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

ELLEN C. MARSHALL,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
vs.	:	
	:	
RONALD FENSTERMACHER, HIGH SWARTZ ROBERTS AND SEIDEL, EMMA DAWSON, ESTATE OF DAVID BURGESS, HETHERINGTON & COMPANY,	:	
Defendants.	:	**NO. 04-3477**

MEMORANDUM

PRATTER, DISTRICT JUDGE OCTOBER 2, 2007

This case presents such a complicated, convoluted and contentious dispute over unpaid legal fees that the legal issues at the core of the dispute are virtually obscured. At a minimum, this dispute exemplifies why there are reports of the public's disdain for lawyers. Ellen C. Marshall is an attorney who represented Warren Matthei in his divorce proceedings in 1992. Mr. Matthei is not a party to this action but nevertheless is the focal point of all Ms. Marshall's allegations. Mr. Matthei never paid the bill for Ms. Marshall's services and Ms. Marshall has spent the last 14 years and reportedly hundreds of thousands of dollars chasing Mr. Matthei from New Jersey to the Bahamas, to England, and back to Pennsylvania seeking to collect approximately $76,000 in unpaid legal fees.

In this action, Ms. Marshall alleges in lengthy pleadings described immediately below that Ronald Fenstermacher, Esquire and High Swartz Roberts & Seidel, the law firm with which Mr. Fenstermacher is affiliated (together, the "Defendants"), along with Mr. Matthei, Emma Dawson, David Burgess, Esquire, and Hetherington & Company, the British law firm that

employed Mr. Burgess,[1] acted in concert to deprive her of her ability to enforce an $85,000 judgment against Mr. Matthei in New Jersey State court. Ms. Marshall now seeks over one million dollars in damages.[2]

PROCEDURAL BACKGROUND

The Defendants previously moved to dismiss Ms. Marshall's 203-paragraph Second Amended Complaint, and the Court granted that motion in part, dismissing counts I, II, V, VI, VII and VIII. See Marshall v. Fenstermacher, 388 F. Supp. 2d. 536 (E.D. Pa. 2005). Seven counts remain, consisting of allegations of civil conspiracy against all defendants (Count IV),

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[1] Mr. Fenstermacher, the High Swartz firm, Ms. Dawson, Mr. Burgess and Hetherington & Company originally were named as defendants in this action. Mr. Fenstermacher and High Swartz are the only defendants that have appeared in this case. Since this case began, David Burgess passed away and his estate has been substituted as a defendant. Summonses associated with the Second Amended Complaint were issued on November 19, 2004 with respect to the Estate of Mr. Burgess, Ms. Dawson, and Hetherington & Company. Of these defendants, the docket reflects that the Second Amended Complaint was served on Ms. Dawson on April 20, 2005. When Ms. Dawson failed to appear, on May 18, 2005, upon Ms. Marshall's request, the Clerk of Court entered a default against Ms. Dawson. As of the date of this Memorandum and Order, according to the docket, no service has been made on the Burgess Estate or Hetherington & Company.

[2] Ms. Marshall represented Mr. Matthei in his divorce proceedings in New Jersey in 1992. In 1993, Ms. Marshall sued Mr. Matthei for more than $76,558.30 in unpaid legal fees related to that action, and in 1995 she won a default judgment against him in the amount of $85,553.87. (Pl. Statement of Facts ¶ 29; Def. Statement of Facts ¶ 4.) According to the Defendants, after the instant suit commenced, certain of Mr. Matthei's bank accounts were recovered and the amounts were paid to Ms. Marshall. (Def. Statement of Facts ¶ 41.) In addition, Defendants aver that a piece of property Mr. Matthei owned in Virginia was sold, and that the after-tax proceeds of this sale of $63,000 were paid to Ms. Marshall. (Def. Statement of Facts ¶ 41.) Thus, according to the Defendants, Ms. Marshall has received over three-quarters of the aggregate amount of her judgment against her former client. Ms. Marshall concedes that such proceeds were paid to her, but claims that such proceeds were but a "drop in the bucket" in relation to the damages she has suffered. (Pl. Response ¶ 42.) Ms. Marshall now claims to have suffered over $1 million in damages during the 12 years she has spent seeking to recover on the $85,000 judgment. These damages include those "engendered by the litigation defendants caused." (Pl. Statement of Facts ¶ 129.)

violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), and New Jersey's RICO counterpart, N.J. Stat. Ann. § 2C:41-2(c) and (d), against all defendants (Counts IX through XII), respondeat superior liability against High Swartz (Count XIII), and ratification/equitable estoppel against High Swartz (Count XIV).

Following discovery, Mr. Fenstermacher and High Swartz submitted a Motion for Summary Judgment (Docket No. 84), which the Court denied by Order dated November 16, 2006 (Docket No. 110). Defendants then submitted a Motion for Reconsideration (Docket No. 111), fairly described as imploring the Court to reconsider its November 16 Order denying Defendants' Motion for Summary Judgment only with respect to Plaintiff's claims under the federal and New Jersey RICO statutes.

For the reasons stated below, Defendants' Motion for Reconsideration will be granted insofar as the Court will enter summary judgment in favor of the Defendants on Counts IX and X – the federal RICO claims – of Plaintiff's Second Amended Complaint. Summary judgment will be denied in all other respects.

FACTUAL BACKGROUND

The facts underlying Plaintiff's various causes of action are set forth in detail in the Court's previous opinion, see Marshall, 388 F. Supp. 2d. at 543-46, and will not be repeated here in toto. The facts presented below relate to Defendants' motion for summary judgment on Ms. Marshall's RICO claims. The following facts are undisputed unless otherwise indicated. Where there is a dispute, the Court considers those facts in the light most favorable to Ms. Marshall. See Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 267 (3d Cir. 2001).

I. The Matthei–Dawson Relationship

In 1992, Mr. Matthei divorced his previous wife, Susan Kelley, in New Jersey. (Def. Statement of Facts ¶ 2.) Ms. Marshall was Mr. Matthei's lawyer during these divorce proceedings. (Pl. Statement of Facts ¶ 8.) In 1993, Mr. Matthei received a large settlement related to a lawsuit against his former employer. (Pl. Statement of Facts ¶ 9.) Although a court order required Mr. Matthei to share the proceeds of this settlement with Ms. Kelley (and the couple's two children), Mr. Matthei diverted these funds to his own off-shore accounts. (Pl. Statement of Facts ¶¶ 10-11.) Mr. Matthei also failed to pay Ms. Marshall's legal fees. (Pl. Statement of Facts ¶ 28.) Ms. Marshall sued Mr. Matthei in New Jersey state court, and obtained a default judgment against him in April 1995. (Pl. Statement of Facts ¶ 29.)

In 1993, Mr. Matthei moved to London, England. (Def. Statement of Facts ¶ 3.) Mr. Matthei met Emma Dawson in England in September 1994, and the two became romantically involved. (Pl. Statement of Facts ¶ 19; Def. Statement of Facts ¶ 6.) On December 14, 1995, they entered into a "prenuptial agreement," under the terms of which Mr. Matthei transferred (or at least attempted to transfer) all of his assets to Ms. Dawson. (Def. Statement of Facts ¶ 6.)[3] Mr. Matthei and Ms. Dawson were married in England on December 19, 1995. (Def. Statement of Facts ¶ 6.)

Mr. Matthei returned to the United States in August 1996, and was arrested in New Jersey for failing to pay alimony and child support to Ms. Kelly. (Pl. Statement of Facts ¶ 30; Def.

[3] Ms. Marshall argues that this "prenuptial agreement" was a mere device used by Mr. Matthei as a scheme to defraud his creditors by transferring all of his assets to Ms. Dawson, thereby divesting himself of all valuable assets. Mr. Matthei's attempt to transfer his assets to Ms. Dawson by way of this prenuptial agreement appears to be one of the initial acts in his alleged "scheme."

Statement of Facts ¶ 11.) According to the record before the Court, Mr. Matthei has been incarcerated in the United States since that date. (Def. Statement of Facts ¶ 18.) The Matthei-Dawson marriage was terminated under the laws of England in 1998. (Def. Statement of Facts ¶ 26.)

II. Lepanto and the Mayfair Flat

In 1993, before Mr. Matthei became acquainted with Ms. Dawson, he formed Lepanto Company Limited ("Lepanto") as a Bahamanian corporation. (Pl. Statement of Facts ¶ 12.) During discovery in this case, Mr. Matthei testified that he originally formed Lepanto for the purpose of operating a hedge fund. (Pl. Statement of Facts ¶¶ 12-16.) Mr. Matthei later abandoned the idea operating Lepanto as a hedge fund, and Lepanto never actually operated as such. (Pl. Statement of Facts ¶ 16.)

In 1994, Mr. Matthei arranged for Lepanto to purchase an apartment, or "flat," in the Mayfair section of London (the "Mayfair Flat"). (Pl. Statement of Facts ¶ 16.) The Mayfair Flat was owned in Lepanto's name; in other words, at least for appearances, Mr. Matthei did not himself "own" the flat. Mr. Matthei and Ms. Dawson lived together in the Mayfair Flat from 1994 until Mr. Matthei returned to the United States in August 1996 and went to prison. Ms. Dawson lived in the Mayfair Flat following Mr. Matthei's incarceration until she eventually sold it in or around 2002. During Mr. Matthei's incarceration in the United States, both before and after the marriage ended in 1998, Ms. Dawson handled certain financial affairs for Mr. Matthei, including paying bills, maintaining insurance policies, and maintaining the Mayfair Flat.

The record contains a copy of the "First Resolutions" of Lepanto, dated June 3, 1993. (See Butler Decl. Ex. CC.) These corporate resolutions, in which Mr. Matthei is named as the

sole director of Lepanto, appoint Mr. Matthei as Lepanto's President and Secretary.[4] The Record contains an unsigned version of these resolutions, and another version signed by Mr. Matthei. (See Butler Decl. Ex. CC.)

Another "corporate resolution," dated November 4, 1998, identifies "Emma Dawson Matthei" as the "owner and holder of all shares" of Lepanto. (See Butler Decl. Ex. CC.) Further, the resolution purports to give Ms. Dawson the authority to execute documents on behalf of Lepanto as of December 19, 1995. The resolution is signed by Mr. Matthei in his capacity as Lepanto's Secretary, President, Chairman and Managing Director. The record does not indicate whether Lepanto had any officers or directors other than Mr. Matthei. The November 1998 resolution granted certain authority to Ms. Dawson but does not name her as a corporate officer of Lepanto.

