UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. 4:06CR00337 CEJ/MLM**
v.	)	
	)	
BETONSPORTS PLC, et al.,	)	
	)	
Defendants.	)	
	)	

CONSOLIDATED RESPONSE TO MOTIONS TO DISMISS COUNT 1 OF THE SUPERSEDING INDICTMENT

The United States, through counsel undersigned, hereby responds to defendant Gary Kaplan's (Doc. #446) and defendant Penelope Tucker's (Doc. # 476) motions to dismiss Count 1 of the Superseding Indictment. These virtually identical motions are without merit, and should be denied. Additionally, defendant Tucker filed a supplemental motion to dismiss Count 1 (Doc. 507). That supplemental motion is addressed separately below. This Consolidated Response is filed pursuant to authorization of the Court (Doc. #488).

I. THE MOTIONS TO DISMISS ARE INAPPROPRIATELY PLED

A. The Motions to Dismiss Actually Seek Summary Judgment

Defendants Gary Kaplan and Penelope Tucker have submitted what amount to motions for summary judgment, not motions to dismiss. The defendants ask the Court to apply civil pleading rules to an indictment, and to dismiss the Superseding Indictment on the grounds that it does not fully state all of the evidence necessary to prove guilt. The defendants are seeking judgment prior even to the selection of the jury. The standards and rules that the defendants would have the Court apply in this case are inappropriate in a criminal prosecution, and would have the effect of wrongfully denying the United States the opportunity to present its case to the

finder of fact at the proper time and in the proper manner.

> In civil cases, of course, the summary judgment procedures contemplated by Federal Rule of Civil Procedure 56 may be utilized to test, pretrial, the sufficiency of the evidence to establish triable issues of fact; but there is no corollary in criminal cases. The government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29 . . . We simply cannot approve dismissal of an indictment on the basis of predictions as to what the trial evidence will be.

United States v. Ferro, 252 F.3d 964, 968 (8th Cir. 2001) (interior citation omitted); see also United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995) ("[t]here being no equivalent in criminal procedure to the motion for summary judgment that may be made in a civil case, see Fed.R.Civ.P. 56(c), the government has no duty to reveal all of its proof before trial.").

B. Review of a Motion to Dismiss is Limited to the Face of the Indictment

Federal Rule of Criminal Procedure 12(b) requires that a motion alleging a defect in an indictment be raised prior to trial, while allowing a claim that the indictment fails to allege an offense or engage the court's jurisdiction to be raised at any time.[1] As stated by the Eighth Circuit Court of Appeals (quoting Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417 , 419, 76 L.Ed.2d 861 (1932) (interior citations omitted):

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Goldberg, 225 F.2d 180, 184 (8th Cir. 1955); see also United States v. Carter,

[1] "The following must be raised before trial: (B) a motion alleging a defect in the indictment or information – but at any time while case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

270 F.3d 731, 736 (8th Cir. 2001).

The Supreme Court has long held that, except in very narrow circumstances, the test of the sufficiency of the Government's evidence is to come at trial, and not before:

> Petitioner urges that this Court should exercise its power to supervise the administration of justice in federal courts and establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence. No persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial.

Costello v. United States, 350 U.S. 359, 363-64, 76 S.Ct. 406, 409, 100 L.Ed.2d 397 (1956). See also United States v. Hirsch, 360 F.3d 860, 863 (8th Cir. 2004) ("[The defendant's] motion to dismiss amounted to no more than a request for the court to determine his guilt or innocence based on factual elements of the offense which were within the purview of the jury to decide at trial.").

Rule 7(c) of the Federal Rules of Criminal Procedure states that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The Eighth Circuit Court of Appeals has also stated:

> The sufficiency of an indictment should be judged by practical, and not by technical, considerations. It is nothing but the formal charge upon which an accused is brought to trial. An indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good.

Hanf v. United States, 235 F.2d 710, 714 (8th Cir. 1956).

In this case, the Superseding Indictment fully and fairly informs the defendants of the charges against them. The Superseding Indictment alleges facts sufficient to allow the defendants to prepare their defenses and to protect them from double jeopardy. The Superseding Indictment therefore fully complies with the requirements of the Federal Rules of Criminal Procedure and should not be dismissed.

II. THE SUPERSEDING INDICTMENT ADEQUATELY ALLEGES THE CHARGE OF RACKETEERING CONSPIRACY

A. Defendants have Misstated the Charge Alleged in Count 1 of the Superseding Indictment

In their motions, defendants Gary Kaplan and Penelope Tucker misstate the charge alleged in Count 1 of the Superseding Indictment. The defendants are charged with racketeering conspiracy, not a substantive racketeering offense. While the two charges have elements in common, they are separate and distinct violations of federal law. "A RICO substantive charge is not a conspiracy and it is axiomatic that a substantive offense is distinct from a conspiracy to commit that or another substantive offense." United States v. Bennett, 44 F.3d 1364, 1374 (8th Cir. 1995) (interior citation omitted); see also United States v. Kehoe, 310 F.3d 579, 587-88 (8th Cir. 2002).

B. The Indictment Adequately Charges the Defendants with a Racketeering Conspiracy Offense

In order to prove the defendants guilty of conspiracy as alleged in Count 1, the Government must establish: (1) the existence of an enterprise as alleged in the Superseding Indictment; (2) that the enterprise engaged in or affected interstate 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) by knowingly agreeing to further a scheme which, if completed, would constitute a violation of Title 18, United States Code, §1962(c), i.e., with the knowledge and intent that other members of the conspiracy would commit at least two racketeering acts in furtherance of the enterprise. Salinas v. United States, 522 U.S. 52, 65, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997); see also United States v. Darden, 70 F.3d 1507, 1518 (8th Cir. 1995).

Count 1 of the Superseding Indictment charges all of the defendants with conspiracy to conduct and participate, directly and indirectly, in conducting the affairs of the Gambling Enterprise. The racketeering predicates alleged are violations of various State anti-gambling laws, and violations of Title 18, United States Code, §§1084 (the Wire Wager Act); 1341 (Mail Fraud); 1343 (Wire Fraud); 1952 (Interstate Travel in Aid of a Racketeering Enterprise); 1953 (Interstate Transportation of Gambling Paraphernalia); 1955 (Operation of an Illegal Gambling Business) and 1956 (Money Laundering). Count 1 alleges the existence of the Gambling Enterprise by a description of the Enterprise, how the defendants were associated with the Enterprise, the manner, method, and means used to effectuate the alleged illegal agreement, the goals of the Enterprise, and various non-exclusive overt acts committed in furtherance of the conspiracy. Count 1 is both legally and factually sufficient.

