

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BOUCHER BOYS & THE INDIAN,)
INC.)
)
 Plaintiff)
)
v.)
)
FLEET FINANCIAL GROUP, INC.,)
et al.,)
)
 Defendants)

Civil No. 96-143-P-DMC

MEMORANDUM DECISION ON DEFENDANTS’ MOTION TO DISMISS¹

Two of the defendants, Fleet Financial Group, Inc. (“FFG”) and Fleet Bank of Maine (“FBOM”), move to dismiss all claims raised in the amended complaint against FFG and Counts VI, VII and VIII against FBOM. This action arises out of alleged financial and fiduciary relationships between the plaintiff and FFG, between the plaintiff and FBOM, and between FBOM and the remaining defendants, Bates Fabrics, Inc., and Bates of Maine, Inc. The amended complaint raises the following claims against the moving defendants: Count I, breach of fiduciary duty, against both; Count II, breach of contract, against both;² Count III, breach of statutory requirement of good faith,

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² The caption of Count II asserts that it is raised against FBOM only. However, the allegations in this count assert that FFG had contractual obligations to the plaintiff, Amended (continued...)

against FBOM only; Count IV, fraud, against both; Count V, negligent misrepresentation, against both; Count VI, violation of 18 U.S.C. § 1962(a), against both; Count VII, violation of 18 U.S.C. § 1962(b), against both; Count VIII, violation of 18 U.S.C. § 1962(c), against both; Count X, trademark infringement, against both; Count XI, copyright infringement, against both; and Count XII, conversion, against both. Amended Complaint (Docket No. 11). I grant the motion in part and deny it in part.

I. Standard for Reviewing Motions to Dismiss

“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 plaintiff every reasonable inference in his 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 clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

The defendants also base their motion on Fed. R. Civ. P. 12(c). The applicable standard is the same. *International Paper Co. v. Inhabitants of the Town of Jay*, 736 F. Supp. 359, 362 (D. Me. 1990), *aff’d* 928 F.2d 480 (1st Cir. 1991).

²(...continued)

Complaint ¶ 148, and that both FFG and FBOM (referred to jointly as “Fleet” in the amended complaint) breached the terms of “its” agreement with the plaintiff, *id.* ¶ 149, causing damage to the plaintiff, *id.* ¶ 150. Because it is not entirely clear whether the plaintiff intends to press Count II against FFG as well as FBOM, I will treat the claim as having been raised against both.

II. Motion as to Fleet Financial Group Only

Defendant FFG seeks dismissal of claims against it in Counts I, II, IV, V, X, XI and XII. It asserts that the plaintiff “has failed to allege a single instance of actionable conduct by FFG” in connection with these claims. Motion to Dismiss Amended Complaint by Defendants Fleet Financial Group and Fleet Bank of Maine, Inc. with Incorporated Memorandum of Law (Docket No. 14) at 1. This assertion is incorrect.³ On at least one of the counts still pressed by the plaintiff, actionable conduct by FFG has been alleged. Most of the pleading describes actions of “Fleet,” which the plaintiff defines to include both FFG and FBOM. Amended Complaint, ¶ 1.

A. Count I

Count I alleges that FFG breached its fiduciary duty to the plaintiff. The only specific allegations against FFG in this regard are found in paragraph 137 of the amended complaint:

FFG furthered and secured the fiduciary relationship in support of its acquisition strategy and scheme to have BBI assist Fleet in same. Employees of FFG . . . continued the representations that BBI would be assisted, thus preserving BBI’s confidence in Fleet. In addition, FFG arranged for the CDC proposal, which also served to solidify BBI’s trust in Fleet.

