UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
BETONSPORTS PLC, ET AL.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE
CONCERNING MOTIONS TO DISMISS COUNT I OF THE INDICTMENT[1]

This matter is before the court on the Motion to Dismiss Count I of the Indictment filed by defendant Neil Scott Kaplan. [Doc. 167] The government responded. [Doc. 211] Defendant Neil Scott Kaplan replied. [Doc. 236]

In addition, the court will take up the Motions to Dismiss Count I of the Indictment filed by DME Global Marketing & Fulfillment [Docs. 241, 242], William Hernan Lenis [Doc. 244], Monica Lenis [Doc. 249], Tim Brown [Doc. 251], William Luis Lenis [Doc. 258, 260] and Manny G. Lenis [Doc. 262]. The government filed a consolidated Response to all these Motions because they are substantially identical. [Doc. 285][2]

As grounds for the Motions, the defendants allege four basic deficiencies in the Indictment:

1. The Indictment fails to allege an Enterprise that is separate and distinct or substantially different from the acts which form the pattern of racketeering activity;

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[1] Defendant David Carruthers also filed a Motion to Dismiss Count I of the Indictment. [Doc. 269] Because it raises numerous grounds not raised in the instant motions, it will be taken up in a separate Report and Recommendation.

[2] The Motions filed by DME Global Marketing & Fulfillment, William Hernan Lenis, Monica Lenis, Tim Brown, William Luis Lenis and Manny G. Lenis are virtually identical to that filed by Neil Scott Kaplan. In its consolidated Response to these Motions, the government incorporated by reference its Response to Neil Scott Kaplan's Motion and only addressed additional issues raised in his Reply. The court will consider all the Motions together.

2. The Indictment fails to allege that the actions of the Enterprise comprised two or more separate schemes thus failing to allege a pattern of racketeering activity;

3. Some of the listed predicate acts or "racketeering activities" are not considered racketeering activities pursuant to 18 U.S.C. § 1961; and

4. Some of the listed predicate acts or "racketeering activities" are not applicable to the defendants.

I. Background and Applicable Law

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*. provides in pertinent part:

> It shall be unlawful for any person employed by or associated with an 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...

18 U.S.C. § 1962(c).

The Act further provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this Section." 18 U.S.C. § 1962(d).

Count I of the Indictment alleges a RICO conspiracy between and among the named eleven individual and four corporate defendants. In order to meet its burden of proof at trial, the government will have to prove (1) the existence of an enterprise; (2) that the enterprise engaged in or affected interstate or foreign commerce; (3) that each defendant was an employee or associate of the enterprise; and (4) that each defendant entered into the conspiratorial agreement in one of two ways: either (a) by committing or agreeing to personally commit two racketeering acts in the conduct of the enterprise, or (b) knowingly agreeing to further a scheme with the knowledge and intent that other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise. Salinas v. United States, 522 U.S. 52, 65 (1997); United States v. Darden, 70 F.3d

1507, 1518 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996). In the instant Indictment the enterprise is called the "Kaplan Gambling Enterprise" or the "Enterprise". See Ind. ¶17

II. Discussion

A. Ascertainable Structure of the Enterprise Separate From the Pattern of Racketeering Activities

As noted above, defendants allege the 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 government must prove that the Kaplan Gambling Enterprise[3] named in the Indictment had an ascertainable structure apart from the pattern of racketeering activity. United States v. Kragness, 830 F.2d 842, 857 (8th Cir. 1987). Evidence of the racketeering acts may also establish the structure of the racketeering enterprise. Darden, 70 F.3d at 1521.

> [I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity [such as a legitimate line of business], but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Kragness, 830 F.2d at 857. "Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it *does* rather than by abstract analysis of its structure." Darden, 70 F.3d at 1521, quoting United States v. Coonan, 938 F.2d 1553, 1559 (2nd Cir. 1991) (emphasis in original) (internal quotation marks and citations omitted), cert. denied, 503 U.S. 941 (1992). The government must prove both the pattern and the enterprise elements, and "the same piece of evidence may...help to establish both." Darden, 70 F.3d at 1521, quoting United States v. Indelicato, 865 F.2d 1370, 1384 (2nd Cir.), cert. denied, 491 U.S. 907 (1989).

