

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

PETER REINKE,
Plaintiff,

v.

Civil Action
No.97-5740

POTAMKIN GOLDEN MILE MOTORS,
INC., POTAMKIN TOYOTA, INC.,
ROBERT POTAMKIN, ALAN
POTAMKIN, VOYNOW, BAYARD &
COMPANY, P.C., SPRINGFIELD
AUTO OUTLET CORP., R&A
SPRINGFIELD INVESTMENTS, INC.
(RASI), ARTHUR MICCHELLI,
DAVID HYMAN, AMERICAN ISUZU
MOTORS, INC., CHRYSLER
CORPORATION, MITSUBISHI MOTOR
SALES OF AMERICA, INC.,
HYUNDAI MOTOR AMERICA, TOYOTA
MOTOR SALES, USA INC., AND
VOLKSWAGEN OF AMERICA
Defendants.

Gawthrop, J.

May 22, 1998

M E M O R A N D U M

In this action, plaintiff has brought suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Automobile Dealers Day in Court Act (ADDCA), and pendent state law claims. Each of the defendants has filed a motion to dismiss the claims against it, arguing, collectively, that plaintiff has failed to state a claim on which relief may be granted under either RICO or ADDCA, the federal statutes upon which this court's original jurisdiction rests, and that, without these federal claims before it, the court may not exercise supplemental

jurisdiction over the associated state law claims. Fed. R. Civ. P. 12(b)(1), (6). Upon the following reasoning, this court will dismiss the RICO and ADDCA claims, and all of the associated state law claims.

Background

Peter Reinke was the general manager of, and a shareholder in, Potamkin Golden Mile and Potamkin Toyota (the Potamkin dealerships) from April 1991 until April 1996. On January 13, 1997, Springfield Auto Outlet purchased the Potamkin dealerships' Franchise Agreements and assets. This dispute arose out of the manner in which the other shareholders in the Potamkin dealerships allegedly liquidated those businesses and transferred their assets to the new entity of Springfield Auto Outlet Corp.

Peter Reinke is a 33 $\frac{1}{3}$ % shareholder in the Potamkin dealerships. As of May 1994, the other shareholders in the Potamkin dealerships were Robert Potamkin (28%), Alan Potamkin (28%), Edward Moffa (5%), and George Bauer (5%). Until April 1996, Reinke was also the dealerships' general manager. In winter 1996, Edward Moffa, the Chief Financial Officer of Golden Mile, discovered a four million dollar shortage in the used car inventory. To this much the parties agree.

On April 16, 1996, Reinke resigned, allegedly under threat and duress, as an officer, director, and employee of the Potamkin

dealerships. He retained his shares in the dealerships. Reinke alleges that Robert Potamkin, first, "surreptitiously consulted with others" to terminate Reinke's contracts with the dealerships, and then, "systematically looted and depleted the assets of Potamkin Toyota and Golden Mile" by transferring them at less than market value to Springfield Auto Outlet.¹ Reinke claims that, from May to December of 1996,² Robert Potamkin, aided by Alan Potamkin, Micchelli, and Hyman "conspired to [and did] acquire Potamkin Toyota and Golden Mile's new car dealer franchises through the use of interstate telephone wires and interstate mail without payment or notice to all the shareholders of Potamkin Toyota and Golden Mile," namely without notice to Reinke. Allegedly, Robert, Alan, Micchelli, and Hyman contacted the car manufacturers with which the Potamkin dealerships had franchise agreements and asked that they transfer, assign, or

¹Plaintiff does not, at any point, allege any connection between the Springfield Auto Outlet and R&A Springfield Investments. Also, while plaintiff alleges that defendants Robert and Alan Potamkin formed R&A Springfield Investments, plaintiff does not allege that any of the defendants are owners of, or shareholders in, Springfield Auto Outlet Corp. Plaintiff does not actually say who owns, directs, manages, or otherwise controls Springfield Auto Outlet. For the purposes of this motion, the court draws the inference that Robert Potamkin, Alan Potamkin, Arthur Micchelli, and/or David Hyman must be substantially involved with Springfield Auto Outlet, as otherwise they would gain no benefit from allegedly transferring assets from the Potamkin dealerships, which they did partially own, to Springfield Auto Outlet.