The plaintiff alleges that Fleet breached this fiduciary duty by entering into “inappropriate” loan agreements with BBI, by failing to follow through with representations of additional financial assistance, by failing to inform BBI of information known to Fleet concerning the Bates defendants,

³However, FFG and FBOM correctly note in their Reply Memorandum of Law in Support of Motion to Dismiss Amended Complaint (Docket No. 18) at 6-7 that the plaintiff in its Opposition to the motion (Docket No. 16) did not respond to their arguments concerning Counts II, X, XI, and XII (breach of contract, trademark infringement, copyright infringement and conversion). Pursuant to this court’s Local Rule 19(c), the plaintiff is deemed to have waived objection to the motion to dismiss as to FFG on those claims. The motion to dismiss those counts against FFG is granted, *Carey v. Maine School Admin. Dist. No. 17*, 754 F. Supp. 906, 924 (D. Me. 1990), and those counts will not be addressed further in this opinion.

and by other acts of “self-dealing, self-interest . . . and . . . imprudent, improvident conduct described in the Amended Complaint.” Amended Complaint ¶¶ 144-45.

FFG is not alleged in the amended complaint to have entered into any loan agreement with the plaintiff. Only FBOM is alleged to have had knowledge concerning the Bates defendants’ alleged “adverse financial and business condition and resulting inability to perform.” *Id.* ¶ 16. Therefore, the plaintiff’s claim against FFG on this count rests on FFG’S alleged failure to provide promised additional financial assistance. Under Maine law, “fiduciary or confidential relations ‘are deemed to arise whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other.’” *Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 457 (Me. 1993) (quoting *Ruebsamen v. Maddocks*, 340 A.2d 31, 34-35 (Me. 1975)). Disparity in the bargaining positions of the two parties and abuse of its position by the dominant party must be alleged, as well as the actual placing of trust and confidence by the lesser party. *Id.*

The amended complaint does allege that the plaintiff placed actual trust and confidence in both FFG and FBOM. Amended Complaint ¶ 139. However, this allegation is based on “Fleet’s voluntary involvement and affirmative action in connection with the operation of BBI’s business.” *Id.* The only specific allegations of such involvement and action involve FBOM. Amended Complaint ¶¶ 31, 34-40, 52, 72, 81-86, 94-98, 107-13. The amended complaint, interpreted favorably to the plaintiff as it must be, does not state a claim against FFG upon which relief may be granted under Count I. *See Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 605 A.2d 609, 615 (Me. 1992) (stressing difficulty of sustaining burden of establishing such a relation).

B. Count IV

This count of the amended complaint alleges fraud against both FFG and FBOM. Common law fraud in Maine requires:

(1) a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Butler v. Poulin, 500 A.2d 257, 260 (Me. 1985). The plaintiff bases its claim against FFG for fraud on “continual[] and false[]” assurances that “significant financial and other assistance would be forthcoming” from FFG. Amended Complaint ¶ 158. Its use of the word “significant” is important, because the plaintiff does allege that FFG arranged for additional financial assistance in the amount of \$30,000, *id.* ¶ 101, which was insufficient in view of the plaintiff’s request for \$150,000, *id.* ¶ 86. Under Fed. R. Civ. P. 9(b), fraud must be pleaded with particularity. To meet the particularity requirement, the plaintiff must specify the time, place and content of an alleged false representation. *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 222 (D. Me. 1996). Viewed in a favorable light, the plaintiff’s allegations against FFG are sufficient, although barely, to survive a motion to dismiss this count.

C. Count V

This count of the amended complaint alleges negligent misrepresentation. Maine law adopts the Restatement (Second) of Torts definition of this tort. *Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990). That definition provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or

competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977). There is no scienter requirement. *Chapman*, 568 A.2d at 830. The specific allegations against FFG in the amended complaint suggest that the allegedly false information — that the plaintiff would receive the additional financial assistance that it believed necessary from one of Fleet’s companies — was conveyed knowingly rather than negligently. Amended Complaint, ¶¶ 166-71. There is no suggestion that FFG “failed to exercise reasonable care or competence in obtaining or communicating” this information. The allegations are that the conduct was in all respects deliberate. Therefore, Count V of the amended complaint fails to assert a claim against FFG on which relief may be granted, and dismissal is appropriate.

