

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATA COMM COMMUNICATIONS, INC., et al. : CIVIL ACTION
:
v. :
:
THE CARAMON GROUP, INC., et al. : NO. 97-0735

MEMORANDUM AND ORDER

HUTTON, J.

November 25, 1997

Presently before this Court is the Motion of Defendants The Caramon Group, Inc., Marvin Waldman, and Henriette Alban to Dismiss the Plaintiffs' Complaint Pursuant to Federal Rule of Civil Procedure 12(b) for Plaintiffs' Failure to State a Claim and for Lack of Jurisdiction (Docket No. 28). For the reasons set forth below, the Plaintiffs' complaint is dismissed with leave to amend.

I. BACKGROUND

In 1995, the plaintiff, Data Comm Communications, Inc. ("Data Comm"), incorporated in the Commonwealth of Pennsylvania for the purposes of obtaining funding to bid on and to procure Federal Communication Commission licenses for personal communications systems. Compl. at ¶ 14. Specifically, Data Comm and its principals, plaintiffs Eric Perry ("Perry") and Louis Silver ("Silver"), were interested in obtaining funds to bid for 10 MHz personal communications licenses at an August 26, 1996 FCC auction. Id. at ¶ 15. To finance the \$16 million needed to bid for the

licenses, the plaintiffs approached defendant Marvin Waldman ("Waldman"), the chief executive officer of defendant The Caramon Group ("Caramon").¹ Id. at ¶¶ 16-18.

The plaintiffs allege that Waldman expressed a desire to invest in Data Comm's project. In fact, Waldman told "Silver that the Data Comm project 'fell well within the Caramon Group Mission.'" Id. at ¶ 18. Moreover, Waldman revealed to Silver that because it had more than \$16 million available, Caramon was interested in funding the entire project. Id. Waldman instructed Silver to send a business plan to Andrew Bogdanoff ("Bogdanoff") at the Remington Group ("Remington"), both defendants in this action, because Bogdanoff was responsible for screening all of Caramon's projects. Id. at ¶ 19.

Defendants Bogdanoff and Waldman made a series of representations to Silver on behalf of Caramon. Id. at ¶ 21. The plaintiffs allege that Bogdanoff and Waldman told Silver that: 1) Caramon had unlimited investment funds; 2) the chances of Caramon funding Data Comm's project were "extremely high"; and 3) Caramon did not want Data Comm to pursue other investors. Id. Moreover, on November 14, 1995, Waldman told Silver that 1) Waldman had complete authority to approve Caramon's investments, 2) \$16 million

¹/ The other defendants in this action include Henriette Alban, Caramon's vice president and operating officer, The Remington Group and Andrew Bogdanoff, its chief executive officer and principal, Lloyd Scott & Company and Lloyd Bashkin, its president, and Steve Teitleman, an employee of Caramon. On April 17, 1997, the plaintiffs voluntarily dismissed defendants Lloyd Bashkin and Lloyd Scott & Company from this action. Further, on July 30, 1997, the plaintiffs voluntarily dismissed Steve Teitleman from this action.

was already committed to this project; and 3) due diligence would take no more than four weeks and the money would be available three weeks afterwards. Id. at ¶ 22.

Accordingly, Waldman sent Perry a commitment letter on December 21, 1995. Id. at ¶ 23. However, in order to pay for Caramon's expenses in obtaining the funding, Waldman demanded \$50,000 from the plaintiffs, which the plaintiffs paid. Id. at ¶ 26-27. After the due diligence process was completed, though, the defendants refused to provide the requested financing. Id. at ¶ 28.

The plaintiffs allege that Waldman and Caramon made substantial misrepresentations during the course of the parties' negotiations. More specifically, the plaintiffs allege that Waldman and Caramon were not lenders, and that Caramon never had access to the \$16 million. Id. at ¶ 28. The plaintiffs allege that the defendants failed to reimburse the plaintiffs' \$50,000 investment and other fees paid by them. Id. at ¶ 28. Instead, the plaintiffs claim that Caramon and Waldman planned to take the \$50,000 relating to their proposed expenses, without ever having the ability to make the required loan. Id. at ¶¶ 28, 30, 41.

