***UNITED STATES DISTRICT COURT***
***DISTRICT OF MAINE***

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| ***THE GENTLE WIND PROJECT, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiffs*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 04-103-P-C*** |
| | ***)*** | |
| ***JUDY GARVEY, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Defendants*** | ***)*** | |

## *RECOMMENDED DECISION ON MOTION OF DEFENDANTS GARVEY, BERGIN AND J.F. BERGIN COMPANY TO DISMISS*

Judy Garvey, James Bergin and J.F. Bergin Company, three of the seven remaining defendants,[1] seek dismissal of the two claims based on federal law asserted against them and ask this court to decline to exercise supplemental jurisdiction over the state-law claims asserted against them. I recommend that the court grant the motion to dismiss the federal claims but deny the request with respect to the state-law claims.

### I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Motion of Defendants James Bergin, Judy Garvey and J.F. Bergin Company to Dismiss, etc. ("Motion") Docket No. 23) at 1. "[I]n ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal

[1] The plaintiffs voluntarily dismissed their claims against two named defendants, Steven Allan Hassan and the Freedom of (*continued on next page*)

for failure to state a claim only if "it appears to a certainty that the plaintiff[s] would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

## II. Factual Background

The complaint includes the following factual allegations relevant to the moving defendants.

The Gentle Wind Project is a Maine nonprofit corporation; the named plaintiffs are members of its staff and/or its directors. Complaint and Jury Demand, etc. ("Complaint") (Docket No. 1) ¶¶ 1-2, 29. Defendants Judy Garvey and James F. Bergin are residents of Blue Hill, Maine. *Id.* ¶¶ 9-10. Defendant J.F. Bergin Company is an unincorporated entity owned or controlled by Bergin. *Id.* ¶ 11. Gentle Wind is dedicated to education and research aimed at alleviating human suffering and trauma. *Id.* ¶ 23. It pursues these goals by researching, developing and distributing healing instruments that it believes restore and regenerate the human energy field and contribute to healing. *Id.* It does not sell these instruments but suggests a donation from those who request them. *Id.* ¶ 25. Its income is derived entirely from donations. *Id.* It does not advertise its products publicly. *Id.* ¶ 26. Gentle Wind has a staff but does not have members or a leader and does not espouse an all-encompassing belief system. *Id.* ¶¶ 27-28.

For many years, Garvey and Bergin were involved with Gentle Wind. *Id.* ¶ 30. In or about the autumn of 1999 Garvey asked to volunteer at the Kittery office of Gentle Wind. *Id.* ¶ 31. This arrangement was unsuccessful and she was asked to leave. *Id.* Garvey thereafter demanded immediate repayment of outstanding loans to Gentle Wind, all of which were repaid by the early summer of 2003. *Id.* ¶ 32. On October 16, 2002 Garvey stated in an e-mail to a third party that she and Bergin has been

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Mind Resource Center, Inc. Docket No. 22.

subject to an "elaborate mind control project" run by Gentle Wind, plaintiff John Miller and plaintiff Mary Miller. *Id*. ¶ 33. In or about November 2003 Garvey "authored, contributed to and/or edited" a lengthy document (the "Garvey report") containing the statement that Gentle Wind and the individual plaintiffs engaged in mind-control, group sexual rituals and abuse and neglect of children. *Id*. ¶ 34.

Bergin authored a lengthy document (the "Bergin report") containing the statements that Gentle Wind and the individual plaintiffs engaged in mind-control, group sexual rituals, abuse and neglect of children, and improper solicitation and acceptance of financial contributions. *Id*. ¶ 38. Garvey and Bergin published their reports to third parties with the intent that those third parties further publish the reports to others. *Id*. ¶ 41. Garvey and Bergin operate a web site called www.windofchanges.org. *Id*. ¶ 42. The home page of this web site identifies Garvey and Bergin as the authors of the material on the site and invites readers to send comments about their experiences with Gentle Wind. *Id*. ¶¶ 44-45. The web site includes the statement that:

> Here you will find highly personal accounts combined with vivid examples from 17-year members, former "instrument keepers," and former Board Members of GWP. These insiders conscientiously describe how they were skillfully manipulated by GWP leaders who claimed to have exclusive connections with the "spirit world."

*Id*. ¶ 46. The web site includes updated versions of the Garvey and Bergin reports and links to other web sites "with critical information about Gentle Wind Project leaders and Resources about high-control groups and cults." *Id*. ¶¶ 47-48.

Bergin was recently listed as a "presenter" at a conference on "cults and new religious movements." *Id*. ¶ 57. He was described as "President, J.F. Bergin Company, Blue Hill, ME; Co-facilitator, Maine Cult Information Network." *Id*. Bergin is engaged in commerce with respect to "cults and new religious movements." *Id*. ¶ 58. His business would benefit from public attention to his and Garvey's claims

regarding Gentle Wind and the individual plaintiffs. *Id*. Garvey engages in commerce as a hypno-therapist. *Id*. ¶ 59. Her business would benefit from public attention to her and Bergin's claims regarding Gentle Wind and the individual plaintiffs. *Id*.

