, in December 2000, MEAU's Assistant General Counsel informed Wolf that MEAU considered Marshall Wolf's payments to GK as bribes and terminated Marshall Wolf as a distributor of MEAU's products.

Subsequently, Plaintiffs brought the instant action against the Kostopoulos Defendants, MEAU, and Kim Fortney. Prior to the filing of the instant motion, Plaintiffs settled with Defendants MEAU and Fortney. Therefore, the only remaining counts are 1, 2, 4, 9, and 10, which Defendants have now moved to dismiss.

STANDARD OF REVIEW

In ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must assume the truth of all facts alleged in the complaint, construing the allegations liberally and viewing them in the light most favorable to the plaintiff. See, e.g, McMath v. City of Gary, 976 F.2d 1026, 1031 (7th Cir. 1992); Gillman v. Burlington N. R.R. Co.@ 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. Connely v. Gibson, 355 U.S. 41, 45-46 (1957); Kunik v. Racine County, Wisconsin., 946 F.2d 1574, 1579 (7th Cir. 1991), citing Hishon v. Kiniz & Spalding, 467 U.S. 69, 73 (1984).

The court will accept all well-pled factual allegations in the complaint as true. Miree v. DeKalb County , 433 U.S. 25, 27 n. 2 (1977). In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. Craigs, Inc. v. General Electric Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993). However, the court is neither bound by the plaintiff s legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims. Scott v. O'Grady, 975 F.2d 366, 368 (7th Cir. 1992).

ANALYSIS

The Kostopoulos Defendants have moved this Court to dismiss the remaining counts of Complaint which relate to them - Counts 1, 2, 4, 9 , and 10. Counts 1, 2, and 4 are brought under the civil provisions of RICO, while Counts 9 and 10 are state tort claims under this Court's supplemental jurisdiction (28 U.S.C. § 1367(a)). Because this Court's jurisdiction over the supplemental state claims depends on Plaintiffs' RICO claims, the Court will consider the RICO counts and then the state claims.

I. RICO Claims

Plaintiffs allege three RICO counts: (1) GK violated section 1962(c) by operating a RICO enterprise (Count 1); (2) CK violated section 1962(c) by operating a RICO enterprise (Count 2); and (3) CK violated section 1962(d) by conspiring to operate a RICO enterprise (Count 4). Defendants contend the RICO claims should be dismissed because: (A) the statute of limitations bars the RICO claims; and (B) Plaintiffs have failed to sufficiently allege a claim under section 1962(c) (Counts 1 and 2). The Court will discuss each of these contentions in turn.

A. Statute of Limitations

The parties do not dispute that the four year statute of limitations for RICO actions set out in Agency Holding Corporation v. Malley-Duff & Associates, Inc, 483 U.S. 143, 156 (1987)., began to run in 1995 when GK began extorting payments from Marshall Wolf. Therefore, the statute of limitations would have run some time in 1999. Plaintiffs, however, contend that the statute of limitations should not bar this action because GK threatened to take the following actions if Wolf attempted to disclose his extortion scheme: (1) terminate Marshal Wolfs distributorship with MEAU; and/or (2) ensure that Wolf faced false criminal charges for bribery. Plaintiffs raise three doctrines which would preclude the application of the statute of limitations at this time: (1) equitable tolling; (2) equitable estoppel; and (3) tolling by duress. The Court will address each of these doctrines in turn.

1. Equitable Tolling

Under the doctrine of equitable tolling, plaintiffs can avoid the bar of statute of limitations if, despite all reasonable diligence, the plaintiffs were unable to obtain vital information bearing on the existence of their claim. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990). If a reasonable person in the plaintiff s position would have been aware

within the limitations period of the possibility of a claim, then the doctrine of equitable tolling does not apply. Chapple v. Nat'l Starch & Chern. Co. & Oil@ 178 F.3d 501, 506 (7th Cir. 1999). Courts apply this doctrine very sparingly. Id.

Here, the doctrine of equitable tolling does not apply. Plaintiffs were or should have been aware of the possibility of their claim since the summer of 1995 because that is when GK first began demanding kickback payments. Plaintiffs do not allege that they were prevented in any way from obtaining information bearing on their RICO claims. Therefore, this Court finds that the statute of limitations is not suspended by the doctrine of equitable tolling.

2. Equitable Estoppel

In addition to equitable tolling, a plaintiff can prevent a plaintiff from asserting the statute of limitation defense under the doctrine of equitable estoppel. To assert equitable estoppel, also known as "fraudulent concealment," the plaintiff must show that the defendant took "active steps" to prevent the plaintiff from timely bringing suit. Jackson v. Rockford Housing Auth., 213 F.3d 389, 394 (7th Cir. 2000). "Active steps" means that the defendant "made the plaintiff reasonably believe that he had more time to sue," by such conduct as: (1) promising not to plead the statute of limitations as a defense; (2) promising to pay the plaintiff's claim; (3) concealing the cause of action by hiding evidence. Teamsters & Employers Welfare Trust of 111. v. Gorman Bros. Ready Mix 283 F.3d 877, 881-82 (7th Cir. 2002).