III. Motion as to Both FFG and FBOM

This part of the motion concerns Counts VI, VII and VIII of the amended complaint. Each count is asserted under a separate subsection of 18 U.S.C. § 1962, which is part of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-68. Because the elements necessary to survive a motion to dismiss are similar for each count, these counts will be discussed together.

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.

(c) It shall be 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 the First Circuit, a plaintiff seeking to withstand a motion to dismiss claims raised under any of these subsections of section 1962 must allege both a violation of one of the provisions of the statute and an injury to its business or property by reason of the defendant's violation. *Compagnie de Reassurance d'Ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 91 (1st Cir.), cert. denied 116 S.Ct. 564 (1995).

Establishing a RICO violation requires proof of a "pattern of racketeering activity" or of "collection of unlawful debt." Section 1962(a), (b), & (c). There is no allegation of unlawful debt in the amended complaint. To establish a pattern of racketeering activity, a plaintiff must show at least two predicate acts of "racketeering activity," as defined by the statute, and must establish that the predicate acts are related and that they amount to or pose a threat of continuing criminal activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 788 (1st Cir. 1990).

The amended complaint alleges that FFG and FBOM engaged in mail and wire fraud. Amended Complaint ¶ 178. Mail fraud and wire fraud are included in the definition of "racketeering activity." 18 U.S.C. § 1961(1). A single episode of criminal behavior, "even if it involves the commission of multiple related acts, does not constitute a 'pattern.'" *Schultz v. Rhode Island Hosp.*

Trust Nat'l Bank, N.A., 94 F.3d 721, 731 (1st Cir. 1996). When mail and wire fraud are the alleged predicate acts, the plaintiff must plead those acts with particularity, with the same degree of specificity as is required under Fed. R. Civ. P. 9(b) when pleading general fraud. *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987). The time, place and content of the communication must be specified in the complaint in most cases. *Id.* at 292.

The allegations concerning the acts of fraud are found at paragraphs 176 and 177 of the amended complaint. The allegations can only be described as sparse and vague. The only specific acts alleged that might conceivably implicate defendant FFG are “telephone calls in or about August and September, 1995 between FFG and FBOM and Spring and Spencer in which Fleet represented that BBI would receive additional financing” and “the inadequate CDC proposal dated November 17, 1995, which was sent via mail and interstate facsimile transmission.” Amended Complaint ¶ 177(d) & (g). “Spencer” is identified in paragraph 92 of the amended complaint as an aide to Congressman Kennedy. “Spring” is identified in paragraph 104 of the amended complaint as “of the Federal Reserve.” The only other possible references in the amended complaint to such telephone calls are found in paragraph 92, in which Spencer is alleged to have reported at a meeting on September 18, 1995 that he had received oral assurances at unspecified times from three individuals, none of whom is identified as an employee or representative of FFG, although they are identified as being “of” entities defined elsewhere as “legal entities” included in “[t]he entire family of Fleet companies,” Amended Complaint ¶ 174, and that the plaintiff “would be given assistance and the situation would be resolved.” There are no specific allegations concerning telephone contact between Spring and anyone other than the plaintiff. Amended Complaint ¶¶ 89, 104, 114. These allegations are insufficient.

The CDC proposal to which paragraph 177 of the amended complaint refers is the revised proposal described in paragraphs 117-21. “CDC” is defined at paragraph 99 of the amended complaint as Community Development Corporation, “a member of FFG.” As with the allegations concerning the telephone calls, the plaintiff apparently assumes that the court will conclude that an act by an employee or representative of a “member of FFG” or one of the “family of Fleet companies,” is the act of FFG. Assuming without deciding that the court may so conclude without doing violence to the plaintiff’s additional assertion, discussed below, that FFG is a person distinct from the “association-in-fact” made up of FFG and its affiliated corporations, this allegation may provide the plaintiff with one predicate act by FFG.