## III. Discussion

The complaint alleges that Garvey and Bergin violated 18 U.S.C. §§ 1343 and 1962 (the Racketeer Influenced and Corrupt Organizations Act, or RICO); that Garvey, Bergin and the J.F. Bergin Company violated 15 U.S.C. § 1125(a)(1)(B) (the Lanham Act); and that Garvey and Bergin committed several state-law torts against the plaintiffs. Complaint ¶¶ 132-79.

### A. RICO Claim

The RICO section at issue in this case provides:

> It shall be unlawful for any person employed by 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). To state a claim under section 1962(c), a plaintiff must allege four elements: (a) conduct (b) of an enterprise (c) through a pattern (d) of racketeering activity. *Soto-Negrón v. Taber Partners I*, 339 F.3d 35, 38 (1st Cir. 2003). The complaint alleges that the "racketeering activity" at issue is violation of 18 U.S.C. § 1343, Complaint ¶¶ 133-34, 137-38, which provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343. The moving defendants contend that the complaint fails to allege the elements of a scheme to defraud. Motion at 9-11. This court has held that the scheme must be intended to deceive another, and that "to deceive" means "to take or withhold from (one) some possession, right or interest by calculated misstatement or perversion of truth, trickery, or other deception." *Lavery v. Kearns*, 792 F. Supp. 847, 861-62 (D. Me. 1992).[2]

The plaintiffs respond that they have sufficiently alleged an intent to deprive them of money or property because they have alleged that the defendants have an economic motive for the allegedly deceptive statements communicated over the internet and because they need not allege that the defendants intended to gain an economic benefit themselves, but only the benefit of "driv[ing] Gentle Wind out of existence." Opposition at 18. They do not identify the paragraphs of the complaint which they contend allege this economic motive, but the only possible such allegations are found in the following two paragraphs.

> Upon information and belief, Bergin is engaged in commerce with respect to "cults and new religious movements," including but not limited to engaging in such commerce through J.G. Bergin Company and the Maine Cult Information Network. Upon information and belief, Bergin's business would benefit from public attention to his and Garvey's claims regarding Gentle Wind and the individual Plaintiffs.
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> Garvey engages in commerce as a hypno-therapist. In a classified advertisement viewable on the Internet at www.penobscotbaypress.com/classifieds/business.html, Garvey promotes her ability to help "[i]mprove: memory, confidence, addictions, weight, depression, phobias, anxiety, pain, insomnia, pre/post surgery." Upon information and belief,

[2] The Supreme Court case on which the First Circuit opinion giving rise to this definition was based, *Lavery*, 792 F. Supp. at 861 n. 13, was "overruled" by the enactment of 18 U.S.C. § 1346, which expands the definition of "scheme or artifice to defraud" to include the deprivation of the "intangible right of honest services." The parties do not refer to this expanded definition. Motion at 9; Plaintiffs' Opposition to Motion of Defendants James Bergin, Judy Garvey, and J.F. Bergin Company to Dismiss, etc. ("Opposition") (Docket No. 26) at 15-16; Reply Memorandum in Support of Motion of Defendants James Bergin, Judy Garvey and J.F. Bergin Company to Dismiss, etc. ("Reply") (Docket No. 29) at 5. It is not implicated by the facts alleged in this case.

> Garvey's business would benefit from public attention to her and Bergin's claims regarding Gentle Wind and the Individual Plaintiffs.

Complaint ¶¶ 58-59. None of the specific wire communications by Bergin or Garvey alleged to be fraudulent, *id*. ¶¶ 34, 36, 38-39, 46-47, 49, 50-51, 53, 55, 99-100, may reasonably be read to seek any economic benefit to either of them. The conclusory allegation that making their claims about the plaintiffs public would "benefit" Garvey's and Bergin's businesses is insufficient to plead intent to benefit themselves economically for purposes of a RICO wire fraud claim. The likelihood of any such benefit is speculative at best. *See Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996) (court dealing with motion to dismiss need not credit bald assertions).