In contrast to equitable tolling, the application of equitable estoppel "is wholly independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice." Bomba v. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978). Equitable estoppel is available to the plaintiff where *"[a]ny* deliberate or blameworthy conduct by the

defendant ... causes the plaintiff to miss the statutory deadline Shropshear v. Corporation Counsel of the City of Chicago, 275 F.3d 593, 597 (7th Cir. 2001) (emphasis added).

For equitable estoppel to apply, however, the defendant's improper conduct, which prevented plaintiff from timely bringing suit, must be separate and distinct "from the alleged wrong giving rise to the suit." Jackson, 213 F.3d at 394. Courts thus refuse to apply the doctrine of equitable estoppel where the defendant's alleged improper conduct, which prevented the timely filing of the action, constituted part of the plaintiff s claim. See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chicago Med. Sch., 167 F.3d II 70. , II 74-75 (7th Cir. 1999); Cada, 920 F.2d at 45 1; Johnson Controls, Inc. v. Exide Corp, 129 F. Supp. 2d II 37, 1144-45 (N.D. 111. 2001).

Peia v. United States, 152 F. Supp. 2d 226 (D. Conn. 2001), provides a good example of equitable estoppel analysis in the context of a RICO claim. The plaintiff in Peia alleged a conspiracy to launder proceeds from illegal drug sales through a casino. Id. at 230. The court refused to apply equitable estoppel because the alleged acts of fraudulent concealment of documents served as a basis of the plaintiff's RICO claims, "rather than conduct that led Plaintiff to reasonably believe he did not have a claim." Id.

Here, Plaintiffs allege, and the Court must assume as true, that GK threatened to file false criminal charges for bribery against Wolf if he revealed the extortion scheme. Therefore, Plaintiffs have alleged specific conduct, separate from their RICO claim, which forced them to forbear timely bringing suit. The threat of criminal prosecution extends beyond the RICO extortion claims alleged in the Complaint, eg., the threat of terminating Marshall Wolf's distributorship. Therefore, this Court finds that Wolf has sufficiently alleged improper conduct, separate from the conduct which is part of the RICO claim, that prevented him from bringing his

suit in time.

In addition, to establish equitable estoppel, plaintiffs must show that they relied on the defendant's improper conduct in deciding not to timely bring suit. Wheeldon v Monon Corp., 946 F.2d 533, 537 (7th Cir. 1991). Here, the Complaint alleges that: (1) Wolf "reasonably feared that [GKJ would make good on his threats" (PI. Compl. ¶ 16); (2) GK "intended ... to depict ... the kickback payments as bribe payments"; (Id. at ¶ 18); and (3) Wolf feared reporting the extortion scheme because of GK's threats to expose him to criminal prosecution for bribery (Ld. at ¶ 32). Therefore, accepting Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, the Court finds that their reliance on GK's threats to accuse Wolf of bribery were reasonable.

Accordingly, this Court finds that, at this stage in the litigation, the doctrine of equitable estoppel precludes the Kostopoulos Defendants from asserting the statute of limitations.

3. Tolling by Duress

The third alleged applicable tolling doctrine is tolling by duress. The Kostopoulos Defendants contend that this doctrine does not apply because tolling by duress is not applicable under Illinois law. However, under a RICO analysis, state tolling doctrines do not apply. Riverwoods Chappagua Corp v Marine Midland Bank N.A., 30 F.3d 339, 347 (2d Cir. 1994) (rejecting reliance on state tolling doctrines in a RICO case). In Agency Holding Corp., 483 U.S. at 150, the United States Supreme Court established the statute of limitations for RICO claims by borrowing the four-year statute of limitations from the Clayton Act. The Supreme Court believed that RICO was patterned after Clayton and that the two laws were similar. Id. at 151. Because the Supreme Court wanted uniformity and believed that there were strong federal policies at stake, it did not want federal district courts "guessing" on what state statute of

limitations to apply. Id. at 150-51.

Because the Supreme Court borrowed the statute of limitations from the Clayton Act, courts "borrow" the tolling by duress principle used in Clayton Act claims, not state duress tolling doctrines, for RICO claims. Riverwoods Chappaqua, 30 F.3d at 347 (applying the federal duress tolling principles from Clayton to RICO case). Therefore, the parties' discussions of Traylor v. Cent. States, Southeast & Southwest Areas Pension Fund, 1984 WL 3026, at *5-6 (N.D. 111. Nov. 6, 1984), are inapplicable to this case. Although Traylor is a RICO case, it was decided before Agency Holding Corp., and thus relied upon state duress tolling principles. Id. at *5. Accordingly, this Court will not rely on state tolling by duress principles, but instead borrow duress tolling principles from Clayton Act cases. See Center Cadillac, Inc. v. Bank Leumi Trust Co. of N.Y., 808 F. Supp. 213, 225 n.2 (S.D.N.Y. 1992) (refusing to apply New York state tolling doctrines to RICO claim because federal cases applying state tolling doctrines to RICO actions were decided before Agency Holding Corp.).