On January 31, 1997, the plaintiffs filed suit in this Court alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, civil conspiracy, tortious interference with prospective economic

advantage, breach of implied covenant of good faith and fair dealing, and fraud. On May 23, 1997, defendants Caramon, Waldman, and Alban filed the instant motion seeking to dismiss the plaintiffs' complaint. On July 23, 1997, this Court required that the plaintiffs file a RICO Case Statement, pursuant to this Court's RICO Case Standing Order. The plaintiffs filed their RICO Statement on August 6, 1997.

II. DISCUSSION

A. Standard for Dismissal under Rule 12(b)(6)

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),² this Court must "accept as true the facts alleged in

²/ Rule 12(b)(6) provides that:

Every defense, in law or fact, to a claim for relief in
(continued...)

the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwest Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Civil RICO

RICO affords civil damages for "any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Under section 1962(c), RICO "prohibits any person employed by or associated with an enterprise engaged in interstate commerce from conducting or participating in the affairs of the enterprise through a 'pattern of racketeering activity.'" Tabas v. Tabas, 47 F.3d 1280, 1289 (3d Cir.), cert. denied, 515 U.S. 1118 (1995)) (citing 18 U.S.C. § 1962(c)).

(...continued)

any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

Moreover, Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)." 18 U.S.C. § 1962(d).

Under 18 U.S.C. § 1962(c), a plaintiff must allege the following four elements to make out a claim: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts." Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989).

Section 1962(c) applies to a culpable "person" engaged in the conduct of an "enterprise" through a pattern of racketeering activity. Pell v. Weinstein, 759 F. Supp. 1107, 1116 (M.D. Pa. 1991), aff'd, 961 F.2d 1568 (3d Cir. 1992); see Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 (1985). "In the Third Circuit, the culpable 'person' and the 'enterprise' must be separate and distinct entities. . . . That is, the person charged with the RICO violation under § 1962(c) cannot be the same entity as the alleged enterprise." Pell, 759 F. Supp. at 1116. The purpose of section 1962(c) is "to prevent the takeover of legitimate businesses by criminals and corrupt organizations. . . . It is in keeping with that Congressional scheme to orient section 1962(c) toward

punishing the infiltrating criminals rather than the legitimate corporation which might be an innocent victim of the racketeering activity in some circumstances." B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984) (citations omitted).

A plaintiff must allege the following two elements to make out a claim under section 1962(d): "(1) [an] agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate section 1962(a), (b), or (c)." Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989). Moreover, a "conspiracy claim must also contain supportive factual allegations . . . sufficient 'to describe the general composition of the conspiracy, some or all of its broad objectives, and the defendant's general role in the conspiracy.'" Id. (quoting Alfaro v. E.F. Hutton & Co., 606 F. Supp. 1100, 1117-18 (E.D. Pa. 1985)).

Treble damages are available to any person who, by reason of a violation of § 1962, is injured in his or her business or property. 18 U.S.C. § 1964(c). Thus, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Sedima, 105 S. Ct. at 3285. The injury must be direct; that is, it must "flow from the commission of the predicate acts." Id. The directness requirement ensures that a "defendant who violates section 1962 is not liable for treble damages to

everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." Id. (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606 (1985)).

C. Plaintiffs' 1962(c) Claim

1. Pattern of Racketeering

In the defendants' Motion to Dismiss for failure to state a claim, the defendants argue that the plaintiffs fail to plead adequately RICO's pattern of racketeering activity requirements. First, the defendants claim that the plaintiffs have not sufficiently pled the legal elements of any predicate acts by the defendants. Defs.' Mot. at 2, 4, 5. Second, the defendants argue that the plaintiffs have not alleged that the defendants' conduct meets RICO's continuity requirements, because the defendants' alleged scheme lasted less than nine months. Defs.' Mot. at 1-7.