The plaintiffs' next contention is that they need not allege an intent by the moving defendants to benefit economically, but only to benefit in some other sense, and that they have met this requirement by alleging that the moving defendants intended to deprive the plaintiffs of donations, thus benefiting by driving Gentle Wind out of existence. Opposition at 18. The complaint cannot reasonably be read to allege any such intent with respect to the RICO count;[3] it includes only the conclusory assertion that the plaintiffs "have suffered injury in their business or property by reason of" the alleged RICO violation. Complaint ¶ 139. The plaintiffs cite no authority in support of the assertion that emotional or psychic "benefit" is sufficient under the wire fraud statute. They cite *United States v. Pimental*, 236 F.Supp.2d 99, 106-07 (D. Mass. 2002), for the proposition that the intended deprivation need not be "quantifiable" and that "the intent need only be to obtain some 'gainful use' of the object of the fraudulent scheme." Opposition at 18. The *Pimental* opinion does state that "[m]ail fraud liability . . . does not require that the harm be quantifiable,"

[3] Paragraphs alleging that Garvey and Bergin interfered with Gentle Wind's prospective donations by fraud appear in Count IV of the complaint (¶¶ 157-63), well after Count I, the RICO count (¶¶ 132-39), and are not included in that count by reference.

but only in the context of rejecting an argument that there must be an actual loss in order for criminal liability to attach. 236 F.Supp.2d at 106-07. The reference to "gainful use" actually appears as *dictum* in *United States v. Rosen*, 130 F.3d 5, 9 (1st Cir. 1997), and cannot reasonably be read to encompass emotional satisfaction within the scope of the term. Emotional satisfaction is not "gainful use."

The plaintiffs argue in the alternative that an intent by the alleged defrauder to benefit himself is not an element of a RICO wire fraud claim, citing *Rosen*. Opposition at 19. However, the question of Rosen's intent to profit himself was not discussed by the First Circuit in that opinion because it was obvious that Rosen would benefit to the tune of $500,000 if his scheme were successful. *Rosen*, 130 F.3d at 8-9. The First Circuit's failure to state that it was necessary for the government to prove that the defendant intended to derive economic benefit himself from the scheme cannot be taken as authority for the proposition that such an intent is not an element of the crime of wire fraud. Other courts, however, have held that intent by the defendant to benefit himself is only an alternate element of wire fraud; the crime is also complete if the defendant intended to cause actual or potential loss to the victims of the fraud. *E.g., United States v. Ross*, 77 F.3d 1525, 1543 (7th Cir. 1996); *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987). In this regard, the First Circuit has held that "[n]othing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived." *United States v. Christopher*, 142 F.3d 46, 54 (1st Cir. 1998). The plaintiffs' failure to allege any such intent in the portion of the complaint included in Count I, which raises the RICO claim, is dispositive of their argument on this point as well.

The moving defendants are entitled to dismissal of Count I.[4]

[4] The plaintiffs observe that "it is also entirely possible that Defendants have acted with a different type of intent, of (*continued on next page*)

**B. Lanham Act Claim**

Count II of the complaint alleges that Garvey, Bergin and J.F. Bergin Company, along with the other named defendants, violated 15 U.S.C. § 1125(a)(1)(B)[5] (the Lanham Act). Complaint ¶¶ 140-46. The statute provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
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> **(B)** in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B). The moving defendants contend that none of the representations which they are alleged to have made fall into the category of commercial advertising or promotion and that none of the alleged representations constitutes commercial speech. Motion at 5-8.

The complaint does allege that the moving defendants "made the above-described statements in commercial advertising or promotion," Complaint ¶ 143, but that conclusory assertion is insufficient when it is contradicted by the specific factual allegations in the complaint. *Aulson,* 83 F.3d at 3.

> The courts have developed a four-part test to ascertain when representations fall into the category of "commercial advertising or promotion" for purposes of

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which Plaintiffs can only learn through discovery," Opposition at 17, an apparent reference to their earlier assertion that they "should be allowed to conduct discovery and/or be allowed leave to amend the Complaint," should the court find the allegations of the complaint to be deficient, *id*. at 1. In the absence of any indication of what "different type of intent" would meet the requirements of a RICO mail fraud claim, let alone why evidence of such a type of intent would only be available through discovery, the court should decline to postpone resolution of this motion to allow the plaintiffs to conduct discovery. A motion for leave to amend a complaint should be made in considerably more detail than the passing reference presented here, and should be accompanied by a proposed amended complaint.

[5] This count also refers to 15 U.S.C. § 1125(a)(1)(A), Complaint at 38, but it is clear from the parties' submissions, Motion at 5 n.2; Opposition at 6, that subsection (B) is the subsection under which the plaintiffs' claim arises.

> Section 43(a)(1)(B). The test requires that a representation must (a) constitute commercial speech (b) made with the intent of influencing potential customers to purchase the speaker's goods or services (c) by a speaker who is a competitor of the plaintiff in some line of trade or commerce and (d) disseminated to the consuming public in such a way as to constitute advertising or promotion.

*Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003) (citation and internal quotation marks omitted). "To constitute advertising or promotion, commercial speech must at a bare minimum target a class or category of purchasers or potential purchasers, not merely particular individuals." *Id*. The complaint in this case, however indulgently read, does not allege either the second or third elements of this test.