In Clayton Act cases, courts take a very narrow view of the tolling by duress doctrine. Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1423, 1442 (S.D.N.Y. 1986). Duress or coercion that is inherent in the antitrust violation does not toll the statute of limitations. Id. If it did, then the statute of limitations would never apply to any ongoing antitrust violation involving some aspect of coercion. Id. Therefore, tolling by duress is only available when the defendant's threats to prevent the plaintiff from commencing a lawsuit are separate from the coercion which is inherent in many antitrust cases. Id.

Like Clayton Act cases, courts narrowly apply tolling by duress in RICO cases. In Riverwoods Chappaqua Corp., 30 F.3d at 342, the plaintiffs alleged extortion and mail fraud under RICO after their bank withheld disbursements of loan payments to exact new loan

obligations. The plaintiffs alleged that because of economic duress they could not bring suit and were forced to sign the new notes. Id. The court refused to toll the statute of limitations because the allegations of duress were the same acts constituting the RICO violation. Id. at 347. Because duress and coercion are almost always inherent in a RICO violation, tolling by duress is only available when the threats by the defendant are specifically used to prevent the plaintiff from filing a suit and separate and distinct from the conduct forming the basis of the underlying RICO claims. Id.

Here, the alleged threats of terminating the distributorship are the same acts that constitute the RICO violation, and thus, are not sufficient to toll the statute of limitations. However, Plaintiffs also allege actions which are separate and distinct from their RICO claims, the threats of false criminal prosecution, which caused them to delay bringing suit. (PI. Compl. 15, 32.) Although the Kostopoulos Defendants contend that GK's actions did not subject Wolf to duress, the Court is required to accept all of Wolf's allegations as true. Therefore, this Court finds that Wolf has sufficiently alleged that the statute of limitations should be tolled because of duress.

Consequently, this Court holds that, while the statute of limitations for Plaintiffs' RICO claims has run, the doctrines of equitable estoppel and tolling by duress preclude Defendants from asserting the statute as a defense at this stage in the case. The Court therefore DENIES Defendants' Motion to Dismiss Plaintiffs' RICO claims (Counts 1, 2, and 4) as time-barred under the statute of limitations.

B. Sufficiency of Plaintiffs' Section 1962(c) Claims

Defendants next argue that Counts 1 and 2 fail to sufficiently allege a claim under RICO section 1962(c). Before proceeding to Defendants' specific allegations, the Court will review

RICO's "broad civil provisions" which the Seventh Circuit has likened to a "model of a treasure hunt." Haroco. Inc. v. America Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 386 (7th Cir. 1984). Section 1962(c) provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Section 1961 provides the statutory definitions of the key terms in section 1962. "Racketeering activity" is defined as including any of a myriad of activities, including extortion, the primary act alleged here. 18 U.S.C. § 1961(l). A RICO "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A "person" includes "any individual or entity capable of holding a legal or a beneficial interest in property." 18 U.S.C. § 1961(2). A ... pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding a period of imprisonment) after the commission of the prior act of racketeering activity." 18 U.S.C. § 1961(5).

To properly allege a claim under section 1962(c), the plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985). In addition, a plaintiff must allege a connection between at least two separate entities - a "person" and a distinct and separate "enterprise." Cedric Kushner Promotions, Ltd. v. King, 533 @U.S. 158, 163 (2001). Moreover, the "person" must be not only associated with the enterprise, but must "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). See also Reves v. Ernst & Young,

507 U.S. 170, 177 (1993).

Here, Count I alleges that GK was a "person" within the definition of sections 1961(3) and 1962(c) and that he "associated with and/or participated in the conduct of' the following four alleged "enterprises": (1) Marshall Wolf (¶ 53); (2) Marshall Wolf and MEAU (¶ 54); (3) Marshall Wolf and its customers and competitors (¶55); and (4) his marriage to Cynthia Kostopoulos (¶ 56)[3]. Defendants contend that this Court should dismiss Counts I and 2 because Plaintiffs have failed to sufficiently allege: (1) an "enterprise" within the meaning of RICO; (2) GK and the four alleged "enterprises" were "distinct and separate entities"; (3) GK directly or indirectly participated, controlled, or managed any of the alleged enterprises; and (4) Kostopoulos' marriage constituted an "enterprise" under section 1962(c). The Court will consider each of these contentions in turn.

