

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HART ENTERPRISES, INC.,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 98-416-P-H
)	
CHESHIRE SANITATION, INC., et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS
COUNTS III AND VII**

The defendants, Cheshire Sanitation, Inc. (“Cheshire”) and United Waste Systems, Inc. (“United”), move to dismiss counts III and VII of the plaintiff’s complaint in this action that has been removed to this court from the Maine Superior Court (Androscoggin County). I recommend that the court deny the motion as to count III and grant it as to count VII.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v.*

Faber, 834 F. Supp. 471, 473 (D. Me. 1993). Because one of the counts at issue involves a claim asserted under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.*, additional pleading requirements apply and will be set forth in connection with the discussion of that count.

II. Factual Background

Defendant Cheshire is a wholly-owned subsidiary of defendant United. Complaint (included in Docket No. 1) ¶ 3. On December 20, 1996 the plaintiff and Cheshire executed a written agreement pursuant to which Cheshire acquired substantially all of the assets of the plaintiff. *Id.* ¶¶ 4-5. The plaintiff was engaged in the business of collecting, hauling and disposing of commercial and residential solid waste. *Id.* ¶ 5. In the course of the acquisition, Cheshire took possession of all of the plaintiff’s business records. *Id.* ¶ 6.

On December 20, 1996 the plaintiff’s accounts receivable totalled \$270,662.99. *Id.* ¶ 8. The written agreement provided that Cheshire would collect the plaintiff’s accounts receivable for a period of 90 days and pay over the proceeds to the plaintiff. *Id.* After that 90-day period, the plaintiff would assume responsibility for collecting its remaining accounts receivable. *Id.* On March 20, 1997 Cheshire paid over to the plaintiff \$176,751.97 as the amount of accounts receivable collected during the previous 90 days. *Id.* ¶ 10. As of that date \$93,911.02 in accounts receivable for services performed by the plaintiff remained outstanding. *Id.*

After March 20, 1997 the plaintiff attempted to collect the remaining accounts receivable but has been able to collect only about \$1,600. *Id.* ¶ 11. Former customers owing the remaining amounts have refused to pay the plaintiff on the grounds that they have paid these amounts to

Cheshire. *Id.* After the March 20, 1997 accounting, Cheshire continued to receive and accept payments from the plaintiff's former customers on the plaintiff's accounts receivable but refused to remit them to the plaintiff. *Id.* ¶ 12. The plaintiff has made demand for payment over of these monies, for an aged listing of its receivables as required by the written agreement, and for an accounting, all of which Cheshire has refused to provide. *Id.* ¶ 15.

Cheshire was aided and directed in this activity by United. *Id.* ¶ 26. United also conspired with Cheshire "in the breach of Cheshire's duty to turn over property of [the plaintiff] coming into the possession of Cheshire." *Id.* ¶ 27. At all relevant times, Cheshire has acted under the direction and control of United with respect to the plaintiff's accounts receivable. *Id.* ¶ 36. Cheshire, acting under the control of United or aided and abetted by United, has converted money due and owing to the plaintiff. *Id.* ¶ 37. Since January 1, 1995 United has, either directly or through a subsidiary acting under its control, acquired the assets of more than 50 businesses engaged in solid waste hauling and disposal, in many cases on substantially the same terms as those included in the written agreement between the plaintiff and Cheshire. *Id.* ¶¶ 38-39.

On an undetermined number of occasions, United, directly or acting through a subsidiary, has collected money belonging to businesses it has acquired and diverted that money to its own use and benefit in essentially the same manner alleged to have occurred with the plaintiff. *Id.* ¶ 40. This "pattern of conduct" has been employed to convert the assets of two identified Maine businesses in addition to the plaintiff and one identified New York business. *Id.* ¶ 41. The conversion of the assets of the plaintiff and others was implemented in whole or in part "by means of mail and wire services." *Id.* ¶ 42. This conversion of money is a "racketeering activity" within the meaning of 18 U.S.C. § 1962.

