

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

DR. MICHAEL J. CHOVANES

v.

THOROUGHBRED RACING
ASSOCIATION, et al.

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CIVIL ACTION
No. 99-185

O’Neill, J.

January , 2001

MEMORANDUM

The Complaint makes claims under RICO, the Lanham Act, and state law. Presently before me is defendants’ motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). For the reasons stated below, the motion will be GRANTED.

I. BACKGROUND

Plaintiff Dr. Michael J. Chovanes has practiced veterinary medicine at the Philadelphia Park Race Track since 1981. Complaint ¶ 5. Defendant Thoroughbred Racing Association (“TRA”) is a horse racing trade organization that is financially supported by approximately one-half of the thoroughbred racetracks in the United States and Canada. Id. ¶ 12. Defendant Thoroughbred Racing Protective Bureau (“TRPB”) is a private investigative agency affiliated with TRA that offers security and other services to the horse racing industry. Id. ¶ 13.

Defendants Paul W. Berube and Lance T. Morrel are officers and/or employees of TRPB.¹ Id. ¶¶ 9 and 18. Defendant Dr. Deborah A. Mood is also a veterinarian who practices at Philadelphia Park.

The complaint alleges that the TRPB defendants and Dr. Mood formed a relationship that is alternately referred to as a RICO enterprise and a RICO conspiracy with the dual goals of providing information to TRPB that could give it some kind of unspecified commercial advantage and promoting Dr. Mood's practice "by whatever means possible." Id. ¶¶ 39, 40. The complaint further alleges a series of events to illustrate the operation of this enterprise and/or conspiracy. The complaint makes claims under RICO (Counts I, II, III, IV, V, and VI), the Lanham Act (Count VIII), and state law (Counts VII, IX, X, and XI).

II. DISCUSSION

A. Standard of Review

A motion for judgment on the pleadings under Rule 12(c) is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6). See Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994); Craigs, Inc. v. Gen. Elec. Capital Corp., 12 F.3d 686, 688 (7th Cir. 1993); Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376 (E.D. Pa. 1995). Judgment will be granted only if it is clearly established that no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law. See Inst. for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991). I must accept

¹ TRA, TRPB, Berube and Morrel will be collectively referred to as the "TRPB defendants."

all well-plead factual allegations in the complaint as true, Sheppard, 18 F.3d at 150, and all inferences must be drawn in the light most favorable to the non-moving party. See Janney Montgomery Scott v. Shepard Niles, 11 F.3d 399, 406 (3d Cir. 1993). However, I need not accept bald assertions, unwarranted inferences, or legal conclusions. See Maio v. Atena, Inc., 221 F.3d 472, 485 n.12 (3d Cir. 2000); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). “[C]ourts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.” City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 (3d Cir. 1998).

B. RICO Claims

The RICO statute, 18 U.S.C. § 1961 et seq., makes it unlawful to: 1) conduct or participate, directly or indirectly, in an enterprise that engages in a pattern of racketeering activity; 2) derive income, directly or indirectly, from such an enterprise; or 3) conspire to conduct or derive income from such an enterprise. See 18 U.S.C. § 1962 (c), (a) and (d). A RICO “enterprise” can be “virtually any de facto or de jure association.” Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789 (3d Cir. 1984). A “pattern of racketeering activity” is statutorily defined to “require[] at least two acts of racketeering activity.” See 18 U.S.C. § 1961(5). Such activity includes mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and a long list of other specifically enumerated “predicate acts.” See 18 U.S.C. § 1961(1); Annulli v. Panikkar, 200 F.3d 189, 200 (3d Cir. 1999) (noting that § 1961(1)’s “list of acts

constituting predicate acts of racketeering is exhaustive.”). RICO is primarily a criminal statute, but it provides treble damages for “any person injured in his business or property by reason of a violation of [the criminal provisions].” See 18 U.S.C. § 1964(d).

