

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

**UNITED COMPUTER CAPITAL CORPORATION
and UNITED RECOVERY SERVICES CO., a Division
of UNITED COMPUTER CAPITAL CORPORATION,**

Plaintiffs,

-v-

5:02-CV-1431

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**RICHARD W. DAIDONE and SAINT ANDREWS
ASSOCIATES, LLC, a/k/a ST. ANDREWS ASSOCIATES,
EQUIPMENT LEASING ORGANIZATION, LLC,
EQUIPMENT LEASING ORGANIZATION, INC., JASON
GRUNBERG, NORMAN GRUNBERG, and LANSE NATSCH,**

Defendants.

v

APPEARANCES:
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Hon. Norman A. Mordue, D.J.:

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Presently before the Court are motions by defendants to dismiss all claims in the amended complaint based on the Racketeer Influenced and Corrupt Organizations Act (“RICO”), as well as several of plaintiffs’ common-law claims, on the ground that they fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Defendants further move to dismiss the amended complaint on the ground of improper venue under Fed. R. Civ. P. 12(b)(3) or in the alternative to transfer venue to the Southern District of New York. The Court denies the motions in their entirety.

MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants move for dismissal of counts one, eight, nine, and 12 through 17 on the ground that they fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In addressing defendants’ motions to dismiss these counts, the Court reads the amended complaint generously, accepting the truth of and drawing all reasonable inferences from all well-pleaded factual allegations. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). Dismissal is proper only if it appears beyond doubt that plaintiffs can

prove no set of facts which would entitle them to relief. *See Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994).

RICO claims

The Court first addresses so much of defendants' motions as seek dismissal of the RICO claims, counts 14, 15 and 16. To state a claim under 18 U.S.C. § 1964(c), which creates a private right of action for individuals injured as a result of a RICO violation, plaintiffs must allege that the defendants through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invest in, or maintain an interest in, or participate in an enterprise, the activities of which affect interstate or foreign commerce, 18 U.S.C. § 1962(a)-(c), or that they conspired to do so. 18 U.S.C. § 1962(d). *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). A pattern of racketeering activity under RICO consists of at least two acts of racketeering activity – the “predicate acts” – within a ten year period. 18 U.S.C. § 1961(5). Racketeering activity includes any act or threat involving bribery which is chargeable under State law, 18 U.S.C. § 1961(1)(A), and any act which is indictable under specified provisions of title 18, including section 1341 (mail fraud) and section 1343 (wire fraud). 18 U.S.C. § 1961(1)(B). The elements of mail or wire fraud are (1) the existence of a scheme to defraud involving money or property; and (2) the use of the mails or wires in furtherance of the scheme. *See United States v. Trapilo*, 130 F.3d 547, 551-52 (2d Cir. 1997); *United States v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995).

The amended complaint alleges a pattern of racketeering activity comprising eleven racketeering acts occurring between January 2001 and March 2003. In racketeering acts one through seven, plaintiffs allege violations of federal mail and wire fraud statutes, 18 U.S.C. §§

1341, 1343, arising from schemes to defraud the plaintiffs of money and property by means of false and fraudulent pretenses, representations and promises, including appropriating plaintiffs' existing and prospective business clients, and to divert to defendants monies owed to the plaintiffs. Racketeering acts eight through 11 allege violations of commercial bribery and bribe receiving statutes. New York Penal Law §§ 180.03, 180.80; New Jersey Statutes § 2C:21-10. Specifically, they allege commercial bribes paid to defendants Richard W. Daidone and Lanse Natsch by defendants Jason Grunberg, Equipment Leasing Organization, LLC, and Equipment Leasing Organization, Inc., as an inducement to violate their fiduciary duties to the plaintiffs.

The Court rejects defendants' argument that the complaint fails to allege a pattern of racketeering activity because it alleges neither open-ended nor closed-ended continuity. With respect to open-ended continuity, the Second Circuit has explained:

To establish open-ended continuity, the plaintiff need not show that the predicates extended over a substantial period of time but must show that there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed. In this Circuit, the cases assessing whether a threat of continuity exists have looked first to the nature of the predicate acts alleged or to the nature of the enterprise at whose behest the predicate acts were performed. In assessing whether or not the plaintiff has shown open-ended continuity, the nature of the RICO enterprise and of the predicate acts are relevant.

DeFalco v. Bernas, 244 F.3d 286, 323 (2d Cir. 2001) (citation and internal quotes omitted).

