IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**CASE NO.: 4:06CR337 CEJ**
	)	
NEIL SCOTT KAPLAN, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS THE BILL OF INDICTMENT

COMES NOW, Defendant Neil S. Kaplan and co-indictees, by and through their respective counsel, and file this Memorandum of Law in support of the Motion to Dismiss Indictment, Defendants state as follows:

I. Overview of RICO

18 U.S.C. § 1962(c), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), makes it a crime for any person employed 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. 18 U.S.C. § 1962(c); United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir. 1982). Although the original purpose behind RICO was to "curb the infiltration of legitimate business organizations by racketeers and thus thwart organized crime," RICO has been stretched well beyond organized crime. See Atlas Pile Driving Co. v. Dicon, 886 F.2d 986, 990 (8th Cir. 1989), citing United States v. Turkette, 452 U.S. 576, 591, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

To secure a conviction under RICO, the government must prove both the existence of an enterprise and the connected pattern of racketeering activity. United States v. Turkette, 452 U.S.

at 583. Enterprise "includes 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). Racketeering activity, commonly referred to a predicate crimes, acts or offenses, is defined exhaustively and specifically in 18 U.S.C. § 1961(1) and includes any act which is indictable under any certain enumerated provisions of federal or state law, including "any act involving…gambling" that is punishable by a term of imprisonment for more than one (1) year. 18 U.S.C. § 1961(1).

II. The Enterprise Must Exist Separate and Apart from the Pattern of Activity in which it Engages.

18 U.S.C. § 1961(4) defines "enterprise" to include any individual partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. Where the enterprise at issue is not a legal entity, but an "associated enterprise," i.e. a group associated-in-fact, it is not enough for the government to simply establish a pattern of racketeering activity. United States v. Kragness, 830 F.2d 842, 854 (8th Cir. 1987). The existence of the enterprise at all times remains a separate element which must be proved by the government." Id. at 854, citing United States v. Turkette, 452 U.S. at 583.

In United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), the Eighth Circuit held that Congress intended that the phrase 'a group of individuals associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity." Thus, the Eighth Circuit Court held that an enterprise under RICO requires proof of a "discreet economic association existing separately from the racketeering activity." Id.

A RICO enterprise must be established by three elements: (1) a common or shared purpose that animates the individuals associated with it; (2) some continuity of structure and personnel, i.e., an ongoing organization with members who function as a continuing unit; and (3) an **ascertainable structure distinct from the conduct of a pattern of racketeering**. United States v. Lee, 374 F.3d 637, 647 (8th Cir. 2004), citing United States v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987)(emphasis added), accord Atlas Pile Driving Co., v. Dicon, 886 F.2d at 995. These characteristics are mandated in order to avoid the danger of guilt by association that arises because RICO does not require a proof of a single agreement as in a conspiracy case, and in order to assure that criminal enterprises which are RICO's target are distinguished from individuals who associated for the commission of sporadic crime. Atlas Pile Driving Co. v. Dicon, 886 F.2d at 996.

The term 'enterprise' must signify an association that is **substantially different** from the acts which form the pattern of racketeering activity. A contrary interpretation would alter the essential elements of the offense as determined by Congress." United States v. Bledsoe, 674 F.2d at 664 (emphasis added). Thus, the enterprise must be parsed out from the underlying alleged racketeering activity. If it does not exist separate and apart from the racketeering activity, then a RICO case has not been made. United States v. Turkette, 452 U.S. at 583.

In the case sub judice, the issue is whether the government has alleged an enterprise that is separate and distinct from the alleged pattern of racketeering activity. The inquiry focuses on whether the enterprise encompasses more than what is necessary to commit the predicate offense. United States v. Nabors, 45 F.3d 238, 241 (8th Cir. 1995). The Eighth Circuit has set forth this test: in assessing whether an enterprise has an ascertainable structure distinct from the alleged pattern of racketeering, the court must determine if the enterprise would still exist were

the predicate acts removed from the equation. Handeen v. Lemaire, 112 F.3d 1339, 1352 (8th Cir. 1997).