The RICO statute "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern. . . . It thus places an outer limit on the concept of a pattern of racketeering that is broad indeed." H.J. Inc., 492 U.S. at 237. While the concept of "pattern" is difficult to define, the Court has at least provided a basic guideline for fulfilling the pattern requirement: "to prove a pattern of racketeering activity a plaintiff or prosecutor must

show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Id. at 239.

a. Related Predicate Acts

Section 1962(c) prohibits "any person employed by or associated with any enterprise . . . [from] participat[ing] . . . 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). "Racketeering activity" means "any act 'chargeable' under several generically described state criminal laws, any act 'indictable' under numerous specific federal criminal provisions, including mail and wire fraud, and any 'offense' involving bankruptcy or securities fraud or drug-related activities that is 'punishable' under federal law." Sedima, 473 U.S. at 481-82 (citing 18 U.S.C. § 1961(1)). Section 1961(5) defines "pattern of racketeering activity" as at least two acts of racketeering activity within ten years; however, a plaintiff must also "show that the racketeering predicates are related." H.J. Inc., 492 U.S. at 239.

(1) Racketeering Activity

In the instant case, the plaintiffs allege that the defendants have committed the following predicate acts: extortion and mail fraud. Pls.' RICO Case Statement at ¶ 4(a); Compl. at ¶¶

50, 51.\³ The plaintiffs list several paragraphs of facts in their complaint to substantiate these claims.

(a) **Extorsion**

18 U.S.C. § 1951(a) prohibits anyone from obstructing, delaying, or affecting "commerce . . . by . . . extortion." Extorsion is defined as "the obtaining of property of another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2). "The requisite fear suffered by the victim of the extortion need not be one of physical harm." United States v. Inigo, 925 F.2d 641, 649 (3d Cir. 1991). "It is well settled that the element of 'fear' required . . . can be satisfied by placing a person in apprehension of economic loss." United States v. Agnes, 753 F.2d 293, 302 n. 15 (3d Cir. 1985). "Examining the situation from the perspective of the victim 'the proof need establish that the victim reasonably believe first, that the defendant had the power to harm the victim, and second, that the defendant would exploit that power to the victim's detriment.'" United States v. Traitz, 871 F.2d 368, 391 (3d Cir.), cert. denied, 493 U.S. 821 (1989) (quoting United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987)).

3. Although the plaintiffs' complaint also states that the defendants committed commercial bribery, Compl. at ¶¶ 50, 51, the plaintiffs' RICO Case Statement withdraws this allegation. Pls.' RICO Case Statement at ¶ 4. Further, the plaintiffs fail to substantiate this allegation in their complaint. Thus, this Court analyzes only the plaintiffs' mail fraud and extortion allegations.

"Under § 1951, the economic loss to be feared is not the loss of the property obtained by the extortioner, but the threatened economic harm that the victim could reasonably believe would befall it if the extortionate demand were not met." Inigo, 925 F.2d at 649-50 (citation omitted). Moreover, the "potential economic loss need not be one that would put an entity out of business. Instead, there must just be a reasonable fear of an economic loss sufficient to induce the victim to part with the property demanded rather than face the threatened consequent loss." Id. at 650.

In support of its extortion allegations, the plaintiffs claim that the defendants misrepresented their investment capabilities, in order to convince the plaintiffs to rely on the defendants' access to investment funds. Compl. at ¶ 28. Then, when the plaintiffs were in their most vulnerable position, with deadlines pending, the defendants allegedly demanded \$50,000 in previously announced fees. Compl. at ¶¶ 26, 27. The defendants refused to give the plaintiffs the loan if the plaintiffs failed to pay the sum. Compl. at ¶¶ 26, 27, 38, 39. Without access to the investment funds, the plaintiffs would have been precluded from bidding on the FCC licenses. Compl. at ¶ 16. Because of the plaintiffs' earlier reliance on the defendants' promises to grant the loan and the imminent deadlines, the plaintiffs claim that they had no choice but to pay the required amount. Compl. at ¶ 57.

Given the broad definition of extortion, the plaintiff have met their burden of sufficiently pleading facts regarding the defendants' alleged extortion, arising out of the plaintiffs' fear of economic harm.

