TAB 22

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United States District Court, N.D. California.
Diane SASSER, et al., Plaintiffs,
v.
W. Thomas AMEN, et al., Defendants.
No. C 99-3604 SI.

July 2, 2001.

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ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ILLSTON, District J.

***1** Defendants' motion for partial summary judgment on plaintiffs' RICO causes of action is currently pending before this court. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendants' motion, for the reasons set out below.

Under these circumstances, the Court declines to exercise supplemental jurisdiction over plaintiffs' remaining state law causes of action for violation of the California Labor Code, the Business & Professions Code, fraud and conversion. On December 19, 2000, plaintiffs' counsel filed an action in the San Francisco Superior Court on behalf of individuals who are no longer plaintiffs in this action. *See* Reply Declaration of Thomas E. Geidt in Support of Defendants' Motion for Partial Summary Judgment ("Geidt Reply Decl."), Exh. 5. The state court complaint attacks the legality of the same commission policies that are challenged in this action under state law, and asserts additional causes of action including pregnancy and gender discrimination. [FN1] *See id.* at 20-33. This Court's decision on defendants' motion for partial summary judgment is limited to plaintiffs' RICO causes of action, and the Court takes no position on the merits of plaintiffs' state law claims. Further, since no class was ever certified in this matter, this order binds only the ten plaintiffs currently named in the complaint.

FN1. While the state court complaint lists only four named plaintiffs as "parties," the "Unfair Business Practice/Fraud/Conspiracy" section of complaint addressing defendants' "charge back" policies refers to damages suffered by named plaintiffs and other "class members." *See id.*, at 23, 24, 27.

BACKGROUND

Defendant West Coast Beauty Supply ("WCBS") is a distributor of wholesale beauty products. *See* Declaration of W. Thomas Amen ("Amen Decl.") ¶ 6.[FN2] Plaintiffs are current and former sales employees of WCBS who have received wages in the form of commissions. *See* Third Amended Complaint ("TAC") ¶ 6. After the Court's March 3, 2000, Order granting in part and denying in part defendants' motion to dismiss the Third Amended Complaint, the following causes of action remain at issue: (1) violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S .C. § 1962(c), by using wire, mail and interstate and foreign transport to effect a fraud upon employees; (2) violation of RICO's conspiracy provision under 18 U.S.C. § 1962(d); (3) violation of public policy and California Labor Code §§ 200-206, 221, 225, 225.5, 400, 405, 408 and 976; (4) violation of California Business and Professions Code § 17200; (5) fraud by misrepresenting the legality of the compensation policies; and (6) conversion. The only identified basis for original federal jurisdiction is RICO. TAC ¶ 4.

FN2. Unless otherwise indicated, the following evidence is not disputed or controverted.

The facts surrounding plaintiffs' RICO causes of action are as follows: Defendant Wayne Clark has at all relevant times been a shareholder and director of WCBS and currently is WCBS' sole shareholder. *See* Statement of Undisputed Facts in Support of Defen-

dants' Motion for Partial Summary Judgment ("DSUF") ¶ 8; Plaintiffs' Amended Response to Statement of Undisputed Facts ("PRSUF") ¶ 8; Reply Declaration of Wayne Clark ("Clark Reply Decl.") ¶¶ 2, 3. Before 1989, defendant Thomas Amen served as legal counsel to WCBS and, since 1989, has been WCBS' President and Chief Executive Officer. DSUF ¶ 2; PRSUF ¶ 2. Defendant Douglas Jalen first became employed at WCBS in 1987 as an accounting manager, and since 1991 has been the company's controller and then Chief Financial Officer. DSUF ¶¶ 9, 10; PRSUF ¶¶ 9; 10; Reply Decl. of Douglas H. Jalen ¶ 2. Defendant Amen & Keith is a law firm that provides legal services to WCBS. DSUF ¶ 3; PRSUF ¶ 3.