On reviewing the amended complaint and considering the nature of the RICO enterprise and the predicate acts alleged, the Court finds ample threat of continuing criminal activity beyond the period during which the predicate acts were performed. Viewed as a whole, defendants' alleged conduct amounts to a forward-looking scheme to use fraud and other wrongful means to appropriate plaintiffs' assets (*e.g.*, existing and prospective clients, contracts, receivables and other benefits); to exploit those assets to establish their own businesses and

advance their own interests; and to further their businesses and interests in the future by continuing to appropriate and exploit plaintiffs' assets. Defendants' elaborate schemes by their very nature "project[] into the future with a threat of repetition." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989). There is nothing to suggest that defendants intended to stop their wrongful activities "once they met some immediate goal." *De Falco*, 244 F.3d at 324. Nor can the alleged predicate acts and enterprises be characterized as inherently terminable, closed-ended efforts to steal a finite amount of plaintiffs' monies or opportunities. Compare *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 466 (2d Cir. 1995) (scheme to loot corporation was inherently terminable; there was no threat of continued looting activity because there was nothing left to loot). The Court concludes that the "spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation." *Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10, 18 (2d Cir. 1989).

Having found that the amended complaint adequately pleads open-ended continuity, the Court need not address the question of closed-ended continuity. The Court rejects defendants' argument that, because the case involves a commercial business dispute, RICO does not apply. See generally *Sedima S.P.R.L. v. Imrex co.*, 473 U.S. 479, 495-97 (1985). The Court further finds that defendants' other challenges to plaintiffs' RICO claims do not warrant dismissal. Defendants' requests for dismissal of the RICO claims are denied.

Common-law claims

The Court finds no basis to dismiss the first cause of action for permanent injunctive relief against Daidone. The Court rejects defendants' argument that the eighth cause of action,

for intentional interference with plaintiffs' business relations with present and/or prospective clients, should be dismissed as duplicative of the sixth cause of action, for intentional interference with plaintiffs' contractual business relationships. The eighth cause of action adequately places defendants on notice of a claim sounding in misappropriation of corporate opportunities, a claim which is discrete from that in the sixth cause of action.

The ninth count, for tortious interference with prospective economic advantage and/or business relations, is adequately pleaded, particularly when read in view of the previously pleaded allegations, which are expressly incorporated therein. Likewise, count 12, alleging fraudulent concealment against Daidone, and count 13, sounding in fraud against Natsch, are adequately pleaded. There is no basis to dismiss count 17, for injunctive relief against all defendants except Daidone.

VENUE

Defendants also move to dismiss the complaint for improper venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a) or to transfer the case to the Southern District of New York in the interests of justice under 28 U.S.C. § 1404(a).

Plaintiffs urge that venue in the Northern District is proper under the general venue provision of 28 U.S.C. § 1391(b)(2) because "a substantial part of the events or omissions giving rise to the claim occurred" in this district. The factors upon which plaintiffs rely include the following. UCCC, a New York corporation, has its principal place of business in the Northern District. URS, with a business address in New Jersey, is a division of UCCC – not a distinct legal entity. Daidone, a New Jersey resident, served as CEO and President of URS and Senior Vice President of UCCC from 1992 until he was fired on November 12, 2002.

Defendant Natsch, a resident of Bronxville, New York, in the Southern District, was an account executive for UCCC beginning in March 1989 and Vice President of UCCC beginning in December 1999, until he resigned on November 29, 2002.

As officers of UCCC, both Daidone and Natsch owed it a fiduciary duty. Plaintiffs contend that on numerous occasions Daidone and Natsch failed to fulfil that duty. Plaintiffs claim that one of Natsch's violations of his fiduciary duty to UCCC occurred at a luncheon in Cazenovia, in the Northern District, when he was questioned by B. Edward Tibbetts, Chairman of the Board and CEO of UCCC, about The Select Group transaction, and denied his involvement. Also, according to Tibbetts, Natsch denied knowledge of Exhibit K in a telephone conversation with Tibbetts while Tibbetts was in the Northern District. And the affidavit of Lynda Snyder, a Senior Contract Administrator at UCCC, shows that Natsch made further misrepresentations while participating in a conference call originated in this district, involving JPMorgan Chase and Snyder. Daidone and Natsch were paid by UCCC from the Northern District. Further, their expense reimbursement requests (which form the basis of another alleged scheme) were submitted to and paid by UCCC from the Northern District.

