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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUSSEX FINANCIAL ENTERPRISES, INC.,)	Case No. 08-4791 SC
)	
Plaintiff,)	ORDER GRANTING MOTION
)	<u>TO DISMISS</u>
vs.)	
)	
BAYERISCHE HYPO-UND VEREINSBANK AG, a/k/a HYPOVEREINSBANK; HVB RISK MANAGEMENT PRODUCTS, INC.; HVB U.S. FINANCE, INC., f/k/a HVB STRUCTURED FINANCE, INC.; and DOES 1-100, inclusive,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

In this matter, Plaintiff Sussex Financial Enterprises, Inc. ("Sussex"), alleges that Defendants Bayerische Hypo-Und Vereinsbank AG, et al. (collectively, "HVB") committed fraud in connection with the promotion and execution of a tax shelter scheme, and that HVB further violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). See First Amended Complaint ("FAC"), Docket No. 48. This matter comes before the Court on the Motion to Dismiss Plaintiff's RICO Claim or, in the Alternative, to Strike ("Motion") filed by HVB. Docket No. 49. Sussex has filed an Opposition, and HVB filed a Reply. Docket Nos. 56, 59.

1 Sussex also filed a Sur Reply.¹ Docket No. 61. Having considered
2 all of the pleadings submitted by both parties, the Court GRANTS
3 HVB's Motion. Sussex's RICO claim is DISMISSED WITH LEAVE TO
4 AMEND.

5
6 **II. BACKGROUND**

7 According to the FAC, this action concerns a finance program
8 known as Custom Adjustable Rate Debt transactions, or "CARDS."
9 FAC ¶ 6. Under the program, HVB issued loans to limited liability
10 companies set up for the purpose of receiving these loans, and
11 clients of Sussex subsequently became jointly and severally liable
12 on the loans in return for receiving fifteen percent of the loan
13 amount.² Id. Sussex's clients paid it investment banking fees
14 for the CARDS transactions, and Sussex paid HVB loan origination
15 fees. Id. Participation in the transactions was supposed to
16 result in tax benefits for the clients. Id. ¶ 9. In order for
17 the clients to receive those tax benefits, the loans were supposed
18 to be set up and funded in separate accounts in the year in which
19 the loans were made, and all parties to the loans had to have the
20 intent of renewing the loans for thirty years. Id. ¶¶ 11, 15. In
21 spite of the purported long-term nature of the loans, HVB had the
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23 ¹ In a letter attached to the Sur Reply, Sussex submitted a
24 request for permission to file the Sur Reply. Docket No. 60. The
25 Court hereby GRANTS this request. HVB's Motion to Strike
Plaintiff's Sur Reply, Docket No. 63, is DENIED.

26 ² Sussex Financial Enterprises, Inc., was formerly known as
27 Chenery Associates, Inc. Compl. ¶ 3. For the sake of simplicity,
28 the Court will refer to the entity as "Sussex" throughout this
Order.

1 right to not renew the loans at the end of each reset period
2 (which lasted approximately one year), thereby recalling the
3 entire balance of the loan, as long as it had a legitimate
4 business reason for doing so. Id. ¶¶ 12-13.

5 HVB did not renew some of the loans after the first reset
6 period. Id. ¶ 18. In fact, HVB never possessed the requisite
7 intent to allow the loans to remain in effect for thirty years,
8 thereby rendering the purported tax benefits associated with the
9 loans inapplicable. Id. ¶ 23. In addition, Sussex claims that
10 HVB failed to set up the loans in separate accounts in the year in
11 which they were made, and falsely represented that they had done
12 so. Id. ¶¶ 16-17. Sussex claims that it learned of these false
13 representations when HVB entered into a Deferred Prosecution
14 Agreement with the U.S. Department of Justice on February 14,
15 2006. Id. ¶¶ 17, 23; see also Docket No. 46 Ex. A ("DPA").

16 In the DPA, HVB stated that:

17 HVB admits and accepts that . . . through the
18 conduct of certain HVB employees, during the period
19 from 1996 through 2003 HVB assisted high net worth
20 United States citizens to evade United States
21 individual income taxes on over \$1.8 billion in
22 capital gain and ordinary income by participating
23 in and implementing fraudulent tax shelter
24 transactions, including . . . CARDS HVB
25 personnel engaged in conduct that was unlawful and
26 fraudulent, including: (i) agreeing to participate
27 in fraudulent tax shelter transactions; and (ii)
28 preparing and signing false and fraudulent factual
recitations, representations, and documents as part
of the documentation underlying the shelters.