***2** In 1986 WCBS implemented a new sales commission policy. DSUF ¶ 15; PRSUF ¶ 15. Under the policy defendants debited or "charged back" amounts from sales consultants' commissions when a buyer made payments late or defaulted on payments, and when goods were damaged or returned to WCBS. DSUF ¶¶ 21, 23, 25; PRSUF ¶ 21, 23, 25. In the early 1990s WCBS implemented the "instant credit" program, whereby sales consultants could initiate a request for a limited extension of credit to customers. DSUF ¶ 46; PRSUF ¶ 46. At least two plaintiffs had amounts "charged back" against commissions after customer default under the instant credit program. DSUF ¶ 49; PRSUF ¶ 49. Beauty product supplier Matrix Essentials, Inc., had a sales incentive rewards program, known as the "Bonus Bucks" program, whereby Matrix provided gifts and merchandise to consultants for achieving various sales levels. WCBS added points to certain sales consultants' Matrix Bonus Bucks redemption certificates to secure merchandise for WCBS under the Bonus Bucks program. Plaintiffs' Statement of Disputed Material Facts ("PSDF") ¶¶ 47, 50. Matrix issued IRS form 1099s to the sales consultants reflecting the value of gifts provided by Matrix. DSUF ¶¶ 50-52; PRSUF ¶¶ 50-52. Some of the 1099s reflected income for merchandise received by WCBS and not by the sales consultants. Plaintiffs allege that defendants had knowledge of the illegality of the charge back, instant credit, and Matrix Bonus Bucks schemes, but implemented and continued to execute the policies while implicitly or explicitly representing to employees that the policies were legal. PSDF ¶¶ 119, 120.

Currently before the Court are defendants' motion for partial summary judgment on plaintiffs' RICO claims and defendants' evidentiary objections to plaintiffs' evidence submitted in opposition to that motion. Additionally, plaintiffs have submitted a letter brief addressing discovery disputes that have arisen between the parties and seeking a motion to compel.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. *See* *id.* at 325, 106 S.Ct. at 2554.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial." ' *Id.* at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 252, 106 S.Ct. 2505, 2519 (1986).

***3** In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255, 106 S.Ct. at 2513. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment." *Id.*

DISCUSSION

I. Evidentiary Issues

A. The November 1981 Letter

On March 21, 2001, plaintiffs submitted a letter brief requesting an order compelling discovery. One of the issues raised in the letter is the privileged status of a November 1981 letter written by attorney Thomas Amen to WCBS' former President David Clark. On November 8, 1999, the Court ordered that the November 1981 letter, and all references to it, be stricken from the record because the letter was covered by the attorney-client privilege. *See* November, 8, 1999 Order at 10. The Court also found that the "crime/fraud" exception to the attorney-client privilege did not apply to exempt the letter from coverage under the privilege. *Id.* Plaintiffs now argue that the Court should order the production of the November 1981 letter because WCBS waived any claim of privilege when WCBS' then-President, David Clark, gave the letter to Jonathan Kauders, who was employed by WCBS as the Credit Manager charged with implementing the company's commission policy. *See* Declaration of Jonathan Kauders in Support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment ("Kauders Decl.") ¶¶ 2, 5, 6. This argument is without merit. Kauders was charged with implementing the company's commission policy, and was thus acting within the scope of his management responsibilities when reviewing the attorney-client letter. In these circumstances, WCBS has not waived the privilege. *See* *Upjohn Co. v. U.S.*, 449 U.S. 383, 392, 394 (1981).

Plaintiffs' argument that WCBS waived the privilege by intermingling the attorney-client letter with other routine documents is also without merit. Kauders declares that David Clark gave him the document in a folder containing items that would be useful in Kauders' managerial role in implementing the commission policy. Kauders Decl. ¶ 6. There is no evidence that WCBS "indiscriminately intermingled" the letter with non-privileged documents or placed the letter where it was available to others. *Compare* *In re Horowitz*, 482 F.2d 72, 82 (2d Cir.1973).

