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 ON THE PLEADINGS

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motion To Dismiss On The Pleadings.

BACKGROUND

Plaintiff Pacific Shipyards International, LLC ("PSI"), alleges that Defendant Tanadgusix Corporation ("TDX") and Defendant Marisco, Ltd. ("Marisco")(known collectively as "Defendants"), entered into a fraudulent scheme to obtain the federal surplus drydock, *Ex-Competent*, from the United States.

PSI's claim centers on the *Ex-Competent* AFDM-6 ("*Ex-Competent*"), a 56-year-old floating drydock formerly owned by the U.S. Navy that has been moored in Pearl Harbor. Several years ago, the Navy declared it "surplus" federal property that could

be transferred to non-federal entities. TDX and its wholly owned subsidiary Bering Sea Eccotech ("BSE") sought to acquire the *Ex-Competent*. TDX is an Alaska corporation with Aleut shareholders, formed under the Alaska Native Claims Settlement Act. TDX and BSE have stated they wanted to acquire the *Ex-Competent* to gain revenue from its commercial operation, and to train and employ Aleut shareholders in the skills associated with servicing ships. In order to accomplish these goals, TDX and BSE required an experienced drydock company and believed that Marisco was such a company. Marisco is a Hawaiian corporation engaged in the ship repair business.

There are two ways that a non-federal entity such as TDX or BSE can acquire "surplus" federal property from the government: (1) An SBA-certified small, minority-owned business can seek surplus property under § 8(a) of the Small Business Act. See 15 U.S.C. § 636(j), or (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 acquire 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 plan. TDX asked the Alaska SASP for help in acquiring the *Ex-Competent*. In anticipation of BSE's receipt of the *Ex-Competent*, TDX signed a preliminary agreement with Marisco in the fall of 2000. This 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. PSI maintains that this Letter of Understanding between TDX and Marisco contains false and fraudulent statements in furtherance of a scheme to obtain the *Ex-Competent* and deprive PSI of some property interest. PSI also alleges that in TDX's October 9, 2000 letter to the Alaska Department of Administration, it falsely stated that TDX would retain full control over the operation and management of the *Ex-Competent*.

The *Ex-Competent* was not transferred to BSE, apparently as result of some confusion over the appropriate method of transferring surplus property to § 8(a) businesses. In order to complete the transfer, SBA needed to confirm and certify BSE's eligibility to participate in the Alaska SASP's surplus property program. TDX and BSE waited for certification, which did not appear to be coming through quickly. Upon the advice of Alaska's SASP, TDX 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" under the 1949 Act, but TDX is qualified. On January 19, 2001, TDX sent a Letter of Intent with attachments to GSA and the Alaska Department of Administration. PSI alleges that this letter is fraudulent because it did not indicate that TDX intended to operate the *Ex-Competent* in Hawaii but rather implied that it was TDX's intent to move the *Ex-Competent* to Alaska after making repairs in Hawaii.

On January 19, 2001, GSA approved transferring the *Ex-Competent* to TDX by a "Vessel Conditional Transfer Document" signed by TDX and GSA (through the Alaska SASP). BSE and TDX continued seeking SBA certification to enable BSE to receive the *Ex-Competent* and carry out its SBA-approved business plan, but SBA still refused. This dispute between TDX and BSE and the state and federal agencies relating to the transfer of the *Ex-Competent* to BSE is the subject of a related pending case, Tanadgusix Corp. et al. v. Huber, et al., No. A02-0032 CV (JWS), filed on February 15, 2002.

In March 2001, GSA authorized transfer of the *Ex-Competent* to TDX. On May 2, 2001, TDX hired Marisco to move the *Ex-Competent* from Pearl Harbor to temporary mooring at Campbell Industrial Park. Soon thereafter, the *Ex-Competent* was towed to Marisco's shipyard. Defendants maintain that moving, decontaminating and repairing the *Ex-Competent* cost over one

million dollars. On May 5, 2001, TDX sent a letter to GSA reporting on TDX's progress in moving, repairing and cleaning of the vessel. PSI alleges that this letter is fraudulent and overstates the expenses incurred.