25 DPA ¶ 2.

26 In the "Statement of Admitted Facts" that was attached to the
27 DPA, HVB stated that CARDS involved "loans with a purported 30-

1 year term, when all parties involved, including the
2 clients/'borrowers,' knew that the transactions would be unwound
3 in approximately one year in order to generate the phony tax
4 benefits sought by the client participants." DPA Ex. A ¶ 19.

5 By way of background, the Court notes that the CARDS scheme
6 has been the subject of a number of lawsuits against HVB. See
7 Rezner v. Bayerische Hypo-Und Vereinsbank AG, No. 06-2064 (N.D.
8 Cal. May 15, 2009) (order granting consent judgment); Gustashaw v.
9 Bayerische Hypo-Und Vereinsbank AG, No. 08-3479 (N.D. Cal. May 5,
10 2009) (order denying motion to dismiss); Curtis Inv. Co., LLC v.
11 Bayerische Hypo-Und Vereinsbank AG, No. 06-2752, 2007 U.S. Dist.
12 LEXIS 94012 (N.D. Ga. Dec. 20, 2007), aff'd per curiam, No. 14401,
13 2009 U.S. App. LEXIS 17469 (11th Cir. Aug. 5, 2009) (order
14 granting motion to dismiss). Complaints in some of these cases
15 have also implicated Sussex in the fraudulent CARDS scheme. See,
16 e.g., Compl. ¶ 15, Gustashaw, No. 08-3479, Docket No. 1 (July 18,
17 2008). As the Eleventh Circuit has recently noted, "[t]he IRS
18 said that unwinding the transaction after only one year was a part
19 of a plan that was well-understood by all of the participants."
20 Curtis, 2009 U.S. App. LEXIS 17469 at *6-7. However, the current
21 suit addresses only the alleged fraud committed by HVB as to
22 Sussex, and the only issues now before the Court are those raised
23 by the FAC.³

24 Sussex contends that HVB's intention to recall the loan after
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26 ³ In particular, the Court notes that there is insufficient
27 evidence before it to conclude that Sussex or its clients were
28 complicit in the fraud at the motion-to-dismiss stage.

1 only one year, and its failure to undertake all of the steps
2 necessary to put the loans into effect, remained hidden from
3 Sussex until HVB entered into the DPA. Compl. ¶¶ 17, 23. It
4 claims that it relied upon the false representations of HVB, and
5 paid approximately \$4,051,355 in loan origination fees to HVB,
6 which it would not have paid if it had known of HVB's true
7 intentions. Id. ¶ 24. It also claims to have been exposed to
8 damages and attorney fees as a result of lawsuits filed by its
9 former clients, "but does not yet know the amount." Id. ¶ 25.

10 In the FAC, Sussex asserts three causes of action: (1) fraud
11 for failing to properly fund the loans; (2) fraud for failing to
12 have the intent to renew the loans; and (3) violations of RICO, 18
13 U.S.C. §§ 1961 et seq., based on predicate acts of mail and wire
14 fraud. Id. ¶¶ 26-43. HVB has moved to dismiss the RICO claim.

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16 **III. LEGAL STANDARD**

17 A motion to dismiss under Federal Rule of Civil Procedure
18 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
19 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
20 on the lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory.
22 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
23 1990). Allegations of material fact are taken as true and
24 construed in the light most favorable to the nonmoving party.
25 Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.
26 1996). However, the court need not accept as true legal
27 conclusions couched as factual allegations. Ashcroft v. Iqbal,

1 129 S.Ct. 1937, 1949-50 (2009). "Threadbare recitals of the
2 elements of a cause of action, supported by mere conclusory
3 statements, do not suffice." Id. at 1949. With regard to well-
4 pleaded factual allegations, the court should assume their truth,
5 but a motion to dismiss should be granted if the plaintiff fails
6 to proffer "enough facts to state a claim for relief that is
7 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
8 547 (2007).