²Paragraphs 51 and 52 of the complaint refer to actions taken "after April 16, 1997." The court reads this as an error, with the correct reference being to April 16, 1996. That is the only reading which makes sense.

otherwise change the agreement, to reflect Springfield Auto Outlet, instead of Potamkin or Golden Mile, as the franchisee. The complaint does not give any information about the Potamkin dealerships' franchise agreements, such as the provisions for transfer therein.

Reinke alleges that he demanded, on December 15, 1996, that the directors of the Potamkin Dealerships take action against Voynow, presumably because of the four million dollar inventory shortage. He claims that Robert and Alan, acting as directors of the Potamkin dealerships, failed to take appropriate action on behalf of the dealerships.

On January 10, 1997, Reinke alleges that he received, from Micchelli on behalf of Springfield Auto Outlet and Robert and Alan Potamkin, notice of the imminent sale, on January 13, of the Potamkin dealerships' assets to Springfield Auto Outlet. Reinke claims that this notice contained information defendants knew was false, because they knew that the assets Springfield was supposedly purchasing on January 13 had already been transferred to Springfield. Robert also allegedly began defaming Reinke to various third parties, by making accusations that Reinke mismanaged the dealerships, falsified vehicle sales, and embezzled money.

Accountants Voynow, Bayard were the regular accountants for the Potamkin dealerships, and they were also allegedly employed by Springfield Auto Outlet and R&A Springfield Investments. As part of the transfer of assets to Springfield Auto Outlet, Voynow

determined the value, as of December 31, 1996, of the Potamkin dealerships' assets. Reinke alleges that Voynow knew or should have known that assets had been transferred from the Potamkin dealerships to Springfield prior to the stated appraisal date. Reinke alleges that Voynow's participation amounts to misrepresentation, fraud, and accounting malpractice.

Finally, Reinke brings claims against the car manufacturers, under both the ADDCA and the Pennsylvania Vehicle Manufacturer, Dealers and Salespersons Act, 63 Pa. Stat. Ann. § 818.2. He claims that the car manufacturers named in this suit violated their duty, under the ADDCA, to act in good faith towards the Potamkin dealerships. The manufacturers allegedly violated this duty by cooperating with the other defendants' plan to defraud Reinke. He brings these claims both individually and as a derivative action, "for and on behalf of himself and all other shareholders of [the Potamkin dealerships] who are similarly situated."

Standard of Review

A court should dismiss a complaint pursuant to Fed. R. Civ. P. 12(b)(6) only if it finds that the plaintiffs cannot prove any set of facts, consistent with the complaint, which would entitle them to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). In making this determination, the court must accept as true all allegations made in the complaint, and all reasonable

inferences that may be drawn from those allegations. Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must view these facts and inferences in the light most favorable to the plaintiff. Id.

RICO

Reinke alleges that the agreement and actions by Robert and others to transfer the new car dealer sales and service agreements, franchises, and assets to Springfield Auto Outlet amount to a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act (RICO). Although it does not directly say so, this court will infer that the use of interstate telephone wires and mail to which the complaint refers are the predicate acts for the alleged RICO violations.

"Congress enacted RICO in an attempt to eradicate organized, long-term criminal activity." Midwest Grinding Co., Inc., v. Spitz, 976 F.2d 1016, 1019 (7th Cir. 1992). Section 1962(a) prohibits the use of income derived from a "pattern of racketeering activity" to acquire or operate any enterprise engaged in interstate commerce. Section 1962(b) prohibits controlling or maintaining an interest in an enterprise "through a pattern of racketeering activity." Section 1962(c) prohibits individuals who are employed by or associated with an enterprise engaged in interstate commerce from conducting affairs of the enterprise "through a pattern of racketeering activity." Section

1962(d) prohibits persons from conspiring to violate (a)-(c). Common to all of these subsections is the requirement that an injured party show a "pattern of racketeering activity" on the part of the defendants. Tabas v. Tabas, 47 F.3d 1280, 1289-90 (3d Cir. 1995); 18 U.S.C. § 1962.