In May 2001, PSI began sending letters to federal and state officials stating that TDX should be investigated for its activities relating to the *Ex-Competent* and that the vessel must be immediately and permanently moved out of Hawaii. PSI also contacted TDX's shareholders. On July 20, 2001, TDX sent another letter to GSA reporting on the progress on the *Ex-Competent*. PSI also alleges that this letter is fraudulent and repeats the allegations about TDX misrepresenting costs to the government. In addition, PSI maintains that TDX's October 19, 2001 Letter to GSA is fraudulent.

On February 13, 2002, PSI filed this RICO action. TDX filed the instant motion to dismiss on the pleadings on April 30, 2002. Marisco filed its joinder in the motion on May 1, 2002. PSI filed its Memorandum in Opposition on May 13, 2002. TDX and Marisco filed their respective Reply Memoranda on May 20, 2002.

STANDARD OF REVIEW

Rule 12(c) of the Federal Rules of Civil Procedure provides in part as follows:

> After the pleadings are closed but within such time as not to delay the trial, any

party may move for judgment on the pleadings. . . ."

The dismissal on the pleadings is proper only if the moving party is clearly entitled to prevail. Doleman v. Meiji Mutual Life Insurance Co., 727 F.2d 1480, 1482 (9th Cir. 1984). The court's review is limited to the pleadings. See 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.38 (3d ed. 1998). The court may also consider documents attached to the complaint or answers because they are considered a part of the pleadings and all documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir. 1998), cert. denied, 525 U.S. 1001 (1998). All allegations of fact of the opposing party are accepted as true. Id.

Generally, the court is unwilling to grant dismissal pursuant to Rule 12(c) "unless the movant clearly establishes that he is entitled to judgment as a matter of law." Id. (quoting Wright & Miller, Federal Practice and Procedure: Civil § 1368). Courts dismiss complaints under Rule 12(c) for either of two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. See Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). Dismissal is also required if an affirmative defense or other barrier to relief is apparent from the face of

the complaint. 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.34(4).

To the extent, however, that "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(c).

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The purposes of the rule are to give adequate notice to the adverse party of the charges against it and to deter groundless suits. See, e.g., Wright & Miller, Federal Practice and Procedure, Civil 2d §§ 1296-1298 [hereinafter "Wright & Miller"]. To meet Rule 9(b)'s particularized pleading requirement, a plaintiff "must set forth what is false or misleading about a statement, and why it is false." Decker v. GlenFed, Inc., 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc) (citations omitted). A plaintiff must also establish the time and place of the allegedly fraudulent statement, as well as the identity of the perpetrator. See id. Of course, whether the pleading requirements are met is very case specific, and courts should keep in mind that "the most basic consideration in making a judgment as to the sufficiency of the pleading is the determination of how much detail is necessary to give adequate

notice to an adverse party and enable [it] to prepare a responsive pleading." Wright & Miller at § 1298; see also Semegen v. Weidner, 780 F.2d 727, 730 (9th Cir. 1985). If the court finds that fraud has not been particularly pled in compliance with Rule 9(b), the court need not dismiss the complaint with prejudice; rather the court may give the plaintiff an opportunity to amend the complaint. See Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986); Mueller v. Walgreen Corp., 175 F.R.D. 631, 637 (N.D. Cal. 1997) (finding that plaintiff had not pled fraud with particularity, but allowing him to amend complaint to cure defects); Wright & Miller at § 1300.

In addition, Rule 9(b) also requires particularity where fraud forms the underlying basis for a RICO claim. See, e.g., Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir. 1988), cert. denied, 493 U.S. 858 (1989); Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365, 1374 (D. Haw. 1995) (noting that allegations of fraud brought under RICO must identify the time, place and manner of each fraud as well as the role of each defendant).

DISCUSSION

PSI's first amended complaint alleges that TDX conspired with Marisco to violate 18 U.S.C. § 1962(c) of the

Racketeering Influenced and Corrupt Organizations Act ("RICO") through mail and wire fraud, thus violating 18 U.S.C. § 1962(d).

18 U.S.C. § 1964(c) provides:

> 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...

