



## II. Factual Background

The amended complaint includes the following relevant factual allegations. The plaintiff is a Maine corporation with a principal place of business in Portland, Maine. Amended Complaint (Docket No. 2) ¶ 1. Defendant Joy, whose relationship to or position with the Union is not specified in the amended complaint, is a resident of New Hampshire, where the Union has its principal place of business. *Id.* ¶¶ 2-3. In 1993, Joseph A. Capozza, Jr., then president of the plaintiff, and three other officers or employees of the plaintiff were members of the Union. *Id.* ¶ 6. At that time, Capozza had discussions with Joy in which Capozza sought to maintain union benefits for himself and the three other employees. *Id.* ¶ 7. The plaintiff had no intention to enter into a collective bargaining agreement with the Union and the defendants understood that the plaintiff had no such intention. *Id.* ¶ 8.

The defendants presented Capozza with a signature page for a collective bargaining agreement and represented that by signing it Capozza would do no more than achieve the desired maintenance of benefits for the four union members. *Id.* ¶ 9(a). The defendants represented or implied that the plaintiff would incur no liability or responsibility for union benefits in connection with any workers other than the four current union members by executing the document. *Id.* ¶¶ 9(b), 27. The defendants represented or implied that it was unnecessary for Capozza to review the agreement and did not provide the plaintiff with an opportunity to review it either before or after execution. *Id.* ¶ 9(c). The defendants concealed the fact that by executing the signature page Capozza entered into a collective bargaining agreement on behalf of the plaintiff which in Article III purported to incorporate provisions of the Union's pension fund and health fund, making them applicable to all of the plaintiff's employees and arguably all subcontractors and employees of subcontractors as well. *Id.* ¶¶ 9(d)-(e).

In 1998, in response to questions to Joy from Joseph F. Capozza about the agreement, the defendants faxed to the plaintiff the signature page, which states that the agreement expired on April

30, 1995. *Id.* ¶ 9(g). The defendants concealed the fact that Article XV of the agreement states that, notwithstanding the stated expiration date, the agreement will automatically self-renew. *Id.*

The representations and concealments were made with knowledge of their falsity and with the intent that the plaintiff rely upon and act upon them. *Id.* ¶ 11. The plaintiff acted in reasonable reliance on the misrepresentations to its detriment, including signing in 1993 “what turned out to be a collective bargaining agreement purporting to impose broad and prohibitively expensive trust fund obligations on Plaintiff,” taking no action to cancel the agreement and continuing to maintain non-union health and pension benefits for its non-union employees. *Id.* ¶ 13.

Joy conducted or participated in the conduct of an enterprise’s affairs affecting interstate commerce through a pattern of racketeering activity allegedly within the meaning of 18 U.S.C. § 1962(c). *Id.* ¶ 21. Joy engaged in a scheme to defraud the plaintiff, or to obtain money or property by means of false or fraudulent pretenses, representations or promises through repeated use of wire and/or mail, allegedly in violation of 18 U.S.C. §§ 1341 and 1343. *Id.* ¶ 22. Joy conspired with others to engage in this scheme. *Id.* ¶ 24.

On or about January 18, 2001 the trustees of the Bricklayers & Trowel Trades International Pension Fund commenced an action against the plaintiff in the United States District Court for the District of Columbia, predicated on the 1993 agreement. *Id.* ¶¶ 32-33. That action is apparently now pending in this court. *John Flynn, et al. v. Capozza Tile Co.*, Docket No. 01-130-P-H.

### **III. Discussion**

The defendants contend that the plaintiffs’ claims are preempted by the National Labor Relations Act, specifically 29 U.S.C. §§ 157 and 158, pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Memorandum in Support of Defendant’s [sic] Motion to Dismiss (“Defendants’ Memorandum”) (filed with Defendants’ Motion to Dismiss) at 4-15. In the alternative,

they argue that the complaint fails to state a claim under RICO, that Joy may not be sued individually for actions taken in his official capacity as an officer of the Union, and that the plaintiffs' state-law claims are barred by the applicable statute of limitations, 14 M.R.S.A. § 752. *Id.* at 15-18.