III. DEFICIENCIES THE DEFENDANTS CLAIM MANDATE DISMISSAL OF THE SUPERSEDING INDICTMENT

A. The Allegation of a RICO Enterprise Contained in Count 1 is Legally Sufficient to Charge the Defendants and Provide Notice of the Offense

1. Introductory Allegations in a RICO Conspiracy Indictment Need not be Substantively Charged

Contrary to the defendants' belief, there is no requirement that introductory allegations in a RICO conspiracy indictment be charged as substantive counts. The defendants claim that the Superseding Indictment is deficient because it lacks substantive charges to match all of the information alleged in Count 1, but they do not state why this fact should result in dismissal of the charges against them. Proof of the existence of a RICO enterprise has only three elements: "(1) a common purpose that animates the individuals associated with it; (2) 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); see also United States v. Darden, 70 F.3d 1507, 1520 (8th Cir. 1995). All of these elements are fully and adequately alleged in the Superseding Indictment.

2. The Superseding Indictment Adequately Alleges the Framework of the Enterprise and its Decision-Making Processes

The defendants claim that the Superseding Indictment is deficient because it does not allege the framework of the Enterprise or describe its decision-making processes. The defendants do not indicate how the allegations contained in Court 1 fail to adequately describe the Enterprise, nor why a description of its decision-making process is necessary. The defendants do not state how this alleged omission in the Superseding Indictment prevents the

charge in Count 1 from adequately establishing a RICO association-in-fact enterprise. In fact, the manner of decision-making within a RICO enterprise is not a matter to be alleged in an indictment; it may be a matter for proof at trial, but as the Eighth Circuit Court of Appeals has stated, it is not an essential element of a RICO offense:

> We hold 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 operation directed toward an economic goal[2] that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'

United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980).

Though the defendants fail to acknowledge it, the Superseding Indictment does contain allegations regarding the structure and hierarchy of the Gambling Enterprise. As is made clear in the Introduction, the leader of the Gambling Enterprise was defendant Gary Kaplan. Following the Introduction, starting with ¶4 and continuing through ¶17, the Superseding Indictment describes a role played by each defendant in the Gambling Enterprise. Taken together, the information contained in Count 1 is sufficient to inform the defendants of the RICO conspiracy charge against them.

3. The Superseding Indictment Adequately Alleges that the Gambling Enterprise Had Continuity and a Common Purpose

The defendants challenge the sufficiency of the Superseding Indictment because Count 1 describes various methods that the Enterprise used to conduct it's operations. However, continuity of method is not an element of a RICO enterprise. Proof of a racketeering enterprise

[2] But see National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 257, 114 S.Ct. 798, 804, 127 L.Ed.2d 99 (1994); the Supreme Court ruled that the unifying goal of a RICO enterprise need not be economic in nature.

requires that the Government demonstrate continuity of purpose and structure, not method. The Eighth Circuit Court of Appeals has stated that it considers "whether the alleged enterprise has common or shared purposes, some continuity of structure and personnel, and a structure distinct from that inherent in the alleged pattern of racketeering activity" to determine if a RICO enterprise has been adequately alleged. United States v. Davidson, 122 F.3d 531, 534 (8th Cir. 1997) (interior citation omitted). There is no requirement that a RICO enterprise use any particular method or combination of methods to conduct its racketeering operations.

Requiring continuity of method to define a RICO enterprise would not fulfill the need that prompted Congress to add the "enterprise" requirement to the racketeering statute in the first place: the need to distinguish racketeering activity from "ordinary" criminal conduct.

> This use of the 'enterprise' element to provide a relationship between the two predicate crimes aids to contain the prohibitions of RICO rather than expand them to cover purely sporadic criminal activity. This result of the statutory structure does not appear serendipitous, but rather seems to be the product of careful planning.

United States v. Anderson, 626 F.2d 1358, 1367 (8th Cir. 1980). A uniform methodology requirement would not narrow the scope of the statute in the way that Congress intended, and should not be implied.

The defendants criticize the Superseding Indictment for failing to name all of the individuals involved in operating the illegal gambling businesses, and for not describing with particularity the "nature" of the illegal sports wager businesses. However, such specificity is not required. The Government need not name the individual associates of a RICO enterprise until the time of trial. United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995). Further, the Gambling Enterprise is fully described in Count 1:

> ¶1 - '[A]n illegal sports betting business in and near New York City;'. . . 'illegal gambling operation,'. . . 'illegal gambling business,' . . . 'gambling businesses [that] established and controlled toll-free telephone services and Internet web sites, and caused these services to accept sports wagers from gamblers in the United States' . . .;
> ¶2 - 'Internet gambling business' . . . 'computer-based sports book' . . . 'largest online wagering service in the world' . . . 'offered gamblers in the United States illegal wagering on professional and college football and basketball, as well as many other professional and amateur sporting events and contests' . . . 'These Internet gambling web sites also advertised toll free telephone numbers for placing sports bets' . . .;
> ¶3 - 'a holding company, . . . incorporated under the laws of England and the United Kingdom' . . .;
> ¶19 - 'The GAMBLING ENTERPRISE operated a number of Internet web sites, hosted on servers located outside the United States, that did business in the United States by, among things, offering, facilitating and conducting unlawful computer and telephone service based sports betting, and other forms of gambling. The GAMBLING ENTERPRISE caused the operation of toll-free telephone services to facilitate sports gambling, and take sports bets. The GAMBLING ENTERPRISE created and disseminated false and fraudulent advertising for its Internet gambling businesses throughout the United States;'
> ¶20 - 'the GAMBLING ENTERPRISE included legal entities incorporated in the United States and other countries around the world . . . The ENTERPRISE owned and controlled or had contractual rights entitling it to control domain names used to identify web sites that provided illegal gambling in the United States,' . . .

The Superseding Indictment also names the legal entities that were operated for the benefit of the Enterprise, the brand, trade and domain names used by the Enterprise, and its goals. These allegations are more than sufficient to protect the Constitutional rights of the defendants and provide notice as required by Rule 7(c).