(b) Mail Fraud

Moreover, the plaintiffs have sufficiently pled facts to substantiate their allegations of mail fraud. Under 18 U.S.C. § 1341, "[m]ail fraud has two elements: 1) a scheme to defraud, and 2) use of the mails in furtherance of the scheme." City of Rome v. Glanton, 958 F. Supp. 1026, 1044 (E.D. Pa. 1997) (citing United States v. Dreer, 457 F.2d 31 (3d Cir. 1972)). As the Third Circuit recently stated:

The mail fraud statute prohibits any person from knowingly causing the use of the mails "for the purpose of executing" any "scheme or artifice to defraud." 18 U.S.C.A. § 1341 (Supp. 1990). The actual violation is the mailing, although the mailing must relate to the underlying fraudulent scheme. Moreover, each mailing that is "incident to an essential part of the scheme" constitutes a new violation. Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954). The mailing need not contain any misrepresentations. Rather, "'innocent' mailings - ones that contain no false information - may supply the mailing element." Schmuck v. United States, 489 U.S. 705, 715, 109 S.Ct. 1443, 1450, 103 L.Ed.2d 734 (1989).

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1413-14 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

Rule 9(b) of the Federal Rules of Civil Procedure states that a plaintiff must allege fraud with particularity. See Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985) (Rule 9(b) must "place the defendants on notice of the precise misconduct with which they are charged"); Alfaro, 606 F. Supp. at 1118. This requirement is "particularly important in civil RICO pleadings in which the predicate racketeering acts are critical to the sufficiency of the RICO claim." Alfaro, 606 F. Supp. at 1118; accord O'Brien v. National Property Analysts Partners, 719 F. Supp. 222, 230 (S.D.N.Y. 1989) ("All of the concerns that dictate that fraud be pleaded with particularity exist with even greater urgency in civil RICO actions.").

In the instant case, the plaintiffs have alleged mail fraud with sufficient particularity. Taking the plaintiffs' allegations as true, the plaintiffs have established a scheme by the defendants. According to the complaint, the defendants falsely led the plaintiffs into believing that the defendants would finance the plaintiffs' project. Compl. at ¶¶ 28. When the plaintiffs' need for the money grew, the defendants continued to assure the plaintiffs that the defendants were committed to loaning the necessary funds. Compl. at ¶¶ 21-23. However, as the plaintiffs faced strict deadlines and after all other loan opportunities were inaccessible under the time constraints, the defendants required

the plaintiffs to pay them \$50,000 to secure the loan. Compl. at ¶¶ 33-39, 57. Moreover, the plaintiffs assert that the defendants used the mails in furtherance of their scheme, both as a device to send their misrepresentations and to advance their extortion requests. Compl. at ¶¶ 34, 36.

Therefore, this Court finds that the plaintiffs have sufficiently pled the elements required to make out a claim for extortion and mail fraud. Both of these crimes constitute "racketeering activity," pursuant to 18 U.S.C. 1961(1). The next issue before this Court is whether these activities are related.

(2) Relatedness of the Racketeering Activity

As defined in H.J., Inc., predicate acts are related where they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J., Inc., 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e)). "The relatedness test will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction - by definition the acts are related to the same 'scheme or artifice to defraud.'" Kehr, 926 F.2d at 1414.

In the instant case, the plaintiffs have sufficiently pled RICO's relatedness requirements. First, the plaintiffs assert that the defendants used the mail on ten different occasions to further their fraud. Compl. at ¶¶ 34, 36. Second, the alleged

mail fraud and extortion claims were both aimed at defrauding the plaintiffs out of \$50,000, through the same underlying scheme. Thus, they "have the same or similar purposes, results, participants, victims, or methods of commission, [and] otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J., Inc., 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e)).

Thus, the plaintiffs have sufficiently pled the elements required to establish that the defendants performed related racketeering predicates. This Court must now decide whether the defendants' alleged racketeering endeavors "amount to or pose a threat of continued criminal activity." H.J., Inc., 492 U.S. at 239.

b. Continuity

"'Continuity' is both a closed- and open-ended concept." H.J., Inc., 492 U.S. at 241. It may be shown by proving a series of predicate acts over a "substantial" period of time. Id. at 242. "In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." Id.