The plaintiff also refers to “the Fleet advertisement” discussed at paragraphs 46-49 of the amended complaint as a predicate act. Plaintiff’s Opposition at 5-6, 10. Viewing these allegations favorably to the plaintiff, as required in evaluating a motion to dismiss, the letter from FFG’s general counsel conveying the Fleet advertisement to the Federal Reserve is described in sufficient detail to serve as a predicate act for RICO purposes. This constitutes a second predicate act alleged against FFG, meeting the minimal statutory requirement.

The amended complaint also presents only attenuated allegations of acts of wire and mail fraud against FBOM. Only the allegation that the president of FBOM in a telephone call on August 11, 1995 with the plaintiff’s principals “affirmatively represented an amount of financial assistance for BBI and the date by which the problem would be resolved,” Amended Complaint ¶ 177(a), can be understood as stating with particularity the time, place and content of the communications constituting the RICO violation. *See also id.* ¶ 86. The remaining allegations in paragraph 177 concerning FBOM refer to “numerous interstate telephone calls between BBI and [FBOM’s vice

president],” “numerous telephone calls from 1993 to 1995 between [FBOM’s vice president] and BBI,” “telephone calls in or about August and September, 1995 between FFG and BBI ,” and “numerous telephone calls between Fleet and [one of the plaintiff’s principals].” Each of these allegations is insufficient. Each is repeated here because the plaintiff, citing *Becher*, 829 F.2d at 290-92, argues that it should not be required to allege the time, place and content of the predicate acts of fraud upon which it relies because that specific information is within the defendants’ control, and discovery on the RICO issues has been stayed by this court in its Report of Scheduling Conference and Order (Docket No. 8) at page 3. Plaintiff’s Opposition to Motion to Dismiss Amended Complaint by Defendants Fleet Financial Group and Fleet Bank of Maine, Inc. (Docket No. 16) (“Plaintiff’s Opposition”) at 10-12. The plaintiff may not rely on its asserted need for additional discovery as to these alleged acts of wire fraud, other than the August 11, 1995 telephone call, because all of them are alleged to have involved the plaintiff. The details of the particular time, place and content of those telephone calls therefore cannot be said to be “peculiarly within the defendants’ control” so as to entitle the plaintiff to further discovery before the court rules on the motion to dismiss. *Becher*, 829 F.2d at 291; *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 43 (1st Cir. 1991). The plaintiff’s assertion that paragraphs 37, 60 and 61 of the amended complaint provide the required specificity concerning the telephone calls, Plaintiff’s Opposition at 10, is incorrect.

The plaintiff must therefore rely on its allegations of mail fraud by FBOM to support a possible second predicate act. Paragraph 177 lists “mailed monthly loan and interest principal bills regarding BBI’s restructured loan to secure FBOM’s loan to Bates,” “a letter dated June 20, 1994 from Fleet’s advertising agency,” and “a letter dated July 11, 1994 from [FBOM’s vice president]

regarding Dozier's testimonial for Fleet's CRA purposes." The two letters are not otherwise mentioned in the amended complaint. It may be fairly inferred that the plaintiff had access to these letters in order to determine the date and author of each and therefore could have provided the further necessary details without further discovery. The place and content of each are unspecified in the amended complaint. Those allegations are therefore insufficient to plead predicate acts of mail fraud. The monthly loan bills, although not fraudulent themselves, may constitute mail fraud if they were mailed for the purpose of executing a fraudulent scheme. *Carpenter v. United States*, 484 U.S. 19, 28 (1987); *United States v. Lane*, 474 U.S. 438, 451 (1986). Favorably construed, therefore, the amended complaint alleges two predicate acts, one of wire fraud and one of mail fraud, against FBOM.