There is also evidence that Daidone transacted some business from his vacation home in the Northern District, including sending faxes in furtherance of the JPMorgan Chase and Bank of New York schemes. And evidence shows that Daidone transmitted memos regarding the INRANGE "computer switch" scheme to Tibbetts in the Northern District; as a result, plaintiffs purchased the INRANGE switch, procured loans in the Northern District and wired payment to INRANGE from the Northern District. Plaintiffs allege that \$30,000 of this payment went into the defendants' pockets.

Plaintiffs also allege a scheme involving UCCC's leases of banking equipment to Global Processing Services, a subsidiary of Deutsche Bank, wherein Daidone made misrepresentations to UCCC and diverted monies and business to Equipment Leasing Organization, LLC.

According to Brady Cass, Senior Vice President for UCCC, Daidone was actively involved in the transaction and sent e-mails and faxed and/or mailed documents into the Northern District and telephoned Cass in the Northern District, all in connection with the transaction.

Indeed, as a result of the relationship between URS and UCCC, and of Natsch's and Daidone's positions as officers of UCCC, virtually all of the events or omissions alleged have a connection with UCCC in this district. Plaintiffs have met their burden of demonstrating that a substantial part of the events or omissions giving rise to the claim occurred in this district as required by 28 U.S.C. § 1391(b)(2).

The Court finds that the exercise of pendent venue is proper inasmuch as plaintiffs' state law claims are based on the same set of operative facts as their RICO claims and the evidence and witnesses will be the same for both categories of claims. *See City of New York v. Cyco.Net, Inc.*, 2005 WL 174482, *13 (S.D.N.Y.).

The Court now turns to consider whether the case should be transferred to the Southern District pursuant to 28 U.S.C. § 1404(a), which allows the Court in its discretion to transfer venue "[f]or the convenience of parties and witnesses, in the interest of justice." The burden is on the moving party to demonstrate entitlement to transfer on this ground. *See Fine Foods International LP v. North America Fine Foods, Inc.*, 1999 WL 1288681, *5 (E.D.N.Y.). In addressing the request, the Court must balance the following factors: "(1) the weight accorded the plaintiff's choice of forum; (2) the place where the operative facts took place; (3) the

convenience of the parties; (4) the convenience of the witnesses; (5) the availability of process to compel unwilling witnesses; (6) the location of relevant documents and the relative ease of sources of proof; and (7) trial efficiency and the interests of justice.” *Id.*

It is well established that a plaintiff’s choice of forum should not be disturbed unless the balance of factors tips heavily in favor of transfer. *See id.* Defendants have not shown that the locus of operative facts tips in their favor. With respect to the convenience of the parties and witnesses, there is again no showing that the balance tips in favor of defendants. To the contrary, the parties list witnesses in the Northern District, Southern District, District of New Jersey, and in other parts of the United States. Likewise, it appears that relevant documents and sources of proof are located in the Northern District, Southern District, District of New Jersey, and in other parts of the United States. Process is available to compel unwilling witnesses pursuant to 18 U.S.C. § 1965(c); this factor does not aid defendants.

Trial efficiency and the interests of justice would not be served by transfer. This Court is familiar with the case and has already issued three decisions herein. United States Magistrate Judge Gustave J. DiBianco is also familiar with the case and has held settlement conferences. The Court agrees with plaintiffs that defendants have not made a competent showing of financial circumstances such as might support a transfer under section 1404. Accordingly, the motions to dismiss the case for improper venue or to transfer venue are denied.

CONCLUSION

ORDERED that the motion by defendants Richard W. Daidone and Saint Andrews Associates, LLC to change venue and to dismiss the complaint is denied; and it is further

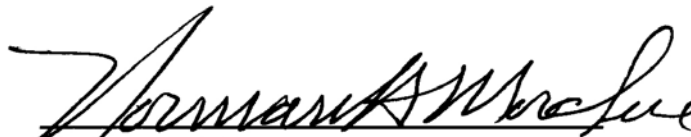
ORDERED that the motion by defendants Equipment Leasing Organization, LLC,

Equipment Leasing Organization, Inc., Jason Grunberg, and Norman Grunberg to change venue and to dismiss the complaint is denied; and it is further

ORDERED that the motion by defendant Lanse Natsch to change venue and to dismiss the complaint is denied.

IT IS SO ORDERED.

March 7, 2005
Syracuse, New York


Norman A. Mordue
U.S. District Judge

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