(1) Closed-Ended Continuity

In Tabas v. Tabas, the Third Circuit discussed how a party may "'by prov[e] a series of related predicates extending over a substantial period of time.'" Tabas, 47 F.3d at 1292

(quoting H.J., Inc., 492 U.S. at 242) (emphasis added by Tabas). The Third Circuit recognized that it "has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard for closed-ended continuity." Tabas, 47 F.3d at 1293 (citations omitted). The Tabas court cited five Third Circuit opinions reaching this result. Id. at 1293. In all of these cases, plaintiffs had alleged that conduct constituted RICO violations, although the actions lasted less than one year and did not threaten future violations; in response, the Third Circuit held that RICO's continuity requirement had not been met.⁴ See Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 610-11 (3d Cir. 1991), cert. denied, 504 U.S. 955 (1992) (defining limitations to closed continuity); Hindes v. Castle, 937 F.2d 868, 875 (3d Cir. 1991) (same); Kehr, 926 F.2d at 1413 (same); Banks v. Wolk, 918 F.2d 418, 422-23 (3d Cir. 1990) (same); Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990) (same).

In Hughes, for example, the plaintiffs testified that two defendant companies, among others, fraudulently misrepresented facts to obtain favorable prices in an attempt to purchase the

4. In Tabas, the Third Circuit found that a scheme lasting three and one half years "extends over a 'substantial' period time and therefore constitutes the type of 'long-term criminal conduct' that Rico was enacted to address." Tabas, 47 F.3d at 1294 (citations omitted). Moreover, the court cited United States v. Pelullo, 964 F.2d 193, 209 (3d Cir. 1992), and Swistock v. Jones, 884 F.2d 755, 759 (3d Cir. 1989), as authority indicating that nineteen months and fourteen months, respectively, may be sufficient to constitute closed-ended continuity. Tabas, 47 F.3d at 1294

plaintiffs' property. Hughes, 945 F.2d at 607. The trial judge found that the scheme lasted one year, id. at 611, and "granted defendants' motion for judgment n.o.v. on the federal RICO claims because plaintiffs failed to prove the continuity prong of RICO's 'pattern of racketeering activity' requirement." Id. at 609 (citing 18 U.S.C. § 1962(c)). In affirming the lower court's decision, the Hughes court stated that:

[C]ases finding substantial period, including H.J., Inc., dealt with fraudulent conduct lasting years, sometimes over a decade. Such findings of substantial time periods are consistent with Congress' intent to combat "long-term criminal conduct." H.J. Inc., 492 U.S. at 242, 109 S.Ct. at 2902. Recently we noted that "[a]lthough RICO has not been limited to organized crime activity, we must not overlook that it was occasioned by Congress' perception of the danger posed by organized crime-type offenses, which are almost by definition continuing." Hindes, 937 F.2d at 874.

The time period of this case belongs with those of Marshall-Silver (seven months), Banks (eight months), and Hindes (eight months). We therefore find no continuity under a closed-ended scheme. In Hindes we declined to set forth a "litmus test" to measure duration. Id. at 875. We still decline. We conclude only that there is no qualitative difference between eight and twelve months for the purposes of RICO continuity.

Hughes, 945 F.2d at 611 (emphasis in original).

In the instant case, the plaintiffs have not sufficiently pled a closed-ended case. According to the plaintiffs, the defendants' culpable conduct lasted from November of 1995 through July of 1996. Compl. at ¶ 29. Although the plaintiffs allege that

during this time the defendants committed several predicate acts, the alleged scheme lasted only nine months. Thus, this Court finds that the plaintiffs have not set forth facts sufficient to constitute closed-ended continuity.

(2) Open-Ended Continuity

"[I]f a RICO action is brought before a plaintiff can establish long-term criminal conduct, the 'continuity' prong may still be met if a plaintiff can prove a threat of continued racketeering activity." Tabas, 47 F.3d at 1295. This burden is satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" H.J. Inc., 492 U.S. at 243; see Tabas, 47 F.3d at 1295 n. 20 (effect upon others doing business with entity, as well as effect on plaintiff, may be considered in open-ended continuity analysis). Moreover, where plaintiffs "allege that such tactics are [the defendants'] 'regular way of doing business', Tabas, 47 F.3d at 1296, [the plaintiffs] have to make [the allegation] consistent with Federal Rules of Civil Procedure 9(b) and 11." Puricelli v. Estate of Bachman, No.CIV.A.95-1713, 1995 WL 447474, at *6 (E.D. Pa. July 27, 1995), aff'd, 111 F.3d 127 (3d Cir. 1997) (table).

