IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PACIFIC SHIPYARDS INTERNATIONAL, LLC, Plaintiff, vs. TANADGUSIX CORPORATION and MARISCO, LTD., Defendants.	CV. NO. 02-00088 DAE-KSC

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

The court heard Defendants' Motion on January 21, 2003. Jeffrey A. Griswold, Esq., appeared on behalf of Plaintiff; Thomas P. Schlosser, Esq., appeared on behalf of Defendant Tanadgusix Corporation, and Michael L. Freed, Esq., appeared on behalf of Defendant Marisco, Ltd. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motion to Dismiss Second Amended Complaint.

BACKGROUND

The facts at issue in this case have been set forth in previous filings by the respective parties, as

well as in this court's order issued on May 31, 2002. See Order Granting Defendants' Motion to Dismiss on the Pleadings ("Order"). A summary of the facts, including developments since this court's Order, is as follows:

Plaintiff Pacific Shipyards International, LLC ("PSI"), alleged in its First Amended Complaint, filed February 27, 2002, that Defendant Tanadgusix Corporation ("TDX") and Defendant Marisco, Ltd. ("Marisco"), entered into a fraudulent scheme to obtain the federal surplus drydock, the *Ex-Competent* AFDM-6 ("*Ex-Competent*")[1], from the United States. As a result of this scheme, PSI alleges it was faced with unfair competition and incurred financial loss.

When the Navy declared the *Ex-Competent* "surplus" federal property that qualified for transfer to non-federal entities, TDX and its wholly owned subsidiary Bering Sea Eccotech ("BSE") sought to

[1]The *Ex-Competent* is a 56-year-old floating drydock formerly owned by the United States.

acquire the *Ex-Competent*.[2] There are two ways that a non-federal entity such as TDX or BSE can acquire "surplus" federal property from the government: (1) A certified small, minority-owned business can seek surplus property under § 8(a) of the Small Business Act ("SBA"). See 15 U.S.C. § 636(j). (2) A "public agency" can seek surplus property from the General Services Administration ("GSA") under the 1949 Federal Property and Administrative Services Act ("1949 Act"). See 40 U.S.C. § 484(j).

In October 2000, BSE sought to acquire the *Ex-Competent* through SBA's § 8(a) program. To donate federal surplus property this way, the federal government initially transfers the property to a State Agency for Surplus Property ("SASP"), which in turn transfers it to a qualified participant in the State. The participant can use the property where it sees fit, provided its use conforms to its SBA-approved business

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[2]TDX is an Alaska corporation with Aleut shareholders, formed under the Alaska Native Claims Settlement Act.

plan. TDX asked the Alaska SASP for help in acquiring the *Ex-Competent*. Allegedly in anticipation of BSE's receipt of the *Ex-Competent*, TDX entered into a Letter of Understanding with Marisco, dated October 24, 2000. This "preliminary agreement" envisioned that BSE would own the *Ex-Competent*, operate it in Marisco's shipyard, and that BSE would seek federal contracts to work on federally-owned vessels.

The *Ex-Competent* was not transferred to BSE. Upon the advice of Alaska's SASP, TDX then attempted to acquire the *Ex-Competent* through the alternative method, as a "public agency" under the 1949 Act's GSA donation program. BSE is not considered a qualified "public agency," but TDX did qualify. On January 19, 2001, TDX sent a Letter of Intent with attachments to GSA and the Alaska Department of Administration. On the same day, GSA approved the transfer of the *Ex-Competent* to TDX by a "Vessel Conditional Transfer Document" signed by TDX and GSA.

In its First Amended Complaint, PSI alleged that in light of the information contained in the

"preliminary agreement" between TDX and Marisco, TDX's January 19, 2000 letter to GSA and the Alaska Department of Administration falsely stated that TDX would retain full control over the operation and management of the *Ex-Competent* to benefit Aleut shareholders. It claimed that the letter contained false and fraudulent statements in furtherance of a scheme to obtain the *Ex-Competent* and engage in a ship repair business that directly competed with PSI.

Specifically, PSI alleged that TDX had conspired with Marisco to violate 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d) of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). PSI argued that TDX and Marisco's racketeering activity was either a closed or open-ended RICO scheme perpetrated through a series of deceptive and misleading communications made to GSA. As a result, PSI asserted it had suffered injuries cognizable under 18 U.S.C. § 1964(c).