Plaintiffs also assert that WCBS waived the privilege by affirmatively placing the 1981 letter at issue in its defense of plaintiffs' RICO claim. Specifically, plaintiffs claim that "[t]o support the claim in their Motion for Partial Summary Judgment that they believed the charge back commission was legal, defendants assert the contents of the letter as 'undisputed' facts, citing the letter as evidence." Letter Brief at 2. It is unclear whether plaintiffs are referring to the charge back commission contemplated in the 1981 letter or the charge back commission implemented in 1986. Regardless, plaintiffs' argument fails. The deposition testimony of Amen cited by plaintiffs as placing the contents of the letter at issue does not reference the 1981 letter at all. Rather, Amen testified how the commission policy adopted in 1986 differed from a policy contemplated in 1981. *See* Letter Brief, Exh. 12. Defendants' Statement of Undisputed Fact 35 mentions the letter, but does not comment on the letter's contents. DSUF 42 discusses the legality of the 1986 commission policy and mentions the 1981 letter only to state that the policy implemented in 1986 was different from the system contemplated in the 1981 letter. Finally, in his declaration, Amen states only that he considered the 1981 letter to be attorney-client privileged, and that the policy implemented in 1986 was very different from the one contemplated in the 1981 letter. *See* Amen Decl. ¶¶ 6, 10.

***4** Defendants do not rely on the letter to argue that either the policy considered in 1981 or the policy implemented in 1986 was legal, or that they had a good faith belief about the legality of those policies based on the advice of counsel contained in the letter. Plaintiffs' reliance on *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.1992), therefore, is misplaced. In *Chevron Corp.*, the defendant claimed that its tax position was reasonable because it was based on advice of counsel. The "reasonableness" of defendants' conduct was at the heart of the case, and the defendant had thus put the tax advice it received directly at issue. The Court held that the defendant could not invoke the attorney-client privilege to deny the plaintiff access to the very information that the plaintiff must refute in order to demonstrate that the defendant violated the law. *Id.* 974 F.2d at 1162-63. The other cases cited by plaintiffs are likewise inapposite. *See* *U.S. v. Amlani*, 169 F.3d 1189, 1196 (9th Cir.1999) (where defendant claimed prosecution's disparagement of defense counsel caused substitution of counsel, defendant waived privilege with respect to communications relating to counsel's substitution); *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991) (defendant's assertion of good faith defense to charges of fraud based on advice of counsel, waived attorney client privilege); *Weil v. Investment/Indicators Res. & Mgmt. Co.*, 647 F.2d 18, 23-25 (9th Cir.1981) (waiver where defendant purposefully released attorney-client

information to demonstrate lack of intent); *SNK Corp. of American v. Atlus Dream Entertainment Co. Ltd.*, 188 F.R.D. 566, 573 (N.D.Cal.1999) (where party injected issue of reliance on advice of counsel into suit, **attorney-client privilege waived**); *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D.Cal.1976) (**deliberate** injection of reliance on the advice of counsel into case **waived** the **attorney-client privilege** as to communications and documents relating to the advice). In this case, defendants have not injected the advice of counsel into the case as a defense, have not put at issue the contents of the 1981 letter, and have not waived their attorney-client privilege.[FN3]

> FN3. After reviewing the letter *in camera* in November 1999, the Court rejected any argument that the crime/fraud exception to the attorney-client privilege applied to the letter. *See* November, 8, 1999 Order at 10. In their letter brief, plaintiffs assert that new evidence establishes that the crime/fraud exception applies. Plaintiffs' new evidence consists solely of Jonathan Kauders' characterizations of the contents of that letter and the January 2000 declaration of an expert, submitted to the Superior Court for the County of Marin, that the letter falls within the crime/fraud exception. *See* March 21, 2001 Letter Brief at 1-2; Exh. 13; Kauders Decl. The Court has rereviewed the letter *in camera* and again finds that the crime/fraud exception does not apply.