In Swistock, the Third Circuit found open-ended continuity was present. Swistock, 884 F.2d at 759. There, the

plaintiffs alleged that the defendants committed "various acts of wire and mail fraud as part of a scheme to defraud." Swistock, 884 F.2d at 756. The district court dismissed the plaintiffs' complaint, finding that the plaintiffs did not adequately plead a pattern of racketeering activity. Id. Although the defendants' conduct concerned false representations regarding a single lease agreement, the Third Circuit reversed.

The Swistock court found that the plaintiffs alleged several predicate acts of wire and mail fraud over a fourteen month period, in order to induce the plaintiffs to sign the lease. Id. at 759. Moreover, the plaintiffs alleged that the defendants made "misrepresentations . . . in regard to other potential transactions with plaintiffs, . . . [which is] not inconsistent with proof that the defendants regularly conducted their business via predicate acts of racketeering." Id. Accordingly, the court found that the plaintiffs might be able to prove open-ended continuity at trial. Id.

In Kehr, the Third Circuit further defined the requirements necessary for open-ended continuity. Kehr, 926 F.2d at 1418-19. The Kehr plaintiffs alleged that the defendants, who were Fidelity employees, made misrepresentations to the plaintiffs concerning the defendants' attempts to secure loans for the plaintiffs. Id. at 1410. Furthermore, the plaintiffs alleged that the defendants unreasonably delayed approving the sale of the

plaintiffs' business, thereby forcing the plaintiffs to liquidate.
Id. at 1411.

The Kehr court found that the plaintiffs failed to allege closed- or open-ended continuity. In its finding that open-ended continuity was absent, the court stated:

[T]here is no apparent threat that the misrepresentations of Cohen and Noon would have continued past the time they left Fidelity. By contrast, the regulatory decisions involved in H.J. Inc. were a continuous part of the defendant's business, and thus the bribes likely would have continued into the future. Unlike Swistock, the additional confirmatory misrepresentations of Cohen and Noon did not concern future transactions, and thus do not pose a threat of additional criminal activity. There is no indication that Cohen or Noon made other false statements to Kehr, or treated other customers in a similar manner.

Id. at 1418.

In the instant case, this Court finds that the plaintiffs have sufficiently pled the open-ended continuity requirements. In their complaint, the plaintiffs state that the defendants' scheme was "to extort substantial sums of money from prospective businesses, including plaintiffs[']," by convincing people to pay the defendants sums of money, under the ruse that these payments would enable the businesses to obtain loans. Compl. at ¶ 44. By demanding these payments when newly formed companies were at their most vulnerable, the defendants allegedly extorted "substantial sums of money from prospective startup companies and other

businesses while misrepresenting their investment abilities." Id. at ¶ 55.

Moreover, in their RICO Case Statement, the plaintiffs allege that the defendants have committed the same type of scheme on another start-up company in Philadelphia. Pls.' RICO Case Statement at pp. 5-7. According to the plaintiffs, the defendants again misrepresented their ability to obtain investment money. Id. at 6. Moreover, after the start-up company paid the defendants' required fees, the defendants failed to provide any funding. Thus, the plaintiffs claim that the defendants' acts represent "a specific threat of repetition extending indefinitely into the future and are the enterprise's regular way of conducting business." Compl. at ¶ 42.

The Third Circuit has applied the H.J. Inc. standard liberally, giving RICO allegations a "broader interpretation" than before. Swistock, 884 F.2d at 758. In practice, this means that "in many cases plaintiffs will be able to withstand a facial attack on the complaint and have the opportunity to have their pattern allegations threshed out in discovery." Banks, 918 F.2d at 419-20 (quoting Swistock, 884 F.2d at 758). "It may be that many of these issues will then be susceptible to resolution via summary judgment." Swistock, 884 F.2d at 758. Thus, while this Court finds that the plaintiffs' have sufficiently pled the open-ended continuity requirements, the defendants have the opportunity at

summary judgment to refute the allegations that this scheme is part of their ongoing business.