The plaintiffs respond that the National Labor Relations Act does not apply because the Union was not acting as the duly selected representative of its employees, there is no allegation that the defendants' misconduct occurred in the course of bargaining over terms and conditions of employment and the parties were not engaged in collective bargaining at the time the agreement was signed. Objection to Defendants' Motion to Dismiss, etc. ("Plaintiff's Objection") (Docket No. 5) at 4-12. Its responses to the defendants' alternate arguments will be set forth in the discussion that follows.

#### **A. *Garmon* Preemption**

In *Garmon*, the Supreme Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act [29 U.S.C. §§ 157, 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." 359 U.S. at 245. The party claiming preemption under *Garmon* "is required to demonstrate that his case is one that the Board could legally decide in his favor." *International Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 395 (1986).

None of the allegations in the amended complaint appear to fall within the scope of 29 U.S.C. § 157, which provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The allegations in the amended complaint do appear to possibly come within the scope of portions of section 158.

**(b) Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents —

\* \* \*

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title . . .

\* \* \*

**(d) Obligation to bargain collectively**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

29 U.S.C. § 158(b) & (d). The parties discuss the issues only in terms of the obligations imposed by section 158.

Charges of fraud in the inducement regarding a collective bargaining agreement and in dealing with issues for which there is a duty to bargain in good faith are ordinarily preempted under *Garmon*. See, e.g., *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1282, 1286-87 (6th Cir. 1986); *Hanley v. Lobster Box Rest., Inc.*, 35 F.Supp.2d 366, 367-69 (S.D. N.Y. 1999). However, in those cases there was no question that the union involved was the representative of the employees at issue.

Section 159(a) of Title 29, incorporated by reference in section 158(b)(3), provides, in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a). Contributions to an employee pension trust fund are included in “other terms and conditions of employment” as a mandatory subject of collective bargaining. *Professional Adm’rs Ltd.*

*v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 643 (6th Cir. 1987), and cases cited therein. However, it is impossible to tell from the amended complaint, which mentions only that four specific officers or employees of the plaintiff were members of the Union, whether the Union represented a majority of the plaintiff's employees or a majority of the employees in a unit appropriate for the purposes of collective bargaining. Presumably, the Union takes the position that all of the employees for whom it seeks contributions to its pension fund were members of such a unit, but the number of employees subject to the Union's claims is not stated in the complaint and certainly not the number of those individuals who were employed at the time the alleged collective bargaining agreement was signed.

In their reply the defendants do not directly address this issue. They first argue that it would have been an unfair labor practice for the union "to refuse to negotiate with Plaintiff" when Capozza contacted it to ensure that coverage was maintained for the four individuals, Defendants' Reply to Plaintiff's Objection to Defendants' Motion to Dismiss ("Defendants' Reply") (Docket No. 7) at 3, but that argument is beside the point, as well as assuming that the Union was in fact an appropriate representative for those employees it now contends were included in the agreement. They next contend that the plaintiff "clearly recognized" the Union "as the representative of [its] employees" by seeking benefits "available only under a collective bargaining agreement," *id.*, but by the terms of the amended complaint Capozza sought benefits only for four individuals. While he may have "recognized" the Union as a representative of those four people, or more accurately, hoped that the Union continued to be their representative, nothing in the amended complaint can fairly be construed to allow the conclusion that Capozza, and through him the plaintiff, thereby recognized the Union as the representative of all of the plaintiff's employees. Neither of the NLRB decisions cited by the defendants, *id.*, supports this conclusion as a matter of law. In *Triple A Fire Prot., Inc.*, 312 NLRB 1088, 1088 (1993), the employer signed an express written acknowledgment of the union's status as

the bargaining representative of “a clear majority of the sprinkler fitters in its employ.” In *Moisi & Son Trucking, Inc.*, 197 NLRB 198, 203 (1972), there was evidence that the employer knew that there was no representation dispute and that the union had been designated by a majority of its employees. Neither situation is apparent here on the face of the amended complaint.