The defendants claim that Count 1 describes three gambling operations, rather than one, and that the continuity of the alleged Gambling Enterprise is thus destroyed. As noted above, a uniform method of operation is not required to prove the existence of a RICO enterprise. And, contrary to the claim of the defendants, there is no requirement that a racketeering enterprise remain static during the course of its activities. Courts have long recognized that a racketeering

enterprise can change personnel, methods and leadership and still function as a continuing unit. United States v. Kragness, 830 F.2d 842, 856-57 (8th Cir. 1987); United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) (Court did not find requisite enterprise structure, but stated "[t]his does not mean the scope of the enterprise cannot change as it engages in diverse forms of activity . . . ."). As stated in ¶1 of the Superseding Indictment, "[t]hrough all these relocations, GARY KAPLAN and the other defendants always operated, and caused the operation of their primary revenue-producing business, illegal sports wagering, in the United States." The changes the defendants made in the manners, methods and means employed by the Gambling Enterprise to conduct its illegal gambling businesses did not interrupt the continuity of the Enterprise under RICO.

4. The Enterprise Consisted of a Continuing Unit and the Allegation of a Defendant's Continued Presence Alone May Establish Continuity

Proof of the existence of a racketeering enterprise requires a showing of structural continuity. United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982). As stated in United States v. Kragness, 830 F.2d 842, 856, "[c]ontinuity of structure exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than an ad hoc basis." The requirement of continuity "does not mean the scope of the enterprise cannot change as it engages in diverse forms of activity nor does it mean that the participants in the enterprise cannot vary with different individuals managing its affairs at different times and in different places." United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982). The Eighth Circuit Court of Appeals has stated:

> The continuity of these elements need not be absolute; the group's system of authority may be modified, old members may leave, and new members may join. That some changes in structure and personnel occur does not mean that there is no mechanism for continuing direction of group affairs; both the structure and the personnel of an enterprise may undergo alteration without loss of the enterprise's identity as an enterprise.

United States v. Kragness, 830 F.2d 842, 856 (8th Cir. 1987).

The defendants claim that the Government relied on the single factor of defendant Gary Kaplan's presence throughout the time period covered in Count 1 to establish structure and continuity. As demonstrated above, this is not correct. However, even if the Superseding Indictment contained only the allegation of defendant Gary Kaplan's continued presence to establish the continuity of the alleged RICO Enterprise, it would be sufficient for the purpose of charging a RICO offense. United States v. Davidson, 122 F.3d 531, 535 (8th Cir. 1997) ("Davidson's continued leadership provided continuity of personnel at the top of the criminal organization."); see also United States v. Keltner, 147 F.3d 662 (8th Cir. 1998) (associated case). The Superseding Indictment adequately alleges the structure and continuity of the Gambling Enterprise, and is not subject to dismissal on this basis.

5. The Enterprise Consisted of an Ascertainable Structure Distinct from the Racketeering Activity.

To establish the existence of an association-in-fact RICO enterprise, the Government must prove that the enterprise had an ascertainable structure, apart from the association necessary to commit the required racketeering acts. United States v. Kragness, 830 F.2d 842, 857 (8th Cir. 1987). Evidence that proves the racketeering acts may also establish a racketeering enterprise. United States v. Darden, 70 F.3d 1507, 1521 (8th Cir. 1995).

The defendants claim that the Superseding Indictment fails to allege a RICO enterprise that is separate and distinct from the alleged pattern of racketeering activity. The defendants claim that the Gambling Enterprise described in the Superseding Indictment had the common purpose of "making money by encouraging individuals in the United States to place 'illegal bets,'" and then claim that the Court must subtract any allegation regarding illegal gambling from the charge, and judge the sufficiency of the Superseding Indictment on what remains. This is incorrect. The advocated method of determining whether a structure exists apart from the racketeering acts does not require the excision of everything associated with the predicates: as the United States Supreme Court has stated, it requires separating the alleged racketeering conduct, and examining what remains:

> 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. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages.

United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981).

As stated in Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997), which involved false filings in a bankruptcy, a RICO enterprise structure is adequately pled even though the charged pattern of racketeering activity encompasses all of the enterprise's alleged conduct. The Court in that case stated:

> It might be argued that the enterprise would have collapsed without the fraudulent submissions because failure to file those documents would have resulted in dismissal of the [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. The structure of an enterprise can be "demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes." Reynolds v. Condon, 908 F.Supp. 1494, 1509 (N.D. Iowa 1995) (interior citations omitted). The focus of the inquiry is on "whether the enterprise encompasses more than what is necessary to commit the predicate RICO offense." Reynolds, 908 F.Supp. at 1509.

In this case, the organization and structure of the Gambling Enterprise existed apart from the conduct in which it is alleged to have engaged. If BETONSPORTS plc had not taken a single illegal wager, but had instead sold greeting cards over the Internet, the structure of the alleged RICO enterprise would remain the same. The defendants cite to the case of Stephens v. Geldermann, Inc., 962 F.2d 808 (8th Cir. 1992) in support of their assertion on this point. However, the activity described in Stephens is readily distinguishable from the activities of the Gambling Enterprise. The Court found in Stephens that, apart from the conduct that brought them together to accomplish the predicate acts, there was no evidence of a relationship between the defendants. In the case of the Gambling Enterprise, the defendants had business relationships that lasted over years, and involved many activities apart from illegal gambling.

The associates of the Gambling Enterprise were engaged in running the businesses that made up the RICO enterprise. They arranged for advertising, leased office space, paid bills, conducted strategy meetings, even engaged in lobbying Congress to legalize Internet gambling.

The associates of the Gambling Enterprise conducted business daily, and not just in the moments when they were soliciting or accepting illegal bets, or laundering the proceeds of the illegal gambling businesses. It was not necessary to describe the evidence the Government will use to prove the nature and characteristics of the Enterprise in the Superseding Indictment, nor are the defendants entitled to test that evidence prior to trial. See United States v. Nabors, 45 F.3d 238, 241 (8th Cir. 1995) (proof that an enterprise is "distinct from the alleged pattern of racketeering activity" need not be offered until trial).