1. Identification of an Enterprise Within the Meaning of Section 1962(c)

Defendants contend that Count I fails to sufficiently identify an "enterprise" because an allegation that there is an association between a "corporate employee and an affiliate of that corporation, (its distributor [Marshal Wolf])," is insufficient to state a RICO claim. Therefore, according to Defendants, Count I fails to state a claim under section 1962(c) because Marshal Wolf "was a distributor of MEAU, and George Kostopoulos was, at the time, MEAU's employee, its Regional Sales Manager." As explained below, this Court finds this contention without merit because Count I does not allege that GK and MEAU and Marshal Wolf made up the enterprise. Instead, Count I alleges that GK was the RICO "person" who operated and controlled three RICO "enterprises" made up of Marshal Wolf, Marshal Wolf and MEAU, and Marshall Wolf and its customers and competitors.

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3 Similar to paragraph 56, Count 2 alleges that Cynthia Kostopoulos conducted or participated in the conduct of her marriage to Kostopoulos as a RICO enterprise.

A RICO complaint must identify the enterprise. Jennings v. Emry, 910 F.2d 1434, 1439-40 (7th Cir. 1990). The RICO statute defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Therefore, a RJCO enterprise encompasses two types of organizations: (1) recognized legal entities; and (2) "associations in fact." See Jennings, 910 F.2d at 1440. An "association in fact" enterprise is defined by the statute as a "union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has described an "enterprise" as "a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981). The Court explained that an enterprise is shown "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Id. The Seventh Circuit has expanded upon this definition characterizing an "enterprise as an ongoing structure ... associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision making." Richmond v. Nationwide Cassel, L.P., 52 F.3d 640, 645 (7th Cir. 1995).

Further defining an enterprise, courts in this circuit have held that a corporation and its subsidiaries and/or distributors can constitute an "association in fact enterprise" under sections 1961(4) and 1962(c). See MCM Partners, Inc. v, Andrews-Bartlett & Assoc., Inc, 62 F.3d 967, 976 (7th Cir. 1995); Williams v. Ford Motor Co., 11 F. Supp. 2d 983, 986 (N.D. I11. 1998) (holding that the plaintiff adequately pled that Ford and one of its dealers constituted an association-in-fact enterprise").

Similarly, an enterprise may also be the victim of the racketeering activity. LaSalle Bank Lake View v. Seguban, 937 F. Supp. 1309, 1322 (N.D. I11. 1996). In LaSalle Bank Lake View,

the plaintiff bank brought a RICO action against a former teller and her husband. 937 F. Supp. at 1313. The complaint alleged that the former teller was the RICO "person" and that the bank was the RICO "enterprise" which the teller controlled. Id. at 1314. In denying the defendant's motion for summary judgment, the court held that "an enterprise may include a legitimate legal entity ... as the victim of the racketeering activity, so long as it is distinct from the person." Id. at 1322. See also United States v. Korvic, 684 F.2d 512, 516 (7th Cir. 1982) (holding that the Chicago Police Department was enterprise within RICO and "could also be the victim of racketeering activity"); Shapo v. Engle, 1999 WL 1045086, at *8 (N.D. I11. Nov. 1999) (holding that a corporation could be both the "enterprise" and the "victim" in a section 1962(c) action).

Here, Count 1 alleges that Marshal Wolf by itself constituted an enterprise and that the following entities were associated in such a manner as to constitute "association-in-fact enterprises": (1) Marshall Wolf and MEAU (¶ 54); and (2) Marshall Wolf and its customers and competitors (¶55). Applying the above authorities, this Court finds that Marshal Wolf by itself clearly falls within section 1961(4)'s definition of a RICO "enterprise" because it is alleged to be a corporation (¶¶ 1, 53) and the fact that it was also the "victim" of the alleged scheme does not prevent it from also being a RICO entity. See LaSalle Bank Lake View, 937 F. Supp. at 1322

As for the association of Marshall Wolf and MEAU, this Court finds that the Complaint has property pled an "association in fact" enterprise between a corporation and its distributor as set forth above in MCM Partners, Inc and Williams. Moreover, as explained below, the Complaint alleges that GK, as a high ranking manager of MEAU, was able to exert control and manage the affairs of both MEAU and Marshall Wolf. Through this control, GK created a RICO enterprise composed of Marshall Wolf and MEAU for the purpose of extorting money from Marshall Wolf for a period of almost four years.

Finally, as for the allegation that Marshall Wolf and its customers and competitors constituted an "association in fact enterprise," the Court finds that the Complaint does not adequately plead an "enterprise" within the meaning of RICO. Other than the fact that these entities were all distributors and/or end users of MEAU's products, the Complaint does not allege that they were "associated together for a common purpose" or that they functioned as "a continuing unit."

Accordingly, construing the Complaint in favor of Plaintiffs, as this Court is required to do, the Court finds that the Complaint has adequately identified a RICO enterprise.