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities 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.

Section 1962(d) states:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (1), (b), or (c) of this section.

RICO defines the term "pattern of racketeering activity" as requiring "at least two acts of racketeering activity ... the last of which occurred within ten years after the commission of a prior act of racketeering activity." RICO, 18 U.S.C. § 1961(5). In H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989), the Supreme Court articulated a two-pronged framework for analysis of a RICO claim: "[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." Id.

at 239. Thus, the determination of whether a RICO plaintiff is able to establish a pattern of racketeering activity necessarily entails an initial determination of whether the defendants committed two or more predicate acts within the meaning of the RICO statute. See 18 U.S.C. § 1965(c). And if so, whether the predicate acts were related in manner such that they created a threat of continued unlawful activity. See Northwestern Bell, 492 U.S. at 239-43.

Congress has enumerated the predicate acts which may form the basis for a RICO claim in 18 U.S.C. § 1961(1). "Racketeering activity" is "any act which is indictable under any of the following provisions of title 18, United States Code...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)". Section 1961(1)(B).

To establish its RICO § 1962(c) claim, PSI must establish: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. See Sedima v. Imrex Co. Inc., 473 U.S. 479, 496 (1985). To establish the claim for mail or wire fraud, PSI needs to establish that Defendants (1) formed a scheme or artifice to defraud; (2) used the United States mails (or, for wire fraud, the use of wire, radio, or television communications); (3) with the specific intent to deceive or defraud. 18 U.S.C. § 1341, § 1343, § 1346; see also Sun Savings and Loan Association v. Dierdorff, 825 F.2d 187 (9th Cir. 1987).

"Mail fraud also requires the intent to defraud someone of money or property." United States v. Carpenter, 95 F.3d 773, 776 (9th Cir. 1996).

Under Fed. R. Civ. P. 9(b), PSI's amended complaint is held to an especially high standard because mail and wire fraud are the alleged unlawful RICO predicate acts. Rule 9(b) requires a RICO plaintiff to plead mail and wire fraud facts with particularity. Local Rules 9.1 and 9.2 also mandate particularity. See, e.g., Alan Neuman Productions, Inc. v. Albright, 862 F.2d 1388, 1392-93 (9th Cir. 1988), cert. denied, 493 U.S. 858 (1989).

A. Standing

In the first instance, to have standing to assert its RICO claim, PSI must establish that Defendants' predicate acts actually and proximately caused PSI's financial loss. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268-270 (1992).

1. Financial Loss

A RICO plaintiff only has standing if, and can only recover to the extent that, its business or property was injured by illegal racketeering activity. See Steele v. Hosp. Corp. of Amer., 36 F.3d 69, 71 (9th Cir. 1994). The Ninth Circuit clearly

limits RICO injury to concrete financial loss. Lui Ciro, Inc. v. Ciro, Inc., 895 F. Supp. 1365, 1378 (D. Haw. 1995). The risk of loss, which is not actionable under RICO, differs from a concrete showing of actual financial loss. RICO requires actual financial loss. Id.

In its Memorandum in Opposition to Defendants' Motion, PSI insists that it has standing because its loss of bids constitutes actual financial loss. PSI cites case law which holds that competitors who lose out on a bid as a result of the conduct of a competing enterprise through a pattern of racketeering activity can maintain a civil RICO action. However, PSI does not cite any Ninth Circuit precedent and fails to account for the fact that the Ninth Circuit expressly rejects RICO standing based on lost "market share" or lost customers. See Lancaster Community Hosp. v. Antelope Valley Hosp. D., 940 F.2d 397, 406 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992). Courts in this circuit confronted with similar facts deny standing to plaintiffs claiming lost bids, lost market share, or lost customers due to RICO activities, because their loss is only speculative and not concrete. Id. PSI is seeking compensation for bids that it has lost to Marisco. PSI has alleged nothing more than it has lost, and is likely to lose in the future, a piece of Hawaii's ship repair market. These are not legally cognizable property interests for which recovery is

permitted in the Ninth Circuit. See Lancaster, 940 F.2d 397, Pharmacare v. Caremark, 965 F. Supp. 1411 (D. Haw. 1996). PSI does not have a right to a share of the Hawaii ship repair market. Accordingly, PSI has not suffered concrete financial harm which is necessary to confer standing to maintain the present action.