B. Defendants' Objections to Plaintiffs' Evidence Submitted in Support of Plaintiffs' Opposition to the Motion for Partial Summary Judgment.

Defendants object to and move to strike portions of the declarations submitted by plaintiffs in support of their opposition to defendants' motion for partial summary judgment. Plaintiffs have not filed a reply to defendants' objections. Defendants object to the declaration of Charles "Ted" Greenfield, because Greenfield is not a party and was not listed in plaintiffs' initial disclosures as a witness. Defendants thus have not had the opportunity to depose Greenfield and defendants seek to strike the declaration in whole. The Court overrules defendants' objection to the Greenfield declaration and denies defendants' request to strike the declaration. With respect to the remainder of defendants' objections to Greenfield's declaration, the Court overrules them and denies the motion to strike. Defendants' objections go to the strength and specificity of Greenfield's statements, but do not demonstrate that his statements are not admissible.

***5** With respect to defendants' objections to the declaration of Leslie Hardy, except for the interlineation objection, the Court overrules defendants' objections and denies the motion to strike. The majority of the objections, again, go to the strength and specificity of the statements but not their admissibility. Defendants' best evidence objections are overruled as the declarant is not testifying to the specific contents of the tax documents to prove their contents. Any conflict between the declaration and Hardy's deposition testimony will be addressed, if necessary, below. The Court sustains defendants' objection to the unauthenticated interlineation included in paragraph 2, and orders this interlineation stricken from the record.

Defendants' objections to the declaration of Susan Wetzel are overruled and the motion to strike denied, as the majority of the objections go to the strength and specificity of the statements but not their admissibility. Defendants' best evidence objections are overruled as the declarant is not testifying to the specific contents of documents to prove those contents. Any conflict between the declaration and Wetzel's deposition testimony will be addressed, if necessary, below.

With respect to the Kauders declaration, the Court sustains defendants' objection to paragraph 49, page 3, lines 6-12; paragraph 16, page 5, lines 21-25; paragraph 17, page 6, lines 5-6; and paragraph 41, page 11, lines 21-23. The Court orders this information stricken from the record on the basis of attorney-client privilege. Any conflict between the declaration and Kauders' deposition testimony will be addressed, if necessary, below. The remainder of defendants' objections to Kauders' declaration are overruled and the motion to strike denied.

With respect to defendants' objection to exhibits 1-16 of the Second Amended Declaration of Noreen A. Farrell in Support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment ("Farrell Decl."), the Court overrules defendants' objections and denies the motion to strike based on the lack of underscoring or highlighting. Defendants' objections to plaintiffs' exhibits 18, 23-27, 29-31 for lack of

authentication are sustained. The Farrell Declaration does not provide sufficient authentication for these documents, and the exhibits are stricken from the record.

II. Motion for Partial Summary Judgment

Under 18 U.S.C. § 1962(c), it is "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." In order to state a valid RICO claim under § 1962(c), a plaintiff must allege "(1) conduct, (2) of an enterprise, (3) through a pattern, and (4) of racketeering activity." *Jarvis v. Regan*, 833 F.2d 149, 151-52 (9th Cir.1987) (citations omitted). "Racketeering activity" is defined by reference to specific crimes and statutes, including 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud). 18 U.S.C. § 1961(1). To demonstrate predicate acts of mail and wire fraud, plaintiffs must show a scheme to defraud, involving use of United States mails or interstate wires, and defendants' specific intent to defraud. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir.1997), *aff'd*, 525 U.S. 299 (1999).