2. The Distinctiveness Requirement

Section 1962(c) further requires that the RICO "person" be an entity separate and distinct from the "enterprise" whose affairs it conducts. Haroco, Inc.- 747 F.2d at 400. Termed the "distinctiveness requirements the plaintiff is required to allege that the RICO person and the corporate entities in the enterprise have "each played a distinct role within the purported scheme." Ewing v. Midland Finance Co., 1997 WL 627644, at *4 (N.D. I11. Sept. 26,1997). To meet this requirement, however, the plaintiff need only allege "some separate and distinct existence for the person and the enterprise." Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1280 (7th Cir. 1989) (emphasis added) (that the enterprise employed persons other than the RICO persons was sufficient to show distinctiveness). To satisfy the distinctiveness requirement, the plaintiff must allege that the person committed the crime while conducting the enterprise's affairs, not merely its own business. Richmond v. Nationwide Cassel, L.P., 52 F.3d 640, 646 (7th Cir. 1995). The person operating the enterprise may be an employee (both "upper management" and "lower rung participants") of the enterprise or anyone "associated with the enterprise who exerted control over it, as for example, by bribery." MCM Partners, Inc., 62 F.3d

at 976. Moreover, the "person" may be a "subsidiary" or an affiliate company that manages the affairs of its parent corporation. Harco, 747 F.2d at 402. Similarly, "an enterprise may include a legitimate legal entity ... as the victim of the racketeering activity, so long as it is distinct from the person." LaSalle Bank Lake View, 937 F. Supp. at 1322.

Here, the Complaint alleges that GK was a regional manager at MEAU, who controlled MEAU's relationship with Marshall Wolf. In conducting the business of MEAU, GK allegedly used his position, to commit the alleged extortion scheme. Thus, the Court finds that the Complaint adequately alleges that the "person" was distinct from the "enterprise" in that GK. committed the alleged crimes while acting on his own accord but while improperly conducting the affairs of MEAU. See United States v. Robinson, 8 F.3d 398, 407 (7th Cir. 1993) (holding that the distinctiveness requirement was met where the RICO person was alleged to have 4 improperly conducted the enterprises activities, "not his own").[4]

3. The Required Element of Control

Defendants further contend that Count I fails to state a cause of action because it does not sufficiently plead that GK "directly or indirectly, controlled or managed [Marshal Wolf]." The RICO "person" must be not only associated with the enterprise, but must "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). See also Reves v. Ernst & Young, 507 U.S. 170,177 (1993).

The Supreme Court discussed "control" with respect to employees and outside persons, in Reves, where an outside accounting fin-n misstated the value of an asset on the financial

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4 The Kostopoulos Defendants contend that Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997), supports their contention that the person here is not distinct from the entity. In Fitzgerald, the corporate parent was alleged to be the RICO person and the subsidiary/distributor was the RICO enterprise. Here, however, the RICO person is GK not the corporate parent (MEAU). Therefore, this Court finds that Fitzgerald is not controlling.

statements of its client, which allowed the financial statements to reflect a positive net worth. 507 U.S. at 175-76. After the client filed for bankruptcy, its debtors sued the accounting firm. Id. The Court held that the accounting firm had not "conduct(ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs." Id. In so holding, the Court noted that "we understand the word conduct to require some degree of direction and the word participate to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to participate, directly or indirectly, in the conduct of such enterprise's affairs, one must have some part in directing those affairs." Id. at 179. This requirement, the Court explained, could also be formulated as "participat[ion] in the operation or management of the enterprise itself." Id. at 183. The word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. Thus, while a plaintiff must allege that a defendant took some part in the conduct of the enterprise, he need not allege that the defendant was directly involved or that he had primary management responsibilities. Id.

In MCM Partners, Inc., 62 F.3d at 967, the Seventh Circuit applied the holding in Reves, in applying the control requirement to outside entities. The enterprise in MCM Partners was an association in fact which attempted to make one member of the enterprise "the exclusive provider of forklift and material handling and personnel moving equipment for all exhibition contractors at McCormick Place." Id. at 978. The Seventh Circuit found that the fact that two of the enterprise's six entities committed predicate acts at the direction of the others did not insulate those two associations from RICO liability, under Reves. Id. The court relied on the holding in Reves that "lower rung" employees in an enterprise who act at the direction of upper

management may be deemed to operate that enterprise. Id. Specifically, the Seventh Circuit stated that the two associations "still participated in the enterprise's operation by carrying out the directions given them." Id. In so holding, the Seventh Circuit articulated a distinction between defendants "outside" the enterprise and those who are "inside" the enterprise by virtue of their membership therein and relied on the nature of the enterprise as a basis for its decision. Id. The court drew a distinction between the defendant in Reves, an accounting firm considered an "outsider" to the enterprise and the two associations at issue in MCM Partners which were alleged to be part of the enterprise itself Id. at 979. The court further noted that "these defendants were vital to the achievement of the enterprise's primary goal" and "knowingly implemented management's decisions, thereby enabling the enterprise to achieve its goals." Id.