The complaint alleges violations of §§ 1962 (a), (c), and (d). In order to state a claim for a violation of any of those provisions, plaintiff must adequately plead a pattern of racketeering activity, i.e., at least two predicate acts of racketeering. See 18 U.S.C. § 1961(5). The complaint alleges seven potential predicate acts. I conclude, however, that none of the seven qualify as an act of racketeering as defined in § 1961(1) and the RICO counts must therefore be dismissed.²

1. The Mislabeled Blood Sample

The first potential predicate act involves a mislabeled blood sample. The complaint alleges that in late 1996 or early 1997 Morrel and Dr. Mood deliberately mislabeled a blood sample sent to a testing lab, thereby “inventing a fictitious horse and trainer.” Complaint ¶ 44. The complaint alleges that this act is “fraud” (id. ¶ 45) and the RICO Case Statement claims that it was “transmitted in whole or part by mail, courier, or wire.”³ See RICO Case Statement at 4. Since it is unclear to me how a blood sample could be transmitted by wire, I will assume that plaintiff is alleging a predicate act of mail fraud under 18 U.S.C. § 1341.

² Defendants also argue that plaintiff’s claims fail the pattern, enterprise, and injury requirements of the RICO statute. Although those arguments likely have merit, I need not address them since the failure to sufficiently plead any predicate acts of racketeering activity justifies judgment on the pleadings.

³ The RICO Case Statement is a pleading that may be considered part of the operative complaint for the purposes of a motion to dismiss or a motion for judgment on the pleadings. See Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993); Smith v. Berg, No. 99-2133, 1999 WL 1081065, at *3-*5 (E.D. Pa. Dec. 1, 1999).

As such, the averments in the complaint fail under Fed. R. Civ. P. 9(b), which provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” When the predicate acts in a RICO complaint sound in fraud, Rule 9(b) applies. See Rose v. Bartle, 871 F.2d 331, 356 n.33 (3d Cir. 1989). “Rule 9(b) requires plaintiffs to plead with particularity the ‘circumstances’ of the alleged fraud in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard against spurious charges of immoral and fraudulent behavior.” Seville, 742 F.2d at 791. While a complaint need not set out “precise words,” it should adequately describe the nature and subject of an alleged misrepresentation. Id.

Plaintiff’s averments regarding the mislabeled blood sample fail the Rule 9(b) test in two respects. First, plaintiff does not adequately describe the blood sample at issue. Plaintiff does not state when this event happened (other than “late 1996 or early 1997”), which testing lab the blood was sent to, or the name of the horse and/or trainer that was allegedly invented. Presumably sending blood to a testing lab is a routine act for a veterinarian. Without more precise pleading, defendants could not possibly distinguish between this allegedly fraudulent act and the other instances where Dr. Mood sent blood samples to labs during the period in question. Second, plaintiff does not adequately state “who received the [fraudulent] information.” See Saporito v. Combustion Eng’g, 843 F.2d 666, 675 (3d Cir. 1988), cert. granted and judgment vacated on other grounds, 489 U.S. 1049 (1989). Plaintiff merely claims that Morrel and Dr. Mood “made their representations with an intent to deceive and to induce at least the testing lab to act in reliance thereon to its detriment.” Complaint ¶ 45 (emphasis added). However, it is unclear how a testing lab could ever “act in reliance” on a representation of which animal’s blood

it was testing. The use of the words “at least” make it more likely that the testing lab was not the intended victim of the alleged fraud, but that plaintiff is alluding to some other scheme or artifice. Such allusions are insufficient under Rule 9(b). Plaintiff’s averments regarding the mislabeled blood sample therefore do not qualify as a predicate act of racketeering.

2. Morrel’s “Obstruction of Justice”

Sometime during 1997, the state Racing Commission allegedly conducted searches of veterinarians’ offices at Philadelphia Park “to ensure that only federally approved medications are present.” Complaint ¶ 49. Morrel allegedly stopped the officials from inspecting Dr. Mood’s office by saying “[she is] under our protection.” Id. ¶ 52. The complaint labels this act “obstruction of justice.” Id. ¶ 56.