9 When a plaintiff asserts a claim for fraud, including claims
10 brought under RICO that are predicated on fraud, the plaintiff
11 must plead its claims with particularity as required by Rule 9(b)
12 of the Federal Rules of Civil Procedure. See Edwards v. Marin
13 Park, Inc., 356 F.3d 1058, 1065-66 (9th Cir. 2004). Such claims
14 "must state precisely the time, place, and nature of the
15 misleading statements, misrepresentations, and specific acts of
16 fraud." Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994). This
17 means that Plaintiffs must include "the who, what, when, where,
18 and how" of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d
19 1097, 1106 (9th Cir. 2003) (citations omitted).

20 Rule 9(b) serves not only to give notice to
21 defendants of the specific fraudulent conduct
22 against which they must defend, but also to deter
23 the filing of complaints as a pretext for the
24 discovery of unknown wrongs, to protect
25 [defendants] from the harm that comes from being
subject to fraud charges, and to prohibit
plaintiffs from unilaterally imposing upon the
court, the parties and society enormous social and
economic costs absent some factual basis.

26 Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001)
27 (quoting In re Stac Elec. Sec. Litig., 89 F.3d 1399, 1405 (9th
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1 Cir. 1996) (brackets in Bly-Magee).

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3 **IV. DISCUSSION**

4 HVB's Motion is based on several arguments for dismissal of
5 Sussex's RICO claim. HVB asserts that the claim (1) is barred by
6 RICO's four-year statute of limitations; (2) is barred by the
7 Private Securities Litigation Reform Act ("PSLRA"); (3) fails
8 because Sussex lacks standing to assert a RICO cause of action;
9 and (4) fails to plead a RICO claim with sufficient particularity
10 and fails to plead the requisite "continuity" of the purported
11 pattern of racketeering. Mot. at 2. For the reasons described
12 below, the Court finds that the third argument -- i.e., failure to
13 plead with particularity -- is sufficiently strong to warrant
14 dismissal, and that dismissal must be without prejudice.

15 **A. Statute of Limitations**

16 HVB claims that Sussex's RICO claims are time barred. Id. at
17 6. Although RICO does not explicitly specify a statute of
18 limitations, the Supreme Court has concluded that "the federal
19 policies that lie behind RICO and the practicalities of RICO
20 litigation make the selection of the 4-year statute of limitations
21 for Clayton Act actions, 15 U. S. C. § 15b, the most appropriate
22 limitations period for RICO actions." Agency Holding Corp. v.
23 Malley-Duff & Associates, Inc., 483 U.S. 143, 156 (1987). In the
24 Ninth Circuit, the "injury discovery" rule determines when the
25 statute of limitations begins to run, meaning that "the civil RICO
26 limitations period begins to run when a plaintiff knows or should
27 know of the injury that underlies his cause of action." Grimmett

1 v. Brown, 75 F.3d 506, 511 (9th Cir. 1996). In addition, a claim
2 may be dismissed pursuant to a statute of limitations only when
3 "the running of the statute is apparent on the face of the
4 complaint." Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th
5 Cir. 2006).

6 The parties here disagree as to when Sussex became aware of
7 its injury. HVB claims that, according to the FAC, "the benefits
8 of the CARDS transaction were 'eliminated' the moment HVB
9 terminated the CARDS loans." Mot. at 7. HVB uses this to argue
10 that Sussex was aware of the injury no later than October 2001,
11 when (according to the FAC) Sussex first learned that HVB would
12 not be renewing some of the CARDS loans. HVB argues that the
13 statute began to run in 2001, and therefore expired in 2005, years
14 before Sussex filed this suit in 2008.

15 The Court does not agree with HVB's reading of the FAC -- at
16 least not at this stage of the litigation, where it must be
17 "construed in the light most favorable to the nonmoving party."
18 Cahill, 80 F.3d at 337-38. This is because, according to the FAC,
19 the key feature of the CARDS transactions that enabled certain tax
20 benefits was the "intention" that the loans remain outstanding for
21 thirty years, rather than the actual amount of time that the loans
22 remained outstanding. FAC ¶ 10. According to the FAC, Sussex did
23 not discover until 2006 that HVB initially lacked the intent to
24 renew the loans. Id. ¶ 23. The FAC provides no additional facts
25 that would have put Sussex on notice that it had been injured
26 (i.e., that the tax benefits would not occur) before this time.

27 A complete statute of limitations defense does not appear on
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1 the face of the FAC.⁴ The Court is quite willing to revisit the
2 statute of limitations issue at a later time, particularly if
3 evidence comes to light that Sussex was aware of facts that would
4 have rendered HVB's actions fraudulent prior to the DPA.