B. The Superseding Indictment Adequately Alleges a Pattern of Racketeering Activity

"Racketeering activity" includes various violations of State statutes and listed federal offenses, including those alleged in the Superseding Indictment. A "pattern of racketeering activity" is defined in Title 18, United States Code, §1961(5), and requires at least two such acts within ten years of each other to constitute a "pattern." In the Eighth Circuit:

> to 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. The predicate acts are related if they 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.

United States v. Keltner, 147 F.3d 662, 669 (8th Cir. 1998) (emphasis in original, interior citations omitted). As stated by the Supreme Court:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists.

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 243, 109 S.Ct. 2893, 2902-03, 106

L.Ed.2d 195 (1989); see also United States v. Hively, 437 F.3d 752, 761-65 (8th Cir. 2006). The pattern of racketeering activity alleged in the Superseding Indictment is more than adequate to meet all of the legal requirements associated with charging a RICO conspiracy.

1. Dismissal of Substantive Counts does not Result in Invalidation of Similar Racketeering Predicates

The defendants assert that dismissal of substantive counts from the Superseding Indictment would require the Court to dismiss similar racketeering acts alleged in Count 1. This is incorrect. In fact, a jury could find the defendants guilty of the RICO conspiracy alleged in Count 1, while acquitting all of the defendants of each alleged substantive offense. It is the unlawful agreement that racketeering acts be committed that constitutes the crime charged in Count 1. As long as the agreement to commit racketeering acts is proven, proof that substantive crimes occurred is not required. See Salinas v. United States, 522 U.S. 52, 64, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997) ("A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense.").

For example, at trial, the jury could conclude that the Government had established that the defendants agreed to operate the Gambling Enterprise through the use of interstate and international wire communications facilities to transmit bets and betting information, as alleged in Count 1, but fail, for whatever reason, to find the requisite proof for any of the substantive Wire Wager Act violations alleged in Counts 3 to 12. Further, the jury could conclude that the Government had established that the defendants had agreed to develop a scheme to defraud, as alleged in ¶¶28 to 31 of the Superseding Indictment, but find one or more of the defendants not guilty of the Mail Fraud violation alleged in Count 2. Such a verdict would not be inconsistent.

See United States v. Cianci, 378 F.3d 71, 92 (1st Cir. 2004) ("If proof of the requisite criminal agreement exists, whether or not the substantive crime ensues is irrelevant."); United States v. Kehoe, 310 F.3d 579, 587-88 (8th Cir. 2002). Therefore, the defendants' claim that the dismissal of substantive counts requires modification of the conspiracy charge is without merit, and should be denied.

2. The Conspiracy Racketeering Predicates are Adequately Pled and are Not Vague

The defendants claim that the Superseding Indictment is insufficient because it merely follows the language of the statutes, or cites to specific statutes, without providing necessary factual allegations. Generally, tracking the language of the statute is considered an element of notice pleading under Rule 7(c). See United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993); United States v. Young, 618 F.2d 1281, 1286 (8th Cir. 1980). However, Count 1 contains much more than the bare-bones allegation that the defendants claim.

In support of their argument, the defendants cite United States v. Camp, 541 F.2d 737 (8th Cir. 1976). However, the indictment considered in the Camp decision is readily distinguishable from the Superseding Indictment. In Camp, the Court found that the charge of interference with a postal inspector was insufficient because an element of the crime, the use of force, had been omitted from the indictment. The government, in defending the charge, argued that the citation to the statute, which included the missing element, was included in the indictment, and thus the defendant was on notice. The Court ruled that the citation, without more, did not suffice, because an element of the offense did not appear on the face of the indictment.

In the Superseding Indictment, the situation is quite different. The State and federal statutes are alleged to give notice of racketeering predicates, and do not in and of themselves

state an element of the RICO conspiracy charge; they are simply part of the alleged pattern of racketeering activity . It is this "pattern of racketeering activity" that is an element of racketeering conspiracy. See United States v. Bennett, 44 F.3d 1364, 1374 (8th Cir. 1995). As long as the pattern of racketeering activity itself is adequately alleged, more is not required.

The defendants also claim that the allegation of racketeering acts in the Superseding Indictment is so vague that the Government will not be bound at trial to proof of charges returned by the Grand Jury, in violation of their Fifth Amendment right to be charged by indictment. In fact, the racketeering acts are specifically alleged, as are the manner, method, and means of the Gambling Enterprise. For example, the defendants state that the Superseding Indictment contains only one reference to money laundering, and is therefore insufficient. This is incorrect. In addition to the reference cited by the defendants (¶35), Count 1 states:

> ¶31. It was part of the scheme to defraud and the conspiracy that the members and agents of the GAMBLING ENTERPRISE 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. The ENTERPRISE instructed these individuals to send the money, intended to be used to place illegal wagers, to a named recipient other than directly to the ENTERPRISE web site or telephone line.
>
> ¶36. It was part of the conspiracy that the ENTERPRISE, its members and associates, used the U.S. and private mail services and wire transfer services to send money from ENTERPRISE components outside the United States to various recipients in the United States, and from the United States to recipients outside the United States, and between locations in the United States, in order to promote the ENTERPRISE's illegal telephone and Internet gambling operations.

Additionally, Overt Acts 18, 19, 20, 21 and 22 refer specifically to occasions of funds transfers that, among other things, constitute money laundering. The allegation of money laundering as a racketeering predicate to the charged conspiracy is more than sufficient to ensure that the defendants are tried only on charges returned by the Grand Jury.

3. Overt Acts Need Not Include Citations to Statute

The defendants claim that the Overt Acts alleged in Count 1 are "troubling" because they do not state what statute each act is alleged to have violated, and because they do not clearly refer to specific conduct alleged as part of the pattern of racketeering activity. Why this should be troubling is not clearly stated. As there is no requirement that the United States allege an overt act in charging a RICO conspiracy, there can be no requirement that overt acts be alleged in any particular manner. Salinas v. United States, 522 U.S. 52, 63, 118 S.Ct. 469, 476, 139 L.Ed.2d 352 (1997). There is also no requirement that overt acts be criminal in nature. United States v. Bass, 472 F.2d 207, 213 (8th Cir. 1972).