Also included in the record is a "Confirmation of Transfer," dated April 22, 2001, signed by Mr. Matthei. (See Butler Decl. Ex. CC.) In this 2001 document, Mr. Matthei purports to attest that he transferred his beneficial interest in Lepanto to Ms. Dawson in November 1998 by executing the November 4, 1998 Lepanto resolution. Notably, Mr. Matthei also tendered his resignation as "Director or other officer" of the Company "with immediate effect." (Butler Decl. Ex. CC.)

III. Mr. Fenstermacher's Representation of Mr. Matthei

Mr. Fenstermacher is an attorney licensed to practice law in Pennsylvania, whose practice is concentrated in the area of tax, trusts, and estates. (Def. Statement of Facts ¶ 19.) Mr.

[4] The various resolutions relating to Lepanto refer to the Articles of Association and Bylaws of Lepanto. Neither of these documents has been submitted as part of the record in this case.

Fenstermacher became involved in Mr. Matthei's affairs when Ms. Dawson called him from England in September 2000 (some five years after Ms. Marshall obtained the default judgment against Mr. Matthei) to discuss retaining him. (Def. Statement of Facts ¶ 20.) Mr. Fenstermacher then corresponded with Ms. Dawson, Mr. Matthei and Mr. Burgess (Ms. Dawson's attorney in England) in order to determine the subject and the scope of any potential representation. (See Butler Dec. Exs. P, W.) Mr. Fenstermacher subsequently agreed to represent Mr. Matthei, and confirmed by letter dated March 1, 2001 that his representation would be in connection with preparing a "Consent Order" to be filed with the courts in the United Kingdom. (See Butler Dec. Ex. TT.)

At the time Mr. Fenstermacher became involved in the Matthei-Dawson matters, Mr. Matthei and Ms. Dawson's marriage had been over for approximately three years. As noted above, however, Ms. Dawson retained certain financial responsibilities with respect to Mr. Matthei, namely, she paid the premiums on Mr. Matthei's insurance policies, and agreed to pay the costs of Mr. Fenstermacher's representation. (See Butler Dec. Ex. TT.) As Mr. Burgess described the Consent Order to Mr. Fenstermacher in a letter, by executing the Consent Order Mr. Matthei and Ms. Dawson intended to give legal effect to the basic terms of the previously executed but unenforceable prenuptial agreement between them. Specifically, the Consent Order would legally confirm the division of assets between Mr. Matthei and Ms. Dawson, and specify any financial obligations going forward. (See Butler Decl. Ex. P.) Most notably, the parties anticipated that when the Consent Order was finally approved by the courts in England, Mr. Matthei will have transferred any assets of value, including the Mayfair Flat, to Ms. Dawson, and he would not hold title to any assets in his name.

Ms. Marshall describes Mr. Fenstermacher's involvement as consisting of three "Fenstermacher Transactions": (1) the transfer of Mr. Matthei's shares of Lepanto to Ms. Dawson to facilitate liquidation of the Mayfair Flat; (2) concealment of the proceeds of the sale of the flat; and (3) preparation of the Consent Order. (See 2d Am. Compl. ¶ 52).[5]

A. *The First "Fenstermacher Transaction" – Transfer of Lepanto*

In April 2001, Ms. Dawson sent a letter to Mr. Fenstermacher that enclosed certain documents related to Lepanto. The main document at issue is the "Confirmation of Transfer" described above. (See Butler Decl. Ex. CC.)[6] Ms. Dawson represented to Mr. Fenstermacher that Mr. Matthei had transferred his shares in Lepanto to her in 1998, but that the company records did not reflect that transfer. In other words, Mr. Matthei's previous attempts to transfer his assets to Ms. Dawson were not legally valid. Accordingly, Ms. Dawson requested that Mr. Fenstermacher have Mr. Matthei sign the Confirmation of Transfer, in which Mr. Matthei would affirm that he previously had transferred his interest in Lepanto to Ms. Dawson in 1998, through his execution of the November 4, 1998 Lepanto corporate resolution. (Def. Mem. Summ. J. Ex. E; Butler Decl. Ex. KK.)

Mr. Fenstermacher complied and forwarded these documents to Mr. Matthei in prison.

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[5] See also Marshall, 388 F. Supp. 2d at 545-46 (describing Ms. Marshall's allegations involved the so-called "Fenstermacher Transactions").

[6] The record does not contain an intact version of the April 5, 2001 letter that Ms. Dawson sent to Mr. Fenstermacher that includes the various attachments. Both parties introduced into the record a copy of the April 5, 2001 letter alone, without the attachments. (See Def. Mem. Summ. J. Ex. E; Butler Decl. Ex. KK.) It appears that Ms. Dawson sent Mr. Fenstermacher the "Confirmation of Transfer" with the November 4, 1998 resolution attached, along with the Lepanto stock certificate number three, the first resolution of Lepanto, and the written consent of the sole director. (See Butler Decl. Ex. KK (letter from Ms. Dawson to Mr. Fenstermacher without attachments); Butler Decl. Ex. CC (sheaf of documents including those referenced in Ms. Dawson's April 5, 2001 letter).)

(See Butler Decl. Ex. LL.) Mr. Matthei signed them and returned them to Mr. Fenstermacher (see Butler Decl. Ex. FF), and Mr. Fenstermacher returned the executed documents to Ms. Dawson (see Butler Decl. Ex. HH).

B. *The Second "Fenstermacher Transaction" – Concealment of Proceeds*

Next, Ms. Marshall alleges that Mr. Fenstermacher assisted in concealing the proceeds of the sale of the Mayfair Flat. However, Ms. Marshall has not introduced any evidence into the record that supports this allegation.[7]

C. *The Third "Fenstermacher Transaction" – The Consent Order*

Finally, Mr. Fenstermacher assisted in preparing the Consent Order. Specifically, Mr. Fenstermacher sent a letter to Mr. Matthei that enclosed a work paper relating to a "Statement of Information for a Consent Order," which solicited the information necessary in order to prepare the Consent Order. (Def. Mem. Summ. J. Ex. I at 11.). He instructed Mr. Matthei to review the document, supply the relevant information and return the completed document to him. Mr. Matthei complied and, upon receipt of the completed work paper, Mr. Fenstermacher prepared the Statement of Information and signed it in his capacity as Mr. Matthei's counsel.

Ms. Marshall admits that Mr. Matthei was the one who actually supplied the substantive information that Mr. Fenstermacher used to prepare the Consent Order, and that Mr.

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[7] In her statement of facts, Ms. Marshall does not provide the exact day or month when the Mayfair Flat was sold; she merely states that it was sold in 2002. (Pl. Statement of Facts ¶ 107.) Mr. Fenstermacher claims that his representation of Mr. Matthei ended on October 11, 2002. (Def. Statement of Facts ¶ 34.) Although Ms. Marshall alleges that Mr. Fenstermacher somehow concealed the proceeds of the sale of the Mayfair Flat, she never explains how Mr. Fenstermacher supposedly was involved in the sale of the Mayfair Flat, or that he was ever involved in disbursing the proceeds from its sale. Ms. Marshall does not aver that Mr. Fenstermacher had any further contact with Mr. Matthei or Ms. Dawson relating to the Mayfair Flat after the Consent Order was approved by the courts in England subsequent to October 2002.

Fenstermacher was not involved in the drafting. (See Pl. Statement of Facts ¶ 102 ("If Fenstermacher were providing legitimate legal services to Matthei, Fenstermacher would have been involved in the drafting [of the revised U.K. Consent Order].").) Mr. Fenstermacher then forwarded a copy of the completed Statement of Information to Ms. Dawson (see Butler Decl. Exs. Q, GG), and also sent a copy directly to Mr. Burgess, stating that it had been "completed by Mr. Matthei," and that he (Fenstermacher) had signed it for Mr. Matthei as his attorney. (Def. Mem. Summ. J. Ex. I at 17.)

The Consent Order was eventually submitted to the courts in the United Kingdom in October 2002. In the Statement of Information, Mr. Matthei represented to the courts of the United Kingdom that he did not possess any assets. Further, the Consent Order provided that, upon approval by the courts, virtually any assets that had been owned by Mr. Matthei and Ms. Dawson while they were married, including the Mayfair Flat, would belong to Ms. Dawson. The British courts approved the Consent Order sometime after October 2002. (Pl. Statement of Facts ¶ 106.) Thereafter, in late 2002, Ms. Dawson sold the Mayfair Flat for approximately $900,000, and the furnishings therein for approximately $100,000. (Pl. Statement of Facts ¶¶ 107-108.) According to Ms. Marshall, Mr. Matthei never accounted for the proceeds of the sale of the Mayfair Flat. She alleges that he testified falsely that he never discussed the sale of the Mayfair Flat with Ms. Dawson. (Pl. Statement of Facts ¶ 109.)

STANDARDS

I. Motion for Reconsideration

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.

1985), cert. denied, 476 U.S. 1171, 106 S. Ct. 2895, 90 L. Ed. 2d 982 (1986)). A court should grant a motion for reconsideration only "if the moving party establishes one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." Drake v. Steamfitters Local Union No. 420, No. 97-585, 1998 U.S. Dist. LEXIS 13791, at *7-8 (E.D. Pa. Sept. 3, 1998) (citing Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)). "Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

II. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court

that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the party opposing summary judgment. Anderson, 477 U.S. at 255.

DISCUSSION

The Court's Trial and Pretrial Procedures require a party moving for summary judgment to provide a numbered paragraph-by-paragraph recitation of the facts relevant to the motion with specific citations to the record to support such facts. These procedures also require a party opposing summary judgment to respond by stating whether it agrees or disagrees with the moving party's stated facts. The opposing party must also include citations to the record to support its factual positions.

The Defendants' initial motion for summary judgment did not include a statement of facts in the format the Court requires. In fact, Defendants' motion did not include any recitation of the facts whatsoever.