A. Statute of Limitations

***6** In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1987), the Supreme Court established a 4-year limitations period for civil RICO claims. The court, however, did not decide when that 4-year period began to run. *See Rotella v. Wood*, 528 U.S. 549, 553, 120 S.Ct. 1075 (2000). The Courts of Appeals have been divided over how to determine when the 4-year limitations period begins to run, *see id.*, 528 at 553-54, and the Supreme Court has addressed this question twice within the last four years, each time rejecting an expansive approach to determining the start of the limitations period. *See Rotella*, 528 U.S. 549; *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984 (1997). In the most recent case, *Rotella*, the court rejected the "injury and pattern discovery rule" under which a civil RICO claim accrues only when the claimant discovers, or should have discovered, both an injury and a pattern of RICO activity. The court noted that adoption of such a rule would frustrate both the purpose of statutes of limitations, to eliminate stale claims, and the object of civil RICO, which is not merely to compensate victims but to "reward the swift who undertake litigation in the public good." *Rotella*, 528 U.S. at 555, 557, 559.

The Ninth Circuit has "continuously followed the 'injury discovery' statute of limitations rule for civil RICO claims." *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir.2001). Under this rule, "the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Id.* (citing *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.1996)). Thus, the "injury discovery" rule creates a disjunctive two-prong test of actual or constructive notice; the statute begins running under either prong.

When asked at oral argument to identify the RICO injury at issue, plaintiffs' counsel asserted that plaintiffs' RICO injury is their loss of income under defendants' charge back policies.[FN4] It is undisputed that defendants' commission policy imposing "charge backs" on sales consultants' accounts as a result of late customer payments and returned goods, was implemented in or around 1986. *See* Amen Decl. ¶¶ 11, 12. The "instant credit" program was instituted in the early 1990s and discontinued in or around September, 1996. *See* Amen Decl. ¶ 25; Kauders Decl. ¶¶ 43, 45. It is also undisputed that each of the nine plaintiffs "generally disliked the 'charge-back' feature of the commission policy and raised questions and concerns about the legality and fairness of the policy in various meetings and one-on-one conversations with the Company's managers between 1986 and the early 1990s, but Plaintiffs took no legal action until June 1999." *See* DSUF ¶ 30; PRSUF ¶ 30.

> FN4. Plaintiffs' counsel also asserted that plaintiffs were injured when WCBS forced sales consultants to claim amounts from inflated 1099s issued under the Matrix Bonus Bucks scheme as income on their taxes. This claim is discussed separately below.

As this Court noted in its March 3, 2000 Order, the statute of limitations began to run when plaintiffs first had actual or constructive knowledge of their injuries-the deductions from their paychecks-which began in 1986 for the commission policy and in the early 1990s for the instant credit policy. *See* March 3, 2000 Order at 14. The Court therefore dismissed plaintiffs' RICO causes of action insofar as they were based on

acts that occurred before the beginning of the RICO limitations period on July 26, 1995, but held that plaintiffs may pursue RICO claims for subsequently occurring acts if those acts were demonstrated to fall within RICO's "separate accrual rule."

***7** RICO's separate accrual rule provides that "a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir.1996) (quotation omitted). In order to fall under this separate accrual rule, the predicate act occurring within the limitations period " 'must be a new and independent act that is not merely a reaffirmation of a previous act; and ... [i]t must inflict new and accumulating injury on the plaintiff." ' *Id.* (quoting *Pace Indus., Inc. v. Three Phoenix Corp.*, 813 F.2d 234, 238 (9th Cir.1987)).

The Court finds that, except for plaintiffs' allegations regarding the Matrix scheme, plaintiffs have not proved new and independent acts inflicting new and accumulating injuries on plaintiffs within the limitations period. Because plaintiffs' allegations regarding defendants' compensation and charge back policies seek to hold defendants liable for conduct and representations that began outside of the limitations period and simply continued within the limitations period, these allegations are time-barred.