While not a required component of the Superseding Indictment, the Overt Acts alleged in Count 1 do supply factual information relevant to the charge. For example, Overt Acts 1 through 11 state various times that the Gambling Enterprise is alleged to have used interstate and international wire communications facilities to transmit bets, information assisting in the placing of bets, and information entitling a recipient to receive money or credit as the result of a gambling activity. Overt Acts 16 and 17 provide information regarding use of interstate and international commercial facilities in aid of the Gambling Enterprise, and Overt Acts 18 to 22 and 25 provide information regarding the transmission of funds via various means by or on behalf of the Gambling Enterprise.

The defendants move from claiming that Count 1 does not adequately inform them of the charge against them to a complaint that there is too much information in the Superseding Indictment for them to determine what conduct underlies the alleged racketeering activity. First, evidentiary specifics are a matter for trial, not charging. United States v. West, 549 F.2d 545,

555 (8th Cir. 1977): "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." Second, while the charges in this case may be broad, they are not vague. The Superseding Indictment states all the specific and factual information necessary to the charges, and is sufficiently detailed to allow the defendants to prepare for trial.

4. The Illegal Gambling Business is Adequately Alleged

The defendants make similar claims regarding the §1955 allegation, arguing that the Superseding Indictment is deficient because it does not fully describe each operation of the illegal gambling businesses, and specify how those operations violated State anti-gambling statutes. As noted above, such allegations are not required under Rule 7(c) or the Constitution. In any case, contrary to defense claims, Count 1 of the Superseding Indictment does contain considerable information regarding how the Gambling Enterprise functioned. The claim that Count 1 lacks requisite factual allegations regarding the §1955 racketeering predicates is not supported by the law, or a plain reading of the Superseding Indictment.

C. Count 1 Adequately Alleges the Formation of a Fraudulent Scheme

The defendants claim that Count 1 fails to allege the formation of a fraudulent scheme as a matter of law. In order to support this claim, they cite civil procedure and common law requirements that are not applicable to criminal racketeering charges.

1. The Gambling Enterprise Fraud Scheme was not Limited to Lies About the Law

The defendants claim that "misstatements of law cannot be the basis for mail-fraud or wire-fraud charges." (Tucker motion, page 21, Gary Kaplan's motion, page 20). The defendants cite the case of Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999),

which concerned the question of whether the materiality of the false representation in a fraud scheme was an element of an allegation pursuant to §§1341 or 1343 of Title 18. The Court found that it was, but noted that "the Government is correct that the fraud statutes did not incorporate all the elements of common-law fraud. The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal statutes." Neder, 527 U.S. at 24-25, 119 S.Ct. at 1841 (emphasis in original). The defendants' assertion that any common-law fraud element, other than materiality, is incorporated into the federal criminal statutes is not supported by this ruling.

The defendants further cite Miller v. Yokohama Tire Corp., 358 F.3d 616 (9th Cir. 2004), a civil case in which the alleged fraudulent statements are qualitatively (and quantitatively) distinguishable from those alleged in the Superseding Indictment. In dismissing the RICO claims made by Miller, the Ninth Circuit Court noted that the "Yokohama Managers' statements did not include express or implied misrepresentations of fact." Miller, 358 F.3d at 621. However, in the advertising for BetonSports.com and other Gambling Enterprise web sites. the defendants made statements regarding their operations and services that were absolutely untrue. These statements, in addition to the claim that the Gambling Enterprise was "legal and licensed," were designed to deceive, thus meeting the statutory requirement that a misrepresentation be alleged.

For example, materials distributed on November 20, 2005, from a motor home advertising BetonSports.com in Baltimore, Maryland, included the following:

> Flyer - "You should ask yourself these important questions before deciding on a Sportsbook: LEGAL SITUATION: Does your Sportsbook have a license to legally operate? BETonSPORTS.com Sportsbook & Casino holds legal gaming licenses in the different countries from which it operates, such as Antigua, and the

United Kingdom."

Materials mailed to an undercover mailbox in St. Louis included the following:

> ISBC Letter - the "International Sportsbook Council" is represented as a "self-regulated, non-profit industry council;" . . . "our goal and purpose is to raise and maintain the ethics, integrity, standards and security of sports wagering."
>
> OSGA Letter - the "Offshore Gaming Association" is represented as an "independent 'watchdog' agency that monitors the financial, legal and ethical standards of the offshore gaming industry."

Both letters recommend BetonSports.com in glowing terms. Actually, the ISBC and OSGA domain names and web sites were owned and controlled by the Gambling Enterprise. Both were used to deceive gamblers into placing bets with the Gambling Enterprise, as opposed to other available alternatives. Also mailed to an undercover mailbox in St. Louis was a letter signed by co-defendant David Carruthers, which states: "We are the safest, most secure and far and away the most customer service focused offshore gaming operation in the world." The materials claim that BetonSports.com made payouts "24/7." This created the impression that the Gambling Enterprise kept the money deposited in wagering accounts liquid and available for gambling or refunds. In fact, the Gambling Enterprise used depositors' money to expand its operations and for other purposes, and did not keep it "safe and secure" for its gambling customers.[3] Therefore, even if the common-law rule regarding legal representations were applied in this case, it would not operate to invalidate the mail and wire fraud allegation in the Superseding Indictment.

The other cases cited by the defendant on this point are equally unavailing. United States v. Panthaky, 2007 WL 1280750, *1 (9th Cir. 2007), is unreported, and not precedent under the

[3] Please refer to the plea agreement executed by co-defendant BETONSPORTS plc in this matter on May 24, 2007, as well as the Stipulated Permanent Injunction executed by co-defendant BETONSPORTS plc on November 9, 2006, in United States v. BETONSPORTS plc, 06CV01064CEJ.

Rules of the Eighth and Ninth Circuit Courts of Appeals.[4] Even if Panthaky constituted binding authority, it would not support the defendants' position, as that decision held that "special circumstance"[5] made the lawyer-defendant's legal lies proper subjects of §1341 charges. In Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 406-07 (8th Cir. 1976), the Court ruled that the representation at issue was actionable because it was a statement of fact rather than opinion, even though it may have included a legal conclusion. In Greater Chicago Auto Auction, Inc. v. Associates Discount Corp., 323 F.2d 429, 430 (8th Cir. 1963), a per curiam opinion, the Court never even reached the issue: "We accordingly find it unnecessary to reach, and therefore do not consider the validity of the trial court's statement in its opinion to the effect that the representations may not be actionable as they relate to questions of title which are questions of law and are hence not fraudulent." Johnson v. Berry, 171 F.Supp.2d 985, 991 (E.D. Mo. 2001) involved a suit between the co-holders of a song copyright. The court stated:

> Although the general principle [legal opinions not actionable as fraud] is readily stated, its application can be less straightforward, as revealed by the Missouri Court of Appeals' review of some of the case law in McMullin v. Community Savings Service Corp., 762 S.W.2d 462 (Mo. App. 1988). . . . [t]he representations may not be mere expressions of opinion as to a matter of law and so may be actionable as fraudulent under Missouri law.