Obstruction is a predicate act of racketeering under the RICO statute. See 18 U.S.C. § 1961(1). However, it is unclear whether Morrel’s alleged statement could be deemed “corrupt,” a “threat or force,” or a “threatening letter or communication” under the obstruction statute. See 18 U.S.C. § 1503. It is also unclear whether there is any federal nexus to the search that was allegedly impeded. Plaintiff avers that the search was “carried out under state and, it is believed, federal law” (complaint ¶ 48), but that reference seems to refer to the drugs at issue and not to the officials who conducted the search. It is clear, however, that plaintiff does not allege that the search involved “any grand or petit juror, or officer in or of any court of the United States.” See 18 U.S.C. § 1503. As the Supreme Court has stated in construing § 1503: “The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceedings, such as an investigation

independent of the court's or grand jury's authority." United States v. Aguilar, 515 U.S. 593, 599 (1995). Assuming there was some federal nexus, at most the search may have been an administrative search that might fall under the ambit of 18 U.S.C. § 1505 (obstruction of proceedings before federal departments, agencies, and committees), which, although otherwise patterned after § 1503, is not a predicate act of racketeering under the RICO statute. See 18 U.S.C. § 1961(1); Annulli, 200 F.3d at 200 (noting that § 1961(1)'s "list of acts constituting predicate acts of racketeering is exhaustive.").

Therefore, even assuming a federal nexus, Morrel's "obstruction" of the search of Dr. Mood's office was not a predicate act of racketeering.

3. Dr. Mood's "Perjury"

In 1997, Dr. Mood testified in United States v. Patrick, the criminal trial of Dr. Leonard Patrick, another veterinarian at Philadelphia Park. Complaint ¶¶ 61-63. On a post-trial motion, my colleague Judge Newcomer granted Dr. Patrick a new trial because the prosecution had failed to produce documents that could have been used to impeach Dr. Mood's credibility. Id. ¶¶ 64-65. See also United States v. Patrick, 985 F. Supp. 543, 563-64 (E.D. Pa. 1997). The complaint labels Dr. Mood's testimony in that case "perjury." Id. ¶ 68. Assuming for the purposes of this motion that plaintiff's allegations of perjury are true,⁴ I nonetheless conclude that perjury is not a

⁴ I note, however, that it is unlikely Dr. Mood's testimony constituted perjury. Judge Newcomer found that the prosecution had failed to produce documents that could have been used to impeach Dr. Mood on the issue of whether she had "ulterior motives" for testifying against Dr. Patrick. See Patrick, 985 F. Supp. at 563-64. Impeachment of a witness is commonplace, and an indictment or conviction for perjury based on a witnesses' stated lack of ill-motive would be unlikely.

predicate act of racketeering under the RICO statute.

I note from the outset that there is a split in authority as to whether perjury is a predicate act. Compare Sellers v. General Motors Corp., 590 F. Supp. 502, 504-05 (E.D. Pa. 1984) (“[T]he common-law absolute immunity for witnesses’ testimony precludes perjury alone from amounting to the corrupt influencing, obstructing or impeding of the administration of justice for which a damage action may be maintained under RICO”) and Rand v. Anaconda-Ericsson, Inc., 623 F. Supp. 176, 182 (E.D.N.Y. 1985) (“Perjury . . . is not a RICO predicate act”) with C & W Constr. Co. v. Bhd. of Carpenters & Joiners of Am., Local 745, 687 F. Supp. 1453, 1467 (D.Haw. 1988) (“The more reasoned rule would allow perjury to be a predicate act under 18 U.S.C. § 1961(1), through 18 U.S.C. § 1503, where the plaintiffs allege that the perjury was part of the pattern of a racketeering activity”). I side with those courts who have held that perjury is not a predicate act for three reasons.

First, perjury is not listed as a predicate act under 18 U.S.C. § 1961(1). The maxim expressio unius est exclusio alterius counsels that the specific enumeration of numerous predicate acts in § 1961(1) necessarily excludes other acts that are not listed.