This court found that Plaintiff lacked standing to assert its RICO claim under § 1962(c) and § 1964(c) because it failed to establish that Defendants'

predicate acts actually and proximately caused Plaintiff a financial loss. According to the case law of the Ninth Circuit, lost bids, lost market share, or lost customers as a result of alleged RICO activities generally do not constitute actual financial loss because they are speculative in nature and insufficiently concrete. See Order at 12 (citing Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F. 2d 397, 406 (9th Cir., 1991), cert. denied, 502 U.S. 1094 (1991)).

This court also found that PSI lacked standing because its allegations referred to "future" inability to compete on equal footing with Defendants, as well as to the "possible" loss of its business investment in drydocks. It noted that courts routinely dismiss RICO cases in which the plaintiff's injury is too far removed from the injurious conduct to establish the required causal link necessary for a finding of proximate cause. See Order at 14 (citing Holmes v. Securities Investor Protection Corporation et al., 503 U.S. 258, 268 (1992)). In this case, PSI could not

prove it suffered a cognizable harm related to Defendants' actions. PSI was neither a target of Defendants' actions nor did it suffer a concrete financial loss.

Even though this court found that PSI did not have standing to qualify as a RICO plaintiff, the Order addressed PSI's arguments regarding Defendants' alleged racketeering activity under §§ 1961(1) and (5). The court found that PSI could not prove it personally had been deceived by any wire or mail communications from TDX or Marisco in violation of either §§ 1341 or 1343. The same obstacles to standing - namely, PSI's inability to establish that any allegedly fraudulent communications led directly to a concrete loss - existed with respect to PSI's substantive racketeering claims: all allegedly fraudulent communications were directed at a third party with no "specific goal" of injury to the PSI. Order at 17.

This court's Order dismissing PSI's action was filed on May 31, 2002, and judgment was entered on June 13, 2002.

After judgment was entered, an Administrative Order issued by GSA on August 2, 2002, ordered TDX to return the *Ex-Competent* to the United States because of its noncompliance with the terms and conditions of the transfer document. See Plaintiff Pacific Shipyards International, LLC's Memorandum in Opposition to Defendant's Tanadgusix Corporation and Marisco, LTD.'s Motions to Dismiss Second Amended Complaint, Exhibit B ("Exhibit B"); see Administrative Order of the United States General Services Administration ("GSA Order"), dated August 2, 2002.

In its Conclusions of Law and Determinations, GSA established upon review of the various communications between GSA, TDX, and Marisco, that TDX had allowed Marisco to moor the drydock permanently at Marisco's facility in Hawaii. Although stopping short of accusing any party of a fraudulent scheme, this arrangement was found to violate the terms of the transfer document, which had identified the public purpose of the drydock as being for the economic

development of St. Paul Island, Alaska, and for the benefit of the Aleuts.[3]

In light of the recent findings set forth in the GSA Order requiring the return of the *Ex-Competent* to the government, it now appears clear that TDX expressed different intentions to different parties in its various exchanges. The Letter of Understanding between TDX and Marisco explicitly sets forth the intent of both TDX and Marisco to operate the *Ex-Competent* in Hawaii. However, the two letters drafted by TDX to the government - one dated October 9, 2000, and the other dated January 19, 2001 - represented that TDX's intentions were *not* to operate the vessel in Hawaii but to prepare it for use in Alaska in keeping with the agreed terms of the transfer.

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[3]In addition to GSA's order, the dispute between TDX and the state and federal agencies relating to the transfer of the *Ex-Competent* to BSE was decided in a related case, Tanadgusix Corp. et al. v. Huber, et al., No. A02-0032 CV (RRB) ("Huber"). The decision filed on December 5, 2002, granted summary judgment against TDX and in favor of GSA. The district court found that GSA's Order of noncompliance prevented the court from finding that the *Ex-Competent* could be transferred to BSE, TDX's wholly-owned subsidiary. See Huber at 2.