2. Proximate Cause

To have standing to bring a RICO claim under 18 U.S.C. § 1964(c), a RICO plaintiff must allege "but for" proximate cause. Id. There must be a "direct relationship between the injury asserted and the injurious conduct alleged." Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1311 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993). The direct causal link must be clear from the pleadings. See Id. PSI's First Amended Complaint alleges only the following harms: (1) future inability "to compete on equal footing" with defendants; (2) a business investment "in the purchase and refurbishment of a drydock" that it will also likely lose. PSI does not allege that TDX or Marisco used the *Ex-Competent* to offer vessel services at artificially low rates. Nor does PSI allege that its $4.5 million dollar investment was in any way related to the *Ex-Competent*. PSI's pleadings do not establish that PSI's losses are directly caused by TDX's or Marisco's communications with the

government. The chain of causation presented by PSI is by no means sufficient to establish "but for" causation. PSI establishes the following chain of events: (1) TDX made allegedly fraudulent statements to government officials through the mails and wires, (2) the government, through the Alaska SASP, ordered conditional transfer of the *Ex-Competent*; (3) TDX took control of the *Ex-Competent*; (4) Marisco, PSI's direct competitor, entered into a non-exclusive contract with TDX for use of the *Ex-Competent*; (5) customers, including the federal government, have chosen to do business with Marisco and TDX rather than PSI; and (6) PSI made unnecessary investments in its business. There are subsequent intervening events which break the "but for" proximate chain of causation. No direct causal link is established. PSI is unable to trace its injuries to the fraudulent acts without traversing "several somewhat vaguely defined links" which eliminates proximate cause. Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540 (1983).

In addition, courts routinely dismiss RICO cases for lack of standing where the RICO plaintiff alleges harm caused by the defendants' misrepresentations to the government or other third party. In such cases, the plaintiff stands at too remote a distance to recover. See e.g. Holmes, 503 U.S. 258; Imagineering, 976 F.2d at 1311; Dow Chem Co. v. Exxon Corp., 30

F. Supp. 2d 673 (D. Del. 1998); Grauberger v. St. Francis Hosp., 169 F. Supp. 2d 1172, 1177 (N.D. Cal. 2001). In this case, PSI is attempting to predicate its RICO claim for mail or wire fraud that was not directed at PSI, but rather at the federal government. PSI's losses, if any, have resulted from intervening acts of the government, the potential customers, and even acts of PSI itself. Therefore, there is not proximate causation in this case.

The factual situations presented in the cases cited by PSI are distinguishable from this case. In many of the cases cited, plaintiffs claimed lost "market share" which, as described above, is insufficient in the Ninth Circuit to provide RICO standing. See Lancaster, 940 F.2d at 406. Moreover, in the cases cited by PSI, the concrete harm suffered by plaintiffs was directly connected to defendants' acts. Here, PSI has not established a direct causal link. Finally, in many of the cases cited there was a plaintiff-defendant connection, either through a joint business venture or where the defendant had directly interfered with plaintiff's exclusive property rights, or defendants intentionally disparaged or harmed plaintiffs. There is no such connection between PSI and either TDX or Marisco in this case.

PSI was not the target or direct victim of any alleged unlawful conduct and suffered no concrete financial harm as a

direct result of Defendants' acts. Accordingly, PSI lacks standing to seek relief under RICO. However, even assuming PSI had standing to bring the instant action, they have failed to meet the remaining elements of a RICO claim.

B. Racketeering Activity

PSI alleges that TDX and Marisco's racketeering activity was through a "series of deceptive and misleading communications made through the State of Alaska to the United States General Services Administration...to obtain the donation of the drydock and to obtain permission to use the drydock in Hawaii".