According to plaintiffs, the new and independent predicate acts that have occurred since July 1995 include: (1) by interstate wire and United States mail, defendants have unlawfully taken money from plaintiffs' accounts electronically pursuant to the unlawful charge back and instant credit policies; and (2) defendants have directed staff to use the United States mail and interstate wires to misrepresent the legality of the charge back policy to different plaintiffs and sales consultants on numerous occasions. *See* Amended Opposition at 24. If defendants have illegally undercompensated plaintiffs through their compensation and charge back policies within the limitations period, these acts are not new and independent, but simply the result of defendants' continued implementation of their policies which began outside of the limitations period.[FN5] With respect to plaintiffs' allegation that defendants have continued to make fraudulent misrepresentations about the legality of the charge back policy to different plaintiffs and sales consultants, the Court finds that plaintiffs have failed to demonstrate that these misrepresentations are "new and independent" acts. Defendants' alleged misrepresentations as to the legality of the charge back policy are not "independent" acts but are simply reaffirmations of previous representations about the legality of the policy. *See* DSUF ¶ 30; PRSUF ¶ 30.

> FN5. If plaintiffs are alleging that defendants illegally took money from plaintiffs' bank accounts, *see* TAC ¶ 26 (alleging that defendants illegally withdrew funds from plaintiffs' bank accounts), plaintiffs have not provided any evidence to support this allegation.

Plaintiffs' also claim to have suffered new and independent injuries within the limitations period including: (1) the unlawful deduction of wages in the form of commission charge backs for delinquent accounts; and (2) WCBS' unlawful deduction of wages to cover half the balance of invoices of delinquent instant credit customers. Again, however, the Court finds that the fact that plaintiffs have continued to suffer loss of income due to defendants' policies within the limitations period does not impose "new" and accumulating injuries sufficient to restart the statute of limitations. In *In re Merrill Lynch Limited Partnerships Litigation*, 154 F.3d 56 (2d Cir.1998), the Second Circuit held that the dissemination of misleading reports and the collection of annual fees relating to investments in limited partnerships, claimed to be fraudulent at their inception, did not constitute new and separate acts of wrongdoing triggering a new limitations period. Where the defendant's scheme was fraudulent at the outset, the later communications were simply efforts to conceal the initial fraud and continued collection of fees could not be viewed as a separate and distinct instances of fraud creating new injuries. *Id.* at 59-60.[FN6] Likewise, in this case defendants' conduct is alleged to have been fraudulent at the outset and plaintiffs have continually suffered the loss of compensation due to the commission and instant credit policies. The same injuries resulting from the same policies continuing into the limitations period are not "new and independent" so as to be saved by the separate accrual rule.

> FN6. In *Merrill Lynch*, the Second Circuit distinguished *Bingham v. Zolt*, 66 F.3d 553, 559-61 (2d Cir.1995), relied on by plaintiffs

here, as limited to situations where the injury falling within the limitations period was new and independent from the type of injury sustained within the limitations period. The Court also noted that the new injuries in *Bingham* were caused by a variety of schemes which were related only in their ultimate goal. *Merrill Lynch*, 154 F.3d at 59. In this case, the injuries flowing from defendants' commission and instant credit policies are neither new nor independent of the initial injuries suffered by the plaintiffs outside of the limitations period and are the result of the continued implementation of those policies. For these reasons, plaintiff's reliance on *Annilli v. Panikkar*, 200 F.3d 189 (3d Cir.1999) is also misplaced. In *Annilli*, the plaintiff suffered a new and distinct type of injury within the limitations period, as a result of the conspiracy that began outside of the limitations period. *Id.* at 197-98.

***8** Ninth Circuit case law discussing the separate accrual rule under the Clayton Act also supports the Court's determination. In *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979), the plaintiff accused car manufacturers of violating the Clayton Act because they all agreed not to purchase the plaintiff's engine emission control devices. By 1964, all manufacturers had refused to buy the plaintiff's device. The plaintiff claimed it suffered a new injury because another company refused to use its device in 1965. The court held that the plaintiff had been injured in 1964 when the car manufacturers' "irrevocable, immutable, permanent, and final" decision was made. *Id.* at 72. A subsequent refusal did not create a new actionable injury. *Id. See also Pilkington v. United Airlines*, 112 F.3d 1532, 1537-38 (11th Cir.1997) (injuries resulting from acts of harassment within limitations period were not new and independent from injuries suffered from harassment occurring outside of limitations period; injuries were merely recharacterizations and continuations of the same injuries suffered as a result of defendants' acts outside of limitations period).