Together, Reves and MCM Partners stand for the proposition that "outsiders" who assist in an enterprise's affairs, without more, are not liable under RICO while "insiders" who through the chain of command either make or knowingly carry out the enterprise's decisions may be held accountable. Id. Accordingly, a RICO enterprise may be operated by: (1) upper management; (2) lower-rung participants in the enterprise who are under the direction of upper management; or (3) others associated with the enterprise who exert control over it, as for example, by bribery. Id.

Here, the Complaint alleges that GK, as one of the "most successful sales managers" had sufficient control over MEAU to meet the RICO control requirement. For example, when Wolf reported GK's conduct to MEAU, the senior MEAU managers allegedly told Wolf to work it out with GK because they did not want to "step on his [GK's] toes." This control is further evidenced by the allegation that when Wolf finally reported the extortion to the CEO of MEAU, Marshall Wolf s distributorship was terminated. Moreover, Count I alleges that GK had

sufficient control to terminate Marshall Wolf s distributorship, and, as explained below, to otherwise cause MEAU to take actions which would negatively affect Marshall Wolf's business. Consequently, the Court finds that the Complaint sufficiently alleges that GK meets the RICO control requirement with respect to MEAU.

Similarly, the Court finds that the Complaint sufficiently alleges that GK exercised control over Marshall Wolf to meet the RICO control requirement. For example, GK allegedly threatened that if Marshall Wolf did not make the extortion payments, he would see that: (1) Marshall Wolfs distributorship was terminated; (2) MEAU solicited direct sales from Marshall Wolf s existing customers; (3) Marshall Wolfs competitors solicited sales from its customers; and (4) Wolf was criminally charged with bribery. In an exercise of his control, the Complaint alleges that GK removed Wolf from MEAU's Distributor Council in 1999. When Wolf reported GK's conduct to MEAU's CEO, GK had Marshall Wolf s distributorship cancelled. Consequently, the Court finds that the Complaint sufficiently alleges that GK meets the RICO control requirement with respect to Marshall Wolf

4. The Kostopoulos' Marriage as a RICO Enterprise

Count I and Count 2 also allege that the marriage of GK and CK was a RICO enterprise and that GK and/or CK conducted or participated in the conduct of this enterprise through a pattern of racketeering activity. (Cmplt. At ¶¶ 56, 612.) Defendants do not directly state their objection to this allegation but appear to contend that marriage is not a cognizable enterprise under RICO section 1962(c).

In response, Plaintiffs point to the decision in American Manufacturers Mutual Insurance Company v. Townson, where the plaintiff alleged that a husband and wife had engaged in racketeering activity by conducting their marriage as an enterprise to commit insurance fraud.

912 F. Supp. 291, 294 (E.D. Tenn. 1995). In denying the defendant's motion for summary judgment, the court reasoned that, while RICO required distinctness between the person and the enterprise alleged,

> Marriage as an institution commits two individuals to maintaining their welfare as a unit. To attain this goal, a husband and wife share in certain responsibilities, some of which they may even be legally obligated to fulfill. One spouse can be obligated to pay the debts of the other; spouses also are entitled to certain benefits procured by the other spouse.
>
> Consequently, with the allegations present in this case, the Court finds that a marriage can be an "enterprise under RICO. In a marriage, a man and a woman are associated together for the common purpose of engaging in a course of conduct necessary to preserve their welfare as a marital unit.

Id. at 295. This Court finds the reasoning above persuasive, particularly in light of the Supreme Court's decisions in National Organization for Women and Cedric Kushner. In National Organization for Women, the Supreme Court held that RICO claims under section 1962(c) need not allege an economic motive for the formation of the alleged enterprise. 510 U.S. at 259-60. Thus, that GK and CK did not enter into their marriage for the purpose of establishing the alleged enterprise, or indeed for any economic purpose, that does not prevent their subsequent operation of the marriage as a RICO enterprise.

Likewise, the Supreme Court's holding in Cedric Kushner that the legal distinction between a person and the entity with which he was associated is sufficient to constitute the distinction between a person and an enterprise required by RICO leads to the inference that, the Defendants, as persons legally distinct from their marriage unit, could act as persons conducting the affairs of that marriage as an enterprise. See Cedric Kushner, 533 U.S. at 163-65. The Supreme Court's comment in U.S. v. Turkette that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact" implies that enterprise is a ten-n intended to be broadly construed, and that, in an

appropriate situation, a marriage could constitute a RICO enterprise. 452 U.S. 576, 580 (1981).

Similarly, the American Manufacturers court found that the parties to the marriage could conduct the affairs of that marriage:

> The nature of the institution of marriage requires both parties to play at least some part in directing the affairs of that union, i.e. living arrangements, what debts to incur, etc. Consequently, in the absence of evidence suggesting that Mr. or Mrs. Townson is the sole decision maker concerning the fulfillment of the responsibilities brought about as a result of their marriage, the Court finds sufficient support for this element of the RICO claim to survive.