Additional evidence exists in an even earlier letter, dated September 8, 2000, from Marisco to the State of Hawaii Harbors Division. Marisco informed the State of Hawaii that it would be replacing its existing drydock with the *Ex-Competent*. GSA Order at 2. Thus, Marisco had apparently reached a rather concrete understanding with TDX well before TDX made directly contradictory representations to the government.

On September 9, 2002, PSI filed a Motion for Leave to File a Second Amended Complaint, which Magistrate Judge Kevin S.C. Chang granted on October 10, 2002. See Order Granting Plaintiff Pacific Shipyards International, LLC's Motion for Leave to File Second Amended Complaint, filed October 18, 2002. Although a judgment for dismissal already had been entered against PSI, Judge Chang granted leave of the court for PSI to file a third complaint in this matter. Judge Chang found that the motion was timely under the Rule 16 Schedule, that the standard under Fed. R. Civ. P. 15(a) favors freely granting leave to amend, and that counterclaims still existed.

PSI's Second Amended Complaint ("Complaint") alleged four new claims: (1) that TDX had acquired another ex-Naval vessel, the *Cape Flattery*, in violation of a surplus transfer agreement; (2) that Marisco had settled a prior claim under the False Claim Act; and (3) that PSI had lost two bids because of the *Ex-Competent*. Both Defendants then filed the present Motions to Dismiss.

STANDARD OF REVIEW

Defendant Marisco and Defendant TDX have asserted motions pursuant to Rule 12(b)(6) and 12(c).[4] Rule 12(b) allows the consideration at the pre-trial stage of any defense, objection, or request "which is capable of determination without the trial of the general issue." Fed. R. Civ. P. Rule 12(b). Rule 12(c) calls for dismissal on the pleadings if the moving party is clearly entitled to prevail.

Under both rules, a motion to dismiss is generally "capable of determination" before trial "if

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[4]At the hearing, Mr. Freed stated that Marisco's motion was made pursuant to Rule 12(c).

it involves questions of law rather than fact." See United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986). Although the court may make preliminary findings of fact necessary to decide the legal questions presented by the motion, the court may not "invade the province of the ultimate finder of fact." Id. (internal quotations and citations omitted.)

A motion to dismiss will be granted where Plaintiffs fail to state a claim upon which relief can be granted. A complaint should not be dismissed unless it appears to a certainty that Plaintiffs "would be entitled to no relief under any set of facts that could be proved." Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All allegations of material fact are taken as true and construed in a light most favorable to Plaintiff. Clegg v. Cult Awareness Network, 18 F. 3d 752, 753-54 (9th Cir. 1994).

This court is not required to accept as true any legal conclusions presented as factual allegations

if those conclusions cannot be drawn reasonably from the allegations. Berquist v. County of Cochise, 806 F. 2d 1364, 1369 (9th Cir. 1986). Also, failure to delineate a cognizable legal theory, or, to present sufficient facts under a cognizable legal theory, should result in dismissal. Balistreri v. Pacifica Police Dept., 901 F. 2d 696, 699 (9th Cir. 1990).

DISCUSSION

Defendants argue that PSI's Motion to Amend was filed after entry of judgment and thus, it should have been treated as an untimely Motion for Reconsideration. After the period for filing either a Motion for Reconsideration or an appeal of this court's decision had ended, among the options available to PSI were a Motion for Relief of Judgment or Order pursuant to Rule 60(b), or, a Motion to Alter or Amend Judgment under Rule 59(e). Under these rules, PSI would have had to show cause for rescinding the finality of the judgment.

Most importantly, PSI would have had to explain why it had not previously brought to the attention of the court allegations of activities that had occurred

by the time this court reviewed the substantive issues last spring. The allegations against TDX that it had perpetrated a similarly fraudulent scheme in acquiring another ex-Naval vessel, the *Cape Flattery*, and the settlement of a federal claim by Marisco in 1993, both involve events that took place well before this court's initial review and its May 31, 2002 Order.

Despite these procedural considerations, the court recognizes PSI's claim that four issues have triggered the need to revisit this case. Moreover, the court recognizes that in the Ninth Circuit, a case that has been dismissed can be reopened after entry of final judgment when leave of the court is granted under Rule 15(a). Jarvis v. Regan, 833 F. 2d 149, 154-55 (9th Cir. 1987) (finding that where a final judgment is entered following dismissal of an action, plaintiff no longer has the right to amend the complaint as a matter of course but may receive leave of the court); see also Weeks v. Bayer 246 F.3d 1231, 1236 (9th Cir. 2001).