Allowing these plaintiffs to sit on their RICO causes of action for injuries sustained under defendants' commission policy since 1986 and the instant credit policy since the early 1990s, and then revive their cause of action simply because defendants made continuing identical representations as to the policies' legality and continued to implement the policies within the limitations period would not serve RICO's purpose to reward plaintiffs who "swiftly" undertake litigation to eliminate RICO activity for the public good. *See Rotella*, 528 U.S. at 559.[FN7] For these reasons, the Court finds that plaintiffs allegations regarding the commission and instant credit policies are time-barred and are not saved by the separate accrual rule.

FN7. Whether plaintiffs discovered the fraudulent nature of defendants' misrepresentations about the commission policy's legality only in 1999 is irrelevant to this determination. While "[e]quitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases," *Grimmett*, 75 F.3d at 514, in the March 3, 2000 Order, the Court noted that plaintiffs' TAC failed to include any allegations that would support an equitable tolling theory. The Court advised plaintiffs that if they sought to pursue their equitable tolling theory further, amendment of the complaint would be necessary. *See* March 3, 2000 Order at 13-14, n. 8. Plaintiffs did not seek leave to amend the complaint.

The result, however, is different when considering the Matrix Bonus Bucks scheme. Plaintiffs allege that defendants have, within the limitations period and by interstate wire, directed plaintiffs to file fraudulent tax documents claiming as income Matrix Bonus Bucks merchandise they did not receive. The Matrix Bonus Bucks scheme, plaintiffs assert, occurred during 1996-97 and 1997-98, when WCBS added "points" to the Matrix redemption certificates so that WCBS could claim merchandise from the program. *See* PSDF ¶¶ 40, 49.[FN8] These acts, plaintiffs allege, are separate and independent of the predicate acts engaged in outside of the limitations period. Plaintiffs also assert that these acts led to new and independent injuries because at least two plaintiffs, Hardy and Wetzel, suffered adverse tax consequences as a result of the Matrix Bonus Bucks scheme. The Court finds that the Matrix scheme encompasses a new and independent act on behalf of WCBS that allegedly inflicted new and distinct injuries on plaintiffs sufficient to come within the separate accrual rule.

FN8. Neither the plaintiffs nor the defendants

provided the specific date when the Matrix Bonus Bucks program began.

***9** In sum, with the exception of the acts and injuries alleged as part of the Matrix Bonus Bucks scheme, the Court finds that plaintiffs' RICO causes of action are time-barred.

B. Injury

With regard to the Matrix Bonus Bucks scheme, defendants argue that plaintiffs have failed to demonstrate that Hardy and Wetzel suffered injury as a result of any mail fraud or wire fraud related to the Matrix Bonus Bucks schemes. *See* DSUF 54. RICO creates a civil cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). In order to maintain a cause of action under RICO, a plaintiff must show a causal connection between the alleged RICO conduct and the asserted injury. *Forsyth v. Humana, Inc.*, 114 F.3d at 1481. A showing of injury also requires proof of concrete financial loss. *Id.* (citing *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir.1992)).

Plaintiff Hardy declares that she received a 1099 form from Matrix that included the value of merchandise received by WCBS in addition to merchandise received by Hardy. Hardy does not specify the amount of income on the 1099 attributable to WCBS, but states that "most" of the income reflected on the 1099 was for items received by WCBS. *See* Hardy Decl. ¶ 2. Hardy also declares that she gave her tax preparer the Matrix 1099s she received, that the 1099 income amounts were added to her gross income for 1996 and 1997, and that she paid taxes on the gross income. *Id.* ¶ 3. This declaration, however, contradicts Hardy's deposition testimony. In her deposition, Hardy declared that she never received a 1099 from Matrix that reflected an amount greater than the value of items she received from Matrix. *See* Geidt Reply Decl., Exh. 3 at 194. In the declaration drafted subsequent to her deposition testimony, Hardy does not explain the inconsistency between her deposition testimony and the declaration. Nor have plaintiffs included copies of Hardy's 1099s or tax returns in the record.