To "defraud" within 18 U.S.C. § 1341 (mail fraud) and § 1343 (Wire fraud) means to intentionally use "dishonest methods or schemes" to deprive a plaintiff "of something of value by trick, deceit, chicane or overreaching." McNally v. United States, 483 U.S. 350, 358 (1987). The scheme to defraud must involve intentional misrepresentations or omissions by a defendant that are reasonably calculated to deceive a plaintiff of ordinary prudence and comprehension. Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400 (9th Cir. 1986). Fraud only occurs when the plaintiff relies on the defendant's misrepresentations. Grauberger, 169 F. Supp. 2d at 1177. Simple breach of contract, anti-competitive behavior and even statutory

violations do not constitute actionable mail or wire fraud unless the plaintiff was deceived. Lui Ciro, 895 F. Supp. at 1383. For these reasons, a RICO plaintiff cannot claim mail or wire fraud if the communications were not directed at the plaintiff, but rather at third parties. Simon v. Value Behavioural Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001).

In this case, none of PSI's allegations describe a communication from TDX or Marisco to PSI. PSI cannot show that TDX and Marisco ever targeted a single act of alleged wire and mail fraud at PSI, or that either of the Defendants intended PSI to view or rely on the communications. PSI simply ignores the clear precedent cited by Defendants establishing that PSI cannot claim mail or wire fraud under these circumstances, where all allegedly fraudulent communications were directed at a third party with no "specific goal" of injury to the plaintiff. SJ Advanced Tech. And Mfg. Corp. v. Junkunc, 627 F. Supp. 572 (N.D. Ill. 1986); Simon, 208 F.3d 1073; Grauberger, 169 F. Supp. 2d 1172.

The communications alleged by PSI to comprise the fraudulent scheme do not show fraud, and discovery will not prove otherwise. Most importantly, PSI was not a target or recipient of any of the communications, either expressly or impliedly.

1. TDX's October 9, 2000 Letter To Alaska Department of Administration

PSI alleges that the October 9, 2000 letter to the Alaska Department of Administration falsely states that TDX would retain full control over the operation and management of the *Ex-Competent*. The letter states that TDX "will retain full control of the vessel according to the terms established by GSA's "Vessel Conditional Transfer Document.'" See TDX's Reply Memo, Exhibit T-2. TDX counters that in order for this statement to be false, PSI's complaint must allege facts showing that TDX planned to violate the GSA's Transfer Document which it had not yet signed as of the date of the letter. PSI presents a legal interpretation of the later executed contract between TDX and GSA. However, the meaning of the Transfer Document is at issue in the related case, Tanadgusix Corp. et al. v. Huber, et al., No. A02-0032 CV (JWS), filed on February 15, 2002. PSI has not participated in that case.

2. TDX's and Marisco's October 24, 2000 Letter of Understanding

This letter contains no evidence of an intent to deprive PSI of property. PSI is not even mentioned in the letter. Moreover, it is only a "preliminary" letter of understanding and subject to revision, and was made before TDX had entered into any agreement with GSA.

3. TDX's January 19, 2001 Letter of Intent (with attachments) to GSA and the Alaska Department of Administration

PSI alleges that this letter is fraudulent because it did not indicate that TDX intended to operate the *Ex-Competent* in Hawaii but rather implied that it was TDX's intent to move the *Ex-Competent* to Alaska after making repairs in Hawaii. There is no evidence of any fraudulent statements. The letter is not fraudulent on its face and the attachments indicate that the *Ex-Competent* was to be put into service in Hawaii. The January 18 letter from "Marisco Limited, the shipyard owner, our partner in the State of Hawaii" to TDX, attached to the January 19, 2001 letter, explicitly stated: "This letter is to reaffirm our commitment and interest in putting the EX AFDM-6 Drydock into service in Hawaii".

4. TDX's May 5, 2001 Letter to GSA

The May 5 letter reports to Alaska TDX's progress in moving, repairing and cleaning the *Ex-Competent*. PSI alleges this letter is fraudulent. There is no evidence on fraud on its face. The letter does not promise to move the vessel to Alaska, does not mention PSI and does not impliedly try to deprive PSI of its property. PSI also alleges that the letter overstates the expenses incurred by TDX. There is no evidence to support this claim. Moreover, PSI's complaint does not show why any alleged

misrepresentations fulfill elements of its RICO claim or deprive PSI of property.