Defendants maintain that PSI's Second Amended Complaint ("Complaint") fails to cure any of the

defects identified in its First Amended Complaint. TDX argues that PSI still does not have standing because the loss of the two bids is not a cognizable financial injury. Moreover, Defendants claim that PSI still has not established a direct relationship between the injury asserted and the injurious conduct alleged such that proximate cause exists.

As set forth previously, it is clear that the Ninth Circuit limits the concept of injury to financial loss and that generally, lost bids are too speculative in nature to constitute a concrete, actual loss. In its Complaint, however, PSI has alleged that Marisco's ability to prepare bids at substantially lower prices is a direct result of its acquisition of the *Ex-Competent* through the government donation program. But for Marisco's dealings and contract with TDX, whose allegedly fraudulent representations to the government resulted in receipt of the donated vessel, Marisco would not have been able to bid at the substantially lower prices alleged.

PSI cites a Second Circuit case, Commercial Cleaning Services, LLC v. Collins Service Systems, Inc., 271 F. 3d 374 (2nd Cir. 2001), as instructive because of the similar factual pattern. The Second Circuit found that the plaintiff had met the requirements for establishing proximate cause because the difficulty in proving injury was reduced by the fact that the parties were in direct competition with each other. Id. at 383. Similarly, this court finds that in light of the new evidence and reformulated allegations, PSI may have suffered a loss that is directly the result of the dealings TDX and Marisco's conducted with the government through mail and wire communications.

Although Lancaster stands generally for the proposition that a plaintiff may not articulate a civil RICO claim for loss of market share, here, as in Commercial Cleaning Services, no case disputes that PSI has a right to pursue its business interests in a fair market. It now appears that Marisco and TDX's anti-competitive behavior is unacceptable not just because

it resulted in lost customers or lost market share but because it may indeed have been fraudulent.

Despite this reconsideration, the court finds that the new evidence presented does not alter the ultimate holding of the prior Order that PSI lacked standing to assert a RICO claim. Although the facts now establish a greater likelihood that a fraud may have been committed against the United States by at least TDX, PSI still has failed to allege with the particularity required under Fed. R. Civ. P. Rule 9(b) that its multi-million dollar investment in the drydock business is recoverable because of Defendants' allegedly fraudulent mail and wire exchanges involving the *Ex-Competent*.

As this court found in Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365, 1373-74 (D. Haw. 1995) (citations omitted), when a plaintiff alleges fraud as a predicate act, Rule 9(b) requires that the "circumstances constituting fraud ... be stated with particularity." Fed. R. Civ. P. 9(b). Although the pleading of detailed evidentiary matter is not

necessary, Rule 9(b) requires particularized allegations of the circumstances constituting fraud. The Ninth Circuit has found that a plaintiff must include statements concerning the time, place, and nature of the alleged fraudulent activities and that mere conclusory allegations of fraud are insufficient.

GSA's official revocation of TDX's ownership of the *Ex-Competent* on August 2, 2002, and the Alaska district court's decision in Huber, filed December 5, 2002, indicate that further investigation into TDX and Marisco's intentions and actions may be warranted. As with the allegations it had set forth in its First Amended Complaint, however, PSI has failed to plead the details regarding the lost bids, the *Cape Flattery*, and the false claims act with the required particularity, including the time, place, and nature of the events.

Indeed, PSI had no guarantee of receiving the two contracts at issue. Even though only two competitors exist in the Hawai`I ship repair market, there is no exclusive distributorship as in Schreiber Distributing v. Serv-Well Furniture Company, 806 F. 2d

1393 (9th Cir. 1986). In contrast to PSI's lack of evidence, Defendants argue that the federal government could have awarded the contracts to mainland companies. Defendants also maintain that in fact, the government contracts were awarded to Marisco's other drydock, *L'il Perris*, and not to the *Ex-Competent*. Thus, they argue that Marisco's contract to use the *Ex-Competent* does not appear to have affected the decisions of the government contractors seeking repair and drydock services.