III. Discussion

A. Count III

Count III of the complaint alleges that defendant United aided and abetted Cheshire's breach of its fiduciary duty to the plaintiff. The defendants contend that, as a matter of law, a party cannot be held liable for assisting another in violating the other's fiduciary duty, an equitable cause of action. Defendants' Motion to Dismiss (Docket No. 3) at 19-20. They correctly point out that the Law Court has not yet recognized a cause of action for aiding and abetting the breach of a fiduciary duty and has never cited section 874 of the Restatement (Second) of Torts, a comment to which does recognize such a cause of action. Defendants' Objection to Plaintiff's Rule 60(b) Motion, etc. ("Defendants' Objection") (Docket No. 6) at 9. They conclude that Maine law "does not support" the existence of such a cause of action. *Id.* at 10.

Of course, the Law Court has repeatedly adopted sections of the Restatement (Second) of Torts when presented with cases appropriately invoking them. Indeed, my own research has unearthed over 150 reported decisions in which the Law Court refers to the Restatement (Second) of Torts, only one of which includes a rejection of a section of the Restatement. *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1284 n.4 (Me. 1987) (discussing implicit rejection of § 313).

Section 874 of the Restatement provides: "One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."

Comment c to this section provides:

A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused. (See § 876.) The measure of his liability, however, may be

different from that of the fiduciary since he is responsible only for harm caused or profits that he himself has made from the transaction, and he is not necessarily liable for the profits that the fiduciary has made nor for those that he should have made.

Section 876 of the Restatement provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The Law Court has recognized a cause of action for aiding and abetting tortious conduct. *Barnes v. McGough*, 623 A.2d 144, 146 (Me. 1993) (defendants "substantially encouraged and assisted the tortious conduct" of others); *Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995) (describing cause of action approved in *McGough* as "aiding and abetting fraud"). At the very least, this constitutes adoption of section 876(b) of the Restatement.

The defendants offer no authority to support their argument that a party cannot be liable for aiding and abetting the "equitable tort" of breach of fiduciary duty, as opposed to other torts. Several jurisdictions have expressly adopted comment c to section 874. *E.g.*, *Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1115 (2d Cir. 1986) (New York law); *Lawyers Title Ins. Corp. v. United Am. Bank of Memphis*, 21 F.Supp.2d 785, 799 (W.D.Tenn. 1998). In light of the Law Court's decisions in *McGough* and *Zappia* and the lack of contrary authority offered by the defendants, I can only conclude that it is more likely than not that the Law Court will adopt comment c to section 874 when presented with an appropriate case. Accordingly, the defendants, or, more appropriately, defendant

United, are not entitled to dismissal of count III.

B. Count VII

Count VII of the complaint asserts that the alleged actions of both defendants constitute RICO violations. The defendants contend that the complaint fails to state a claim upon which relief may be granted because it fails to plead in sufficient detail the elements of such a claim by (i) failing to identify the manner in which RICO was allegedly violated; (ii) casting its allegations in vague and conclusory terms; (iii) failing adequately to allege racketeering activity; (iv) failing adequately to allege a pattern of racketeering activity; (v) failing to allege the existence of an enterprise; and (vi) failing adequately to allege the plaintiff's standing. In the alternative, the defendants argue that the pattern requirement of 18 U.S.C. § 1961(5) is unconstitutional as applied.

A private cause of action under RICO is created by 18 U.S.C. § 1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

Section 1962 provides, in relevant part:

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

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign

commerce.

18 U.S.C. § 1962(a) & (b). Conversion is not within the RICO definition of “racketeering activity.”

18 U.S.C. § 1961(1). Mail fraud, as defined in 18 U.S.C. § 1341, and wire fraud, as defined in 18 U.S.C. § 1343, are included in the definition. 18 U.S.C. § 1961(1). Finally, section 1961(5) provides that “‘pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”

