

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

BONOVITACOLA ELECTRIC	:	
CONTRACTOR, INC., et al.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
	:	
BORO DEVELOPERS, INC., et al.,	:	NO. 01-5508
	:	
Defendants.	:	

MEMORANDUM

Baylson, J.

October 23, 2002

Defendants have moved to dismiss this case, which is brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (“RICO”) (24 Counts)¹, and state law claims (interference with prospective contractual relations, unjust enrichment and a 43 PA. STAT. ANN. § 260 (3 Counts). Plaintiffs are Bonovitacola Electric Contractor, Inc., (“Bonovitacola”), a contractor which provides electrical services to governmental agencies and commercial and industrial accounts in Pennsylvania and New Jersey, and two labor unions, Local Union No. 654, International Brotherhood of Electrical Workers, and Local Union No. 98, International Brotherhood of Electrical Workers, which provide labor to electrical contractors such as Bonavitacola. Also a Plaintiff is an individual, Curtis Bell, who is identified as an employee, agent, servant or representative of one of the Defendants, Boro Developers, Inc.

¹ The parties agreed to withdraw Counts XVI though XXIV of the Complaint, which allege violations of § 1962(d) of RICO, on July 1, 2002.

The Defendants are identified as Boro Developers, Inc., (“Boro”), a corporation engaged in the business of providing electrical services to governmental and private accounts, and two individuals, Frederick J. Shapiro and Bruce J. Shapiro, both alleged to be employees of Defendant Boro, and Chief Executive Officer and Chief Operating Officer of Boro, respectively.

1. Legal Standard on Rule 12(b)(6) Motion to Dismiss

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. *See Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1251, 1261 (3d Cir. 1994). The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. *See Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. *See Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988).

2. Allegations of the Complaint

Plaintiff BonovitaCola alleges it is a competitor of Boro, and that over a period of years, Defendant Boro has solicited and received business through competitive bids to various public entities located in this district, and also the U.S. Department of Navy. A requirement of the bids is that the contractor comply with the Pennsylvania Prevailing Wage Act, 43 PA. STAT. ANN. § 165-1 *et. seq.*, and the Davis-Bacon Act, 40 U.S.C. § 276 *et seq.* The Complaint alleges that the Defendants, in submitting bids on behalf of Defendant Boro, certified that Boro would comply with the aforesaid Pennsylvania and federal statutes, but knowingly and willfully submitted false and fraudulently made bids, and Defendants engaged in a fraudulent practice of falsifying

certified payroll records and other certifications which were required to be submitted to the awarding agencies. (Compl. ¶ 33.) The Complaint alleges that Defendant Boro received these awards based upon the false certifications.

The first nine Counts of the Complaint charge a violation of § 1962(a) of RICO. In the first Count, which is the most detailed, Plaintiff BonovitaCola alleges, in general terms without any specific dates or other identification of predicate acts, that Defendant Boro submitted false certifications to the Ridley School District, the U.S. Department of Navy and the Neshaminy School District. Although the Complaint alleges in conclusory terms that the Defendants committed mail or wire fraud, there are no specifics of dates of mailings or wire transmissions, and the Complaint is completely conclusory, ignoring the requirements of RICO pleadings in many cases previously decided in this district.

Causation is pleaded simply by alleging the “but for” standard, that but for Defendant Boro’s “investment of the income derived from the pattern of racketeering . . . Plaintiff BonovitaCola would have been able to compete with Defendant Boro . . . on a fair and honest basis and awarded the contract. . . .” [sic] Plaintiff BonovitaCola further alleges in conclusory terms that as a proximate result of Defendant Boro’s violation of the RICO statute, BonovitaCola has suffered damages and loss of income and revenue. The remaining eight Counts under § 1962(a) make claims for each of the Plaintiffs (except Curtis Bell) against the three Defendants, charged individually.

Counts X through XV charge violation of § 1962(c) of RICO by the Plaintiffs (except Curtis Bell) against the various Defendants individually, and allege in each Count that the individual Defendant “conducted or participated in the conduct of the affairs of Boro through a

pattern of racketeering as aforementioned.” There is no separate identification of an enterprise. *See generally Jaguar Cars, Inc. v. Royal Oaks Motor Car Tow*, 46 F. 3d 258 (3d. Cir. 1995).

Count XXV is brought by Plaintiff BonovitaCola against all Defendants for interference with prospective contractual relations; Count XXVI is brought by Plaintiff BonovitaCola against all Defendants for unjust enrichment; Count XXVII is brought by Plaintiff Curtis Bell against all Defendants charging a violation of 43 PA. STAT. ANN. § 260.

3. Sufficiency of the Complaint

As noted above, Plaintiffs assert RICO violations pursuant to 18 U.S.C. §§ 1962(a) and (c), which state, in relevant part:

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

(c) 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. To successfully plead a civil RICO violation under any of these three subsections, a plaintiff must allege either “a pattern of racketeering activity” or the “collection of an unlawful debt.” *See H.J. Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 232 (1989); *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 154 (1987) (“[t]he heart of any RICO complaint is the allegation of a pattern of racketeering.”).