Responding to Defendants' motion, Ms. Marshall fared only slightly better. She presented a 32-page melodramatic narrative that, instead of demonstrating any grasp of the events that underlie this action, of the testimonial and documentary evidence in the record, or of the legal issues involved in this case, actually obscured the facts and issues in a blinding fog of

far-fetched inferences and attenuated legal conclusions that had little or no relevance to the Plaintiff's remaining claims in this case.

After the parties submitted their initial briefs, the Court scheduled a conference call to advise counsel that they had not complied with the Court's summary judgment procedures. During this call, the Court gave the parties the opportunity to provide supplemental recitations of facts that would comply with the Court's procedures.

The Defendants squandered this opportunity and filed a grossly insufficient statement of facts that largely provided either useless background facts or bare details of the Defendants' actions and communications underlying the Plaintiff's claims or supporting Defendants' arguments for summary judgment. In her second attempt at reciting the facts, Plaintiff again missed the point. Instead of highlighting the disputed facts in an effort to convince the Court that genuine disputes of material facts remain thereby precluding summary judgment, Plaintiff attempted to best Defendants' paltry submission by presenting a 129-paragraph statement of "facts," which again constituted a rambling, largely incoherent collection of inferences and legal conclusions.

On November 16, 2006, the Court issued an Order denying Defendants' Motion for Summary Judgment (Docket No. 110). The papers Defendants' submitted in support of their motion simply did not provide a sufficient factual basis upon which the Court could grant summary judgment on the grounds argued by Defendants.

Shortly after the Court denied Defendants' Motion for Summary Judgment, Defendants timely moved for reconsideration of that Order. Defendants do not argue that reconsideration is appropriate based on any of the three justifications cited in Drake, supra. Instead, Defendants

essentially argue that Ms. Marshall has not offered any additional evidence than she had produced when the Court considered the defense motion to dismiss. Defendants argue that while Ms. Marshall's allegations may have survived a motion to dismiss, she has not risen to the task of actually producing evidence to substantiate her allegations at the summary judgment phase. Accordingly, Defendants now argue that Ms. Marshall's claims under the federal and New Jersey RICO statutes fail as a matter of law.

After a great deal of contemplation, the Court concludes that, notwithstanding certain deficiencies in the parties' moving and opposing papers, the interests of justice require the Court to reconsider its denial of summary judgment. Even though Defendants did not adequately provide a separate statement of facts pursuant to the Court's rules, Defendants' Motion for Summary Judgment is adequately based on a presentation of facts, many of which are not in dispute, that are supported by the record in this case. Furthermore, aside from transcripts from depositions taken during discovery, the record in this case has been fairly static since the Court considered Defendants' motion to dismiss. Ms. Marshall attached almost two dozen exhibits to her Second Amended Complaint, and many of the documents that the parties attached to their respective papers in order to produce a record for summary judgment are simply duplicate copies of those exhibits.

In Ms. Marshall's initial response to Defendants' summary judgment motion, she argued that the motion was a "motion for reconsideration" of the Court's denial of certain claims raised in the defense motion to dismiss, in lieu of a "true" summary judgment motion. She claimed that Defendants merely had presented the same arguments that the Court had already rejected in ruling upon the motion to dismiss. Regardless of whether this is an accurate observation,

ultimately the shortcoming belongs to Ms. Marshall. After reviewing the parties' motion papers, and the record evidence presented, it can be said that the Defendants' arguments are practically identical because the record before the Court is likewise substantially identical. Only the burden has changed.

While Ms. Marshall's allegations may have survived Defendants' motion to dismiss, such allegations, absent any supporting evidence, are insufficient to withstand Defendants' motion for summary judgment with respect to Ms. Marshall's federal RICO claims. For the reasons set forth below, the Defendants' Motion for Reconsideration as to those claims will be granted, and summary judgment will be entered for the Defendants with respect to Ms. Marshall's claims under 18 U.S.C. § 1962(c) and (d). Defendants' Motion for Summary Judgment will be denied in all other respects.

I. Count IX–Violation of 18 U.S.C. § 1962(c)

Ms. Marshall alleges that Mr. Fenstermacher and his law firm High Swartz violated Section 1962(c) of the federal RICO statute, 18 U.S.C. § 1962(c). This section makes it 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 though a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). To establish a Section 1962(c) violation, a plaintiff must allege (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of

racketeering activity.[8] United States v. Urban, 404 F.3d 754, 769 (3d Cir. 2005).

Defendants argue that Plaintiff has not established the existence of an "enterprise" and that, even if Plaintiff can establish a viable enterprise, Mr. Fenstermacher and High Swartz were not "employed by or associated with" any alleged enterprise and did not "participate in the conduct" of any alleged enterprise.

A. The "Enterprise" Requirement

An "enterprise" may include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). It is an "entity made up of a group of persons associated together for the common purpose of engaging in a course of conduct." United States v. Turkette, 452

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[8] Defendants assail Ms. Marshall's allegations on a number of grounds, but they do not argue that Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz participated in the conduct or the affairs of the enterprise "through a pattern of racketeering activity." The federal RICO statute defines a "pattern" of racketeering activity as requiring "at least two acts of racketeering activity" within a ten year period. 18 U.S.C. § 1961(5). In her Second Amended Complaint, Ms. Marshall alleges that between 2000 and 2002 Mr. Fenstermacher committed multiple acts of mail fraud in violation of 18 U.S.C. § 1341 (2d. Am. Compl. ¶¶ 158(a), 159(b), 159(d)), made "numerous" telephone calls that constitute acts of wire fraud in violation of 18 U.S.C. § 1343 (2d. Am. Compl. ¶¶ 158(b), 160), and engaged in money laundering in violation of 18 U.S.C. §§ 1956-1957 (2d. Am. Compl. ¶ 158(d)).

As an initial matter, Ms. Marshall has not provided any facts to support her allegation that Mr. Fenstermacher or the High Swartz firm engaged in money laundering. Moreover, as the Court noted in its ruling on the defense motion to dismiss, the Court has not been informed that either Mr. Fenstermacher or High Swartz have been charged with either mail fraud or wire fraud in relation to this case. See Marshall, 388 F. Supp. 2d. at 561 n.28. With respect to the mail fraud allegation, Ms. Marshall cites three specific examples of alleged mail fraud, namely, Mr. Fenstermacher's letter to Ms. Dawson dated April 30, 2001 (2d Am. Compl. Ex. I), his March 5, 2002 letter to Slough County Court in England (2d Am. Compl. Ex. S), and the Statement of Information that Mr. Fenstermacher sent to Mr. Burgess (and Ms. Dawson), which Mr. Burgess submitted to the courts in England (2d Am. Compl. Ex. W). As to her wire fraud allegations, Ms. Marshall states that Mr. Fenstermacher had perhaps as many as thirty telephone conversations with Ms. Dawson and others in furtherance of the alleged scheme.

U.S. 576, 583 (1981). To establish the existence of an "enterprise," a plaintiff must prove (1) "an ongoing organization, formal or informal"; (2) "the various associates function as a continuing unit"; and (3) that the enterprise exists "separate and apart from the pattern of activity in which it is engaged." Id. (the "Turkette factors"); see also Urban, 404 F.3d at 770 (citing United States v. Irizarry, 341 F.3d 273, 286 (3d Cir. 2003)). Proof of all three elements is required.

With respect to the first element, Ms. Marshall must present proof of an "ongoing organization with some sort of framework for making or carrying out decisions." Urban, 404 F.3d at 770 (citing Irizarry, 341 F.3d at 286). The decision-making structure can be formal or informal, hierarchical or consensual. Turkette, 452 U.S. at 583; United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983) overruled on other grounds by Griffin v. United States, 502 U.S. 46 (1991)). The enterprise must include "some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." Riccobene, 709 F.2d at 222. Factors to be considered in determining whether the requisite structure exists include whether there is a division of labor, a chain of command, and a structure for resolving disputes. Harry Miller Corp. v. Mancuso Chems. Ltd., No. 99-2669, 2006 U.S. Dist. LEXIS 93082, at *20-21. (E.D. Pa. Dec. 22, 2006).[9]

In order to prove the second element – "associates function[ing] as a continuing unit" –

[9] In Harry Miller Corp., the court addressed the "structure" requirement for a RICO enterprise, and provided a well-organized analysis of the Third Circuit's requirements. The court discussed the court of appeals' decisions in Riccobene, supra, Town of Kearny v. Hudson Meadows Urban Renewal, 829 F2d 1263 (3d Cir. 1987), and another recent case from this district, In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation, MDL Doc. No. 1712, 2006 U.S. Dist. LEXIS 35980 (E.D. Pa. June 2, 2006). Read together, these cases affirm the importance of a producing evidence of a division of labor, a chain of command, and a structure for resolving disputes in establishing the requisite "structure" of a RICO enterprise. Harry Miller Corp., 2006 U.S. Dist. LEXIS 93082, at *20-21.

Ms. Marshall must show "'that each person perform[ed] a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.'" Urban, 404 F.3d at 770 (citing Riccobene, 709 F.2d at 223).

The third element of the enterprise requirement demands proof that the enterprise is an "entity separate and apart from the pattern of activity in which it engages." Turkette, 452 U.S. at 583, 101 S. Ct. at 2529. The Court of Appeals for the Third Circuit has stated:

> As we understand this last requirement, it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Riccobene, 709 F.2d at 223-24. The court of appeals has found this separateness requirement to be satisfied by evidence that the persons or entities that comprised the enterprise "coordinated the commission of multiple predicate offenses, and continued to provide legitimate services during the period in which they were engaged in racketeering activities." United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993) (citations omitted).[10]

B. "Employed by," "Associated with" or "Participate in the conduct" of a RICO "Enterprise"

Defendants argue that Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz was "employed by or associated with" an "enterprise," or "conduct[ed] or

[10] In Console, the court of appeals reviewed an appeal of convictions under RICO where the jury found that members of a law firm and members of a medical practice colluded to commit insurance fraud. The court held that the prosecution had met the three Turkette factors in proving that an enterprise existed, and, with respect to the separateness requirement, held that the law firm and the medical practice concurrently "coordinated the commission of multiple predicate offenses" while maintaining their respective practices during the period in which they were engaged in racketeering activities. Console, 13 F.3d at 652.

participate[d], directly or indirectly, in the conduct of such enterprise's affairs." 18 U.S.C. § 1962(c). Specifically, Defendants claim that under Reves v. Ernst & Young, 507 U.S. 170 (1993), Defendants are not liable under RICO because neither Mr. Fenstermacher nor High Swartz "participated" in the "operation and management" of any alleged RICO enterprise. (Def. Mot. Reconsideration 5, Def. Mot. Summ. J. 10.)