1. Pleading requirements for a RICO claim. Under Fed. R. Civ. P. 9(b), a complainant alleging fraud must allege the circumstances constituting the fraud with particularity. “Rule 9(b) applies to civil RICO claims, including those based on mail and wire fraud.” *Cutler v. FDIC*, 781 F.Supp. 816, 818 (D. Me. 1992). The degree of specificity required in pleading RICO mail and wire fraud is the same as that required in general fraud and securities fraud cases. *New England Data Svcs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987). The complaint must specify the time, place and content of an alleged false representation and must include more than a general statement of the time frame during which alleged fraudulent representations were made, even when the information concerning the fraud is in the possession of the defendant. *Cutler*, 781 F. Supp. at 818. The First Circuit requires strict compliance with Rule 9(b). *E.g., Becher*, 829 F.2d at 290. “[T]o avert dismissal under Rule 12(b)(6), a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.” *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Wholly conclusory allegations do not meet the particularity requirement of

Rule 9(b). *Cutler*, 781 F. Supp. at 819.

2. *The manner in which RICO was allegedly violated.* 18 U.S.C. § 1962, in four subsections, provides four different types of actionable violations, two of which are quoted above. The complaint in this action fails to specify which subsection or subsections the defendant is alleged to have violated. That failure renders the complaint insufficient as a matter of law. *United Transp. Union v. Springfield Terminal Co.*, 869 F. Supp. 42, 48-49 (D. Me. 1994).¹

This insufficiency in the complaint does not necessarily require dismissal, however. In certain instances, a court may allow discovery and subsequent amendment. *Id.* at 49. “Allowing time for additional discovery is not necessary when it does not appear that a lack of specific information was the basis for the inadequate pleading.” *Id.* Here, the plaintiff states in its memorandum of law that its RICO claim is asserted under section 1962(c), Plaintiff’s Objection at 8, and requests, “[t]o the extent that there are pleading defects in Count VII, . . . an opportunity to cure those defects by amendment after completing any necessary discovery,” *id.* at 16. The plaintiff has not filed a motion for leave to amend its complaint since receiving the defendants’ motion to dismiss, nor has it offered a proposed amended complaint correcting what, at least in this instance, is clearly a pleading error that does not require further discovery, as the plaintiff is able to specify

¹ The plaintiff contends that this court’s cited holding in *Springfield Terminal* “is not . . . the rule in this Circuit at this time,” citing *Miranda*, 948 F.2d at 44, and *Schultz v. Rhode Island Hosp. Trust Nat. Bank*, 94 F.3d 721, 730 (1st Cir. 1996), “in which the plaintiff did not identify the specific sub-section involved.” Objection to Defendants’ Motion to Dismiss (“Plaintiff’s Objection”) (Docket No. 9) at 8. To the contrary, nothing on page 44 of the *Miranda* decision, issued three years before this court decided *Springfield Terminal*, is inconsistent with a requirement that a complaint alleging a RICO violation specify the subsection of section 1962 that is invoked. Further, the First Circuit’s decision in *Schultz*, an appeal after trial, does not state whether the subsection of section 1962 at issue was specified in the complaint, nor may it be assumed by any reasonable inference that no such specification was made.

in its memorandum the subsection of section 1962 that it means to invoke. Because there are other defects in the pleading of Count VII, I will address each issue raised by the defendants in that regard before discussing the plaintiff's request. Each of the remaining arguments pressed by the defendants applies to claims brought under any of the subsections of section 1962.

3. *Vague and conclusory allegations.* The defendants argue that the complaint is fatally defective because it does not provide the specific facts upon which allegations made on information and belief are based, as required by *Becher*. They specify paragraphs 40 and 41 of the complaint as those which must be disregarded on this basis. Motion to Dismiss at 7. The plaintiff responds that such information is exclusively within the control of the defendants, so that it is entitled to discovery and a subsequent opportunity to amend the complaint to address this defect, also relying on *Becher*. Plaintiff's Objection at 9-11. Both arguments have merit, as far as they go.