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[4] United States Court. of Appeals 9th Circuit Rule 36-3 states: "(a) Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. (b) Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1." United States Court of Appeals 8th Circuit Rule 32.1A states: "Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent."

[5] The Court found that the evidence indicated that the lawyer-defendant knew the statements he made were false, and that he was not merely giving bad, but honest, legal advise.

None of the cases cited by the defendants support their contentions regarding the elements that must be alleged in a RICO conspiracy fraud scheme predicate, or a substantive fraud scheme charge pursuant to 18 U.S.C. §§1341 and 1343.

The defendants further claim that the Fifth Circuit Court of Appeals rejected the Government's theory regarding fraudulent schemes in the MasterCard opinion, In re MasterCard International Inc., Internet Gambling Litigation, 132 F.Supp.2d 468, 495-97 (E.D. La. 2001), affirmed by 313 F.3d 257 (5th Cir. 2002). In fact, the MasterCard trial court ruled that the RICO claim failed because the gamblers could not show that MasterCard was the cause of their losses; their own conduct as gamblers operated as an intervening cause that prevented the credit card gamblers from establishing proximate cause. The court further stated that the plaintiffs could not show reliance, also necessary to establish proximate cause. In affirming the trial court, the Circuit Court of Appeals found that the credit card company had not made a fraudulent statement in holding that the debts of the gamblers were legal, because they were, in fact, legal debts.[6] Further, "[t]he district court correctly stated that although reliance is not an element of statutory mail or wire fraud, we have required its showing when mail or wire fraud is alleged as a RICO predicate."[7] The Fifth Circuit Court did not rule that a so-called "statement of law" could not be actionable in fraud; rather the Court ruled that no fraudulent statement had been made.

The defendants cite to Equal Justice Foundation v. Deutsche Bank Trust Co. Americas, 412 F.Supp.2d 790, 795-96 (S.D. Ohio 2005), which involved false statements allegedly made in

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[6] Please refer to the Government's Response to defendant Gary Kaplan's motion to dismiss Counts 3 to 12 of the Superseding Indictment, filed this date.

[7] Please refer to the ruling in Neder v. United States, cited on page 18-19 above, regarding the "justifiable reliance" showing required by the Fifth Circuit Court.

a class action settlement. The court stated:

> [A] nonactionable misrepresentation of legal opinion involves the legal meaning and effect of a statute, ruling, document, instrument or other source of law, while actionable misrepresentations of fact involves statements that imply the existence of accurate and readily ascertainable facts that either concern the law or have legal significance, but which are not part of the law themselves.

Equal Justice Foundation, 412 F.Supp.2d at 795-96 (interior citations omitted.) The Gambling Enterprise's "legal and licensed" claim is a statement of fact regarding the status of the Gambling Enterprise – it is not a statement of the law or legal opinion, as claimed by the defendants.

The defendants dismiss the "licensed" portion of the Gambling Enterprise's "legal and licensed" advertising in a footnote, stating that the claim is technically true, as the Gambling Enterprise held gambling licenses from several jurisdictions. This claim is at best disingenuous: no reasonable consumer would think that a business claiming to be "licensed" was referring to a license granted by a foreign nation. In this manner, the Gambling Enterprise used the "licensed" representation to deceive. The fraudulent misrepresentations alleged in the Superseding Indictment are adequate to substantively charge a fraud scheme, as well as a fraud scheme racketeering predicate.

2. Persons who were Targeted by the Gambling Enterprise's False Statements were Unlawfully Deceived by the Gambling Enterprise's Advertising

The defendants claim that the people who received the Gambling Enterprise's false advertising could not be defrauded, because they have no legally recognizable right to be told the truth. The defendants cite to the case of McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 97 L.Ed.2d 292 (1987), claiming that the mail fraud statute does not encompass

schemes to defraud persons of intangible property.[8] The defendants then make the wholly unjustified and unsupported claim that the individuals who were recipients of the Gambling Enterprise's false statements and subsequently sent money to the Gambling Enterprise were not deprived of a "legally recognized property right." This is absurd. Quite apart from the money that U.S.-based gamblers sent to the Gambling Enterprise, these individuals were deprived of the opportunity to place their bets with a legal sports book or casino, and the tangible benefit of having their gambling money available to them in the United States. As the many gamblers who lost their wagering accounts when BETONSPORTS plc went out of business can attest, the opportunity to gambling legally, as opposed to illegally, is not of inconsiderable monetary value, and quite certainly qualifies as a property right.

The defendants also claim that gamblers cannot be defrauded by false statements regarding the legality of a gambling activity, because, like all citizens, they are presumed to know the law, and cannot, as a matter of law, rely on a statement that a particular gambling activity is legal. This is also absurd. Boiled down to its essentials, the defendants are claiming that; (1) because the gamblers could not loose legally recognized tangible property by gambling with an illegal gambling business, they could not be harmed by the Gambling Enterprise's false statements; and (2) as the gamblers could not be harmed, the false representations by the Gambling Enterprise could not be fraudulent. This bootstrap, Moebius-like argument is based on an incorrect premise and a mish-mash of mis-cited civil cases and black letter law.

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[8] The ruling in McNally prompted Congress to enact Title 18, U.S.C. §1346, which reinstated denial of the right to honest services as a basis for fraud scheme charges. The defendants dispose of the statute in a footnote.

The defendants cite to Atkins v. Parker, 472 U.S. 115, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985), to support their argument. This case dealt with food stamp recipients who claimed they had been denied due process when their benefits were reduced without individual notice. The Supreme Court ruled that food stamp recipients were not entitled to more notice than non-recipient citizens, and that legislative changes in the food stamp program were the law of the land, which all citizens are presumed to know. Atkins, 472 U.S. at 130, 105 S.Ct. at 2529. Factually, this is a very different situation from that presented by the defendants. The defendants claim that the Gambling Enterprise had the legal right to lie to its customers, because they should have known that they were being lied to. This turns "ignorance of the law is no defense" into "a victim's ignorance of the law is an absolute defense." This is not, and should not be, the law of the land.