5. TDX's July 20, 2001 Letter to GSA

PSI alleges that this letter is fraudulent and repeats the allegation about TDX misrepresenting costs to the government. However, this allegation, even assuming it to be true, does not evidence an intent to deprive PSI of property.

6. TDX's October 19, 2001 Letter to GSA

This letter was written by TDX's attorneys to GSA to try and clarify the situation with regards to the vessel. The letter outlined the legal support for allowing the vessel to operate in Hawaii and explained TDX's relationship with Marisco. There is nothing fraudulent on the face of this letter.

In addition to its Opposition, PSI submitted an affidavit alleging two additional fraudulent statements. The submission of these materials is improper. These materials were not found in PSI's complaint. Rule 9(b) and Local Rules 9.1 and 9.2 require a RICO plaintiff to plead mail and wire fraud with particularity. Alan Neuman Prod., Inc., 862 F.2d at 1392-93. Accordingly, the additional statements should be disregarded by the court. However, even if the court were to consider this evidence, there is still no evidence of fraud. PSI alleges that in April or May 2001, Robert Dewitz of PSI asked a TDX employee,

Kevin Kennedy, whether it was TDX's plan to operate the *Ex-Competent* in Hawaii during the time that it was being repaired in Hawaii. According to Mr. Dewitz, Mr. Kennedy said TDX had not decided what to do with the drydock while it was in Hawaii. This statement is not fraudulent, nor was it intended to deprive PSI of any property. PSI's second new allegedly fraudulent statement is that TDX representatives said to PSI during a conference call in February 2002 that PSI should withdraw its opposition to TDX's use of the *Ex-Competent* because the drydock would be available for use by PSI as well as others. This statement can reasonably be understood as an offer of settlement, considering the state of affairs and the relationship between PSI and Defendants at that time. This is not evidence of a fraudulent statement by TDX.

Interpreting all of the evidence in the light most favorable to PSI, PSI has at most claimed that Marisco and TDX have defrauded the United States government, through the State of Alaska, of the ownership of the *Ex-Competent*, and possible also defrauded the government of a property right to use and/or operate the vessel in drydock in Hawaii. PSI has not established any right or claim of its own. PSI has not been defrauded out of any business or recognizable property interest. Accordingly, PSI has failed to establish the requisite racketeering activity.

C. Pattern of Racketeering Activity

The heart of a RICO complaint is the allegation of a *pattern* of racketeering. See Agency Holding Corp. v. Malley-Duff & Assocs, Inc., 483 U.S. 143, 154 (1987). A 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 occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

18 U.S.C. § 1961(c). There are two kinds of patterns: "open-ended" and "close-ended." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 241 (1989). In this case, as discussed above, there is no "racketeering activity" as Defendants did not commit wire and mail fraud upon PSI. Therefore, there cannot possible be a pattern.

Even assuming the existence of racketeering activity, PSI has failed to establish a "pattern of racketeering activity." Open-ended continuity occurs if the unlawful acts constitute a threat of continued racketeering activity. Id. There is no threat of long-term, continued criminal activity when fraudulent conduct leads to a clear goal, so that the fraud has a built-in ending point. See Religious Technology Center v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir. 1992). PSI's complaint alleges fraudulent communications that culminated in a single event: the government's transfer of the *Ex Competent* to TDX in Hawaii. In

its Opposition, PSI attempts to establish a continuing threat of mail and wire fraud by alleging that BSE is a front for Marisco, and that the carrying out of BSE's business plan is somehow a final stage of Defendants' fraudulent scheme. These BSE-related allegations are absent from the Complaint, and should therefore be disregarded at this stage. In any case, PSI has failed to provide any evidence which supports these allegations.

Alternatively, a RICO plaintiff may demonstrate continuity over a "closed period" by showing a series of related RICO activities extending over a substantial period of time. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. at 241. A few weeks or months is not enough to constitute such a substantial period of time in the RICO context. Id. at 243. In Sea-Land Service, Inc. v. Atlantic Pacific International, Inc., 57 F. Supp. 2d 1048, 1054, (D. Haw. 1999), this court stated:

> We have found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year. A pattern of activity lasting only a few months does not reflect the "long term criminal conduct" to which RICO was intended to apply.