912 F. Supp. at 297. Here, the Complaint alleges that CK actively participated in the racketeering conduct alleged by allowing her name to be placed on Marshall Wolf's payroll and by cashing the checks issued to her as a ghost employee.

At this stage in the case, whether GK, CK, both of them, or neither operated their marriage as a RICO enterprise is not necessary. For now, it is enough to hold that a marriage may be conducted as a RICO enterprise and that Plaintiffs have alleged facts sufficient to show that GK and /or CK did operate their marriage in this fashion.

Consequently, this Court DENIES Defendants' motion to dismiss as it relates to the RICO claims - Counts 1, 2, and 4.

II. Supplemental State Law Claims

Having concluded that the RICO Counts survive the motion to dismiss, the Court now turns to Plaintiffs' two supplemental state law claims -- defamation (Count 9) and intentional interference with prospective business advantage (Count 10).

A. Defamation

Plaintiffs allege that GK defamed Marshall Wolf to its customers. Defendants contend that: (1) Plaintiffs have failed to allege a prima facie case of defamation; and (2) the defamation claim is barred by the statute of limitations. Because, as discussed above, Defendants are

stopped from asserting the statute of limitations, the Court will only discuss whether Plaintiffs have sufficiently pled defamation.

Before addressing the specifics of the defamation claim, however, the Court will address Defendants' contention that the defamation count should have been pled with specific detail because Illinois is a fact pleading jurisdiction. Section l652 of Title 28 of the U.S. Code provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." In addition, section 2072(b) provides that "[such rules [of procedure and evidence] shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). In the landmark case of Erie R. Co. V. Tompkins, the Supreme Court considered what is now addressed in section 1652 and concluded that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law." 304 U.S. 64, 78 (1938). In the subsequent case of Hanna v. Plumer, the Court further elucidated choice of law principles, explaining that "... federal courts are to apply state substantive law and federal procedural law." 380 U.S. 460, 465 (1965). It further explained that

> It is true that both the Enabling Act and the Erie rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna, 380 U.S. at 471.

> Here, Federal Rule of Civil Procedure Rule 8(a) provides that
>
> > A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

This rule "transgress[] neither the ten-ns of the Enabling Act nor constitutional restrictions," Hanna, 380 U.S. at 471, and therefore, this Court shall apply Rule 8 in assessing the sufficiency of Plaintiffs' pleading of their supplemental state law claims.

Defendants contend that Count 9 fails to allege sufficient facts to plead a claim for defamation because Plaintiffs have not specifically alleged that the statements by GK were false. While it is true that to make out a prima facie case of defamation under Illinois law, a plaintiff must allege that "the defendants made a false statement," Krasinski v. United Parcel Serv., 530 N.E.2d 468, 471 (I11. 1988), words which are libelous per se "carry . . . a presumption of falsity. Bloomfield v. Retail Credit Co., 302 N.E.2d 88, 95 (I11. App.Ct.1973). Therefore, if Defendants' statements were libelous per se, then Plaintiffs did not need to specifically allege that the statements were false.

Illinois courts distinguish defamatory language as slanderous per quod and slander per se. Dubrovin v. Marshall Field's & Co., 536 N.E.2d 800, 802 (I11. App.Ct.1989). A statement is slanderous per quod if innuendo and extrinsic facts are required to give it a slanderous meaning and special damages are alleged and proved. Id. Slander per se is a defamatory remark adversely affecting the plaintiff's abilities in its business. Mullen v. Solber, 648 N.E.2d 950 (I11. App. Ct. 1995); Quilici v. Second Amendment Foundation, 769 F.2d 414

(7th Cir. 1985) (holding that statements are defamatory per se when they constitute "a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with").

To constitute slander per se, the language and acts complained of in and of themselves must be "so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary." Dubrovin, 536 N.E.2d at 802. Moreover, it is well-settled that under common law, words are actionable per se, if they falsely impute: (1) a lack of integrity in the discharge of that person's duties of office or employment; (2) words that result in prejudice to that person's trade or profession; (3) commission of a criminal offense; and (4) infection with a communicable disease. Id. at 803. Where a plaintiff in a defamation action is a corporation, as is the case here, the allegedly defamatory statements "must assail a corporation's financial or business methods or accuse it of fraud or mismanagement." American International Hospital v. Chicago Tribune Co., 483 N.E.2d 965, 969 (I11. App. Ct. 1985). Statements that "undercut a corporation's reputation for discharging its duties with integrity and have the likely effect of harming the business, fall within the ambit of defamation per se." Levitt v. S.C. Food Service, Inc., 820 F. Supp. 366, 367 (N.D. I11. 1993). See also Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc., 546 N.E.2d 33, 39 (111. App. Ct. 1989) (words that reflect on a business' integrity or reputation may give rise to a defamation action).