Racketeering activity includes “any act which is indictable under . . . title 18 . . . section 1341 (relating to mail fraud) [or] section 1343 (relating to wire fraud).” 18 U.S.C. § 1961(1)(B). A pattern of racketeering activity “requires at least two acts of racketeering activity,” i.e. two acts of mail or wire fraud, within ten years. 18 U.S.C. § 1961(5). However, “while two acts are necessary, they may not be sufficient.” *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 n.14 (1985). The Supreme Court, noting that a pattern cannot be formed by “sporadic activity,” has established a two-prong framework for considering the existence of a pattern. *H.J. Inc.*, 492 U.S. at 239. Proof of a pattern requires both “a relationship” among the predicate acts and a showing that the acts “amount to or pose a threat of continued criminal activity.” *Id.*

The “relatedness” prong requires that the predicate acts “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.” *Id.* (quoting Organized Crime Control Act of 1970, 18 U.S.C. § 3575, et seq. (partially repealed)); *Tabas v. Tabas*, 47 F.3d 1280, 1292 (3d Cir. 1995). The “continuity” prong is “both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” *Tabas*, 47 F.3d at 1292 (quoting *H.J. Inc.*, 492 U.S. at 241). Thus, a short-term fraudulent scheme posing no threat of future criminal conduct cannot satisfy the continuity requirement. *See Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1412 (3d Cir. 1991). One way to show continuity is to establish that the predicate acts of racketeering “are part of an ongoing entity's regular way of doing business.” *Id.* (quoting *H.J. Inc.*, 492 U.S. at 242).

The Third Circuit has explained that, in assessing the continuity of criminal activity in a

particular case, “it is often helpful to examine the actions which are alleged to form the basis of criminal activity.” *Id.* at 1413. Plaintiffs allege that Defendants committed various predicate acts of mail fraud and wire fraud. (Compl. ¶ 78.) The mail fraud statute, 18 U.S.C. § 1341, applies only where the defendant uses the U.S. mails as “part of the execution” of a fraudulent scheme. *Schmuck v. United States*, 489 U.S. 705, 710 (1989). The wire fraud statute, 18 U.S.C. § 1343, “is identical to the mail fraud statute except it speaks of communications transmitted by wire,” i.e. telephone, radio, or television, and does not apply to intrastate communications. *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994). The Court of Appeals has noted that “cases construing the mail fraud statute are applicable to the wire fraud statute as well.” *Id.* at 797 n.2 (quoting *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977)). To support a mail or wire fraud conviction, a transmission “must further the scheme to defraud or be incident to an essential part of that scheme.” *Id.* at 798. The “scheme” need not be fraudulent on its face, but “must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.” *Kehr Packages*, 926 F.2d at 1415 (quoting *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978)).

4. The Complaint Fails to Plead a Civil RICO Violation

As is obvious from the above summary, the Complaint is woefully short of the above RICO requirements. Plaintiffs have mystifyingly alleged for each Plaintiff (except Curtis Bell) a separate count against each Defendant, but do not assert even the most minimal statement of the elements of RICO. The Complaint does not contain any specific allegation of acts of mail or wire fraud and fails to explain how any alleged acts by the Defendants furthered the scheme to defraud or was incident to an essential part of that scheme. The Complaint contains no

allegations as to enterprise, relatedness, or continuity.

5. Leave to Amend

Although the Court believes it would be justified in dismissing the Complaint with prejudice, nonetheless because of the seriousness of the claims, i.e., the allegedly fraudulent submission of salary data to the U.S. Department of Navy and two school districts, the Court has determined to allow Plaintiffs to amend their Complaint under the following guidelines, specifically the use of the RICO case statement.

Leave to amend a pleading “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Grant of leave to amend is within the discretion of the district court. *See Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971). Prejudice to the non-moving party “is the touchstone for the denial of an amendment.” *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (quoting *Cornell & Co. v. Occupational Safety & Health Rev. Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978)). In the absence of substantial prejudice, “denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment.” *Id.* None of these reasons for denial are presented in the instant case. The Court grants leave to amend because it would be unfair to dismiss the Complaint with prejudice only because Plaintiffs have not satisfied the peculiar pleading requirements of RICO. Accordingly, Plaintiffs shall have twenty days from the date of this Order, within which to file an Amended Complaint.

6. RICO Case Statement

The Amended Complaint should include or be accompanied by a “RICO Case Statement” which this Court will consider as part of the amended pleading. *See, e.g., Glessner v. Kenny*, 952

F.2d 702, 712 n.9 (3d Cir. 1991) (“Courts may consider the RICO case statements in assessing whether plaintiffs’ RICO claims should be dismissed.”), *overruled on other grounds by Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 260 (3d Cir. 1995); *Heintz Corp. v. Electro Methods*, No. 94-cv-6916, 1995 U.S. Dist. LEXIS 8346, at *3 (E.D. Pa. June 15, 1995) (Padova, J.) (accepting facts drawn from Complaint and RICO Case Statement as true in considering motion to dismiss); *Greek Radio Network of America, Inc. v. Vlasopoulos*, 731 F.Supp. 1227, 1234 n.12 (E.D. Pa. 1990) (O’Neill, J.) (referring to Complaint and RICO Case Statement collectively as “the Complaint”); *see also* Judge O’Neill’s recent decision in *Chovanes v. Thoroughbred Racing Assoc.*, Civ. No. 99-185, 2001 U.S. Dist. LEXIS 375 (E.D. Pa. Jan. 18, 2001).