5 **B. Whether the Claim is Barred by the PSLRA**

6 Under 18 U.S.C. § 1964(c), which was amended by the PSLRA, a
7 plaintiff asserting a RICO claim may not "rely upon any conduct
8 that would have been actionable as fraud in the purchase or sale
9 of securities" HVB points out that the FAC makes
10 reference to one of HVB's programs, called "BLIPS," which also
11 served as a basis for the DPA, and which the Ninth Circuit has
12 held, in other contexts, to be actionable as securities fraud.
13 Mot. at 10-11 (citing FAC ¶¶ 39-41; Swartz v. KPMG, LCC, 476 F.3d
14 756, 761 (9th Cir. 2007)). Sussex responds by pointing out that
15 CARDS alone is the basis for its damages, that it cannot bring any
16 claims under BLIPS, and that it is not now bringing a claim for
17 the purchase or sale of securities related to BLIPS. Opp'n at 5-
18 6.

19 HVB initially raised this objection when Sussex sought leave
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21 ⁴ HVB cites Curtis, a recent decision of the Northern District
22 of Georgia involving HVB's CARDS scheme, in which the court found
23 that the RICO claim of a plaintiff (apparently a client of Sussex)
24 was barred by the statute of limitations. Mot. at 7-8. However,
25 the complaint in Curtis is not the complaint that is before this
26 Court, and the current question is whether a defense appears on the
27 face of the FAC. The court in Curtis found that "Curtis alleges
28 that early repayment destroyed the benefits it anticipated from the
CARDS arrangement." 2007 U.S. Dist. LEXIS 94012 at *31. In
contrast, Sussex has identified critical passages of the FAC that
demonstrate that the key benefit from the transaction may not have
been destroyed by recalling the loans, as long as HVB possessed the
intent to renew when it entered the transaction. FAC ¶¶ 10-11.

1 to amend its complaint to include a RICO claim, and the Court then
2 ruled that "both the Complaint and the Proposed FAC focus on the
3 CARDS program. It is not clear to the Court that the CARDS
4 program involved the purchase or sale of securities." Docket No.
5 47 ("July 1 Order") at 4. This remains true. At present, the
6 Court does not read the FAC to include BLIPS as a predicate act,⁵
7 and thus Sussex is not "relying" on BLIPS to establish a violation
8 of RICO. HVB has not made any further attempt to convince the
9 Court that CARDS involved the purchase or sale of securities.

10 **C. Whether Sussex Has Standing to Pursue a RICO Claim**

11 HVB claims that Sussex lacks standing to bring its RICO
12 claim. Mot. at 15-21. In particular, it claims that Sussex
13 failed to establish that HVB's conduct was a proximate cause of
14 Sussex's injury. Id. "To have standing under § 1964(c), a civil
15 RICO plaintiff must show: (1) that his alleged harm qualifies as
16 injury to his business or property; and (2) that his harm was 'by
17 reason of' the RICO violation, which requires the plaintiff to
18 establish proximate causation." Canyon County v. Syngenta Seeds,
19 Inc., 519 F.3d 969, 972 (9th Cir. 2008).

20 Sussex is claiming that it was injured because it paid to HVB
21 loan origination fees in the amount of \$4,051,355 for CARDS
22 transactions. FAC ¶ 24. According to Sussex, these were "fees

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24 ⁵ Sussex has also urged the Court to adopt this reading. It
25 has stated that it may bring "evidence of [HVB's] actions regarding
26 BLIPS as relevant to proving the wrongdoing in CARDS. That is,
27 indeed, all plaintiff is trying to do in its recitation of HVB's
28 conduct regarding BLIPS." Opp'n at 7. If this is the case, then
of course, Sussex cannot rely on BLIPS activities as predicate
acts, for example, to demonstrate that HVB's activities extended
beyond a one-year period. See Part IV.D., infra.