PSI alleges, however, that Marisco had to bear very few of the start-up costs generally associated with initiating the operation of a new drydock, and thus was able to bid at artificially lower prices. This allegation, though potentially meritorious, nonetheless fails for lack of particularity regarding details such as the differences in the bid prices, the factors considered by the government bidders, and the precise projected losses to PSI. Generally asserting the loss of two bids does not meet the particularity requirement. Also, the court does not see how allowing

additional discovery would be helpful, as all such information was available to PSI at the time it drafted the Complaint.

Similarly, the two allegations related to prior acts by both TDX and Marisco also fail to meet the heightened pleading standard for fraudulent acts. Whether TDX's previous business arrangements defrauded the United States in a completely separate matter - the *Cape Flattery* acquisition - may have relevance to the issues presently before the court. However, PSI has not demonstrated with the particularity required under Rule 9 that the *Cape Flattery* acquisition was identical or even similar to the *Ex-Competent* acquisition and operation. Also, Marisco's ten-year-old false claims settlement does not remedy PSI's lack of standing. On its face and without more detail, it says nothing about the specific mail and wire communications between TDX and GSA, and Marisco and TDX, that are the subject of PSI's allegations in this matter.

Although PSI requests discovery in an attempt to uncover additional details about both the *Cape*

Flattery and the false claims settlement, this court finds that even were such a request granted, PSI would still be unable to satisfy the requirements of a RICO pleading. First, PSI would have to prove the existence of a pattern of racketeering activity by showing that the mail and wire fraud predicates alleged in this case are related to any possible mail and wire communications that happened in one or both of the earlier occurrences. See H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989).

At the hearing, PSI's counsel argued that the schemes are related because they are identical. However, he did not demonstrate how the acquisition and operation of the *Cape Flattery* may have constituted a pattern of activity engaged in by an enterprise between Marisco and TDX. Along a similar vein, PSI's attempt to use the false claims settlement involving Marisco to demonstrate further the existence of a series of related RICO activities extending over a substantial period of time fails. PSI does not assert that the false claims settlement involving Marisco constitutes a

continuous pattern of mail and wire fraud activity by an enterprise involving both TDX and Marisco specifically.

In addition to the flaws in the new evidence offered, PSI still has not successfully demonstrated the existence of an enterprise that is consistent with the RICO definition. As this court found in the original Order, TDX and Marisco's dealings do not constitute an enterprise because the business relationship between the two parties does not have "an existence beyond that which is merely necessary to commit the predicate acts of racketeering." See Chang v. Chen, 80 F. 3d 1293, 1299 (9th Cir. 1996).

PSI argues that the parties are engaged in a ship repair business that is a separate activity from the allegedly fraudulent communications such that a separate structure can be discerned from the arrangement between the two companies. This argument fails for two reasons. First, the mail and wire fraud activities alleged by PSI are directly related and foundational to the transfer of the *Ex-Competent* and

the operation of the ship repair business between the two parties. Secondly, PSI argues that an enterprise exists in the form of the business relationship between two separate corporations, TDX and Marisco, and, that the definition of "enterprise" need not encompass an entity separate and apart from the RICO defendants. In so arguing, PSI may not then also assert that this "enterprise" is distinct from the pattern of racketeering activity, a pattern predicated on the mail and wire communications establishing the relationship between TDX and Marisco. At best, PSI is alleging the existence of a conspiracy between Marsico and TDX. Such allegations do not, however, rise to the level of a RICO enterprise.[5]

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[5]Despite PSI's representation that River City Markets, Inc. v. Fleming Foods West, Inc., 960 F. 2d 1458 (9th Cir. 1992) supports its argument that a business relationship between defendants can constitute an enterprise, in fact, the case stands for the proposition that a plaintiff may sue a RICO enterprise and RICO defendant simultaneously. It merely notes that two contracting business entities *may* form a RICO enterprises *if* the other statutory provisions are met.

CONCLUSION

The court finds that the defects in PSI's Second Amended Complaint are such that no additional evidence or amendments will save PSI's underlying allegations against TDX and Marisco. Accordingly, the court GRANTS Defendants' Motion To Dismiss.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JAN 31 2003.

DAVID ALAN EZRA
CHIEF UNITED STATES DISTRICT JUDGE