Even assuming that TDX and Marisco committed mail or wire fraud, taking the view most generous to PSI, the claimed predicate acts occurred in less than six months. The first event of the alleged pattern of racketeering occurred on October 9, 2000 when TDX requested the Alaska SASP's assistance in obtaining the *Ex-*

Competent. The boat was transferred on March 22, 2001, completing the alleged scheme. PSI alleged in its RICO statement acts of mail and wire fraud as late as February 14, 2002. However, wire and mail fraud occurring after the scheme to defraud is completed does not prolong a scheme's duration. The scheme itself which could constitute "a pattern of racketeering activity" within the meaning of § 1961 occurred within 6 months, and therefore is not sufficient to constitute continuity over a closed period of time. Accordingly, PSI has failed to demonstrate an essential element of their RICO claim.

D. Enterprise

A RICO "enterprise" must (1) exist "separate and apart" from the pattern of illegal RICO activity in which it is engaged, and (2) have an "ongoing" organization where various associates "function as a continuing unit." Lui Ciro, Inc., 895 F. Supp. at 1384. Even a conspiracy among two entities is not an enterprise under RICO; something more is required. Simon, 208 F.3d at 1083.

PSI's pleadings do not establish a RICO enterprise. Together, TDX and Marisco are using the *Ex-Competent* to train a work force and generate revenue by repairing vessels. The pleadings show that everything TDX and Marisco have done or will do together relates to the *Ex-Competent*'s transfer or use. This same operation of the *Ex-Competent* constitutes the "pattern of

racketeering activity" alleged by PSI. TDX and Marisco cannot be a RICO enterprise because they do not have a function wholly unrelated to their alleged pattern of illegal RICO activity. Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996). In its Opposition, PSI asserts that TDX and Marisco have an enterprise that "operate[s] the AFDM-6 [The *Ex-Competent*] to perform drydocking and ship repair for paying customers," which is an "otherwise legitimate activity in performing ship repair," Opposition at 25. Defendants correctly point out that PSI cannot have it both ways. If PSI broadly casts the "scheme" and "racketeering activity" to encompass the operation of the *Ex-Competent*, then it cannot simultaneously claim that this operation is now legitimate for purposes of establishing a RICO enterprise.

PSI makes the argument that once two corporations come together, elements of a RICO enterprise are automatically met because they are corporations with separate corporate existences outside of the illegal activity. Ninth Circuit case law does not support this proposition. In Chang, a corporation joined with four individuals in conducting fraudulent land transactions. Id. at 1296. The Ninth Circuit found no purpose of the organization outside of the alleged acts of racketeering and dismissed the case. Id. at 1300. The mere fact that a corporation has a

separate legal existence does not satisfy the "separate and apart" requirement.

In addition, PSI has not alleged an "ongoing" organization where associates "function as a continuing unit." Lui Ciro, 895 F. Supp. at 1384. At minimum, to be an enterprise, an entity must exhibit some sort of structure for the making of decisions, whether it be hierarchical or consensual. Chang, 80 F.3d at 1299. The plaintiff must show that the entity's structure provides a mechanism for controlling and directing the group's affairs on an ongoing, rather than as hoc basis. Id. PSI has made no such showing of any ongoing organization or decision-making structure. Accordingly, PSI has failed to establish a RICO enterprise.

PSI has failed to adequately plead a substantive violation of RICO under § 1962(c). Therefore, PSI cannot sustain a conspiracy claim under § 1962(d). See Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000).

CONCLUSION

For the reasons stated above, the court GRANTS Defendants' Motion To Dismiss On The Pleadings.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 31, 2002.

DAVID ALAN EZRA
CHIEF UNITED STATES DISTRICT JUDGE

Pacific Shipyards International, LLC vs. Tanadgusix Corporation, et al., Civil No. 02-00088DAE-KSC; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON THE PLEADINGS