Second, the Court of Appeals’ decision in Annulli v. Panikkar, 200 F.3d 189, 200 (3d Cir. 1999), clearly states that § 1961(1)’s “list of acts constituting predicate acts of racketeering activity is exhaustive.” The Annulli Court further stated that a judicial expansion of the list of predicate acts would “usurp the role of Congress” and unnecessarily add to the “behemoth” of civil RICO law. Id.

Finally, I am in substantial agreement with the view expressed by my colleague Judge VanArtsdalen in Sellers, which relied on the Supreme Court’s decision in Briscoe v. LaHue, 460

U.S. 325 (1983). In Briscoe, the Court held that a convicted state defendant could not bring a Section 1983 claim against a police officer who had given perjured testimony at the defendant's trial. The Court found that Section 1983 had not abrogated the "absolute immunity" from subsequent damage claims that the common law provided to witnesses who give testimony in judicial proceedings. Id. at 330. This absolute immunity was intended to protect against a fear of future litigation that might make witnesses reluctant to come forward to testify and/or lead to self-censorship. Id. at 333. In Sellers, Judge VanArtsdalen reasoned that recognizing perjury as a predicate act under RICO would be analogous to the cause of action for perjured testimony under Section 1983 that was rejected in Briscoe. See Sellers, 590 F. Supp. at 504-05. I agree that the two situations are analogous. However, Judge VanArtsdalen went on to say that common law immunity "precluded" perjury from being a RICO predicate act. Id. at 504. In my view, the RICO statute, or for that matter any other federal or state statute, could abrogate this common law immunity if there were a clear statement of the intent to abrogate it in the text or legislative history. No such clear statement exists in the RICO statute; therefore, Dr. Mood's alleged perjury is not a predicate act of racketeering activity.⁵

⁵ Of course, there is some overlap between the perjury and obstruction statutes. See United States v. Langella, 776 F.2d 1078, 1082 (2d Cir. 1985). It is therefore conceivable that in some circumstances an act of perjury could constitute a predicate act of racketeering by way of the obstruction statute. However, the Court of Appeals has held that the mere act of perjury, without something more, does not constitute obstruction. See United States v. Rankin, 870 F.2d 109, 111-12 (3d Cir. 1989). Although the Rankin Court declined to determine "how much more than a perjurious act" is required to prove obstruction (id. at 122), I need not attempt such a determination because plaintiff has, at best, plead mere perjury and has not argued that Dr. Mood endeavored to obstruct or impede "the due administration of justice" with her testimony. See 18 U.S.C. § 1503.

4. TRPB's "Violation" of the Hobbs Act

In late 1996 or early 1997, during a period in which plaintiff had been suspended by the state Racing Commission and could practice only off the track premises in an adjacent property, Morrel allegedly told unspecified third-parties that plaintiff "was of insufficient character to be associating or operating in any way in the vicinity of the racetrack." Complaint ¶¶ 72, 75, and 83.

Remarkably, the complaint labels this conduct a violation of the Hobbs Act, 18 U.S.C. § 1951, a provision of the U.S. Code that deals with interference with interstate commerce by means of robbery or extortion.⁶ See generally Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 522-27 (3d Cir. 1998) (discussing the Hobbs Act in the context of civil RICO). This characterization is completely unfounded. At worst, the complaint alleges garden-variety defamation and/or commercial disparagement.⁷ It does not plead any conduct that could reasonably be construed to constitute "robbery," "extortion," or "physical violence" as defined in the Hobbs Act.⁸ See 18 U.S.C. § 1951(b)(1) and (b)(2).

5. TRPB's First "Mail Fraud"

⁶ 18 U.S.C. § 1951(a) provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

⁷ The plaintiff makes no claim for defamation or commercial disparagement.

⁸ Moreover, it is unclear whether Dr. Chovanes was engaged in interstate commerce as defined in 18 U.S.C. § 1951(b)(3).