The defendants’ final argument, to which the plaintiff did not have an opportunity to respond, is that the plaintiff had an obligation to bargain with the Union even in the absence of majority status because the agreement at issue was a “pre-hire” agreement under section 158(f). Defendants’ Reply at 3-4. It cannot be determined from the face of the amended complaint that the alleged agreement may fairly be characterized as such an agreement, and only the plaintiff is entitled to the drawing of reasonable inferences from those allegations in the context of a motion to dismiss, not the defendants. Only if the agreement at issue could only be so characterized could the defendants’ argument possibly succeed. In addition, section 158(f) provides that it shall not be an unfair labor practice for an employer to make an agreement covering employees in the building and construction industry when the majority status of the union has not yet been established; it says nothing about unfair labor practices by a labor organization, which would be the issue in this case. In *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990), the authority cited by the defendants on this point, the issue was whether two companies were alter egos for the purpose of an unfair labor practice complaint brought by a union, *id.* at 352-53; there was no question that the agreement at issue was a pre-hire agreement, or whether the existence of a pre-hire agreement meant as a matter of law that a claim under section 158(b)(3) or (d) could be brought against the union. At the current stage of the proceedings in this case, based on the amended complaint, the defendants are not entitled to dismissal of any claims under *Garmon*.

The parties have addressed separately the possible preemption of Count III, which alleges RICO violations, but the same considerations apply. Based solely on the allegations in the amended complaint, it is possible that the conduct alleged as the basis of the RICO claim is illegal “without reference to the N[ational] L[abor] R[elations] A[ct],” and accordingly not subject to *Garmon* preemption. *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 978 (1st Cir. 1995). See also *Teamsters Local 372, Detroit Mailers Union Local 2040 v. Detroit Newspapers*, 956 F. Supp. 753, 758-59 (E.D. Mich. 1997) (where alleged predicate offense is only unlawful because proscribed by labor laws RICO claim preempted).

### **B. Sufficiency of the RICO Claim**

The defendants contend that the complaint fails to meet the pleading requirements for a claim brought under RICO. Defendants’ Memorandum at 15-17.

A RICO plaintiff must allege a pattern of racketeering activity involving at least two predicate acts, the second of which must occur within 10 years of the first. 18 U.S.C. § 1961(5). Predicate acts under this statute are acts indictable under any one or more of certain specified laws, including the mail and wire fraud statutes. Furthermore, a RICO plaintiff must allege the existence of an enterprise, which the statute defines as including: “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C § 1961(4).

*Ahmed v. Rosenblatt*, 118 F.3d 886, 888-89 (1st Cir. 1997) (citations omitted). It is “well settled law” in the First Circuit that RICO pleadings of mail and wire fraud must satisfy the particularity requirements of Fed. R. Civ. P. 9(b), and that under Rule 9(b) a pleader must state the time, place and content of the alleged mail and wire communications perpetrating that fraud. *Id.* at 889. Here, the amended complaint alleges fraud “through repeated use of wire and/or mail,” Amended Complaint ¶ 22, but it mentions only one use of a fax, sometime in 1998, *id.* at 9(g), as a specific instance of wire fraud. Even if that incident were sufficiently pleaded as to time and place, the absence of any specific

information concerning any other instance of wire or mail fraud makes the pleading insufficient. The amended complaint, construed as favorably to the plaintiff as reasonably possible, contains no other allegations of an offense indictable under a specified statute.

This case does not present a situation, based on the allegations in the amended complaint, where the specific information concerning use of interstate mail or telecommunications facilities is within the exclusive control of the defendants, the only situation in which a court must allow a plaintiff whose pleadings are insufficient on this point an opportunity for discovery and further amendment of the complaint. *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 43 (1st Cir. 1991). The plaintiff does request this relief, but only in order to undertake discovery to “reveal that Mr. Joy’s fraudulent activity extended to other tile and masonry companies in Northern New England.” Plaintiff’s Opposition at 15. Evidence of such instances will not cure the amended complaint’s lack of specificity concerning predicate acts in “a scheme to defraud Plaintiff.” Amended Complaint ¶ 22.

While it may well be the case, as the plaintiff urges, that concealment of information which a defendant is under a duty to disclose to another under circumstances where the nondisclosure could or does result in harm to another is a violation of the mail fraud statute, *see United States v. Carpenter*, 791 F.2d 1024, 1035 (2d Cir. 1986), in such cases the plaintiff must still plead with specificity either that the defendant actually used the mail or knew that the use of interstate mail or wire services was a reasonably foreseeable consequence of the scheme, *id.* The facts set forth in the amended complaint do not, with the exception of the single fax mentioned in paragraph 9(g), make it likely that the defendants used interstate mail or telecommunications facilities in the course of the specific acts described. *See New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987). For that reason as well, the amended complaint is insufficient and leave to take additional discovery is not warranted. *Id.*

The defendants are entitled to dismissal of Count III.