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[3] The Kaplan Gambling Enterprise is defined as a group of entities and individuals associated in fact. 18 U.S.C. § 1961(4). See Ind. ¶17.

The parties agree that in order to determine the "separate existence," courts generally use a method of analysis which subtracts the racketeering acts and examines what remains. Kragness, 830 F.2d at 857. If the enterprise does not exist separate and apart from the underlying racketeering activity then there is no RICO enterprise. United States v. Turkette, 452 U.S. 576, 583 (1981) ("The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute.")

Defendants argue that the Indictment states the goal of the Kaplan Gambling Enterprise was to make money by offering and advertising unlawful betting or gambling services furthered by

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

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

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

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

The defendants further argue that the "pattern of racketeering activities" falls into general categories of offenses which are identical to the enterprise's methods for maintaining operations, specifically (1) unlawful offering, facilitating or conducting betting or gambling; (2) promoting its web sites and telephone services for unlawful betting or gambling; (3) creating and disseminating by fraudulent advertising and (4) evading taxes. After each category, defendants cite the specific statutes referenced in the Indictment which are included in 18 U.S.C. § 1961(1) defining "racketeering activity." See Neil Scott Kaplan's Memorandum in Support [Doc. 167] at 4-5.

Defendants cite Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997) in support of their position. However, Handeen cuts the other way. In Handeen the Eighth Circuit reversed the District Court's dismissal of a RICO Complaint alleging bankruptcy fraud finding that the stated racketeering acts, although limited to false claims to avoid paying a judgment, were sufficient to allege a RICO violation. The court stated:

> It might be argued that the enterprise would have collapsed without the fraudulent submission because failure to file those documents would have resulted in dismissal of [the defendant's] petition [in bankruptcy]. In removing the predicate acts from our analysis, however, we assume that the filings would have been made, but with accurate contents. Otherwise, it would be unduly difficult to find an enterprise in situations similar to this.

Handeen, 112 F.3d at 1352, n. 16.

In the instant case the structure used by the Enterprise could just as easily have been used for an entirely legal purpose, as the government argues, for example, "the sale of books by way of the Internet." The structure consisted of the defendants and the legal entities that operated as fronts for or supporters of the Enterprise, the corporate entities owned or controlled by members of the Enterprise, entities operated under Internet-associated brand or trade names belonging to or controlled by Enterprise members and domain names used to operate web sites. There is no question that if the web sites operated by the Enterprise and the supporting promotional activities had offered a legal product rather than Internet gambling, the structure required to offer the product and to promote the product to U.S. buyers would be the same as the structure the defendants used to deliver and promote illegal Internet gambling. Pursuant to Handeen, 112 F.3d at 1352, n. 16 and Darden, 70 F.3d at 1521 and the other cases cited, the Kaplan Gambling Enterprise had a structure separate from the racketeering acts alleged in the Indictment. See e.g. Darden, 70 F.3d at 1521 (holding that predicate acts of murder, attempted murder and both state and federal drug dealing together with oversight and coordination of activities were sufficient to establish an ascertainable structure distinct from the structure needed to commit the predicate acts or engage in the pattern of racketeering activities).

B. Pattern of Racketeering Activity/One Illegal Scheme

Defendants claim that the racketeering acts alleged in Count I do not constitute a "pattern" as defined in 18 U.S.C. § 1961(5) because the Indictment alleges only one illegal scheme. Defendants cite Superior Oil v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) and Holmberg v. Morrisette, 800 F.2d 205, 210 (8th Cir. 1986) [cert. denied, 481 U.S. 1028 (1987)] for the proposition that unless the

racketeering predicate acts were part of different schemes, the schemes were part of the same course of illegal conduct and could not support the two separate racketeering acts required under the RICO statute. As an initial matter, the requirement of two or more separate schemes was specifically overruled by the United States Supreme Court in H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989). The Court said: "We find no support...for the proposition espoused by the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes." Id. at 236. The Court said:

> In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

Id. at 237

The Indictment in the instant case charges racketeering acts each of which is a violation of state law or a statute included in 18 U.S.C. § 1961(1) which defines "racketeering activity".[4] All comprise a single scheme relating and amounting to continued criminal activity. Id. at 237.