Sometime in July or early August 1997, Dr. Mood allegedly told the TRPB defendants that plaintiff had killed a horse named Bleu Madura as part of an insurance fraud scheme. Complaint ¶ 96. Plaintiff alleges that the claim was false and Bleu Madura is alive. Id. ¶¶ 97, 104. The complaint labels this act “fraud” (id. ¶ 97) and “defamatory and libelous per se” (id. ¶ 98). However, the RICO Case Statement does not claim that it was a predicate act, and there is no allegation that Dr. Mood used the mail or wires in communicating the claim to TRPB.

However, on August 19, 1997, TRPB allegedly sent a letter “to numerous entities” that repeated Dr. Mood’s claim about Bleu Madura. Id. ¶ 102. Plaintiff does not allege that TRPB knew the accusation was false. Rather, plaintiff alleges that “[p]rior to issuing its letter, TRPB failed to conduct any investigation of Mood’s allegations, or to make any inquiry of the alleged participants of the insurance fraud scam as to its truth or falsity . . . If TRPB had conducted even the most minimal investigation, it would have quickly discovered” that the allegation was false.⁹ Id. ¶¶ 103-04. Plaintiff nonetheless labels this correspondence “mail fraud.” See RICO Case Statement at 4.

The August 19th letter is not mail fraud for at least two reasons. First, plaintiff does not allege that TRPB made an intentional misrepresentation. At worst, TRPB is alleged to have acted negligently by failing to conduct an investigation of Mood’s allegations. Therefore, it cannot be said that TRPB had the “specific intent to defraud” that is required by the mail fraud statute. See United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994). There is no such thing

⁹ I note that if the allegations in the complaint are true, Dr. Mood knew that the allegations regarding Bleu Madura were false but the TRPB defendants did not. This admission rebuts the inference that Dr. Mood and the TRPB defendants acted in concert and could be fatal to the RICO enterprise and conspiracy claims. However, I need not reach this issue because those claims will be dismissed on other grounds.

as negligent mail fraud.¹⁰ Second, plaintiff attempts to collapse the distinction between defamation and fraud. Defamation is “[a]n intentional false communication, either published or publicly spoken, that injures another’s reputation or good name.” Black’s Law Dictionary 288 (Abridged 6th ed. 1991). Fraud is “[a]n intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.”¹¹ Id. at 455. Assuming for the purposes of this motion that plaintiff’s allegations are true, TRPB defamed Dr. Chovanes by publishing an untrue allegation that was likely to injure him in his reputation and trade. However, the third parties who heard that defamatory falsehood were not induced to part with anything of value as a result. The victim of defamation is the person who is lied about; the victim of fraud is the person who is lied to.

Therefore, the August 19, 1997 letter was not a predicate act of mail fraud.

¹⁰ The specific intent to defraud can be found where a defendant acted with reckless disregard of the truth. See United States v. Boyer, 694 F.2d 58 (3d Cir. 1982). However, the mere failure to investigate a defamatory statement is not reckless disregard of the truth. See St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (“[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact had serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity.”). Plaintiff does not allege that TRPB had any doubts about the Bleu Madura allegations when the August 19th letter was written, and the August 25th letter (see discussion infra) shows that TRPB subjectively believed the allegations to be true when the August 19th letter was written. See Complaint (Exhibit C).

¹¹ Unlike common law fraud, actual reliance is not an element of mail fraud. See United States v. Sanders, 893 F.2d 133, 138 (7th Cir. 1990). However, most courts now agree that reliance must be shown when mail fraud is a predicate act in a civil RICO case. See Summit Properties, Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 559 (5th Cir. 2000); Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 (4th Cir. 1996); Appletree Square I v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994); Central Distribs. of Beer, Inc. v. Conn., 5 F.3d 181, 184 (6th Cir. 1993); Pelletier v. Zweifel, 921 F.2d 1465, 1499-1500 (11th Cir. 1991); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1990).

6. TRPB's Second "Mail Fraud"

On August 26, 1997, TRPB sent a second letter regarding Bleu Madura. It stated in relevant part:

By letter dated August 19, 1997, TRPB reported to you information confidentially received that the horse "Bleu Madura" was killed in an effort to collect on a fraudulent insurance claim.