Here, Plaintiffs allege that GK "made defamatory statements that tended to cause harm to the reputation of Marshall Wolf in that the statements lowered Marshall Wolf in the eyes of the MEAU product end-user community or deterred MEAU product end-users from associating with Marshall Wolf." (Cmplt. At ¶ 100.) Count 9 specifically alleges the following:

> 101. In particular, MEAU, by and through its agent Kostopoulos, made defamatory statements that prejudiced Marshall Wolf or imputed Marshall Wolf's

lack of ability in its trade, profession or business, including (but not limited to) the following statements:

a) Informing Marshall Wolf customers, such as Eisenmann Corp., that Marshall Wolf was incompetent or not qualified to handle the customers [sic] business and recommending that the customer make its purchases through other distributors, such as McGregor Automation;

b) Entering a distributor relationship with another company in Marshall Wolf's territory, Steiner Electric Company, and informing Marshall Wolf customers that the new distributor relationship was entered because Marshall Wolf was incompetent or not qualified to be a MEAU distributor;

C) Wrongfully reducing Marshall Wolf s credit terms from 60 days to 30 days and several times placing Marshall Wolfs credit on hold, informing Marshall Wolf's customers of the credit hold, and causing Marshall Wolfs customers unwarranted concern; and

d) Informing customers, such as Anatol Automation located Vernon Hills, Illinois that MEAU was on the verge of terminating Marshall Wolf as a distributor because Marshall Wolf was incompetent or not qualified to be a MEAU distributor.

(Cmplt. at ¶ 101.)

Construing the allegations in the light most favorable to the non-moving party, as this Court is required to do, the Court finds that Count 9 alleges sufficient facts to allege a prima facie case of defamation per se in that the alleged statement would clearly have the effect of 44undercut[ting] [Marshal Wolfs] reputation for discharging its duties with integrity and have the likely effect of harming the business." Levitt, 820 F. Supp. at 367. Therefore, the Court DF,NMS Defendants' motion to dismiss Count 9.

B. Intentional Interference with Prospective Economic Advantages [5]

Plaintiffs further allege that GK interfered with Marshall Wolf s prospective economic advantage by selling products directly to Marshall Wolf customers. Defendants contend that Plaintiffs have failed to allege the elements of the prima facie case and that Count 10 should

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5 Plaintiffs denominate this Count "Intentional Interference with Prospective Business Advantage." However, it is evident from their allegations and their Opposition to Defendants' Motion to Dismiss that they intend to assert a claim under Illinois tort law for intentional interference with prospective economic advantage.

therefore be dismissed.

In Illinois, to make out a prima facie case of intentional interference with prospective economic advantage, a plaintiff must allege

> (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff s legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference.

Fellhauer v. City of Geneva, 568 N.E.2d 870, 878 (I11. 1991). In addition, the plaintiff must indicate specific third parties with whom it expected to enter into such relationships. Schuler v. Abbott Laboratories, 639 N.E.2d 144, 147 (I11. App. Ct. 1993).
Here, Plaintiffs allege that they had a reasonable expectation of entering into valid business relationships with MEAU product end-users, and list specific companies that they expected to enter into such relationships. (Cmplt. at ¶ 105.) Defendants contend that because Plaintiffs alleged that in 1995 MEAU adopted a policy of entering into direct relationships with MEAU product end-users, that Plaintiffs could not have had a reasonable expectation of entering into valid business relationships with those end-users.

Whether Marshall Wolf had a reasonable expectation of entering into business relationships with the MEAU product end-users depends on the question of the status of MEAU's alleged policy of entering into direct relationships with those businesses. Because Plaintiffs do not contend that MEAU was contractually or otherwise precluded from adopting such a policy, the question is whether MEAU (though GK) was privileged to act as it did in soliciting direct business from Marshall Wolfs customers. The Illinois Appellate Court has held that "[w]here the defendant acts under a privilege or with justification, it is plaintiff s burden to plead malice or lack of justification to satisfy the elements of tortious interference with economic

advantage. The actions of corporate officers and directors who use their best business judgment on behalf of their corporations are clothed with a privilege." Schuler, 639 N.E.2d at 148.

Here, Plaintiffs have alleged that "MEAU's intentional interference with Marshall Wolf s prospective business advantage was committed with fraud, actual malice, deliberate violence or oppression, willfulness, or such gross negligence as to indicate a wanton disregard for the rights of Marshall Wolf." (Cmplt. at ¶ 109.) Therefore, this Court finds that Plaintiffs have alleged sufficient facts to plead a claim for intentional interference with Marshall Wolf's prospective business advantage, and the Court thus DENIES the motion to dismiss with respect to Count 10.

CONCLUSION

For the reasons set forth above, this Court DENIES the Kostopoulos Defendants' Motion to Dismiss Counts 1, 2, 4, 9, and 10 of Plaintiffs' Complaint [26-1]. It is so ordered.

ENTER

Blanche M. Manning

BLANCHE M. MANNING
U.S. DISTRICT COURT JUDGE

DATE: AUG 16 2002

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