### **C. Individual Liability of Defendant Joy**

Joy seeks dismissal of all counts asserted against him, arguing that the National Labor Relations Act exempts from liability individuals who are acting in their capacity as agents of a labor organization, stating specifically that “all of the allegations involve conduct that was clearly within the scope of Joy’s role as President of Local 1, Northern New England.” Defendants’ Memorandum at 17. Of course, the amended complaint does not allege that Joy was president of the Union; it is completely silent as to his position with the Union, if any. This court will not resort to information outside the pleadings to resolve a motion to dismiss; to do so would transform the motion into one for summary judgment. At most, it may be reasonably inferred from the allegations in the amended complaint that Joy was a representative of the Union. The immunity from individual liability extended by the National Labor Relations Act, 29 U.S.C. § 185(b), extends to members of unions against which money judgments are obtained. While the language of the statute does not appear to limit this immunity to claims made under the National Labor Relations Act, *see also Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962) (statute “evidences a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it”), it is not possible to draw an inference from the amended complaint that Joy was a member of the Union. For this reason, and this reason only, the motion to dismiss should be denied.

### **D. Statute of Limitations**

Finally, the defendants contend that the state-law claims raised in the amended complaint must be dismissed because the operative events occurred in 1993, and 14 M.R.S.A. § 752 establishes a six-year statute of limitations for such claims. Defendants’ Memorandum at 18. The plaintiff responds that 14 M.R.S.A. § 859 provides an exception to that statute of limitations which is applicable under

the circumstances of this case and that its claim for contribution or indemnification that is set forth in Count VI of the amended complaint will not accrue until it has paid a judgment on the underlying claim, an event that by the terms of the amended complaint has not yet occurred. Plaintiff's Objection at 16-17.

Maine's general statute of limitations provides:

All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record on the United States, or of any state or of a justice of the peace in this State, and except as otherwise specifically provided.

14 M.R.S.A. § 752. In the instant case, the amended complaint alleges that the defendants fraudulently induced the plaintiff to enter into a collective bargaining agreement in 1993 and in 1998 concealed from the plaintiff the fact that the agreement did not by its terms expire on April 30, 1995. Amended Complaint ¶¶ 6-14. The complaint was filed on April 18, 2001. Docket.

The plaintiff relies on 14 M.R.S.A. § 859, which provides:

If a person, liable to any action mentioned, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action, except as provided in section 3580.

14 M.R.S.A. § 859. Section 3580 deals with fraudulent transfers, which are not at issue in the instant action.

Because the statute of limitations is an affirmative defense, a complaint will not be dismissed, pursuant to Rule 12(b)(6), as time-barred unless the complaint contains within its four corners allegations of sufficient facts to show the existence and applicability of the defense.

*Francis v. Stinson*, 760 A.2d 209, 220 (Me. 2000) (citations and internal quotation marks omitted).

Here, the allegations in the amended complaint allow the drawing of the reasonable inference that the plaintiff did not discover the causes of action, and could not have discovered them "in the exercise of

due diligence and ordinary prudence,” *id.* (quoting *Westman v. Armitage*, 215 A.2d 919, 922 (Me. 1966)), until a point fewer than six years before this action was brought.

With respect to the claim for indemnification or contribution, that relief is sought for any judgment that might be entered against the plaintiff in an action alleged to have been commenced on or about January 18, 2001, Amended Complaint ¶ 32, well within the limitations period. The plaintiff’s argument concerning the accrual of this cause of action is also correct. Because claims for indemnification and contribution do not accrue for the purposes of the statute of limitations until a judgment has been paid, the plaintiff’s claim in Count VI of the amended complaint was filed in a timely manner. *St. Paul Ins. Co. v. Hayes*, 676 A.2d 510, 511-12 (Me. 1996).

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendants’ motion to dismiss be **GRANTED** as to Count III of the amended complaint 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.*

Date this 13th day of September, 2001.

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David M. Cohen  
United States Magistrate Judge

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