On August 25, the above information was discredited when TRPB was reliably advised that "Bleu Madura" is alive and is receiving treatment for the injuries previously alluded to. No death claim has been filed.

TRPB regrets any inconvenience and alarm this report may have caused and we are properly embarrassed to have to issue this retraction. However, at the time (and even now) TRPB did not have any reason to question the authenticity of the information and thus we felt an obligation to pass it along to you.

Id. ¶ 112-13 (Exhibit C). Plaintiff characterizes this letter as a refusal to retract the allegation regarding Bleu Madura (id. ¶ 113) and claims it is another instance of mail fraud. See RICO Case Statement at 4.

However, characterizing this letter as a refusal to retract the allegation is disingenuous. Plaintiff focuses on the parenthetical in the final sentence and argues that if Berube (the author of the letter) did not "question the authenticity" of the false information "even now," he must have been reaffirming the contents of the earlier letter. As plaintiff puts it, Berube had "in effect adopted [the allegations regarding Bleu Madura] once again." Id. ¶ 112. There is no doubt that the final sentence is poorly drafted. Berube seems to have meant that he had no reason to doubt the reliability of the source of the information, not the authenticity of the information itself. However, his imprecise wording does not negate the import of the remainder of the letter, which clearly and unequivocally states that: 1) it is a "retraction" of the August 19th letter; 2) the information in the August 19th letter had been "discredited"; and 3) Bleu Madura was alive and

receiving treatment. Id. (Exhibit C).

Moreover, even if the August 26th letter could reasonably be construed as reaffirming the allegations regarding Bleu Madura, it still would not be mail fraud for the same reasons as the August 19th letter. Plaintiff does not allege that TRPB acted with the specific intent to defraud¹² and once again attempts to collapse the distinction between fraud and defamation. For these reasons, the August 26, 1997 letter is not a predicate act of mail fraud.

7. TRPB's "Wire Fraud"

Plaintiff labels the final potential predicate act as "wire fraud." However, it is unclear to me whether there is any "act" at issue. Rather, plaintiff constructs an "act" of wire fraud out of what might be called "syllogistic pleading."

The major premise of plaintiff's syllogism is that "the Conspiracy will not admit the horse [i.e., Bleu Madura] is alive and was not killed for insurance money or otherwise." Id. ¶ 132. The minor premise is that "the horse, Bleu Madura, was tattooed with TRPB's own [tattoo branding] system, touted by TRPB as 'the single most effective, secure, practical and economical method of horse identification available'." Id. ¶ 134. From these premises, plaintiff argues for the following conclusion:

The failure by the Conspiracy to act in accordance with TRPB's statements – transmitted by interstate wire and specifically the Internet at www.trpb.com/tatobrnd.htm – regarding the efficacy of the tattoo method means that: 1) either Berbue is committing fraud when he refused, [sic] in sworn proceedings to acknowledge the horse is alive; or, 2) the TRPB is committing

¹² Plaintiff does claim that TRPB "acted at least recklessly in publishing" the August 25th letter. Complaint ¶ 113. However, at least in this context, arguably poor draftsmanship is not reckless behavior.

fraud, via the interstate wires, when it promulgates false information about the tattoo method of identification.

Id. ¶ 137. The RICO Case Statement then refers to the TRPB defendants' website as "wire fraud." See RICO Case Statement at 4. This argument fails both as a matter of logic and as a matter of law.

As a matter of logic, plaintiff might have a valid argument if: 1) the TRPB defendants affirmatively continued to maintain that Bleu Madura is dead; 2) the TRPB defendants claimed that their tattoo branding system was perfect; and 3) the TRPB defendants were presented with a branded (and living) horse that they refused to acknowledge was, in fact, Bleu Madura. However, none of these conditions have been pled. As to #1, plaintiff pleads that defendants "will not admit" that Bleu Madura is alive. Complaint ¶ 132. That is different than affirmatively claiming that the horse is dead. As to #2, plaintiff pleads that the TRPB defendants call their branding system "the single most effective, secure, practical and economical method of horse identification available." Id. ¶ 134. That is different than saying the system is perfect or fool-proof. As to #3, plaintiff pleads that "Berube has sworn that he has not attempted to determine if the horse is alive." Id. ¶ 133. That is different than claiming that the TRPB defendants attempted to determine whether Bleu Madura is alive but were lead into error because their tattoo branding system is faulty.