In Reves, the Supreme Court held that the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," found in 18 U.S.C. § 1962(c), requires that "one must have some part in directing those affairs." Reves, 507 U.S. at 179, 185. The Supreme Court adopted an "operation or management" test, holding that "Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity." Id. at 184. In Reves, the Supreme Court applied the "operation or management" test and held that an auditor's failure to inform the board of directors of a farmers' cooperative that a certain asset should have been given its fair market value, when doing so would have resulted in the asset being insolvent, did not constitute "participating in the operation or management" of the cooperative, such that liability would arise under § 1962(c). Id. at 186.[11]

Several courts, following Reves, have held that professionals such as accountants or lawyers are not immune from liability under RICO. Those courts have often acknowledged,

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[11] However, the Supreme Court specifically stated that:

> An enterprise is "operated" not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

Reves, 507 U.S. at 184.

however, that it is difficult for an attorney to be liable for performing ordinary legal tasks because such tasks often do not entail the "operation or management" of an enterprise. For example, in Handeen v. LeMaire, 112 F.3d 1339, 1349 (8th Cir. 1997), the Court of Appeals for the Eighth Circuit stated:

> It is a good thing, we are sure, that we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney). This result, however, is not compelled by the fact that the person happens to be a lawyer, but for the reason that these actions do not entail the operation or management of an enterprise.[12]

Id. at 1349. The plaintiff in Handeen was a creditor in a Chapter 13 bankruptcy action who alleged that a debtor-in-bankruptcy engaged the defendant law firm essentially to "navigate[] the estate through the bankruptcy system" in an effort to defraud the creditors. Id. at 1350. The plaintiff argued the law firm's level of involvement in the scheme satisfied Reves' "operation or management" test. Id. While the court of appeals emphasized that it had no basis for speculating as to whether the plaintiff could ultimately prove that the defendant attorneys actually "conducted" the bankruptcy estate, it offered the following narrative in describing the attorneys' involvement:

> [T]he Firm directed Gregory [Lemaire] and his parents to enter into a false promissory note and create other sham debts to dilute the estate, the Firm represented the elder Lemaires and defended their fraudulent claims against objections, the Firm prepared Lemaire's filings and schedules containing erroneous information, the Firm formulated and promoted fraudulent repayment

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[12] Ms. Marshall cited the court's holding in Handeen as having "held liable under RICO attorneys who had participated in a client's fraudulent efforts to impede a creditor's ability to collect on its judgment." (Pl. Mem. Opp'n Summ. J. 47.) Contrary to Plaintiff's assertion, the appellate court in Handeen did not "hold" the attorneys liable but only reversed the district court's grant of summary judgment in defendants' favor on plaintiff's state law and RICO claims (and affirmed other aspects of the district court's opinion). Handeen, 112 F.3d at 1350. The court remanded the case to the district court for further proceedings.

> plans, and the Firm participated in devising a scheme to conceal Gregory's new job from the bankruptcy trustee. In short, Handeen might prove that Lemaire, who was, after all, ultimately interested solely in ridding himself of the oppressive judgment, controlled his estate in name only and relied upon the Firm, with its legal acuity, to take the lead in making important decisions concerning the operation of the enterprise.

Id. The Handeen court emphasized the essential features of a Chapter 13 bankruptcy, noting that the debtor exercises a great degree of "control" over such proceedings, and stated that if the plaintiff could produce substantial evidence, it was "comfortable that [plaintiff] will have succeeded in proving that the attorneys conducted the bankruptcy estate," which could satisfy Reves' "operation and management" test. Id. The court noted, however, that its reversal of summary judgment against the defendant attorneys was consistent with the way other courts had applied the "operation or management" test in the attorney-client context. Id. The court distinguished its case from other actions where "a lawyer merely extended advice on possible ways to manage an enterprise's affairs" or "where counsel issued an opinion based on facts provided by a client." Handeen, 112 F.3d at 1350 (citing Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d Cir. 1994) (foreclosing liability where defendant only acted as attorney in illicit transactions); Reves, 507 U.S. at 185-86 (holding that accounting firm did not violate RICO when it prepared audits in reliance upon a client's existing records); Nolte v. Pearson, 994 F.2d 1311, 1316-17 (8th Cir. 1993) (refusing to impose RICO liability where attorney had generated documents based on facts provided by client)).

Most courts that have considered whether a professional can be liable under § 1962(c) in light of Reves' "operation or management" test have held that performing professional services for an enterprise, i.e., facilitating an enterprise's activities by such services, does not give rise to liability under § 1962(c). See Univ. of Md. at Baltimore v. Peat, Marwick, Main & Co., 996 F.2d

1534, 1539 (3d Cir. 1993) (stating that "simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO"); Stone v. Kirk, 8 F.3d 1079, 1092 (6th Cir. 1993) (holding that defendant "who was associated with the enterprise" and "engaged in a pattern of racketeering activity when he repeatedly violated the anti-fraud provisions of the securities laws" was not liable under § 1962(c) because he "had no part in directing" the enterprise's affairs); Goren v. New Vision Int'l, 156 F.3d 721, 728 (7th Cir. 1998) ("[S]imply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c); instead, the individual must have participated in the operation and management of the enterprise itself."); Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993) (holding that attorneys who prepared allegedly false opinion letters and informational memoranda regarding a music recording leasing program had not participated in operation or management of enterprise); Baumer v. Pachl, 8 F.3d 1341, 1344-45 (9th Cir. 1993) (holding that attorney who simply provided legal services to corporation did not participate in operation or management of enterprise regardless of whether he performed those services "well or poorly, properly or improperly"); Redtail Leasing, Inc. v. Bellezza, No. 95-5191, 1997 U.S. Dist. LEXIS 14821, at *15 (S.D.N.Y. Sept. 30, 1997) ("A defendant does not 'direct' an enterprise's affairs under § 1962(c) merely by engaging in wrongful conduct that assists the enterprise."); Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 590-91 (E.D.N.Y. 1993) (holding that provision of legal services did not extend to operation or management of enterprise under § 1962(c), despite the fact that the attorney knowingly assisted enterprise in execution of fraudulent scheme); Gilmore v. Berg, 820 F. Supp. 179, 183 (D.N.J. 1993) (holding that attorney who allegedly prepared false

private placement memoranda regarding limited partnership did not conduct affairs of enterprise because he did not "direct[] the legal entities he represented to engage in particular transactions").

The Court of Appeals for the Third Circuit considered the potential RICO liability of an accounting firm in Peat Marwick, stating:

> Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus. In other words, the person must knowingly engage in "directing the enterprise's affairs" through a pattern of racketeering activity.

996 F.2d at 1539 (citation omitted). The Peat Marwick court held that the defendant accounting firm was not liable under RICO where plaintiffs had not averred that defendants participated in the operation or management of the enterprise. The court specifically rejected plaintiff's arguments that the accounting firm "directed" the enterprise's affairs simply because its services were "indispensable," stating:

> The plaintiffs have nowhere averred that Peat Marwick had any part in operating or managing the affairs of Mutual Fire. Although they make much ado about how important and indispensable Peat Marwick's services were to Mutual Fire, the same can be said of many who are connected with Mutual Fire. Similar to the allegation against the accounting firm in Reves, the plaintiffs' amended complaint, when distilled to its essence, is nothing more than an allegation that Peat Marwick performed materially deficient financial services.

Id.

C. Ms. Marshall's Alleged "Enterprises"

In this case, Ms. Marshall has cast a wide net, at times offering arguments that as many as four alternative RICO "enterprises" exist within the fact pattern recited above. However, in her various responsive papers, she only presents thorough arguments as to two alternative

enterprises, namely, (1) the association-in-fact of Matthei and Dawson, and (2) Lepanto.[13]

As a preliminary matter, the Court notes that Ms. Marshall has already obtained a judgment against Mr. Matthei. Therefore, while Mr. Matthei, according to Ms. Marshall, was the "constant fixture at the 'hub' of the broader enterprise" involved in this alleged conspiracy to defraud her, he is not a defendant in this case. (Pl's Mem. Opp'n Mot. Reconsideration 8.) The Court also notes that Ms. Dawson has failed to appear in this action, and the clerk of the court has entered a default against her. In addition, neither Mr. Burgess's estate nor his former employer, Hetherington & Co., has been served in this case. As far as the Court is aware, neither

[13] Ms. Marshall has vacillated as to how many alternative "enterprises" she claims exist here. Plaintiff's brief in response to Defendants' Motion to Dismiss, and Plaintiff's Amended Answers to the First Set of Interrogatories both allege the existence of three alternative enterprises: the two enterprises described above and the expanded association-in-fact of Ms. Dawson and Messrs. Matthei, Fenstermacher and Burgess. (Pl. Mem. Opp'n Mot. Dismiss 34; Def. Mot. Summ. J. Ex. B at 4.) However, Plaintiff's brief in response to Defendants' Motion for Summary Judgment only argues for the existence of the first two enterprises cited above. (Pl. Mem. Opp'n Summ. J. 39.) Then in Plaintiff's response to Defendants' Motion for Reconsideration, Plaintiff reverts back to the theory that a broader enterprise exists consisting of all of the defendants plus Mr. Matthei. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Plaintiff devotes one paragraph to support her argument that this third enterprise exists. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Without providing any factual or authoritative support, Plaintiff claims that "this broader enterprise has the requisite distinctiveness and structure as required" under law. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Aside from this one paragraph and one passing reference to this broader enterprise in Plaintiff's response to Defendants' Motion for Summary Judgment, Plaintiff has not argued that this third "enterprise" exists or provided any evidence to support the existence of this association-in-fact as an "enterprise," aside from the mere allegation in her complaint. (Pl. Mem. Opp'n Summ. J. 43-44.)

Incredibly, in her Memorandum in Opposition to Defendants' Motion for Reconsideration, Plaintiff for the first time raises the possibility of a fourth alternative "enterprise" solely consisting of Mr. Matthei himself. (Pl's Mem. Opp'n Mot. Reconsideration 8.) Plaintiff contends that Mr. Matthei was a "constant fixture at the 'hub' of the broader enterprise." (Pl's Mem. Opp'n Mot. Reconsideration 8.)