In the case at bar, the Indictment alleges the "enterprise" is the Kaplan Gambling Enterprise, purportedly made up of a group of entities and individuals associated-in-fact. (See Indictment, p. 5 [hereinafter "I"]. The stated goal of the enterprise was to "make money for the enterprise, its employees, members, and associates (I. ¶20)" by offering and advertizing unlawful betting or gambling services. The enterprise maintained operations to further this purpose by:

(1) offering, facilitating, and conducting betting and gambling (I. ¶18);

(2) operating web sites and telephone services for betting and gambling (I. ¶18-19),

(3) creating and disseminating advertising to attract customers (I. ¶18, 20), and

(4) evading payment of federal taxes (I. ¶21).

The Indictment alleges the enterprise engaged in a pattern of racketeering offenses that falls into three general categories of offenses, identical to the enterprise's methods for maintaining operations. The following lists the general categories of the predicate offenses and those statutes, by number and title, which are cited as "racketeering activities" in the Indictment:

(1) unlawfully offering, facilitating or conducting betting or gambling:

(a)	Mo. Rev. Stat. §572.020	(Gambling)
(b)	Fla. Stat. § 849.25.	(Bookmaking)
(c)	NY CLS Gen Oblig § 5-401	(Illegal wagers, bets, etc.)
(d)	Rev. Code Wash.§ 9.46.220	(Professional gambling, First Degree)
(e)	Rev. Code Wash.§ 9.46.221	(Professional gambling, Second Degree)
(f)	§ 720 ILCS 5/28-1	(Gambling)
(g)	18 U.S.C. §1084	(Wire Wager Act)
(h)	18 U.S.C. §1952	(travel in aid of a racketeering enterprise)
(i)	18 U.S.C. §1953	(transportation of Gambling paraphernalia)

(2) promoting its web sites and telephone services for unlawful betting or gambling;

(a)	Mo. Rev. Stat. §572.030	(Promoting gambling)
(b)	NY CLS Penal § 225.10	(Promoting gambling)

(c) N.J. Stat. § 2C:37-2 (Promoting gambling)

(3) creating and disseminating fraudulent advertising; and

(a) 18 U.S.C. §1341 (Mail Fraud)
(b) 18 U.S.C. §1343 (Wire Fraud)

(4) evading taxes

(a) 18 U.S.C. §1956 (Money Laundering).

I. 8-9.

It is apparent that the four categories of offenses are one and the same as the four methods the enterprise allegedly used to maintain its operations. If the four categories of predicate acts were removed from the equation, the four means of maintaining the enterprise's operations would also be eliminated.

Therefore, without the supposed racketeering activities, i.e. conducting, promoting, advertizing, and making money from gambling, the Kaplan Enterprise would have no remaining purpose or structure. If the predicate acts were removed, the Enterprise would no longer exist. Thus, a separate and distinct enterprise has not been established. See Handeen v. Lemaire, 112 F.3d at 1352. As the Bill of Indictment fails to allege an enterprise that is separate and distinct, or substantially different from, the acts which form the pattern of racketeering activity, the Indictment is deficient and must be dismissed.

III. The Racketeering Activity Must Constitute a Pattern, and Not be Merely a String of Predicate Acts.

"Racketeering activities," also known as predicate acts, include acts indictable under specified federal statutes, or which comprise various state crimes. 18 U.S.C. § 1961(1). To gain a conviction under RICO, the government must also prove that the defendant committed some of

these specified acts of racketeering. More specifically, RICO requires a **pattern** of racketeering activity. 18 U.S.C. § 1961(5)(c)(emphasis added). It is not the number of predicate acts that controls, but whether those acts form a pattern of racketeering activity.

The concept of a pattern is essential to the operation of the statute. Criminal conduct forms a pattern if it "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." Holmberg v. Morrisette, 800 F.2d 205, 210 (8th 1986), quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 496, n.14.

Where all the predicate acts are committed in furtherance of a single scheme, there is not "sufficient continuity among the acts to meet the pattern requirement." United States v. Kragness, 830 F.2d at 858. As the Eighth Circuit stated in Superior Oil v. Fulmer, 785 F.2d at 257, "It places a real strain on the language to speak of a simple fraudulent effort, implemented by several fraudulent acts, as a "pattern of activity."