Moreover, assuming arguendo that plaintiff's syllogism was logically valid, his claim would still fail as a matter of law. If Berube was wrong in failing to admit under oath that Bleu Madura is still alive, then he may (though it is unlikely) have committed perjury but he certainly did not commit fraud (including mail fraud and wire fraud). If TRPB's website is inaccurate in

its claims regarding the tattoo branding system, then it may be in violation of some consumer protection law,¹³ but it certainly is not a “scheme or artifice to defraud” within the meaning of the wire fraud statute. See 18 U.S.C. § 1343.

Plaintiff has failed to adequately plead a single predicate act of racketeering activity; therefore, all of plaintiff’s RICO claims will be dismissed.

C. Lanham Act Claim

Count VIII of the complaint asserts a claim under Section 43(a) of the Lanham Act, which provides in relevant part:

Any person who, or in connection with any goods or services, or any container for goods, uses in commerce any word, term name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. See 15 U.S.C. § 1125(a).

I conclude that plaintiff fails to state a claim for a violation of the Lanham Act because the statements complained of are not “commercial advertising or promotion” within the meaning of § 1125(a). The test of what constitutes commercial advertising or promotion was first enunciated by the Court of Appeals for the Fifth Circuit in Seven-Up Co. v. Coca-Cola Co., 86

¹³ I note that it is unlikely that the TRPB website could even be deemed inaccurate. Plaintiff objects to the description of the tattoo branding system as “the single most effective, secure, practical and economical method of horse identification available today.” See <http://www.trpb.com/tatobrnd.htm>. Since the law is very tolerant of “puffing” in commercial advertising, it is unlikely that such vague language would ever be actionable. Cf. U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 926 (3d Cir. 1990) (“This strikes us as the most innocuous kind of ‘puffing,’ common to advertising and presenting no danger of misleading the consuming public. Consequently, we find that no cause of action lies.”).

F.3d 1379, 1384 (5th Cir. 1996). Under the Seven-Up test, commercial advertising or promotion consists of: 1) commercial speech; 2) by a defendant who is in commercial competition with the plaintiff; 3) for the purpose of influencing consumers to buy the defendant's goods or services; and 4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry. Id. at 1384. The Seven-Up test has since been adopted by other circuit courts and by the courts of this District. See Proctor & Gamble, Co. v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000); Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 735 (9th Cir. 1999); Peerless Heater Co. v. Mestek, Inc., No. 98-6532, 2000 WL 637082, at *10 (E.D. Pa. May 11, 2000); Syngy, Inc. v. Scott-Levin, Inc., 51 F. Supp.2d 570, 576 (E.D. Pa. 1999); J&M Turner, Inc. v. Applied Bolting Tech. Prods., Inc., No. 96-5819 & 95-2179, 1997 WL 83766, at *16 (E.D. Pa. Feb. 24, 1997); Guardian Life Ins. Co. of Am. v. Am. Guardian Life Assurance Co., No. 95-3997, 1995 WL 723186, at *3 (E.D. Pa. Nov. 14, 1995).

The statements at issue in this case fail the second and fourth prongs of the Seven-Up test: they were not disseminated by plaintiff's commercial competitors and/or were not sufficiently disseminated to the relevant purchasing public. Plaintiff complains of two sets of statements. The first are oral statements allegedly made by Morrel to unspecified third parties that accused plaintiff of having "insufficient character to be associating or operating in any way in the vicinity of the race track." Complaint ¶¶ 72, 75, and 83. The second are the allegations regarding the supposed murder of Bleu Madura that were made in Berube's letter of August 19, 1997. Id. ¶ 102 (Exhibit B). In both cases, the statements at issue were made by TRPB, which is not in the practice of veterinary medicine and therefore is not in commercial competition with

plaintiff.¹⁴ Moreover, in neither case does plaintiff sufficiently allege that the statements were disseminated to the relevant purchasing public. Plaintiff never alleges to whom the Morrel statements were disseminated, and the August 19, 1997 letter was clearly disseminated to insurance companies, not horse owners who might potentially retain plaintiff's services.