At the summary judgment phase, Plaintiff's mere allegations, without more, that a third enterprise of all of the defendants plus Mr. Matthei or a fourth enterprise consisting solely of Mr. Matthei existed are insufficient. Therefore, the Court will consider Ms. Marshall's arguments only with respect to the two alternative enterprises of (1) the association-in-fact of Mr. Matthei and Ms. Dawson, and (2) Lepanto.

Ms. Dawson nor Mr. Burgess (before he passed away) were deposed in this action or have otherwise offered any testimonial evidence to assist the Court in deciding the pending motions. The parties have not informed the Court whether, if this matter proceeds to trial, Ms. Dawson (who lives in England) will be available to testify. However, based on the extensive opportunity for discovery in this case, and the duration of the proceedings thus far, the Court expects not. Thus, Mr. Matthei, the main "bad actor," is not a defendant; Ms. Dawson, the only person who arguably benefitted here by obtaining any assets of value that belonged to Mr. Matthei, apparently is no where to be found; and Mr. Burgess, Mr. Fenstermacher's English counterpart, who was involved in this matter long before Mr. Fenstermacher became involved, has died. That leaves Mr. Fenstermacher and High Swartz as the only viable defendants in this case, even though, by any reading of the facts presented, Mr. Fenstermacher had a relatively minute role in the alleged "scheme," and had the least to gain.[14]

However, even viewing the evidence presented in the light most favorable to Ms. Marshall, the Court finds that Ms. Marshall cannot establish the existence of an "enterprise" for federal RICO purposes. Further, even assuming, arguendo, that a viable "enterprise" exists under federal RICO laws, Ms. Marshall has not established that Mr. Fenstermacher or High Swartz conducted or participated in the "operation or management" of any such enterprise's affairs.

The Court will discuss the viability of the Matthei–Dawson association-in-fact and Lepanto as potential enterprises in turn.

1. *The Matthei–Dawson Association-in-Fact*

Ms. Marshall argues that the association-in-fact of Mr. Matthei and Ms. Dawson, as

[14] According to Mr. Fenstermacher (and otherwise uncontested), he billed a total of $4,231.89 during his representation of Mr. Matthei.

evidenced by their "ongoing relationship," constitutes an "enterprise" under RICO. The "structure" of this alleged enterprise, Plaintiff argues, can be inferred through a certain division of labor, i.e., because Mr. Matthei was incarcerated, Ms. Dawson managed certain assets, paid Mr. Matthei's bills, and paid expenses with respect to the Mayfair Flat. (Pl. Mem. Opp'n Summ. J. 41.)[15] The "goal" of this enterprise was, presumably, to bilk Mr. Matthei's ex-wife and his creditors, including Ms. Marshall, out of money and assets that rightfully belonged to them. In that regard, Ms. Marshall argues that Mr. Matthei and Ms. Dawson (with the assistance of Messrs. Fenstermacher and Burgess) conspired together to file the Consent Order in the United Kingdom in order to keep certain assets out of the grasp of those creditors.

In support of her argument that Mr. Matthei and Ms. Dawson's "ongoing relationship" constitutes a RICO enterprise, Ms. Marshall cites American Manufacturers Mutual Insurance Co. v. Townson, 912 F.Supp. 291, 295 (E.D. Tenn. 1995), where the court found that a married couple who worked together to defraud their insurance company could constitute an "enterprise" under RICO. Defendants argue that American Manufacturers is distinguishable because the couple in that case was married throughout the time period that they committed the racketeering activities. Ms. Marshall argues that a RICO enterprise nonetheless exists here because Mr. Matthei and Ms. Dawson were engaged in an "ongoing relationship" from at least 1995 to 2002.

One of the hallmarks of a RICO enterprise consisting of an "association-in-fact" is that the participants must have associated together for a "common purpose of engaging in a course of

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[15] As evidence of Mr. Matthei and Ms. Dawson's "continuing relationship," Ms. Marshall claims that after Mr. Matthei was incarcerated, Ms. Dawson continued to fund certain of Mr. Matthei's expenses, including membership fees in the Baltusrol Country Club in New Jersey, paying for certain publications, providing him with an annual stipend, and paying his legal expenses. (Pl. Statement of Facts ¶ 125.)

conduct." Turkette, 452 U.S. at 583. While both Mr. Matthei and Ms. Dawson were certainly involved in a personal relationship, and were married for a short time, Ms. Marshall has not pointed to facts that support her argument that Mr. Matthei and Ms. Dawson shared a common purpose, namely, engaging in a scheme to defraud her. At best, the evidence permits competing inferences.

It seems clear that Mr. Matthei intended to engage, and did engage, in a course of conduct designed to defraud his creditors, including Ms. Marshall. As the Court noted in its prior opinion, a court in New Jersey found Mr. Matthei to have conveyed his property with the intent to defraud his creditors. See Marshall, 388 F. Supp. 2d at 553 (citing Marshall v. Matthei, 327 N.J. Super. 512, 518, 744 A.2d 209 (N.J. Super. Ct. 2000)). Mr. Matthei sought to evade his creditors by moving his money and other assets, including the multi-million dollar settlement he received from his former employer, to overseas bank accounts, utilizing off-shore vehicles, such as Lepanto, or entering into the allegedly "sham" prenuptial agreement in order to shield his ownership of certain assets from his creditors. Mr. Matthei admitted that his purpose in executing the prenuptial agreement was to transfer his assets to Ms. Dawson so that his creditors could not access them. (See Butler Dec. Ex. A, Feb. 27, 2006 W. Matthei Dep. Tr. 65:19–66:3 (stating that the prenuptial agreement "was important for Emma [Dawson] to have assets that would be safe from the predations of Susan Kelly").)

However, Ms. Marshall has offered no evidence explaining what Ms. Dawson's purpose may have been. As noted above, Ms. Dawson has not testified in this action, so any evidence of her purpose would be circumstantial. Ms. Marshall asserts that because Ms. Dawson signed the prenuptial agreement, and she essentially agreed to receive any and all assets that Mr. Matthei

chose to convey to her, she must have been complicit in Mr. Matthei's "scheme." Although Ms. Marshall tries very hard to establish the existence of a "scheme" that lasted seven years, from approximately 1995 to 2002, this "scheme" consists entirely of Mr. Matthei's constant, failed attempts to transfer his property to Ms. Dawson first via the prenuptial agreement, next by transferring ownership of Lepanto, and finally by executing the Consent Order.

Because Mr. Matthei constantly failed to successfully transfer his assets to Ms. Dawson, it could be said that his multiple attempts begin to resemble a "scheme." However, the steps in this alleged scheme are far-fetched to say the least. According to Ms. Marshall, as part of the elaborate scheme to defraud her, Mr. Matthei and Ms. Dawson entered into a prenuptial agreement in 1995, married shortly thereafter, divorced in 1998, and then entered into a post-divorce agreement in England in 2002, the Consent Order, that resulted in Mr. Matthei having almost no assets of value in his name. Ms. Marshall alleges that Mr. Matthei and Ms. Dawson shared the common purpose of entering into this multi-step, seven-year course of conduct with the goal of frustrating her attempts to collect on an $85,000 judgment.

Moreover, the record evidence permits the inference that Mr. Matthei and Ms. Dawson not only did not share a common purpose but actually held positions that were adverse to one another. After all, a Consent Order is akin to a post-divorce settlement agreement under English law. In this case, the Consent Order executed by Mr. Matthei and Ms. Dawson confirmed that Mr. Matthei transferred all of assets to Ms. Dawson, and that Ms. Dawson had no further financial responsibilities or obligations towards Mr. Matthei. Numerous pieces of correspondence in the record indicate that Mr. Matthei and Ms. Dawson engaged in contentious back-and-forth negotiations over different aspects of the Consent Order that they eventually

signed. Far from evincing a "common purpose," this evidence permits the inference that these two individuals were each protecting their own financial interests, without regard, at least directly, as to how the Consent Order would potentially affect Ms. Marshall.[16] The weight of the evidence representing communications between Mr. Matthei (often through Mr. Fenstermacher) and Ms. Dawson (often through Mr. Burgess), reveal communications between legal adversaries, who were addressing the particular details of a post-divorce settlement agreement, and who both sought to extricate themselves from the responsibilities attendant to this particular relationship. The fact that two adversaries communicated through their lawyers is hardly unusual, unconventional or actionable.

While there is ample evidence suggesting that Mr. Matthei's "purpose" in executing the Consent Order was to evade his creditors, the evidence suggests that Ms. Dawson's "purpose" was to protect her own financial interests and to extricate herself from her relationship with Mr.

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[16] Numerous letters between Mr. Matthei and Mr. Fenstermacher provide evidence of a substantial back-and-forth negotiation between Mr. Matthei and Ms. Dawson with respect to the Consent Order. Each sought to further his or her own position as they vied for possession of money, property, or control of certain assets. For example, in a letter dated August 12, 2001, Mr. Matthei conceded that a certain insurance policy could not be reinstated, but demanded that in lieu of that policy he would accept $200,000 from Ms. Dawson. (See Butler Decl. Ex. YY.) In the same letter, Mr. Matthei stated his position that Ms. Dawson is a "golddigger who 'cut and ran' in record speed and who had dissipated the asset base." (Butler Decl. Ex. YY.) He further expressed his frustration that Ms. Dawson had delayed in handling post-divorce proceedings. He stated that "[Ms. Dawson] and her people have had years to sew this up, and the delay adds to my jail time. I have plans and no patience remaining, and owe no debt to [Ms. Dawson] any longer." (Butler Decl. Ex. YY.)

In an August 22, 2001 letter to Mr. Fenstermacher, Mr. Matthei wrote that "I consider that the Consent Order as proposed by Dawson is an abrogation of the verbal agreement." (Butler Decl. Ex. II.) He added, "I love Emma and want to take care of her, but this is ridiculous." (See Butler Decl. Ex. YY.) In an August 27, 2001 letter, while professing to love Ms. Dawson, Mr. Matthei refers to her and Mr. Burgess as "a couple of little sneaks." (Butler Decl. Ex. VV.) In a December 3, 2001 letter, Mr. Matthei wrote that he told Ms. Dawson to discontinue certain insurance policies, which Ms. Dawson had objected to paying. (See Butler Decl. Ex. JJ.)