In Superior Oil Co. v. Fulmer, supra, the Eighth Circuit held that several related acts of mail and wire fraud as part of a single scheme to divert natural gas from Superior Oil's pipeline, did not amount to a pattern of racketeering. Similarly, in Holmberg v. Morrisette, supra, the Eighth Circuit held that as a matter of law, Holmberg failed to prove the continuity necessary to form a "pattern" of racketeering, where defendants' acts comprised but one scheme to draw down three letters of credit securing transactions to specially produce goods for shipment to Nigeria, committed through various acts of mail and wire fraud. Thus, they were all related to a common purpose or scheme.

This is in contrast to the facts in United States v. Kragness, supra, where there were three separate schemes: One, to import marijuana into La Junta, Colorado; another, to conduct a

cocaine and Quaalude project; and a third, to import marijuana into the Phoenix area. The schemes involved different drugs, different suppliers, different U.S. bases of operation, different customers, and different operatives involved in some of the schemes but not others. Under these circumstances, the Eighth Circuit held it had little difficulty concluding that the RICO pattern requirement was met.

In the instant case, the enterprise was allegedly perpetrating one scheme and one scheme only – conducting a business of providing wagering services on the internet. To that end, it allegedly committed numerous "predicate" acts, or acts to facilitate its business activity. As there is only one scheme, the Indictment fails to allege a "pattern" of racketeering activity under the statute. See Superior Oil v. Fulmer, 785 F.2d at 257, n.8 (approving dismissal of a RICO claim by the court in Professional Assets Management v. Penn Square Bank, 616 F.Supp. 1418, 1421-22 (W.D. Okla 1985), where multiple wire and telephone communications were made in furtherance of a single scheme and were merely "constituents of a single, unified activity").

Based upon the above, the Bill of Indictment must be dismissed.

IV. The "Racketeering Activities" must be only those offenses set forth in 18 U.S.C. §1961(1).

Pursuant to 18 U.S.C. §1961(1)(A), a racketeering activity means any act of gambling, *et al*, which is chargeable under State law and punishable by imprisonment for more than one (1) year. Here, however, the Indictment incorrectly names as predicate offenses or "racketeering activities," three statutes under New York, Illinois and Missouri law that are not racketeering activities as set forth in 18 U.S.C. §1961(1)(A). Accordingly, this Honorable Court must strike those statutes from the Indictment since they are not "racketeering activities."

First, the Indictment alleges the Enterprise committed predicate offenses in violation of N.Y. CLS Gen. Oblig. §849.25. However, this statute is a civil statute under Title 4, dealing

with contractual obligations. Thus, this statute does not codify a criminal offense which is punishable by a term of imprisonment of more than one (1) year and cannot constitute a predicate act within the meaning of 18 U.S.C. §1961.

Second, the Illinois statute named in the Indictment, 720 Ill. Comp. Stat. 5/28-1(c), is a misdemeanor, and thus, is not punishable by a term of imprisonment of more than one (1) year and cannot constitute a predicate act under 18 U.S.C. §1961(A). 720 Ill. Comp. Stat. 5/11.

Third, the Indictment alleges the Kaplan Gambling Enterprise committed acts in violation of Missouri laws, specifically Mo. Rev. Stat. §§ 572.020 (Gambling) and 572.030 (Promoting Gambling in the first degree). See I. 8. However, pursuant the Chapter Definitions in the Missouri statute pertaining to Gambling crimes, gambling under these statutes "does not include any licensed activity." Mo. Rev. Stat. § 572.010(4). Defendants were licensed to engage in gambling under the laws of Antigua and elsewhere. As the statute specifically exempts "any licensed activity" from the definition of gambling, the Defendants' actions are not in violation of the Missouri laws named in the Indictment. Thus, this Honorable Court must dismiss Mo. Rev. Stat. §§ 572.020 and 572.030 as predicate acts and strike them from the Indictment.

Further, Mo. Rev. Stat. § 572.020 is not a "racketeering activity" because it could only constitute a misdemeanor offense as applied to the alleged Enterprise and its members. Pursuant to this statute, gambling is a misdemeanor offense, unless committed by a professional player. Further, gambling is defined as occurring when a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event." Mo. Rev. Stat. §§ 572.010(4)(definition of gambling). The Indictment does not allege that any member of the Enterprise staked or risked something of value upon the outcome of a contest of chance or a future contingent event. Moreover, the Indictment identifies those who placed bets or wagers as

"gamblers" or "bettors," but does not name those individuals as members of the Enterprise.