This case is similar to Tabas in that the central issue is whether the defendants participated in a "pattern of racketeering activity." 18 U.S.C. § 1962. Racketeering activity includes the broadly defined federal offenses of mail and wire fraud, in addition to crimes more traditionally associated with racketeers. See 18 U.S.C. § 1961(1).

A plaintiff must show that the statutory racketeering acts, or predicate acts, are related and "that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989). Predicate acts are related if 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." Id. at 240. Continuity refers "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." Id. at 241-42. Plaintiff here has described a closed-ended scheme. A plaintiff may establish closed-ended continuity by proving that the related predicate acts extended over "a substantial period of time." 492 U.S. at 242. The Third Circuit 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 (compiling five recent Third Circuit cases); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3d Cir. 1991).

The court may consider factors other than duration to determine whether the predicate acts occurred over a substantial period of time. Although continuity is ultimately a fact-specific determination, courts may consider the number of predicate acts, the length of time over which they occurred, the character of the conduct, and the number of perpetrators and victims. Barticheck v. Fidelity Union Bank, 832 F.2d 36, 40 (3d Cir. 1987); Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1412 (3d Cir. 1991). When determining continuity for a RICO claim based on mail fraud, the court must look not just to when the predicate acts occurred, but at the duration of the underlying scheme. Tabas, 47 F.3d at 1294.

According to the plaintiff, the Potamkin defendants'³ concocted a scheme to transfer the assets of Potamkin Toyota and Golden Mile to another corporation, assumedly Springfield Auto Outlet.⁴ They accomplished this end by contacting the various

³The Potamkin defendants are Robert Potamkin, Alan Potamkin, Arthur Micchelli, David Hyman, Potamkin Toyota, Potamkin Golden Mile Motors, Springfield Auto Outlet, and R&A Springfield Investments.

⁴In reference to some of the franchise agreements, the complaint only says that the franchises were transferred to "a

car manufacturers which the Potamkin dealerships had franchise agreements with and arranging for these franchises to be transferred to Springfield. Reinke alleges that defendants, in carrying out their plan, committed mail and wire fraud.

This plan allegedly began in "the winter of 1996," although the first concrete step was taken in April 16, 1996, when Robert terminated Reinke's employment. The plan ended on January 13, 1997, the date on which Springfield Auto Outlet officially bought out the Potamkin dealerships. Thus, the Potamkin defendants accomplished their alleged end of "looting and depleting the assets of Potamkin Toyota and Golden Mile" within, at most, a year. This span of time is not sufficient to comprise the continuity needed to establish a pattern of racketeering activity under RICO. See Tabas, 47 F.3d at 1293.

In his response to defendants' motion,⁵ Reinke attempts to extend the time period of the alleged RICO plan by claiming that defendants acted throughout the first half of 1997 to conceal their previous actions, committing additional mail and wire

new entity." Again, drawing every reasonable inference in favor of the plaintiff, the court infers that this new entity was Springfield Auto Outlet.

⁵Reinke attempts, in his response to defendants' motion, to make numerous corrections for inadequacies or gaps in his complaint. For example, Reinke alleges for the first time in his response that Robert, Alan, Arthur and David are shareholders in Springfield Auto Outlet. Likewise, although the complaint refers only to "telephone calls," which is insufficient to make out a claim of federal wire fraud under 18 U.S.C. § 1343, see Midwest Grinding, 976 F.2d at 1025, the response refers often to "interstate wires."

fraud. Even if these additional allegations in the response were properly pled, they would be insufficient to make out the continuity required for a RICO claim. Even if actions to hide the alleged racketeering activity qualify as predicate acts, they do not extend the time of the underlying scheme. Midwest Grinding v. Spitz, 976 F.2d 1016, 1024 (7th Cir. 1992); see also Philadelphia Reserve Supply Co. v. Norwalk & Associates, Inc., 1992 WL 210590, *6 (E.D. Pa. 1992). The time span of the underlying scheme would, thus, still be one year, too short to support a RICO claim.