The defendants claim that the courts cannot make any determination regarding the Gambling Enterprise's fraud scheme because of the "strong public policy against courts adjudicating gambling transactions." First and foremost, the United States is not asking the Court to adjudicate a disputed gambling transaction. The Government is seeking to try the defendants for criminal conduct. There is no correlation between the situation of a gambler seeking to collect a gambling debt, and the present prosecution of the Gambling Enterprise. Secondly, the "strong public policy" claimed by the defendants does not extend to the judicial enforcement of laws regulating legal gambling activity. For example, one of the cases cited by the defendants, Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 745 A.2d 301 (D.C. 2000) concerned a compulsive gambler who sued his bank for paying checks he had written to a New Jersey casino after he gave the bank a "stop payment" order. The gambler based his suit on the

claim that the checks were unenforceable promises to pay under New Jersey gambling law. The District of Columbia court ruled that, while New Jersey law prohibited the extension of credit to gamblers, there was nothing in New Jersey law that prohibited the negotiation and enforcement of valid checks written by gamblers to casinos. The "strong public policy" claimed by the defendants persists, if it exists at all, only in situations where gamblers or bookies seek to involve the courts in the enforcement of "rights" based on illegal activity. For example, Kelly v. First Astri Corp., 84 Cal.Rptr.2d 810, 819 (1999), cited by defendants, involved an attempt by a gambler to recover money he lost in rigged games. The court ruled that, as the games were themselves illegal, the gambler could not use the power of the courts to redress his losses.

The state of the law on this issue is better summarized in the case of Kramer v. Bally's Park Place, Inc., 535 A.2d 466, 471 (Md. 1988). In that case, a New Jersey casino sought to collect on checks written by a resident of Maryland. The court stated: "Maryland courts will enforce a gambling debt incurred in another state where the gambling is legal and the debt enforceable," despite the fact that the form of gambling at issue was then illegal in the State of Maryland. The Maryland court cited a New York case, Intercontinental Hotels Corp. v. Golden, 203 N.E.2d 210, 212-13 (NY 1964), which states:

> The trend in New York State demonstrates an acceptance of licensed gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct in the community. . . . Informed public sentiment is only against unlicensed gambling, which is unsupervised, unregulated by law and which affords no protection to customers and no assurance of fairness or honesty of the operation of the gambling devices.

(Emphasis in original). Miller v. Pacific Shore Funding, 224 F.Supp.2d 977 (D.Md. 2002), cited by the defendants on this point, involved a class action suit brought by borrowers against a lender. The plaintiffs claimed that the lender, by stating charges in its documentation, had

fraudulently led them to believe that the payments were required under state law. The court ruled that the mere stating of the charges did not imply their legality. The quote cited by the defendant is merely illustrative dicta.[9]

3. Internet Gambling as Conducted by the Gambling Enterprise is Illegal in the United States as a Matter of Law

The defendants claim that, in order to convict them, the Government must prove, and a jury must find, that the operations of the Gambling Enterprise were illegal under state, federal and international law. The defendants further claim that the Court may not determine the law in this case, because such a decision by the judge would deny them their right to a trial by jury. This argument turns the roles of the judge and jury on their heads. It is the duty of the court to determine the law, and that of the jury to determine the facts. A court may find, as a matter of law, that particular conduct is not permitted, or requires a specific license or permit. It is then up to the jury to determine whether the charged conduct, in the context of that legal ruling, was lawful or unlawful.

"[F]ederal courts have uniformly recognized the right and duty of the judge to instruct the jury on the law and the jury's obligation to apply the law to the facts . . ." United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983); see also United States v. Kroh, 915 F.2d 326, 335 (8th Cir. 1990) ("Jurors take an oath wherein they assume a duty to apply the law of the case to the facts."). In the Eighth Circuit, juries are to be instructed in the following manner: at the opening

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[9] "Bookies . . . routinely tell gamblers how much they stand to win (in terms of the quoted odds). Only a fool more foolish than most gamblers would believe the odds they are quoted for the legality of the wager. And while bookies may violate a congeries of laws by taking bets, they do not also commit fraud by obtaining money for their services." Miller, 224 F.Supp.2d at 988-89.

of the case:

> [I]t will be your duty to decide from the evidence whether the defendant is guilty or not guilty of the crimes charged. From the evidence, you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

And at the close of the case:

> It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Model Criminal Jury Instructions §§1.01 & 3.02 (2007). The defense claim that the Constitution prevents the Court from determining the law in this case is ridiculous. The citation to Neder v. United States, 527 U.S. 1, 31, 34-35, 119 S.Ct. 1827, 1841, 1845-46, 144 L.Ed.2d 35 (1999) is unavailing, as that case concerned the determination of materiality in a fraud scheme trial by the court, rather than the jury. The majority held the invasion of the jury's fact-determining role to be harmless, while Justice Scalia wrote in dissent that such an invasion could never constitute harmless error. Neither statement supports the defendants' contention regarding their alleged "right" to have the legal status of Internet gambling determined by the jury, rather than the Court.

IV. THE SUPERSEDING INDICTMENT ADEQUATELY INFORMS THE DEFENDANTS OF THE CHARGES AGAINST THEM

The defendants make generalized claims that the racketeering allegations in the Superseding Indictment do not provide constitutionally adequate notice of the charges against them. The defendants state only that the charges are vague, but do not indicate how the

Superseding Indictment fails to provide adequate notice of the crimes alleged. In fact, the Superseding Indictment provides more than adequate descriptions of the Gambling Enterprise and its criminal conduct, and complies with the charging requirements set forth by the Eighth Circuit Court of Appeals:

> To establish the elements of a substantive RICO offense, the government must prove (1) that an enterprise existed; (2) that the enterprise affected interstate or foreign commerce; (3) that the defendant associated with the enterprise; (4) that the defendant participated, directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendant participated in the enterprise through a pattern of racketeering activity by committing at least two racketeering (predicate) acts.
>
> To establish the charge of conspiracy to violate the RICO statute, the government must prove, in addition to elements one, two, and three described immediately above, that the defendant 'objectively manifested an agreement to participate ... in the affairs of [the] enterprise.' Proof of an express agreement is not required; 'the government need only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of [each defendant's] actions.'