Matthei following the termination of their marriage. Thus, while Ms. Dawson and Mr. Matthei may have shared the same goal of executing the Consent Order, it seems that their motivations for wanting to do so may have been quite different.

However, viewing the evidence in Ms. Marshall's favor, and considering any potential inferences arising therefrom, Ms. Marshall points to certain facts that indicate that the "negotiations" over the Consent Order were far from arms-length. For example, Ms. Dawson and Mr. Fenstermacher frequently corresponded with one another directly, instead of Ms. Dawson contacting him through Mr. Burgess. Ms. Marshall alleges that these "improper" communications between counsel and his client's adversary, whom he knows to be represented by counsel, is evidence of the conspiratorial scheme. In addition, Ms. Marshall contends that if Mr. Matthei or Ms. Dawson truly sought to contest the divorce, or fight for a certain post-divorce allocation of assets, each of them could have pursued a route other than settling their dispute through execution of a "consent" order. Moreover, Ms. Marshall argues that the "prenuptial agreement" that the couple signed was unorthodox, as one does not often see (according to Ms. Marshall) the wealthier half of a soon-to-be-married couple transfer all of his assets to the poorer half.

While Ms. Marshall raises a disputed issue of fact as to whether the association-in-fact of Mr. Matthei and Ms. Dawson actually shared a common purpose, the Court finds that this association-in-fact fails to satisfy the requirements of a RICO "enterprise" for other reasons. As explained more fully above, to establish the existence of an "enterprise," Ms. Marshall must prove the existence of "an ongoing organization, formal or informal," Turkette, 452 U.S. at 583, which requires proof of an "ongoing organization with sort of framework for making or carrying

out decisions." Urban, 404 F.3d at 770 (citing Irizarry, 341 F.3d at 286).

Ms. Marshall's assertion that the Matthei-Dawson relationship constitutes an "ongoing organization" is tenuous at best. Mr. Matthei and Ms. Dawson were involved in a romantic relationship that evolved into a marriage, subsequently soured, and then legally terminated. After Mr. Matthei became incarcerated, communication between the two was limited. There is no evidence of an "ongoing organization" following the termination of the marriage aside from the fact that Mr. Matthei and Ms. Dawson intermittently contacted one another (often through their attorneys), in order to pursue the Consent Order. The evidence suggests that they stayed in touch until they were able to legally dissolve their marriage and resolve any attendant financial obligations toward one another. Furthermore, the evidence suggests that, after the marriage terminated, the two only communicated with respect to the Consent Order.

Ms. Marshall has not offered any evidence that this association-in-fact had either a formal or informal decision-making structure, or that it functioned through the use of a chain of command or any central decision-making function. She has offered no evidence indicating how decisions were made. This is not a case where one participant issued instructions and the other participant carried out those instructions. Rather, the evidence indicates that Ms. Dawson acted of her own accord and in her own interest, as did Mr. Matthei. This would tend to indicate either an unconventional "structure" or a complete absence thereof. Or, as the Court observed above, this indicates that Mr. Matthei's and Ms. Dawson's motives were not as aligned as Ms. Marshall would like them to be.

Certainly, some minimal "division of labor" can be adduced by the fact that for much of this "ongoing relationship" Mr. Matthei was in prison, and therefore required assistance, which

Ms. Dawson provided, in order to pay bills, keep his financial affairs in order, keep insurance policies current, etc. Mr. Matthei indicated that he had reached a "verbal agreement" with Ms. Dawson whereby she would continue to assist him in this manner while he was incarcerated. However, this de facto "structure" does not rise to the level of qualifying this relationship as a RICO enterprise.[17]

For the reasons stated above, the Court concludes that the association-in-fact of Mr. Matthei and Ms. Dawson is not a viable enterprise under RICO.[18]

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[17] As noted above, second Turkette factor requires Ms. Marshall to show that the participants in the alleged enterprise occupied continuing positions within the group consistent with the organizational structure established by the first element. Riccobene, 709 F.2d at 223. Because the Court found that the association-in-fact of Mr. Matthei and Ms. Dawson lacks sufficient structure to satisfy the first Turkette factor, the Court need not address the second factor. The Court notes, however, that because this association-in-fact does not have any discernable "organizational structure," it is not difficult to conclude that Mr. Matthei and Ms. Dawson did not occupy "continuing positions" consistent with any such "structure."

In addition, it would seem that Ms. Marshall's arguments fall short of establishing the third Turkette factor - that this association-in-fact is "separate and apart from the pattern of activity" in which it engages. Mr. Matthei and Ms. Dawson were married in December 1995, and their Consent Decree was entered in late 2002. In the interim, Mr. Matthei was incarcerated since August 1996. Therefore, for over six years of the couple's seven-year "ongoing relationship," Mr. Matthei was in prison. The only evidence of any communication between the two is Mr. Matthei's testimony, and the various correspondence between the two, at times involving Mr. Fenstermacher and/or Mr. Burgess. Based on this evidence, once Mr. Matthei was incarcerated, it seems the substance of communications, aside from a few communications of a personal nature, was restricted to financial responsibilities, terminating the marriage, and settling any financial matters attendant to the marriage. Under these circumstances, it seems unlikely that Mr. Matthei and Ms. Dawson's "ongoing relationship" had any real existence that was "separate and apart from" communicating in order to extricate themselves from one another by way of the Consent Order.

[18] For the same reasons, Ms. Marshall cannot establish that the expanded association-in-fact of Matthei-Dawson-Fenstermacher-Burgess is an "enterprise" under RICO. Because the evidence establishes that Mr. Matthei and Ms. Dawson did not occupy roles in an "enterprise" in furthering any scheme, the fact that Mr. Fenstermacher represented Mr. Matthei and Mr. Burgess represented Ms. Dawson in certain matters germane to this dispute, does not transform this group of individuals into an "enterprise" for RICO purposes.

b. *Lepanto*

Defendants' Motion for Summary Judgment does not address in detail any argument that Lepanto fails to satisfy the first or second of the Turkette factors, i.e., that it was an ongoing entity with a decision-making framework that functioned as a continuing unit.[19] Instead, Defendants argue that Lepanto is not a valid "enterprise" because Lepanto is not "separate and apart from the pattern of activity" in which it engages. Defendants argue that Lepanto "existed for no other reason than housing the fraudulently conveyed assets." Ms. Marshall argues that Lepanto was formed as a hedge fund, which constitutes a distinct purpose for purposes of establishing a RICO enterprise.

As discussed above, the Third Circuit does not require evidence "that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." Riccobene, 709 F.2d at 223-24.

Even under this liberal test, however, Lepanto cannot satisfy the separateness requirement. Every corporation, by its nature, has an "existence" that is separate from the acts that the corporation commits. Unless a corporation is dissolved or otherwise ceases to exist as a separate entity, it "exists." However, while Lepanto may have had a separate "existence," no evidence presented indicates that it ever had a separate function or purpose. In this case Ms.

[19] Because Lepanto was a corporate structure, Mr. Matthei was its President and Director from at least 1993 until April 2001, and Ms. Dawson had the authority to take certain actions on behalf of the corporation, it appears that a basic "framework" for decision-making was in place. It also appears that Lepanto "existed" as a continuing unit throughout the period of time in question, even though it is not clear that Lepanto actually conducted any business or served any purpose at all. Because Defendants do not argue that Lepanto fails the first or second Turkette factor, the Court will presume that these factors are met.

Marshall has not even alleged, and cannot prove, that Lepanto conducted any business or served any purpose other than the commission of two discrete acts: it bought and later sold the Mayfair Flat. It cannot be argued that Lepanto – through its agents – performed the "function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis." Riccobene, 709 F.2d at 223-24. Even though Lepanto may have technically "existed" apart from the commission of the predicate acts, there is no evidence that Lepanto had any function unrelated to such acts, any involvement in Mr. Matthei's affairs other than those acts, or that it provided any legitimate services at all during the period in question. See Console, 13 F.3d at 652.

This is not to say that Lepanto was not a cleverly-designed vehicle that Mr. Matthei used to shield his assets from his creditors. However, giving Ms. Marshall the benefit of every inference, the evidence suggests that Lepanto was at most a mere tool utilized by Mr. Matthei for those purposes. However Mr. Matthei may have conducted his affairs, it is clear that Lepanto was not the entity that provided the visual presence, legitimacy or organizational structure that enabled Mr. Matthei to carry out his goals. Therefore, the Court concludes that Lepanto does not constitute an "enterprise" under the RICO statutes.

Because Ms. Marshall has not established the existence of any RICO "enterprise," summary judgment will be granted for Defendants on Ms. Marshall's § 1962(c) claims. In addition, the Defendants argue, and the Court agrees, that summary judgment also must be granted on Ms. Marshall's § 1962(c) claims because, even if Ms. Marshall was able to establish that a viable RICO "enterprise"exists, she has failed to establish that either Mr. Fenstermacher or High Swartz "participated" in the "operation or management" of any such RICO enterprise.

D. Mr. Fenstermacher's Alleged "Participation"

While Plaintiff correctly asserts that Reves' "operation or management" test is not a "broad shield against attorney liability under RICO," Ms. Marshall has not provided any evidence that Mr. Fenstermacher or High Swartz participated in the "operation or management" of any alleged RICO enterprise. (Pl. Mot. Opp'n Summ. J. 46.) Notably, while at various stages of this litigation Ms. Marshall has alleged the existence of as many as four alternative "enterprises," she has failed to argue with any specificity which of her alleged enterprises Mr. Fenstermacher was employed by, associated with or participated in conducting the affairs of. As in Peat Marwick, Ms. Marshall's papers focus almost exclusively on the alleged importance and indispensability of Mr. Fenstermacher's services and the "power" Mr. Fenstermacher wielded over the alleged scheme, without addressing which alleged enterprise Mr. Fenstermacher's activities were supposedly advancing.

The Court is guided by our Court of Appeals' reasoning in Peat Marwick in holding that by any reading of the evidence, Mr. Fenstermacher or High Swartz cannot be said to have participated in the "operation or management" of any alleged RICO enterprises.