Further, even if the durational requirement were met, the plaintiff still has not alleged a sufficiently continuous scheme for a claim under RICO. This alleged scheme only had one victim,⁶ there was only one purpose, there were few perpetrators, and only about nine predicate acts.⁷ The character of the alleged misconduct is closer to common-law fraud than to racketeering. As the Third Circuit has observed, "[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and spread over a period of at least several months." Marshall-Silver

⁶Although Reinke brings his complaint on behalf of all other similarly situated shareholders in the Potamkin dealerships, his complaint made clear that the only other shareholders were active participants in the alleged scheme, and so not its victims.

⁷Again, the court reads the complaint liberally, inferring that phone calls referred to might be interstate phone calls, a required element of wire fraud under 18 U.S.C. § 1343.

Constr. Co. v. Mendel, 894 F.2d 593, 597 (3d Cir. 1987).

Congress enacted RICO to prevent organized crime from infiltrating businesses and other economic entities, not to subject ordinary crimes to heightened punishment, absent proof that the defendants engaged in a pattern of racketeering activity. Considering all the facts, the plaintiffs have not, and could not, make out the continuity required for a claim under RICO. See Nova Ribbon Products v. Lincoln Ribbon, 1995 WL 154749 (E.D. Pa. 1995).

Even were there a sufficient pattern of racketeering activity present in these facts, it is unlikely that Reinke could make out a valid RICO claim. In the interest of judicial economy, I will not dissect every flaw in the complaint, but I will offer some examples. As the complaint does not specify which part of section 1962 Reinke is bringing his claim under, the court must consider its sufficiency under each part. Examining it in this manner, there are numerous and sundry other problems with Reinke's RICO count. A claim under § 1962(a) requires that the plaintiff be injured by the use or investment of income derived from racketeering activities. Rose v. Bartle, 871 F.2d 331, 357-58 (3d Cir. 1989). Reinke has not alleged that he was hurt by the use or investment of money gained through purported racketeering; his hurt - the loss of value in Potamkin assets - comes directly from the alleged fraudulent acts. For a § 1962(c) claim, the alleged RICO enterprise cannot also be a defendant. An "innocent" business must be the enterprise under

RICO. See Kehr Packages, Inc., v. Fidelcor, Inc., 926 F.2d 1408, 1411 (3d Cir. 1991); Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991). Yet Reinke's complaint and response treat Springfield Auto Outlet as both a defendant to the action and the RICO enterprise. Reinke has, thus, failed to plead one of the RICO elements.

In sum, these allegations of fraud relate to a discrete dispute, rather than to numerous distinct attempts to defraud. As such, they can not amount to a pattern of racketeering activity required for RICO liability. Accordingly, defendants' motion to dismiss Count I of the complaint, for violation of RICO, will be granted.

Automobile Dealers Day in Court Act

Reinke has brought claims against the defendant car manufacturers for violation of the ADDCA. The ADDCA authorizes an automobile dealer to bring suit against an automobile manufacturer from whom the dealer holds a franchise who fails to act in good faith with respect to the franchise agreement. 15 U.S.C. § 1222. Defendant automobile manufacturers move to dismiss on the grounds, inter alia, that Reinke is not an automobile dealer within the meaning of the act, and, thus, does not have standing to bring a claim under it.

The ADDCA defines automobile dealers as "any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise." 15

U.S.C. § 1221. "Good faith" under the Act means the duty of each party to the franchise agreement to act in a manner which is not coercive or intimidating. 15 U.S.C. § 1221. An individual does not gain standing to sue under the ADDCA simply by holding stock in a dealership. E.g., Olson Motor Co. v. General Motors Corp., 703 F.2d 284 (8th Cir 1983); Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 627 F. Supp. 1202 (S.D.N.Y. 1986), aff'd, 814 F.2d 90 (2d Cir. 1987). Although there is no uniformity among the circuits, the majority of cases have only allowed individuals to bring claims under the ADDCA when, among other factors, the manufacturer holds a majority of the voting stock in the dealership. The courts generally reason that the dealership itself is the proper plaintiff, but that when the dealership could not bring suit because it is controlled by the potential defendant manufacturer, an individual owner-operator might have standing. See Olson, 703 F.2d 284; Empire, 627 F. Supp. 1202; Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965). The only Third Circuit court to directly address the standing issue held that for an individual shareholder or employee to enforce the Act they must have the dominant financial interest in the dealership corporation, extensive control over the corporation's activities, and a very substantial relationship with the manufacturer, such as that shown by a franchise agreement which requires that individual's personal and substantial participation in the ownership and operation of the dealership. Moorehead v. General Motors Corp., 442 F. Supp. 873 (E.D. Pa. 1977). In

Moorehead the court held that plaintiff did not have standing to bring a claim as an individual under ADDCA, even though he had previously owned 36.1% of the stock in the dealership and the franchise agreement was premised on his personal participation in operating the dealership. Id. at 876.