United States v. Darden, 70 F.3d 1507, 1518 (8th Cir. 1995) (interior citations omitted). All of these elements are sufficiently alleged, with appropriate factual information. The Superseding Indictment is not vague, and provides more than adequate notice to the defendants regarding the charges against them.

V. DEFENDANT TUCKER'S SUPPLEMENTAL MOTION IS WITHOUT MERIT

In her supplemental motion, the defendant begins her argument by noting the elements that must be established to prove a substantive RICO violation. Once again, it must be stated that the defendant is charged with RICO conspiracy, and not a RICO violation. It must also be repeated that the matters the defendant complains of may only be determined at trial. As long as the Superseding Indictment adequately alleges a RICO conspiracy, the manner of the agreement

and the Government's proof should not be tested prior to trial. United States v. Ferro, 252 F.3d 964, 968 (8th Cir. 2001).

Even were the Court to consider defendant Tucker's claims, they would not provide a basis for dismissal of the Superseding Indictment. The defendant claims that under RICO, a conspiracy must encompass two agreements: one, to conduct or participate in the affairs of an enterprise; and a second agreement to the commission of at least two predicate acts. This is an incorrect statement of the law in the Eighth Circuit. The Eighth Circuit jury instruction regarding an unlawful RICO agreement states that the Government must prove beyond a reasonable doubt that:

> the defendant knowingly reached an agreement or understanding with at least one other person to participate, directly or indirectly, in the affairs of an enterprise through a pattern of racketeering activity. . . .
> A person may be come a member of a conspiracy even if that persons agrees to play only a minor role in the conspiracy, so long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.[10]

This is the law that will be given to the jury at the end of the trial in this matter.

Defendant Tucker cites the case of United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986) to support her argument. Neapolitan involved the appeal of two RICO conspiracy convictions arising from the operations of an auto theft ring. The Court had no problem upholding the RICO conviction conspiracies, but struggled somewhat with an analysis of what constitutes a RICO conspiracy agreement. The Court stated:

> From a conceptual standpoint a conspiracy to violate RICO can be analyzed as composed of two agreements (in reality they would be encompassed by the same manifestations of the defendant): an agreement to conduct or participate in the

[10] Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, §6.18.1962C (2003).

> affairs of an enterprise and an agreement to the commission of at least two predicate acts.

Neapolitan, 791 F.2d at 499. The opinion then goes into the statement quoted by the defendant in her motion. The United States would argue that this is merely judicial musings on an analytical framework rather than the enunciation of a legal requirement, but such is not necessary. The Seventh Circuit itself has modified the ruling in Neapolitan in light of Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) and Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

In Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961 (7th Cir. 2000), the Court considered a suit by disgruntled investors against a securities advisor and law firm. The Court stated:

> To conspire to commit a subsection [§1962](c) offense, . . . [o]ne must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner. It is an agreement not to operate or manage the enterprise, but personally to facilitate the activities of those who do. All of this said, we are painfully aware that this is not a bright line, that district judges will have to evaluate whether what a defendant agreed to do is sufficient to bring his conduct within [§1962](d). The district court in this case did a remarkable job of evaluating these issues. His conclusion, however, was that to be in violation of subsection (d) one must agree to personally participate in the operation or management of the enterprise. That conclusion was wrong.

Brouwer, 199 F.3d at 967; see also Frost Nat. Bank v. Midwest Autohaus, Inc., 241 F.3d 862, 869-70 (7th Cir. 2001). The Seventh Circuit further refined its definition in United States v. Cummings, 395 F.3d 392, 397 (7th Cir. 2005): "It is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do." In her supplemental motion, defendant Tucker recites requirements from pre-Salinas case law, which are entirely inapplicable in that they pre-date not only Salinas, but the Reves decision as well.

Defendant Tucker is correct in stating that the Eighth Circuit Court has not issued an opinion directly on point. However, the other Circuit Courts have ruled in harmony with the Seventh Circuit in Cummings: see United States v. Saady, 393 F.3d 669, 676 (6th Cir. 2005) ("the government must prove that [the defendant] intended to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense [and] it suffices that he adopt the goal of furthering or facilitating the criminal endeavor"); United States v. Fernandez, 388 F.3d 1199, 1230 (9th Cir. 2004), cert. denied, Fernandez v. United States, 544 U.S. 1043 (2005) ("a defendant is guilty of conspiracy to violate §1962(c) if the evidence showed that she knowingly agreed to facilitate a scheme which includes the operation or management of a RICO enterprise"); United States v. Cianci, 378 F.3d 71, 90 (1st Cir. 2004) ("he must intend to further an endeavor which, if completed, would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor"); Smith v. Berg, 247 F.3d 532, 538 (3rd Cir. 2001) ("a defendant may be held liable for conspiracy to violate section 1962(c) if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise").

Defendant Tucker also claims that the Superseding Indictment is insufficient because it charges her with only a "vague agreement to commit a RICO offense,"[11] and does not specify which acts were agreed to by which defendant. In fact, such specification is not required. The proof of the conspiratorial agreement is a matter for trial, and need not be alleged in the indictment. United States v. Nabors, 45 F.3d 238, 240-41 (8th Cir. 1995). The defendant also claims that the Superseding Indictment does not establish a pattern of racketeering activity, but

[11] Supplemental motion at page 6.

alleges only "a basic recitation of Title 18 Statute Titles."[12] In fact, the Superseding Indictment alleges much more than simple violations of federal statute. As demonstrated above in Section III.5.B., the Superseding Indictment adequately alleges a pattern of racketeering activity. The defendant's claim on this point is not supported in law or in fact, and should therefore be denied.

VI. CONCLUSION

The defendants' attempts to prevent this prosecution from going forward are not legally or factually appropriate, and should not succeed. There is no basis in law or in fact for the dismissal they seek, and therefore their motions should be denied.

Respectfully submitted,

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[12] Supplemental motion at page 6.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, the foregoing was filed 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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Law Offices of Wolff & D'Agrosa
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Direct Mail Expertise, Inc.;
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