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

Defendants argue that some of the predicate acts do not qualify as "racketeering activities" as defined in 18 U.S.C. § 1961(1).

1. New York Statutes

Defendants claim that the Indictment alleges the Enterprise committed predicate acts in violation of N.Y. CLS Gen. Oblig. § 849.25, a civil statute dealing with contracts. Actually, the Indictment charges violations of N.Y. Gen. Oblig. § 5-401 and N.Y. CLS Penal § 225.10. The former makes unlawful wagering/betting and the latter makes unlawful promoting gambling in the first

[4] The statutes deal with gambling, bookmaking, illegal wagers, bets, etc., professional gambling first degree, professional gambling second degree, wire wager act, travel in aid of a racketeering enterprise, transportation of gambling paraphernalia, promoting gambling, mail fraud, wire fraud and money laundering.

degree, which is a Class E felony. These conform to the requirements of 18 U.S.C. § 1961(1)(A) ("any act or threat involving...gambling...which is chargeable under State law and punishable by imprisonment for more than one year.")

2. Illinois Statutes

Defendants claim that Count I alleges a violation of Illinois Statute 720 Ill. Comp. Stat. 5/28-1(c), which is a misdemeanor and thus not punishable by a term of imprisonment of more than one year as required by 18 U.S.C. § 1961. Actually the Indictment charges violation of 720 Ill. Comp. Stat. 5/28-1(a)(11). The government admits that the citation in the Indictment is incorrect. It should be 720 Ill. Comp. Stat. 5/21-1.1 which makes unlawful syndicated gambling, a Class C felony. The government further states in its response the intention to seek a superceding indictment correcting this inaccurate statutory citation. This minor error, particularly with the stated intention to supercede, does not amount to grounds for dismissal of Count I of the Indictment or grounds for striking this portion of the Indictment.

3. Missouri Statutes

Defendants also claim that the Indictment alleges the Kaplan Gambling Enterprise committed violations of Mo. Rev. Stat. §§ 572.020 (gambling) and 572.030 (promoting gambling in the first degree). Defendants allege that the definition section of the statutes states that these statutes "do not apply to any licensed activity," Mo. Rev. Stat. § 572.010(4), and because BetOnSports PLC was licensed in Antigua and Barbuda, the Indictment does not allege a racketeering activity prohibited by 18 U.S.C. § 1961(1).

As an initial matter, whether BetOnSports was licensed at all is a question of fact to be determined at trial. Secondly, the term "gambling" in the Missouri statute only excludes "any licensed activity, or persons participating in such games which are covered by sections 313.800 to 313.840 RSMo." Section 313.800(15) defines "licensee" as "any person licensed under sections 313.800 to 313.850" applying only to persons and entities licensed by the Missouri Gaming

Commission. Therefore even if BetOnSports PLC is licensed by Antigua and Barbuda, the gambling business it conducts in Missouri is still illegal.