1 obtained by fraud." Opp'n at 14. Although the FAC also lists a
2 number of other injuries that were suffered by its clients (i.e.,
3 the profitability or tax benefits from the CARDS transactions),
4 the injury that Sussex is claiming appears to be based upon the
5 simple payment of money from Sussex to HVB, predicated on
6 fraudulent statements made by HVB directly to Sussex (or so this
7 Court now assumes). Based solely on the FAC, this injury is not
8 necessarily derived from any injury suffered by Sussex's clients,
9 or by any other party.⁶ Consequently, Sussex can point to direct
10 harm that is distinct from the harm that was suffered from its
11 clients, or by the United States Government, as a result of HVB's
12 fraud.⁷ This is therefore not an appropriate case to apply the
13 tests and inquiries cited by HVB, which are designed to determine
14 whether a particular harm is proximate enough to confer RICO
15 standing. See, e.g., Holmes v. Sec. Investor Prot. Corp., 503

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17 ⁶ The Court notes that Sussex "received investment banking
18 fees for the CARDS transactions from the clients and in turn paid
19 [HVB] loan origination fees for loans ostensibly made by [HVB] to
20 the clients." FAC ¶ 6. This could be read to suggest that Sussex
21 is asserting damages that are based solely on fees received from
22 its clients, which it would not have received in the first place
23 but for HVB's fraud. Although the Court finds this to be a very
24 strong inference, it remains a mere inference, and the FAC leaves
some room for concluding that Sussex was in fact made worse off by
HVB's fraud. It would therefore be inappropriate to conclude at
this stage that Sussex lacks standing to pursue its RICO claim. If
HVB can later show that Sussex's injury was, in fact, wholly
derived from fees paid by Sussex's clients, or that Sussex was not
made worse off by HVB's fraud, then this could substantially impair
Sussex's ability to establish damages.

25 ⁷ In addition, the parties have not yet briefed, and this
26 Court does not reach, the issue of whether the legal fees and
27 damages that arise from the lawsuits filed by Sussex's previous
28 clients were proximately caused by HVB's fraud. This claim for
relief could potentially provide Sussex with a separate basis for
standing.

1 U.S. 258 (1992) (plaintiff's purported injury was based on
2 reimbursement to direct victims of RICO violation); Sybersound
3 Records, Inc. v. UAV Corp., 517 F.3d 1137 (2008) (plaintiff's
4 purported injury was based on unfair competition involving
5 infringement of copyrights held by others). These tests are
6 designed for situations in which a purported injury is derivative
7 of injuries to another party. As articulated by the FAC, this
8 suit does not involve derivative or passed-on harm. Rather,
9 Sussex claims that it was a direct victim that suffered a unique
10 harm.⁸

11 **D. Whether the FAC Pleads a RICO Claim With the Requisite**
12 **Particularity**

13 When Sussex requested leave to amend its original Complaint,
14 this Court briefly addressed the issue of the FAC's sufficiency.
15 July 1 Order at 4. At that time, the Court concluded that "HVB
16 can prepare an adequate response to the RICO cause of action based
17 on the allegations in the Proposed FAC relating to HVB's allegedly
18 fraudulent involvement in the CARDS program." Id. at 5. The
19 Court now revisits this issue in the context of HVB's Motion to
20 Dismiss. The Court finds that HVB has identified several key
21 defects with the FAC.

22 HVB points out that the FAC does not specify precisely how
23

24 ⁸ Although the Court now rejects HVB's attempt to argue that
25 Sussex lacks standing because it was itself a coconspirator, see
26 Mot. at 20, the Court does so only because there is insufficient
27 evidence to establish this allegation upon a motion to dismiss. If
28 it turns out that Sussex was in fact a coconspirator, then HVB may
have recourse to other remedies for pursuing a suit without
sufficient factual basis.

1 HVB "agreed to participate" in the CARDS program, or how it
2 communicated that it would not "renew" the loans. Mot. at 15.
3 Indeed, the FAC does not identify any specific meeting or
4 document, and does not identify a single phone conversation or
5 wired communication. As much of the FAC hinges on HVB's
6 fraudulent portrayal of its "intent" to renew the loans under the
7 CARDS program for thirty years, the Court finds it particularly
8 problematic that the FAC never once suggests "the who, what, when,
9 where, and how" of the communication of this "intent" to Sussex.
10 C.f. Vess, 317 F.3d at 1106. Although Sussex can point to the DPA
11 as convincing evidence that HVB has committed fraud, it does not
12 establish conclusively that HVB committed this fraud upon Sussex.
13 The Court will not read the DPA as a waiver of the pleading
14 requirements of Rule 9(b) for all parties who were connected with
15 the activities covered by the DPA. Even in these circumstances,
16 Rule 9(b) requires Sussex to establish, with particularity, the
17 factual basis for concluding that fraud was plausibly committed
18 upon it, before it "unilaterally impos[es] upon the court, the
19 parties and society" the costs of pursuing this fraud claim. See
20 Bly-Magee, 236 F.3d at 1018. Presumably, Sussex is familiar
21 enough with the facts underlying its allegations to cure this
22 defect with minimal cost or effort.