No intent to influence potential customers to purchase the speaker's goods or services is explicit on the face of any of the statements alleged in the complaint to have been made by Bergin or Harvey.[6] They simply cannot reasonably be construed to have "promoted defendants' own product." *World Wrestling Fed'n Entertainment, Inc. v. Bozell*, 142 F.Supp.2d 514, 530 (S.D.N.Y. 2001). The plaintiffs apparently contend, Opposition at 7, that a reasonable inference to that effect may be drawn from the facts that Garvey is a hypno-therapist and that Bergin "is engaged in commerce with respect to 'cults and new religious movements.'" Complaint ¶¶ 58-59.[7] No such inference could reasonably arise from the allegations about Garvey's profession. With respect to Bergin, such an inference is far too attenuated and speculative to meet the *Podiatrist* test.

Although the failure to allege facts sufficient to state a claim on the second element of the test is enough to entitle the moving defendants to dismissal of Count II, I note that the complaint also fails to allege

[6] No allegation is made that J.F. Bergin Company made any representations at all. For that reason alone, defendant J.F. Bergin Company is entitled to dismissal of Count II.

[7] They also assert that "the defendants' web sites promote Defendants and their businesses to the public at large." Opposition at 10. None of the paragraphs in the complaint which mention the "Garvey/Bergin Web Site" may reasonably (*continued on next page*)

factual support for the third element. The plaintiffs contend that a claim under section 1125(a)(1)(B) does not include competition between the plaintiff as an element, Opposition at 13-14, essentially arguing that this court should not follow *Podiatrist*. It is not the role of this court to disregard rulings of the First Circuit that are still in effect. Indeed, even before *Podiatrist* this court found that commercial competition between the parties is an element of a claim under section 1125(a)(1)(B). *Town & Country Motors, Inc. v. Bill Dodge Auto. Group, Inc.*, 115 F.Supp.2d 31, 33-34 (D. Me. 2000). The fact that the moving defendants and the plaintiffs hold opposing views does not and cannot make them into commercial competitors.

Under the circumstances, it is not necessary to address the moving defendants' contention that the statements at issue were not commercial speech.

The moving defendants are entitled to dismissal of Count II.[8]

### C. Request to Decline Jurisdiction

Garvey and Bergin ask that the court dismiss the remaining counts of the complaint as against them under 28 U.S.C. § 1367 because they are state-law claims as to which diversity of citizenship does not exist.[9] Motion at 11. This argument ignores the fact that four other defendants, against whom the same state-law claims are asserted, Complaint ¶¶ 147-79, remain in this action.

The supplemental jurisdiction statute provides that federal district courts have jurisdiction over claims so related to the federal claims in the action that they form part of the same case or controversy,

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be read to allege any such promotion. Complaint ¶¶ 42-52.

[8] The plaintiffs contend in passing that they have alleged that the "Defendants are acting in concert with other defendants who are engaged in various forms of commercial activity not the least of which is selling directly competing products," and that "[n]o more need be alleged." Opposition at 7. They cite no authority in support of this proposition, which reappears fleetingly later in their memorandum of law. Opposition at 16. The plaintiffs apparently intend to invoke theories of conspiracy, aiding and abetting or joint liability. My research has located no reported cases allowing a plaintiff to proceed under section 1125(a)(1)(B) on any such theory. More important, the complaint cannot reasonably read to allege any of these theories. In any event, arguments so undeveloped need not be considered by the court. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

although the courts would otherwise not have jurisdiction over such claims. 28 U.S.C. § 1367(a). The statute also provides, in relevant part, that the federal district courts may decline to exercise jurisdiction over such claims if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). This discretionary power should be applied "in light of such considerations as judicial economy, convenience, fairness to litigants, and comity." *Newman v. Burgin*, 930 F.2d 955, 963 (1st Cir. 1991). Only the last of these factors could possibly be served by declining to exercise jurisdiction over the state-law claims alleged against Garvey and Bergin under the circumstances of this case.

Requiring the plaintiffs to conduct separate proceedings in state court on identical claims, where the defendants differ but the facts, from all that appears, do not differ substantially, does not serve judicial economy or the convenience of any litigants other than possibly the moving defendants. It would be unfair to the plaintiffs to require them to do so, and it is not unfair under the circumstances to require Garvey and Bergin to present their defense to these claims in federal rather than state court.

I recommend that the court continue to exercise jurisdiction over the state-law claims asserted against Garvey and Bergin.

## IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendants Garvey, Bergin and J.F. Bergin Company to dismiss be **GRANTED** as to Counts I and II and that the request of defendants Garvey and Bergin that the court decline to exercise supplemental jurisdiction over the remaining counts asserted against them be **DENIED**.

## ***NOTICE***

[9] None of the state-law claims are asserted against J.F. Bergin Company. Complaint ¶¶ 147-79.

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Dated this 2nd day of September, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

**Plaintiff**

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