Defendants also argue that the violations of Missouri Law are misdemeanors because BetOnSports PLC and the other defendants are not "professional players" as required for felonies under Missouri Law. "Professional player" is defined by Missouri statute as "a player who engages in gambling for a livelihood or who had derived at least 20% of his income in any one year within the past five years from acting solely as a player." Mo. Rev. Stat. § 572.010(9). It will be up to the government to prove at trial that BetOnSports PLC fits this statutory definition. It is not grounds for dismissal of the Indictment. Defendants also argue that Mo. Rev. Stat. § 572.010(4) defines gambling as occurring when a person "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event." Defendants argue that 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 future contingent event. Defendants argue that of the twelve paragraphs in the Indictment which set forth the actions in which the Enterprise allegedly participated in racketeering activities (Ind. ¶24-35) not one constitutes an act of gambling by members of the Enterprise as defined by § 572.010(4). Clearly violations of Mo.Rev.Stat. § 572.030 (promoting gambling in the first degree) are alleged in the Indictment. These violations deal specifically with advancing or profiting from unlawful gambling. Section 572.010(10) states: "Profit from gambling activity", a person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity." The citation to § 572.020, to the extent the definition of "gambling" informs and clarifies the definition of "promoting gambling," is not improper and it will be up to the government to meet its burden at trial. The Indictment should not be dismissed on this ground nor should this section be stricken from the Indictment.

D. The Racketeering Activities as Committed by the Defendants

Defendants state that the Indictment names violation of a Florida law as a "racketeering activity" pursuant to 18 U.S.C. § 1961(1)(A). They argue that this law does not apply to the actions of the Enterprise or its members and that this statute should be dismissed as a racketeering act and stricken from the Indictment. Specifically, the Indictment alleges defendants committed the predicate offense of "bookmaking" in violation of Florida Statute § 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."

Defendants argue that the American Heritage Dictionary definition of "result" is (1) "to come about as a consequence" or (2) "to end in a particular way." Therefore, defendants argue "upon the result" indicates any taking or receiving of a bet after or as a consequence of a trial or contest, etc. constitutes bookmaking. Defendants argue that because the Enterprise accepts bets prior to a contest or event, the Florida statute does not apply to them.

This reading of the statute defies common sense. In making their argument, defendants apparently did not consider the entire definition of "bookmaking" which, after describing the act of taking or receiving"... "any bet or wager"... "upon the result" of any contest etc., it goes on to say "or upon the result of any chance, casualty, unknown or contingent event whatsoever." The American Heritage Dictionary notwithstanding, it is impossible to place a bet on a result after the result is known.[5] The Florida Statute is properly cited as a racketeering activity in the Indictment. It is not grounds for dismissal nor should it be stricken.

In addition, even though the Indictment does not allege a specific violation of the Florida statute it does not make the violations inadmissable as racketeering predicates. Unlike the general

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[5] If a dictionary is defendants' choice of statutory interpretation, Blacks Law Dictionary defines a bookmaker as "a gambler who makes book (i.e. partakes in bookmaking) on uncertain future events and defines gambling, *inter alia*, as "a play for value against an uncertain event in hope of gaining something of value." (Emphasis added.)

conspiracy laws, in a RICO conspiracy there is no requirement of an overt act. United States v. Salinas, 522 U.S. 52, 63 (1997) (holding "there is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provisions applicable to federal crimes, which requires that at least one of the co-conspirators have committed an "'act to effect the object of the conspiracy'"). Paragraph 26 at page 10 of the Indictment states, in the Manner, Method and Means section, that "[t]he Enterprise conducted illegal Internet and telephone gambling operations throughout the United States in violation of the laws of the United States." Individual allegations of such conduct are not required.

III. Conclusion

None of the arguments raised by defendants amounts to grounds for dismissal of Count I of the Indictment.

Accordingly,

IT IS HEREBY RECOMMENDED that defendant Neil Scott Kaplan's Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 167]

IT IS FURTHER RECOMMENDED that defendant DME Global Marketing & Fulfillment's Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 241, 242]

IT IS FURTHER RECOMMENDED that defendant William Hernan Lenis' Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 244]

IT IS FURTHER RECOMMENDED that defendant Monica Lenis' Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 249]

IT IS FURTHER RECOMMENDED that defendant Tim Brown's Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 251]

IT IS FURTHER RECOMMENDED that defendant William Luis Lenis' Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 258, 260]

IT IS FURTHER RECOMMENDED that defendant Manny G. Lenis' Motion to Dismiss Count I of the Indictment be **DENIED**. [Doc. 262]

The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

/s/Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this 7th day of May, 2007.