The *Becher* opinion cites *Wayne Inv., Inc. v. Gulf Oil Corp.*, 739 F.2d 11 (1st Cir. 1984) in this regard. *Becher*, 829 F.2d at 290. In *Wayne Investment*, the First Circuit cites with approval decisions of other courts holding that allegations based on information and belief do not satisfy the particularity requirement of Rule 9(b) unless the complaint also sets forth the facts upon which the belief is based. 739 F.2d at 13-14; *see also Gott v. Simpson*, 745 F. Supp. 765, 770 (D. Me. 1990). In the case at hand, while information concerning the time, place and content of the defendants' allegedly fraudulent use of the mail and telephone to obtain money belonging to the plaintiff may well be within the control of the defendants, although that control is unlikely to be exclusive, the specific allegations of paragraphs 40 and 41 of the complaint based upon information and belief are that United, acting directly or through a subsidiary, has converted money belonging to the plaintiff and three other specified businesses. The facts upon which such a belief is based are not only the

time, place and content of specific communications, but more directly information concerning these three businesses that would not be exclusively within the control of the defendants: for example, when those businesses contracted with United or one of its subsidiaries, what the relevant terms of those contracts were, what monies due to each of them from United or the relevant subsidiary have not been paid, etc. The plaintiff does not need further discovery from United to obtain such information, which should be available from the other identified businesses.

To the extent that the plaintiff's allegations concerning wire and mail fraud are not pleaded with sufficient particularity, *Becher* does provide for "a *second* determination as to whether the claim as presented warrants the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint." 829 F.2d at 290 (emphasis in original). However, the only mention of mail and wire in the complaint is found in paragraph 42, which is not challenged on this basis by the defendants. Paragraph 41 does appear to be unduly vague and conclusory under *Wayne Investment*. Paragraph 40 is not made upon information and belief by its own terms, but it too is fatally conclusory: "On an undetermined number of occasions," United "acting directly or through a subsidiary," has collected "money belonging to the acquired business" and "diverted" it. This does not constitute pleading an element of a RICO claim with particularity.

Because it might be possible for the plaintiff to amend the complaint to eliminate these deficiencies, I will not base my conclusion on the motion to dismiss solely upon this finding. Again, I will discuss the possibility of amendment after addressing all of the specific arguments raised by the defendants.

4. *Failure adequately to allege "racketeering activity."* Paragraph 43 of the complaint, the last numbered paragraph in count VII, provides: "The aforesaid conversion of money by United,

Cheshire and/or other identified subsidiaries of United is a ‘racketeering activity’ within the meaning of 18 U.S.C. § 1962.” As set forth above, RICO specifies the actions that may constitute racketeering at 18 U.S.C. § 1961(1), and conversion is not among those actions. Apparently recognizing the flaw in paragraph 43, the plaintiff contends in its memorandum of law that “there should be no misunderstanding that ‘conversion’ is a euphemism for mail and wire fraud (18 U.S.C. §§ 1341, 1343).” Plaintiff’s Objection at 10. The plaintiff also contends that paragraph 42, by “specifically referenc[ing] use of mail and wire in the implementation of the scheme,” sufficiently pleads racketeering activity. *Id.* Paragraph 42 of the complaint provides, in its entirety: “The conversion of the assets of [the plaintiff] and others was carried out and implemented, in whole or in part, by means of mail and wire services.”

The plaintiff’s “euphemism” argument deserves little or no consideration. The word “conversion,” even drawing every reasonable inference favorable to the plaintiff, cannot be considered the equivalent of mail and wire fraud.

Assuming, without deciding, that paragraph 42’s reference to “mail and wire services” may reasonably be construed as an allegation of mail and wire fraud, that conclusory reference is not enough to save count VII. In *Cutler*, the complaint at issue was considerably more expansive in its references to mail and wire fraud than is paragraph 42, 781 F. Supp. at 819, yet this court found those allegations to be insufficient, *id.* at 820. The plaintiff offers no reason for this court to find otherwise here. It does suggest that it is entitled to further discovery on this point, an argument that will be addressed below.

5. *Failure adequately to allege a pattern of racketeering activity.* The pattern of racketeering activity required as an element of a RICO claim is composed of at least two acts of racketeering

activity, 18 U.S.C. § 1961(5), and a plaintiff “must show that the racketeering predicates 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) (emphasis in original). The defendants contend that the complaint fails to allege both the relationship element and the continuity element of the necessary pattern.