However, the mere allegation of the minimum number of predicate acts is not sufficient. In order to allege a "pattern of racketeering activity," the predicate acts must be related and "amount to or pose a threat of continued criminal activity." *H.J., Inc.*, 492 U.S. at 239-40. In construing this requirement, the First Circuit has noted that "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.'" *Schultz*, 94 F.3d at 731. The alleged racketeering acts attributed to FFG and FBOM in this case, taken together, comprise a single effort to facilitate a single endeavor to achieve one goal, so they do not suffice to allege a pattern. *Schultz*, 94 F.3d at 732; *see also Jones v. Lampe*, 845 F.2d 755, 758 (7th Cir. 1988) (allegations that defendant bank engaged in multiple acts of mail fraud in furtherance of a single general scheme involving four victims with one distinct injury and relating to one basic transaction cannot constitute necessary pattern).

Even if the plaintiff had sufficiently alleged a pattern of racketeering activity against either

FFG or FBOM, in order to state a claim under 18 U.S.C. § 1962(a) the complaint must also allege that the plaintiff was harmed by reason of the defendants' use or investment of income derived from a pattern of racketeering activity in some enterprise. *Compagnie de Reassurance*, 57 F.3d at 91. This is a basic element of the statutory claim. Here, the amended complaint alleges injury to the plaintiff under section 1962(a), but only as a result of FFG's and FBOM's misrepresentations. Amended Complaint ¶ 181. Even when generously read, the amended complaint does not allege that FFG's or FBOM's use or investment of income derived from the pattern of racketeering activity set forth in the predicate acts harmed the plaintiff.

Similarly, in order to state a claim under 18 U.S.C. § 1962(b), the complaint must allege that the plaintiff was harmed by the defendant's acquisition or maintenance of control of an enterprise through a pattern of racketeering activity. *Compagnie de Reassurance*, 57 F.3d at 91. Generously read, the amended complaint alleges that the Fleet defendants acquired Shawmut Bank through a pattern of racketeering activity, but there is no allegation that this acquisition harmed the plaintiff. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1231 (D. C. Cir. 1991). If the amended complaint is to be read as alleging that the pattern of racketeering was used to maintain control of an enterprise identified as "the entire family of Fleet companies," Amended Complaint ¶ 174, despite the lack of allegations suggesting that it was in any way necessary for FFG and FBOM to engage in the predicate acts in order to maintain such control, there is simply no allegation in the amended complaint that maintenance of this control harmed the plaintiff. *See* Amended Complaint ¶¶ 184-85.

Even if the allegation concerning harm were sufficient under section 1962(b), the plaintiff faces an additional hurdle. For claims brought under 18 U.S.C. ¶ 1962(b) and (c), it is necessary that

the enterprise to which the statute refers not be answerable as a defendant. *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir. 1991). “[I]t is clear that under § 1962(c) the ‘person’ alleged to be engaged in a racketeering activity (the defendant, that is) must be an entity distinct from the ‘enterprise;’ under § 1962(c) the enterprise is not liable.” *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988). “[T]he enterprise must be an entity separate from the named defendants who are allegedly engaging in unlawful activity.” *Libertad v. Welch*, 53 F.3d 428, 442 (1st Cir. 1995). Here, the amended complaint defines the “enterprise” as “[t]he entire family of Fleet companies, including but not limited to FBOM, FFG, Fleet Bank of Massachusetts, Fleet Community Development Company, and Fleet Corporate Administrative Corp., [which] are legal entities associated in fact for the purpose of advancing a company-wide acquisition strategy.” Amended Complaint ¶ 174. In *Odishelidze*, the plaintiff named as defendants on a RICO claim Aetna Life & Casualty Company; its subsidiaries Aetna Variable Annuity Life Insurance Company, Aetna Financial Services, Inc. and Aetna Life Insurance Company; and several individual officers or employees of these corporations. 853 F.2d at 22. The First Circuit upheld the dismissal of the RICO claim because the complaint did not specifically identify “a defendant, distinct from the enterprise, which conducted the enterprise’s activities through a pattern of racketeering activity.” *Id.* at 23. “[T]he Aetna companies and their officers or employees (the named defendants) cannot be the entity that conducts its own affairs through a pattern of racketeering activity.” *Id.*