1. *The Matthei–Dawson Association-in-Fact*[20]

Simply stated, Mr. Fenstermacher's participation in the affairs of the association-in-fact

[20] Mr. Fenstermacher and High Swartz also argue that neither of them were "employed by" or "associated with" the association-in-fact of Mr. Matthei and Ms. Dawson. However, assuming that this association-in-fact constitutes a RICO enterprise, Mr. Fenstermacher admits that he was retained as counsel for Mr. Matthei in order to represent him in matters pertaining to filing the Consent Order in England. Mr. Festermacher communicated frequently with both Mr. Matthei and Ms. Dawson in pursuit of this goal. This representation satisfies the requirement that the participant be "employed by" or "associated with" a RICO enterprise. However, as explained above, Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz participated in the "operation and management" of any such enterprise.

of Mr. Matthei and Ms. Dawson does not satisfy Reves' "operation and management" test. Viewing the "Fenstermacher Transactions" as a whole or as three discrete transactions yields the same conclusion: Fenstermacher acted as a mere "middleman," a conduit for communications between Mr. Matthei and Ms. Dawson. Mr. Fenstermacher provided certain professional (although largely ministerial) services that, although "indispensable" in that certain events may not have occurred without a lawyer's involvement, do not indicate that Mr. Fenstermacher was involved in the "operation or mangement" of any alleged enterprise.

Ms. Marshall consistently refers to Fenstermacher as a "middleman" who was hired "simply to ferry documents back and forth – either in person or using the attorney-client imprimatur – to keep the untoward secrets from being learned by the federal authorities." (Pl. Statement of Facts ¶ 78; see also id. ¶¶ 1, 43, 47, 93.) A "middleman" is an "intermediary" or an "agent" between two parties. Mirriam-Webster Collegiate Dictionary (11th ed. 2003). Plaintiff has offered no evidence that Mr. Fenstermacher acted in any capacity other than as a mere "intermediary." She alleges that Mr. Fenstermacher's role was to "create secrecy for the communications between Matthei and Dawson" (Pl. Statement of Facts ¶ 45), but she acknowledges Mr. Fenstermacher's admission that he "rendered no advice to Matthei." (Pl. Statement of Facts ¶ 46.)[21] Ms. Marshall at once attempts to belittle his role in the allege scheme

[21] Plaintiff argues that Mr. Fenstermacher exercised both "power" and "control" over the activities at play here. (Pl. Mem. Opp'n Summ. J. 48.) Plaintiff argues that Mr. Fenstermacher had the "power" to decide whether to execute the Statement of Information, and that he possessed "control of the scheme at various other points" including his decision to use the "attorney-client imprimatur" to process the Lopanto documents to further the backdating scheme. (Pl. Mem. Opp'n Summ. J. 48.) Surely, however, Plaintiff is required to prove that Mr. Fenstermacher's involvement amounted to more than making the decision to exercise free will. As discussed above, Mr. Fenstermacher's participation included nothing more than implementing requests from Mr. Matthei or Ms. Dawson.

Further, Plaintiff contends that the services that Mr. Fenstermacher played a "crucial

by asserting that he provided no legitimate legal services, while emphasizing the "control" he exercised over the scheme by misusing the attorney-client "imprimatur." Even if his conduct was improper, "[a] defendant does not "direct" an enterprise's affairs under § 1962(c) merely by engaging in wrongful conduct that assists the enterprise." Redtail Leasing v. Bellezza, No. 95 Civ. 5191, 1997 U.S. Dist. LEXIS 14821, at *14 (S.D.N.Y. Sept. 30, 1997).

Mr. Fenstermacher's role as a "middleman" was minimal, ministerial and falls far short of satisfying Reves' "operation and management" test. Unlike Handeen, there is no evidence that Mr. Fenstermacher "controlled" or "conducted" any material element of any scheme. See Handeen, 112 F.3d at 1350. Like Peat Marwick, although Mr. Fenstermacher's involvement may have been technically "indispensable," i.e., someone needed to assist Ms. Dawson, who resided in England, in communicating with Mr. Matthei, who was incarcerated in Philadelphia, Mr. Fenstermacher merely performed a ministerial service. There was not a sufficient nexus between his conduct and the alleged "enterprise" of Mr. Matthei and Ms. Dawson to satisfy the Reves' test. See Peat Marwick, 996 F.2d at 1539.

In sum, Plaintiff's borderline derisive characterization of Mr. Fenstermacher as a "middleman" seems accurate, and is supported by evidence in the record. However, Mr. Fenstermacher's role as a "middleman," under the circumstances of this case, does not satisfy Reves' "operation or management" test. The record is devoid of any indication that Mr. Fenstermacher made any substantive decisions that advanced any scheme devised by Mr. Matthei; he simply did what he was asked to do. The record evidence indicates that Mr. Fenstermacher's role was to provide other parties with a means of communication with Mr.

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role," that he was not a "helpless pawn" and that the services he provided were "indispensible." to the success of the scheme. (Pl. Mem. Opp'n Summ. J. 48; Pl. Statement of Facts ¶ 110.)

Matthei and to facilitate the execution of certain paperwork by Mr. Matthei. Mr. Fenstermacher sent and received correspondence, the purpose of which was to convey a message to, or to forward documents between or among, Mr. Matthei, Ms. Dawson and Mr. Burgess.[22] This correspondence related to Mr. Fenstermacher's representation of Mr. Matthei in negotiating the Consent Order with Ms. Dawson.[23] No evidence has been introduced to suggest that Mr. Fenstermacher had any input in the drafting, editing or in any way determining the substance of the various documents that effectuated the transfer of Lepanto to Ms. Dawson. Further, there is no evidence that Mr. Fenstermacher played any role in devising any strategy, legal or otherwise, for furthering any alleged scheme in particular, or for generally evading Mr. Matthei's creditors. Indeed, it seems that the goal of entire "scheme" – to represent to certain legal bodies in the United Kingdom that Mr. Matthei owned no assets by preparing and filing the Consent Order –

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[22] For example, Plaintiff includes in the record several typed letters and handwritten notes from Matthei to Fenstermacher (see Butler Decl. Exs. FF, II, JJ, MM (duplicate of Ex. JJ), SS VV, YY), typed letters and handwritten notes from Dawson to Fenstermacher (see Butler Decl. Exs. V, KK (duplicate of Ex. V), RR, AAA (duplicate of Ex. R)), letters from Burgess to Fenstermacher (see Butler Decl. Exs. P, EE, WW, ZZ), letters from Fenstermacher to Matthei (see Butler Decl. Exs. HH, LL, TT), letters from Fenstermacher to Dawson (see Butler Exs. BB, GG), and a letter from Fenstermacher to Burgess (see Bulter Decl. Ex. W).

[23] Ms. Marshall notes that although Mr. Fenstermacher represented Mr. Matthei, and Ms. Dawson had retained her own counsel in England, Mr. Fenstermacher and Ms. Dawson often corresponded with one another outside of the presence of her counsel. Ms. Marshall points to this interaction as evidence of the alleged scheme.

Ms. Marshall's arguments are unavailing because, even if there is a "scheme" at work here, it is clear that Mr. Fenstermacher played no operative or management role in it. While it is odd – and under certain circumstances, professionally inappropriate – that Mr. Fenstermacher would have frequently corresponded with Ms. Dawson while representing her ex-husband (and adversary) in a post-divorce proceeding, this oddity is partially explained by the fact that Ms. Dawson was paying Mr. Fenstermacher's bills due to Mr. Matthei's incarceration. Mr. Fenstermacher's contact with Ms. Dawson is consistent with Ms. Marshall's assertion that Mr. Fenstermacher was retained as an intermediary to allow Ms. Dawson to correspond with Mr. Matthei, via Mr. Fenstermacher, while Mr. Matthei was incarcerated in Philadelphia.

was devised before Mr. Matthei retained Mr. Fenstermacher as counsel. Mr. Fenstermacher merely served as a glorified messenger, albeit an arguably importantly placed one.

2. *Lepanto*

There is no question that Mr. Fenstermacher was only remotely affiliated with Lepanto. The most Ms. Marshall alleges is that Mr. Fenstermacher was "highly aware" of Lepanto. (Pl. Mem. Opp'n Mot. Summ. J. 45.) Mr. Fenstermacher was not "employed by" Lepanto, "associated with" Lepanto, and neither he nor High Swartz participated in the "operation or management" of Lepanto.[24] As noted above, Lepanto purchased the Mayfair Flat in 1994, six years before Mr. Matthei retained Mr. Fenstermacher, and Lepanto sold the flat in late 2002, after Mr. Fenstermacher's participation in Mr. Matthei's affairs had ended. In between those two dates, the evidence suggests that Mr. Fenstermacher sent certain documents to Mr. Matthei for him to sign – or "backdate," as Ms. Marshall alleges – which enabled Mr. Matthei to transfer the Mayfair Flat to Ms. Dawson. However, Ms. Marshall does not allege, and the evidence does not suggest, that Mr. Fenstermacher devised the alleged "backdating" scheme, that he drafted any of the pertinent documents, or that he added any substantive value to the scheme at all. As described above, Mr. Fenstermacher served as a mere "middleman," and any role Mr. Fenstermacher may have played in Lepanto's affairs, by virtue of his representation of Mr. Matthei, was incidental and minimal. In short, Ms. Marshall has failed to show that Mr. Fenstermacher participated in the "operation or management" of Lepanto.

Because Ms. Marshall has failed to establish that any "enterprise" exists and, even if any

[24] Ms. Marshall notes that initially some confusion arose as to whether Mr. Fenstermacher would be representing Mr. Matthei or Ms. Dawson, but Ms. Marshall never alleges that Mr. Fenstermacher was engaged to provide legal services to Lepanto itself.

such enterprise did exist, that Mr. Fenstermacher or the law firm of High Swartz participated in the conduct or affairs of any such enterprise, summary judgment will be granted in favor of the Defendants as to Ms. Marshall's § 1962(c) claims.

II. Count X – Violation of 18 U.S.C. § 1962(d) – RICO Conspiracy

Defendants also argue that because Ms. Marshall has not established facts that can support a violation of Section 1962(c), the Defendants could not have conspired to violate RICO. Therefore, Defendants argue, Ms. Marshall's Section 1962(d) claim must also fail.

Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this subsection." 18 U.S.C. § 1962(d). Under Section 1962(d), "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." Smith v. Berg, 247 F.3d 532, 538 (3d Cir. 2001). Liability under Section 1962(c) is not a prerequisite for liability under Section 1962(d). See Salinas v. United States, 522 U.S. 52, 63 (1997); see also Smith, 247 F.3d at 537 ("Salinas makes clear that § 1962(c) liability is not a prerequisite to § 1962(d) liability"). However, because Ms. Marshall has failed to establish the existence of a RICO enterprise, she cannot prove that the Defendants knowingly agreed to facilitate any such enterprise's activities. See Harry Miller Corp., 2006 U.S. Dist. LEXIS 93082, at *30-31. Therefore, Ms. Marshall's Section 1962(d) claim fails, and Defendants' motion for summary judgment will be granted as to that claim as well.

IV. Counts XI and XII – New Jersey RICO and RICO Conspiracy

Defendants argue that New Jersey courts construe the New Jersey RICO statute and the federal RICO statute in the same way, and, therefore, the same analysis applies to both statutes.

Accordingly, Defendants argue, if the Court grants summary judgment in their favor on Ms. Marshall's federal RICO claims, then the Court must also find that Ms. Marshall's New Jersey RICO claims fail. Ms. Marshall argues that New Jersey court have interpreted its RICO statutes more broadly than the federal law. She argues that under New Jersey courts' more lenient interpretation of what constitutes an "enterprise,"[25] any one of her alleged alternative enterprises satisfied New Jersey's standard. In addition, Ms. Marshall argues that the Reves' "operation or management" test is not applied under New Jersey's RICO statute.

New Jersey's equivalent to 18 U.S.C. § 1962(c) provides that it is "unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." N.J. Stat. Ann. § 2C:41-2(c). The New Jersey Supreme Court has recognized that the New Jersey RICO statute is modeled on the federal RICO statute, and that in the absence of New Jersey decisions applying a broader analysis of the New Jersey statute, courts interpreting that statute may look to opinions interpreting equivalent provisions of the federal statute. Shan Indus., LLC v. Tyco Int'l (US), Inc., No. 04-1018, 2005 U.S. Dist. LEXIS 37983, at *47-48 (D.N.J. Sept. 12, 2005) (citing State v. Ball, 141 N.J. 142, 156 (N.J. 1995) [hereinafter Ball II]).

The Appellate Division of the New Jersey Superior Court acknowledged that the New Jersey and Federal RICO Statutes are very similar, but that "there are significant differences in their expressed purposes which demonstrate [the New Jersey] Legislature's willingness to

[25] New Jersey law defines as enterprise as follows: "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities." N.J. Stat. § 2C:41-1(c).

fashion a state RICO law even broader in scope than its federal counterpart." State v. Ball, 268 N.J. Super. 72, 105 (App. Div. 1993) [hereinafter Ball I].[26] The court stated that "all that is required to satisfy the New Jersey RICO enterprise element is a group of people, however loosely associated, whose existence provides the common purpose of committing two or more predicate acts." Ball I, 268 N.J. Super. at 107.[27]

On appeal, the New Jersey Supreme Court clarified the lower court's ruling, requiring that an enterprise have "organization." Ball II, 141 N.J. at 162. The court stated that the RICO statute does not contain a requirement that an enterprise have a "distinct ascertainable structure," but that "it is framed broadly to include any group of persons 'associated in fact.'" Id. at 160. The court found that the New Jersey RICO statute "commands the liberal construction of 'enterprise,'" which encompasses less organized and non-traditional criminal entities, in addition to the typical "mafia" elements. Id. at 160-61. The Court further stated that:

> The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a

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[26] New Jersey's equivalent to 18 U.S.C. 1962(c) states that "[i]t be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." N.J. Stat. Ann. § 2C:41-2(c).

[27] In Ball I, the court acknowledged that the alleged enterprise was a "somewhat disorganized group of individuals" with "no real 'leader,'" and "no one to whom all members owed allegiance, or to whom all members are required to report." Ball I, 268 N.J. Super. at 107. Despite the fact that the groups members "did not even seem to like each other, and were often engaged in double-dealing and back-stabbing," the court concluded that an enterprise existed because the members of the group "deliberately associated themselves with one another in order to make money from illegal dumping" and "collectively agreed to take part in a number of criminal activities, including money laundering, forgery, theft of services, and bribery." Id.

> group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."
>
> This understanding of the kind of organization that establishes an "enterprise" is different from, but not necessarily inconsistent with, that understanding of "enterprise" premised on an "ascertainable structure." Thus, evidence showing an ascertainable structure will support the inference that the group engaged in carefully planned and highly coordinated criminal activity, and therefore will support the conclusion that an "enterprise" existed. Apart from an organization's structure as such, however, the focus of the evidence must be on the number of people involved and their knowledge of the objectives of their association, how the participants associated with each other, whether the participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them.

Ball II, 141 N.J. at 162-63.

As Ball II makes clear, the New Jersey courts have interpreted New Jersey RICO's definition of an "enterprise" to be more broad than the federal counterpart. Therefore, "it is quite conceivable that one could fail to satisfy a federal RICO cause of action, yet meet the requirements for a successful [New Jersey] RICO claim." Horowitz v. Marlton Oncology, P.C., 116 F. Supp. 2d 551, 554 n.1 (D.N.J. 1999).

Defendants have made no effort to argue that, despite some differences between courts' interpretations of the federal RICO statute and New Jersey's counterpart, Ms. Marshall has still failed to prove the existence of a viable "enterprise." Ms. Marshall on the other hand, has noted these differences in some detail and argued that her alternative enterprises satisfy New Jersey's more liberal tests.[28] Because Defendants have put forth no real arguments as to why summary

[28] As noted above, Ms. Marshall also argues that the Reves' "operation or management" test is not applied under New Jersey's RICO statute. In Ball II, the New Jersey Supreme Court held that New Jersey's RICO statute "does not contain a requirement that in order 'to conduct or participate in an enterprise,' a defendant must be found to exercise responsibilities of 'operation

judgment should be granted in their favor on Ms. Marshall's New Jersey RICO claims, their motion will be denied as to these claims.[29]

CONCLUSION

For the reasons stated above, the Motion for Reconsideration filed by Mr. Fenstermacher and High Swartz will be granted. In reconsidering Defendants' Motion for Summary Judgment

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or management.'" Ball II, 141 N.J. at 175. The court further held that under N.J. Stat. Ann. § 2C:41-2(c),

> a person is "employed by or associated with an enterprise" if he or she has a position or a functional connection with the enterprise that enables him or her to engage or participate directly or indirectly in the affairs of the enterprise. Further, we hold that to conduct or participate in the affairs of an enterprise means to act purposefully and knowingly in the affairs of the enterprise in the sense of engaging in activities that seek to further, assist or help effectuate the goals of the enterprise. Those activities may include acts that are managerial or supervisory or exercise control and direction over the goals, or over the methods used to achieve the goals, of the enterprise. Participatory conduct or activities also may be found in acts that are below the managerial or supervisory level, and do not exert control or direction over the affairs of the enterprise, as long as the actor, directly or indirectly, knowingly seeks to carry out, assist, or further the operations of the enterprise or otherwise seeks to implement or execute managerial or supervisory decisions.

Id. Thus, even though the Court has found that Mr. Fenstermacher's participation in any of Ms. Marshall's failed to satsify the Reves' "operation and management" test under federal RICO laws, should Ms. Marshall prove to be successful in establishing an enterprise under New Jersey law, the Court cannot foreclose the possibility that Ms. Marshall could adduce evidence that may convince a factfinder that Mr. Fenstermacher "directly or indirectly, knowingly [sought] to carry out, assist, or further the operations of" an enterprise. Id.

[29] The Court suspects that, even under New Jersey's more liberal definition of "enterprise," the "hallmarks" of an enterprise nevertheless easily could prove to be missing from each one of Ms. Marshall's alleged "enterprises." The association-in-fact of Mr. Matthei and Ms. Dawson lacks the elements of an "organization" that the New Jersey Supreme Court discussed in Ball II, namely, the division of labor and separation of functions necessary to "engage in a high degree of planning, cooperation and coordination." Ball II, 141 N.J. at 162-63. Ms. Marshall has not offered any evidence that would indicate that any degree of planning was involved, that the participants performed discrete roles in carrying out the scheme, or that would indicate any semblance of coordination among the participants involved in implementing decisions. Id. at 163.

as to Ms. Marshall's RICO claims, the Court concludes that summary judgment is appropriate with respect to Ms. Marshall's claims under the federal RICO statutes. However, Defendants' Motion for Summary Judgment will be denied in all other respects.

S/Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge

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

ELLEN C. MARSHALL,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
vs.	:	
	:	
RONALD FENSTERMACHER, HIGH SWARTZ ROBERTS AND SEIDEL, EMMA DAWSON, ESTATE OF DAVID BURGESS, HETHERINGTON & COMPANY,	:	
Defendants.	:	**NO. 04-3477**

O R D E R

AND NOW, this 2nd day of October, 2007, upon consideration of the Defendants' Motion for Reconsideration (Docket No. 111), and Plaintiff's response thereto (Docket No. 113),[30] for the reasons provided in the accompanying Memorandum, it is **ORDERED** that:

1. Defendants' Motion for Reconsideration (Docket No. 111) is **GRANTED**.

2. The Court's Order of November 16, 2006 (Docket No. 110) is **VACATED**.

3. Defendants' Motion for Summary Judgment (Docket No. 109) is **GRANTED** and summary judgement is entered as to Counts IX and X of Ms. Marshall's Second Amended Complaint.

4. Defendants' Motion for Summary Judgment is **DENIED** in all other respects.

IT IS FURTHER ORDERED that a status conference in this matter is scheduled for Thursday, November 15, 2007 at 1:00 p.m. in Chambers.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

[30] In rendering its decision the Court also reviewed Defendants' Motion for Summary Judgment (Docket No. 84), Ms. Marshall's responses thereto (Docket Nos. 95, 97, 98), Defendants' Reply (Docket No. 105), Defendants' Proposed Statement of Facts in Support of Motion for Summary Judgment (Docket No. 106), Plaintiff's Response to Defendants' Proposed Statement of Facts (Docket No. 108), and Plaintiff's Statement of Facts in Opposition to Defendants' Motion for Summary Judgment (Docket No. 109).