23 HVB also argues that Sussex fails to allege a "pattern" of
24 racketeering activity because the pattern is not "continuous"
25 enough; i.e., it does not extend over "a substantial period of
26 time." Mot. at 12 (citing H.J. Inc. v. Northwestern Bell Tel.
27 Co., 492 U.S. 229, 242 (1989)). HVB cites Religious Technology

1 Center v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir. 1992), and
2 claims that Sussex must plead predicate acts that take place over
3 a period of not less than twelve months in order to constitute a
4 pattern lasting a "substantial period of time." Id. HVB would
5 read the FAC as alleging conduct lasting for about a year,
6 beginning in October of 2000 (when HVB "agreed to participate as a
7 lender to clients of [Sussex] in" CARDS) and ending in October of
8 2001 (when HVB "decided not to renew some of the loans"). Id. at
9 12-13 (citing FAC ¶¶ 6, 18). Should HVB amend the FAC, it can and
10 should specify, to the best of its ability, the temporal
11 boundaries of the predicate acts that underlie its RICO claims.
12 If, in good faith, Sussex does not possess enough information to
13 specify when the predicate acts began or ended, and must rely on
14 the DPA for its inference that CARDS "continued over a course of
15 years," FAC ¶ 41, then it should do so explicitly. Sussex may not
16 plead that the predicate acts took place over the required
17 "substantial period of time" by conclusory allegations alone.
18 Based on these deficiencies, the Court GRANTS Defendants' Motion
19 WITH LEAVE TO AMEND.

20 **E. Motion to Strike**

21 HVB has requested that the Court strike paragraph 25 of the
22 FAC, as well as Sussex's fourth prayer for relief. Mot. at 21-22.
23 In these sections, Sussex states:

24 As a result of Defendants [sic] actions, Plaintiff
25 has been sued by a number of Clients and incurred
26 expenses, including attorney fees in as yet an
27 unknown amount. Plaintiff is also exposed to
28 damages as a result of said lawsuits but does not
yet know the amount and prays leave to amend when
such amounts are determined.

1 FAC ¶ 25.

2 Sussex then prays for "the costs of defending lawsuits by
3 Clients and for any damages Plaintiff has to pay as a result of
4 said lawsuits that was caused by Defendants' fraudulent acts."
5 FAC at 13. HVB points out that prospective or future contingent
6 damages are not actionable under RICO. Mot. at 22 (citing Walter
7 v. Palisades Collection, LLC, 480 F. Supp. 2d 797, 804 (E.D. Pa.
8 2007)). In response, Sussex insists only that it has a right to
9 recover fees incurred in cases that are certain at the time of
10 trial. Opp'n at 18 (also citing Walter, 480 F. Supp. 2d at 804).
11 The Court agrees -- Sussex can recover prior expenses that can be
12 proven by the time of trial. See Burger v. Kuimelis, 325 F. Supp.
13 2d 1026, 1036 (N.D. Cal. 2004). Sussex is granted leave to amend
14 the FAC; if it chooses to do so, it must clearly state in any
15 prayer for litigation expenses that it is seeking only expenses or
16 costs that it can establish as a certainty by the time of trial,
17 excluding those barred by the statute of limitations.

18
19 **V. CONCLUSION**

20 This Court concludes that, as alleged, the RICO claim is not
21 barred on its face by the statute of limitations, nor is it
22 precluded by the PSLRA. The FAC also sufficiently alleges a basis
23 for standing. However, the FAC fails to plead fraud with
24 sufficient particularity. Sussex's third cause of action for
25 violation of the Racketeer Influenced and Corrupt Organizations
26 Act is therefore DISMISSED WITH LEAVE TO AMEND. As certain issues
27 raised in this Order may relate to Sussex's first and second

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causes of action for fraud, Sussex also has leave to amend these causes of action. If Sussex chooses to amend its complaint, Sussex may file an amended complaint no later than thirty (30) days from the date of this Order.

IT IS SO ORDERED.

Dated: September 23, 2009


UNITED STATES DISTRICT JUDGE