The RICO Case Statement to be filed should include the following, in substance:

- a. As to each Defendant in each RICO Count, state the alleged misconduct and basis of liability of each Defendant.
- b. As to the racketeering activity alleged under each RICO Count, include the following:
 - i. List each predicate act which Plaintiffs allege constitutes the RICO violation, including such specifics as names, dates and types of communications or acts.
 - ii. Describe how each predicate act is fraudulent and/or part of a pattern of racketeering activity.
 - iii. State how the alleged predicate acts relate to each other as part of a common plan.

- c. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:
 - i. The names of the individuals, partnerships, corporations, associations or other legal entities that allegedly constitute the enterprise;
 - ii. The structure, purpose, function and course of conduct of the enterprise;
 - iii. Whether any defendants are employees, officers or directors of the alleged enterprise;
 - iv. Whether any defendants are associated with the enterprise; and,
 - v. Whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise that the defendants are the enterprise itself, or members of the enterprise.
- d. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity.
- e. Describe how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.
- f. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.
- g. Describe the effect of the enterprise on interstate or foreign commerce.
- h. If the complaint alleges a violation of U.S.C. § 1962(a):
 - i. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,
 - ii. Describe the use or investment of such income.

- i. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe the acquisition or maintenance of any interest of control of the alleged enterprise.
- j. If the complaint alleges a violation of 18 U.S.C. § 1962(c), state:
 - i. Who is employed by or associated with the enterprise; and,
 - ii. Whether the same entity is both the liable “person” and the “enterprise” under 18 U.S.C. § 1962(c).
- k. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe the alleged conspiracy.
- l. Describe the alleged injury to business or property.
- m. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.
- n. Provide any additional information that you believe would be helpful in processing your RICO claim.

6. Can Plaintiffs Bring a RICO Action Even Though There Is No Private Right of Action Under the Davis-Bacon Act or the Pennsylvania Prevailing Wage Act?

One of the Defendant’s grounds in moving to dismiss this case is that there is no private right of action under the Davis-Bacon Act, 40 U.S.C. § 276 *et seq.*, or the Pennsylvania Prevailing Wage Act, 43 PA. STAT. ANN. § 165-1 *et. seq.* Plaintiffs do not dispute the abstract correctness of the proposition that there is no private right of action under the Davis-Bacon Act, which is well settled in the law. *See Miccoli v. Ray Communications, Inc.*, CIV.A.99-3825, 2000 U.S. Dist. LEXIS 10048 (E.D. Pa. July 21, 2002) (stating that no private right of action is recognized for back wages under the Davis-Bacon Act). Plaintiffs assert that the cases relied

upon by the Defendants involved instances where the Plaintiffs were employees of contractors/subcontractors, alleging that they had been paid at a wage rate below the contract rate for work performed, but that the Plaintiffs' allegations are different. Plaintiffs themselves do not allege that they have not been paid a prevailing wage, but rather, that they have lost business because the Defendants have made fraudulent misrepresentations as to the Defendants' salary and wage payments, and have used these fraudulent statements to gain business at the expense of Plaintiffs.

Without deciding this issue at this time, the Court will allow Plaintiffs to file an Amended Complaint, subject to the requirements of the RICO case statement as noted above, and will then determine whether the requisites of RICO have been satisfied. Defendants have also asserted that Plaintiffs' claim would be preempted by the exclusive jurisdiction of the National Labor Relations Board ("NLRB") and cite to *Butcher's Union v. SDC Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986), in support of its assertion. Although the court in *Butcher's Union* noted that, as a general principle, a claim is preempted by the labor law where the claim is arguably within the NLRB's jurisdiction, the court held that violations of § 302 of the Labor Management Relations Act were not preempted because RICO specifically included § 302 violations as predicate acts. *Id.* at 1009-10. Once again, however, the Court will not decide whether Plaintiffs' claims are preempted by exclusive jurisdiction of the NLRB at this time, but will reconsider any such allegation depending upon the contents of the Amended Complaint.

An appropriate Order follows.

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

BONOVITACOLA ELECTRIC	:	
CONTRACTOR, INC., et al.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
	:	
BORO DEVELOPERS, INC., et al.,	:	NO. 01-5508
	:	
Defendants.	:	

ORDER

AND NOW, this 23rd day of October, 2002, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED but the Court will grant Plaintiffs leave to file an Amended Complaint, subject to the requirements of a RICO case statement, within twenty (20) days; and Defendants shall respond to the Amended Complaint within twenty (20) days after service.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.