2. Enterprise

There is one outstanding problem associated with the plaintiffs' complaint. Although the defendants have not raised this issue in their motion, under section 1962(c) a defendant may not be named as the RICO "enterprise" and defendant. Kehr, 926 F.2d at 1411; Banks, 918 F.2d at 421 (citing B.F. Hirsch, 751 F.2d at 633-34). Such a dual role is impermissible in section 1962(c) cases. Banks, 918 F.2d at 421.

In the instant case, the plaintiffs name the following parties as defendants: Caramon, Waldman, Alban, Remington, and Bogdanoff. Compl. at ¶¶ 4-9. However, the plaintiffs allege that "Waldman, Alban, [and] Bogdanoff . . . constitute[] an "enterprise." Id. at ¶ 47. Moreover, the plaintiffs claim that the enterprise as "defined by plaintiffs in their complaint consists of The Caramon Group, . . . The Remington Group," and the above-named other defendants. Pls.'s RICO Statement at ¶ 5(a).

Although "[s]uch a dual role is permissible in actions based on 18 U.S.C. § 1962(a)," this is prohibited under section 1962(c). Banks, 918 F.2d at 421. The plaintiffs' failure to choose which defendants constitute the "enterprise" and which are culpable actors under section 1962(c) prevent this Court from allowing this case to proceed. Thus, although the plaintiffs have properly alleged most of the RICO elements, this Court must dismiss the plaintiffs' complaint. However, the complaint is dismissed

with leave to amend, so that the plaintiffs may revise their complaint accordingly.\⁵

D. Plaintiffs' 1962(d) Claim

Because this Court finds that the plaintiffs did not state a valid section 1962(c) claim, this Court must also dismiss the dependant section 1962(d) claim. Kehr, 926 F.2d at 1411 n. 1. If the plaintiffs choose to amend their complaint, this Court will determine the validity of the plaintiffs' 1962(d) claim at that time.

E. Pendent State Claims

Pursuant to 28 U.S.C. § 1367, this Court may exercise supplemental jurisdiction over state law claims. However, the Court may decline supplemental jurisdiction if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

5. In Rose, the Third Circuit held that:

We see nothing in our decisions that would necessarily preclude an entity from functioning both as an "innocent victim" of certain racketeering activity, and thus be the enterprise under section 1962(c), and as a perpetrator of other such activity, and thus be a person under that subsection.

Rose, 871 F.2d 331, 359 (3d Cir. 1989). If this is the plaintiffs' objective, they must express that intent in their amended complaint, should they choose to file one. However, it seems unlikely that all of the remaining defendants could assume this dual role.

- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). The Court may properly decline to exercise supplemental jurisdiction and dismiss the State claims if any one of these applies. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993).

The Courts in this district "ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed." Eberts v. Wert, No. CIV.A.92-3913, 1993 WL 304111, at *5 (E.D. Pa. Aug. 9, 1993), aff'd, 22 F.3d 301 (3d Cir. 1994) (table). Here, the RICO claims are the only claims in the complaint over which this Court has original jurisdiction. Since those counts have been dismissed, it is appropriate to decline to exercise supplemental jurisdiction over the remaining state law claims.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATA COMM COMMUNICATIONS, INC., et al. : CIVIL ACTION
:
v. :
:
THE CARAMON GROUP, INC., et al. : NO. 97-0735

O R D E R

AND NOW, this 25th day of November, 1997, upon consideration of the Motion of Defendants The Caramon Group, Inc., Marvin Waldman, and Henriette Alban to Dismiss the Plaintiffs' Complaint Pursuant to Federal Rule of Civil Procedure 12(b) for Plaintiffs' Failure to State a Claim and for Lack of Jurisdiction (Docket No. 28), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiffs' complaint is **DISMISSED** with leave to amend within twenty (20) days of the date of this Order.

BY THE COURT:

HERBERT J. HUTTON, J.