Reinke is the largest shareholder in the Potamkin dealerships, but his is not the dominant interest, as he owns only one-third of the stock. The extent of his control over the dealerships is not described by the parties, but, even drawing all favorable inferences on his behalf, a one-third owner is unlikely to have "extensive control." Finally, although he alleges that he was the named operator under the various franchise agreements, he does not allege that the agreements were premised on his participation. Reinke certainly does not meet the standing requirements set out by the Second and Eighth Circuits, which require that the manufacturer hold a majority of the dealerships stock before an individual shareholder may bring a claim under ADDCA. Accordingly, I find that Reinke does not have standing to bring a claim under the ADDCA.

There are additional reasons raised by the defendants why the ADDCA claims should be dismissed, but, again, it would not serve judicial economy to elaborate upon them here. An example of such a reason is that none of the defendant manufacturers engaged in behavior towards Reinke which was coercive or intimidating. Thus, none of the defendant manufacturers violated the good faith standard imposed by the ADDCA. Accordingly,

defendants' motions to dismiss count II, for violation of the ADDCA, will be granted.

Supplemental Jurisdiction over State Law Claims

Reinke claims that this court should exercise its supplemental jurisdiction over his various state law claims which arise out of the same transaction or occurrence as the RICO and ADDCA claims. The defendants argue that, if the federal claims are dismissed, this court should, under Fed. Rule Civ. P. 12(b)(1), decline to exercise jurisdiction over the supplemental state law claims. A federal court may decline to exercise its supplemental jurisdiction if the court dismisses all the claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). In Borough of West Mifflin, the Third Circuit held that, where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims. 45 F.3d 780, 788 (3d Cir. 1995). Only if considerations of fairness, judicial economy, and convenience provide an affirmative justification for doing so should the district court keep the case. Id.

First, as the court has only a motion to dismiss before it, this court has expended virtually no resources in adjudicating these state law claims; thus retaining jurisdiction would not further the interests of judicial economy. As claims related to the same sequence of events are now pending in the state courts, withdrawal of jurisdiction over the supplemental claims might actually further judicial economy. Second, again due to the early stage of litigation, neither party would be prejudiced by

the court's withdrawal of jurisdiction, and so the doctrines of fairness does not weigh in favor of retaining jurisdiction. Third and finally, Pennsylvania state court and this court are equally convenient forums for adjudicating these claims. Accordingly, the balance of interests weighs against this court retaining jurisdiction over plaintiff's state law claims, and so these counts will be dismissed with prejudice.

An order follows.

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

PETER REINKE,
Plaintiff,

v.

Civil Action
No.97-5740

POTAMKIN GOLDEN MILE MOTORS,
INC., POTAMKIN TOYOTA, INC.,
ROBERT POTAMKIN, ALAN
POTAMKIN, VOYNOW, BAYARD &
COMPANY, P.C., SPRINGFIELD
AUTO OUTLET CORP., R&A
SPRINGFIELD INVESTMENTS, INC.
(RASI), ARTHUR MICCHELLI,
DAVID HYMAN, AMERICAN ISUZU
MOTORS, INC., CHRYSLER
CORPORATION, MITSUBISHI MOTOR
SALES OF AMERICA, INC.,
HYUNDAI MOTOR AMERICA, TOYOTA
MOTOR SALES, USA INC., AND
VOLKSWAGEN OF AMERICA
Defendants.

O R D E R

AND NOW, this day of May, 1998, the defendants' Motions
to Dismiss (Document Nos. 20, 21, 22, 25, 39, 44, 45, & 47) are
GRANTED.

BY THE COURT:

Robert S. Gawthrop, III

J.