Plaintiff Wetzel declares that she received inflated 1099 forms from Matrix that included the value of merchandise received by WCBS in addition to merchandise received by Wetzel. Wetzel Decl. ¶ 3. Wetzel does not specify how much of the income on her 1099 forms is attributable to WCBS, but states that "most" of the income reflected on the inflated 1099s was for items received by WCBS. *Id* . Wetzel also declares that in 1996 and 1997 she gave her tax accountant the 1099s she received from Matrix. Wetzel states that the amounts on the 1099s were included as part of her gross income and that she paid taxes on that gross income. *Id.* ¶ 6. In her deposition, however, Wetzel denied that she had ever contacted her tax examiner to determine whether she suffered any negative tax consequences as a result of receiving the 1099s from Matrix. *See* Geidt Reply Decl., Exh. 4 at 89, 90. Wetzel's 1996 and 1998 Matrix 1099s are the only documents regarding tax liability that have been included in the record before the Court. *See* Geidt Reply Decl., Exh. 4 at 90; Wetzel Decl. ¶ 7. Wetzel, however, does not indicate whether she claimed the 1998 Matrix 1099 on her 1998 taxes.

***10** Neither plaintiff has provided any indication of the exact or approximate amount of income attributable to WCBS claimed on their taxes. Moreover, neither plaintiff has provided copies of her tax returns from the years at issue to demonstrate that she actually incurred tax liability due to the portions of income only attributable to WCBS.[FN9] Without direct evidence that the plaintiffs actually incurred and paid higher tax liability, defendants argue that plaintiffs cannot demonstrate an injury to support their RICO allegations.[FN10] The Court agrees. It was plaintiffs' burden to raise a material question of fact on whether plaintiffs suffered actual injuries and sustained concrete financial losses, yet there is no evidence in the record to demonstrate that Hardy and Wetzel suffered a concrete financial loss or the amount of that loss. *See Forsyth*, 114 F.3d at 1481. Plaintiffs, therefore, have failed to raise a genuine issue of material fact to survive summary judgment with respect to the Matrix Bonus Bucks scheme.

FN9. If plaintiffs claimed income from inflated 1099s on their tax returns for certain years, plaintiffs would not have necessarily been subject to increased tax liability. Plaintiffs' potential tax liability would depend on the amount of inflated 1099s income combined with plaintiffs' other sources of income.

> FN10. Without an injury caused by an overt act of racketeering, plaintiffs cannot maintain a cause of action for civil conspiracy under RICO. *See, e.g.*, *Beck v. Prupis*, 529 U.S. 494, 500, 505 (2000).

III. State Law Claims

As the Court has granted defendants' motion for partial summary judgment on plaintiffs' RICO claims, there is no remaining basis for original federal jurisdiction, and the Court declines to exercise supplemental jurisdiction over the remaining state law claims. They will be dismissed without prejudice to their continuation in state court.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiffs' request to compel the production of the November 1981 letter [docket # 164]; GRANTS in part and DENIES in part defendants' motion to strike portions of plaintiffs' declarations submitted in support of plaintiffs' opposition to defendants' motion for partial summary judgment [docket # 176]; and GRANTS defendants' motion for partial summary judgment on the RICO claims [docket # 114]. The state law claims are DISMISSED without prejudice.

IT IS SO ORDERED.

N.D.Cal.,2001.
Sasser v. Amen
Not Reported in F.Supp.2d, 2001 WL 764953 (N.D.Cal.), RICO Bus.Disp.Guide 10,108

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