Specifically, in the section of the Indictment entitled "Manner, Method and Means of the Racketeering Conspiracy," twelve (12) paragraphs set forth the actions in which the Enterprise allegedly participated in the racketeering activities. I. 9-13, ¶ 24-35. Therein, it alleges the Enterprise or its members:

(1) took wagers from gamblers in the United States and operated web sites and telephone gambling services (I. ¶ 24);
(2) targeted United States gamblers by advertising its web sites and telephone services (I. ¶ 25);
(3) operated various illegal gambling businesses (I. ¶ 26);
(4) invited, induced, and persuaded United States gamblers to place bets (I. ¶ 27)
(5) delivered print advertising to bettors in the United States (I. ¶ 28);
(6) controlled two entities that were advertised as watchdog agencies (I. ¶ 29),
(7) instructed individuals to send or cause money to the Enterprise (I. ¶ 30);
(8) use wire communications to illegally accept and record wagers (I. ¶ 31);
(9) traveled, communicated, and purchased products and services to be delivered across State and national borders (I. ¶ 32);
(10) transported gambling equipment (I. ¶ 33);
(11) laundered money (I. ¶ 34);
(12) used United States and private mail services and wire transfer services to send money to promote gambling operations (I. ¶ 35).

I. 9-13.

None of the above-listed actions constitutes a single act of gambling, i.e. staking or risking something of value, by the Enterprise or its members. Again, any betting or wagering referred to in the Indictment is committed by the "bettors" or "gamblers," who are not themselves named as members of the Enterprise.

None of the above-listed actions allege any member of the Enterprise participated in an act of gambling, much less as a professional player, defined as "engaging in gambling as a livelihood or by a person who has derived at least twenty percent of his income in any one year within the past five years from acting solely as a player." Mo. Rev. Stat. § 572.010(9). No person in the Indictment is described in such a manner and especially, not a member of the

Enterprise. Therefore, Mo. Rev. Stat. § 572.020, as applied to the actions allegedly undertaken by the Enterprise would only constitute a misdemeanor, which is not punishable by imprisonment for a term of one year or more. See Mo. Rev. Stat. § 556.016. Thus, this statute does not constitute a "racketeering activity" pursuant to 18 U.S.C. §1961(1)(A).

V. The "Racketeering Activities" must have been committed by the defendants.

The Indictment names one state law as a "racketeering activity" pursuant to 18 U.S.C. §1961(1)(A), which does not by its language apply to the actions of the Enterprise or its members. Thus, these statutes should be dismissed as a "racketeering activity" and stricken from the Indictment.

The Indictment alleges the Enterprise committed a predicate offense of "bookmaking," in violation of Florida's law. I.8. Pursuant to Fla. Stat. § 849.25(1)(a):

> The term "bookmaking" means the **act of taking or receiving**, while engaged in the business or profession of gambling, any bet or wager **upon the result** of any trial or contest of skill, speed, power, or endurance of human, beast, fowl, motor vehicle, or mechanical apparatus or upon the result of any chance, casualty, unknown, or contingent event whatsoever.

"Result" is defined by the American Heritage Dictionary as: (1) "to come about as a consequence" or (2) "to end in a particular way."[1] Hence, "upon the result" indicates that any taking or receiving of a bet or wager after or as a consequence of any trial or contest, etc. would constitute "bookmaking" under the statute.

[1] "Result." The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004. Answers.com 13 Dec. 2006. http://www.answers.com/topic/result.

However, the Indictment does not allege any actions wherein the Enterprise accepted bets or wagers after any contests or events. Specifically, the Indictment alleges the Enterprise allegedly "instructed individuals in the United States to send, or cause money to be sent to the Enterprise, for the purpose of opening one or more gambling accounts." I.12, ¶30. This would suggest the Enterprise was requiring bettors to establish accounts with the Enterprise before placing any bets or wagers. Logically, any bets or wagers were to be placed prior to the result of any contests or events. The Enterprise, as the Indictment alleges, did not take or receive any bets or wagers after or "upon the result" of any contest or event. Thus, the actions of the Enterprise as alleged are not actionable under the language of Fla. Stat. ch. 849.25. Accordingly, this Honorable Court must dismiss this statute as a racketeering activity and strike it from the Indictment.

WHEREFORE, Defendant Neil S. Kaplan and all co-Defendants pray that the indictment be dismissed for the reasons stated herein.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2006, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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