The plaintiff apparently considers the predicate acts in this case to be the conversion of its funds (through the use of mail and wire fraud) and the conversion of the funds of the businesses or individuals named in paragraph 41 (also through the use of mail and wire fraud), although it also suggests that the collection of its money from multiple customers on multiple dates also creates a pattern. Plaintiff’s Objection at 11-12. The latter contention is unlikely to succeed. Courts have consistently held that a single episode of criminal behavior, even if it involves the commission of multiple related acts, does not constitute a pattern. *Apparel Art Int’l, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992). The acts alleged to have been taken by the defendants with respect to the plaintiff may only be characterized as a single effort to achieve one goal or to facilitate a single financial endeavor. *Schultz*, 94 F.3d at 732. They are best characterized as separate parts of a single allegedly criminal episode. *Id.* By themselves, therefore, they do not amount to a pattern of racketeering activity.

With respect to the contention that conversion of the funds of others serves as a predicate act, as already noted the allegations of paragraph 41 are based upon information and belief and the complaint does not provide the necessary factual support for those allegations. In addition, the allegations concerning conversion of money belonging to others are insufficiently specific for the purpose of establishing a pattern under RICO. *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 444-45 (1st

Cir. 1990). *Cf. United Fish Co. v. Barnes*, 627 F. Supp. 732, 734-35 (D. Me. 1986) (describing sufficient allegations concerning a pattern of racketeering activity to avoid dismissal). Thus, it appears unnecessary to reach the parties' contentions concerning continuity and relationship.

If those issues were reached, I would conclude that the complaint includes sufficient allegations that the identified predicate acts are related, because they are alleged to have the same purpose, result and methods of commission. *H.J. Inc.*, 492 U.S. at 240. With respect to continuity, the complaint alleges the relevant period of time for the predicate act or acts involving the plaintiff, Complaint ¶¶ 11-14, 36, and alleges that any predicate acts involving other parties have occurred "since January 1, 1995," *id.* ¶¶ 38, 40. While the latter allegation is marginal in terms of the desired particularity, I would conclude, applying the legal standard for evaluation of motions to dismiss, that the complaint also establishes continuity, as a closed period of activity that amounts to continued criminal activity. *Sion*, 893 F.2d at 446-47.

6. *Failure to adequately allege the existence and identity of an enterprise.* Under the subsections of section 1962, an enterprise is either the victim of the racketeering activity or the vehicle through which the racketeering activity is conducted. The complaint does not identify the RICO enterprise, and the enterprise is a necessary element of any claim under section 1962. The plaintiff contends that paragraphs 37 and 40-43 of the complaint allege that the enterprise in this case is Cheshire² and that United is the person who is liable under section 1962.³ Plaintiff's Objection at 13-15. It further

² The plaintiff does not seem to be entirely sure about its characterization of Cheshire. First, it states that "Cheshire is the corporation that was engaged in the racketeering activity." Plaintiff's Objection at 14. One page later, it states that "United is the active person allegedly engaging in racketeering activity." *Id.* at 15.

³ To the contrary, it is not possible to draw these conclusions from the identified paragraphs
(continued...)

suggests that, “[g]iven the designation of Cheshire as the ‘enterprise,’ Cheshire should be dropped as a party from whom damages are sought in Count III.” *Id.* at 13. While this cavalier approach is not the method by which pleadings are amended in this court, I take this statement as an admission that dismissal of Count VII is appropriate as to defendant Cheshire.

Having identified in its memorandum of law section 1962(c) as the basis for its claim, the plaintiff spends considerable time and effort arguing that a parent corporation and its subsidiary can serve as the enterprise and the culpable party. Plaintiff’s Objection at 13-15; *see Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988) (enterprise and person alleged to be engaged in racketeering activity must be distinct entities for claims under § 1962(c)). That argument misses the point. The complaint fails to allege the existence of any enterprise, or to identify the enterprise. Either omission alone is fatal. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 191 (1st Cir. 1996) (failure of complaint to identify enterprise is fatal); *see Miller Hydro Group v. Popovitch*, 793 F. Supp. 24, 28 (D. Me. 1992) (conclusory allegation that defendants are part of the enterprise insufficient to state a claim upon which relief may be granted). I will discuss the question whether the complaint could successfully be amended to allege that Cheshire is the enterprise and United the liable person, if necessary, when I reach the issue of the plaintiff’s request for leave to take discovery and amend the complaint.