For these reasons, I conclude that the statements at issue were not commercial advertising or promotion and plaintiff has failed to state a claim for violation of the Lanham Act.

D. State Law Claims

Because the federal claims will be dismissed, I will not exercise jurisdiction over the state law claims in Counts VII, IX, X, and XI.¹⁵ See 28 U.S.C. § 1367(c)(3).

E. Leave to Amend

¹⁴ Plaintiff also alleges that Dr. Mood, who is a veterinarian and therefore is a commercial competitor of plaintiff, first made the allegations regarding Bleu Madura to Morrel. See Complaint ¶ 96. However, a single "isolated, individualized, informal and oral" misrepresentation to someone who is not a potential client of plaintiff is not "commercial advertising or promotion." Cf. Synogy, 51 F. Supp.2d at 577.

¹⁵ Count X asks for a declaratory judgment that the horse Bleu Madura is still alive. The complaint does not state whether the claim arises under the federal or state Declaratory Judgment Act and the parties have argued the issue with reference to both federal and state law. By declining to exercise supplemental jurisdiction, I am construing the claim to arise under state law. However, even if it were a federal claim I would dismiss it. Some courts and commentators have suggested that courts in an exercise of their equitable powers can declare defamatory publications untrue so that a party may have an official vindication of their reputation even when monetary damages cannot be awarded. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 772-74 (1985) (White, J., concurring); Thomas Kane, Malice, Lies and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns, 30 Rutgers L.J. 755, 791-92 (1999). In my view, however, the Federal Declaratory Judgment Act is not an appropriate jurisdictional vehicle for having such a claim heard in federal court.

Fed. R. Civ. P. 15(a) provides that leave to amend a pleading “shall be freely given when justice so requires.” Plaintiff has not sought leave to amend the complaint. In previous cases, however, I have granted leave to amend sua sponte in RICO cases where I felt it was appropriate. See, e.g., Smith v. Berg, No. 99-2133, 1999 WL 1081065, at *6 (E.D. Pa. Dec. 1, 1999).

This case does not warrant leave to amend for two reasons. First, plaintiff had an opportunity to refine his complaint by filing a RICO Case Statement, which I considered in ruling on this motion. Second, leave to amend can be denied on the basis of undue delay, bad faith, dilatory motive, prejudice, and futility. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). Granting leave to amend would be futile because plaintiff’s claims are essentially state claims for defamation and/or commercial disparagement that are not predicate acts of racketeering under RICO. Therefore, leave to amend will be denied.

III. CONCLUSION

The complaint does not allege violations of RICO or the Lanham Act. At worst, plaintiff complains of garden-variety defamation and/or commercial disparagement that has no place in a federal forum absent some other basis for jurisdiction. The RICO statute, which serves a vital role in some situations, should not be used to federalize routine state matters or to award treble damages for injuries that could fairly be compensated through the tort system.

An appropriate Order follows.

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

DR. MICHAEL J. CHOVANES

v.

THOROUGHBRED RACING
ASSOCIATION, et al.

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CIVIL ACTION
No. 99-182

ORDER

AND NOW, this day of January, 2001, after consideration of defendants’ motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), and plaintiff’s response thereto, and for the reasons contained in the accompanying memorandum, it is ORDERED that the motion is GRANTED. It is further ORDERED that:

1. Judgment is entered against plaintiff and in favor of defendants on Counts I, II, III, IV, V and VI (RICO) and Count VIII (Lanham Act); and
2. Pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over the state law claims in Counts VII, IX, X, and XI.

THOMAS N. O’NEILL, JR., J.