The plaintiff distinguishes *Odishelidze* by arguing that the defendants and the enterprise alleged in that case were identical, whereas here it alleges that defendants FFG and FBOM, while “component[s] of the enterprise,” are persons distinct from the enterprise. Plaintiff’s Opposition at 17. The plaintiff relies on *Haroco v. American Nat’l Bank & Trust Co. of Chicago*, 747 F.2d 384,

401 (7th Cir. 1984), *aff'd on other grounds* 469 U.S. 1157 (1985), as authority for its assertion that “each participant in the enterprise may also be a person liable under RICO, it is only the association itself that may not be.” Plaintiff’s Opposition at 18. However, *Haroco* holds only that claims brought under section 1962(a) do not require the distinction of a person as defendant from the enterprise. 747 F.2d at 401-02; *see also Schofield v. First Commodity Corp.*, 793 F.2d 28, 31 (1st Cir. 1986).

FFG and FBOM argue that the Third and Fourth Circuits have specifically rejected the plaintiff’s argument. In *Brittingham v. Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), the enterprise was alleged to be “[t]he association in fact of Mobil and Mobil Chemical, the advertising agencies engaged by them, . . . and other agencies which participated in the marketing of” the subject product. *Id.* at 300. Mobil and Mobil Chemical were the only named defendants. The Third Circuit agreed with the trial court that “the alleged enterprise is not distinct from the defendants.” *Id.* at 301.

We believe a § 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation. A corporation must always act through its employees and agents, and any corporate act will be accomplished through an “association” of these individuals or entities. Consequently, the *Enright* rule [that a person must be distinct from the enterprise for purposes of section 1962(c) claims, *B. F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984)] would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf. The distinctiveness requirement ensures that RICO sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted. Therefore, we must examine the enterprise allegation to determine whether it is no more than an association of individuals or entities acting on behalf of a defendant corporation. Our decision is in accord with numerous courts that have rejected attempts to circumvent the distinctiveness requirement by alleging enterprises that are merely combinations of individuals or entities affiliated with a defendant corporation.

Id. at 301 (footnote listing eleven other reported decisions omitted). The Third Circuit also notes that its ruling would differ if some of the corporate members of the alleged association-in-fact constituting the enterprise were not affiliated with all of the other corporate members. *Id.* at 302.

In *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279 (4th Cir. 1987), the Fourth Circuit held that a corporation cannot combine with other entities, either its corporate franchisees or its officers and directors, or both groups, to form an enterprise for RICO purposes “when it is already the ‘person’ whose behavior the Act is designed to punish.” *Id.* at 1287. *Entre* applied to claims under all subsections of section 1962, but was subsequently overruled as to section 1962(a) claims only. *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 841 (4th Cir. 1990).

The First Circuit has not yet addressed this question squarely. Given the language of *Odishelidze*, I find the analysis of the Third and Fourth Circuits to be persuasive. The plaintiff’s claim under section 1962(c) against FFG and FBOM fails to distinguish the “person” from the “enterprise,” and dismissal is therefore appropriate. This analysis properly extends to the claim under section 1962(b) as well, because the statutory language makes the same distinction.

IV. Conclusion

For the reasons stated above, the motion of Defendants Fleet Financial Group and Fleet Bank of Maine to dismiss all counts against Defendant Fleet Financial Group is **GRANTED** as to Counts I, II, V, VI, VII, VIII, X, XI and XII and is otherwise **DENIED**. The motion of these defendants to dismiss Counts VI, VII and VIII against Defendant Fleet Bank of Maine is **GRANTED**.

Dated at Portland, Maine this 30th day of January, 1997.

David M. Cohen
United States Magistrate Judge