7. *Standing.* The defendants argue that the complaint fails to allege that the plaintiff has standing to bring a RICO claim because it does not adequately allege that any violation of section 1962 by either defendant was the proximate cause of harm to the plaintiff. Motion to Dismiss at 18. The

³(...continued)
of the complaint.

plaintiff responds in summary fashion that there is a connection between the taking of its money by Cheshire and its financial loss, and nothing further need be pleaded. “Courts apply a proximate-cause analysis to civil RICO claims, requiring that the ‘injury’ to business or property flow from the predicate acts alleged in the complaint.” *Popovitch*, 851 F. Supp. at 13. It is harm “caused by predicate acts sufficiently related to constitute a pattern” that bestows standing. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985).

I have determined that the conversion of the plaintiff’s money, however many separate acts of billing and receiving that may have involved, constitutes only a single predicate act under RICO. However, in the First Circuit, a RICO plaintiff need allege only that the alleged injury to its business or property flows from one of the two or more predicate acts that make up the violation. *Camelio v. American Fed’n*, 137 F.3d 666, 669-70 (1st Cir. 1998). The defendants contend that the complaint does not allege that any violation of section 1962 “proximately harmed” the plaintiff. Motion to Dismiss at 19. The formulation of the test is too restrictive. Under *Camelio*, if the complaint adequately alleges the existence of a RICO violation, the plaintiff has alleged that it has standing. Complaint ¶¶ 12-15, 37.

C. Discovery and Opportunity to Amend

Having determined that count VII of the plaintiff’s complaint is subject to dismissal for five separate failures to adequately allege the elements of a RICO cause of action, I now must address the plaintiff’s request that it be allowed to undertake discovery, followed by the opportunity to submit an amended complaint.⁴

⁴ I undertake this task in the absence of a motion requesting such relief for the purpose of judicial economy, but I remind counsel for the plaintiff that the appropriate procedural means for
(continued...)

It is only in cases involving allegations of wire and mail fraud, where the specific times, places and content of the allegedly fraudulent acts may be under the exclusive control of the defendants, that courts have allowed further discovery and opportunities for plaintiffs to amend defective complaints. *E.g., Becher*, 829 F.2d at 290. Only one of the plaintiff’s five deficiencies concerns such allegations. Even when such circumstances are present, however, the First Circuit and this court “do not automatically allow discovery and subsequent amendment where RICO claims fail to satisfy Rule 9(b).” *Cutler*, 781 F. Supp. at 819. This court’s opinion in *Gott* provides clear guidance for the instant case. In *Gott*, a claim of RICO violation by means of mail and wire fraud was supported in the complaint by an allegation that the defendants had perpetrated “similar frauds against others.” 745 F. Supp. at 770. Finding that this allegation clearly failed to meet the requirements of Rule 9(b), this court weighed “the policies underlying Rule 9(b), the specificity (or lack thereof) of the general allegations of fraud, and the policy against denying plaintiffs their day in court.” *Id.* The plaintiffs had not named the victims of the alleged frauds, nor had they described “the subject matter concerning them.” *Id.* This court concluded that the fraud allegations were so deficient that the purposes of Rule 9(b) outweighed the competing policies in favor of discovery. *Id.*

While the complaint at issue here does identify three of the “undetermined number” of alleged victims of the alleged mail and wire fraud, Complaint ¶¶ 39-41, the remaining allegations of fraud are so minimal as to be virtually nonexistent. Coupled with the other pleading violations discussed above, Count VII is so deficient that the purposes of Rule 9(b) and of First Circuit case

⁴(...continued)
such a request is not a single sentence at the end of a memorandum of law opposing a motion to dismiss.

law establishing pleading requirements for RICO claims outweigh the policies in favor of discovery in this case. I conclude that the motion to dismiss Count VII should be granted.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** as to Count VII and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of February, 1999.

*David M. Cohen
United States Magistrate Judge*