

ENTWISTLE & CAPPUCCI LLP  
30 Columbia Turnpike  
P.O. Box 95  
Florham Park, New Jersey 07932  
Attorneys for the Mosher Defendants  
(WG-2770)  
(RD-1007)

RECEIVED-CLERK  
U.S. DISTRICT COURT

2004 APR 23 P 2: 03

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

----- X  
RPA ASSOCIATES, INC. and MOSHER & :  
DORAN, INC. t/a RPA/Mosher & Doran, :  
 :  
 :  
Plaintiffs, :  
 :  
v. : 03 CV 2602 (WGB)(MCA)  
 :  
 :  
THE MOSHER GROUP, INC., FREDERICK K. :  
MOSHER, FREDERICK K. MOSHER, INC., :  
ROBERT C. DAVIS, FRANK S. RADOSIN, :  
GERALD K. VAN PELT, JR., RONALD M. :  
SIEGLER, JANE F. FRAN CZ, BERKOWSKY :  
AND ASSOCIATES, INC., KITCHEN & :  
ASSOCIATES ARCHITECTURAL SERVICES, :  
P.A., PETER A. PIRO, HACK, PIRO, O'DAY, :  
MERKLINGER, WALLACE & McKENNA, :  
JOHN DOES 1 THROUGH 20, and ABC :  
BUSINESS ENTITIES 1 THROUGH 20, :  
 :  
Defendants. :  
 :  
----- X

---

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT  
OF THE MOSHER DEFENDANTS' MOTION FOR  
PARTIAL DISMISSAL OF THE AMENDED COMPLAINT

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
ARGUMENT	
POINT I.	
THE BREACH OF RESTRICTIVE COVENANT CLAIM (COUNT I) SHOULD BE DISMISSED .....	1
A.    Francz.....	1
B.    Radosin, Davis, Van Pelt and Siegler .....	2
POINT II.	
PLEADING DEFICIENCIES COMPEL THE DISMISSAL OF THE FRAUD CLAIM (COUNT VIII).....	6
A.    No Misrepresentations Are Attributed to Radosin, Van Pelt, Davis, Siegler or Francz.....	6
B.    RPA’s Improper Group Pleading Is Fatal to the Fraud Claim.....	7
POINT III.	
RPA’S OPPOSITION HIGHLIGHTS THE DEFECTS IN ITS ILL-CONCEIVED RICO CLAIMS (COUNTS III-VI).....	8
A.    RPA Continues to Cling to Its Frivolous Aiding and Abetting Claim.....	8
B.    RPA Ignores the Group Pleading Issue, Hoping the Court Will Do Likewise.....	10
C.    RPA Does Not Adequately Allege a “Pattern” of Racketeering .....	11
D.    RPA Lacks “Investment Injury” Standing to Assert a Section 1962(a) Claim .....	15
E.    RPA Lacks “Acquisition Injury” Standing to Assert a Section 1962(b) Claim.....	16

F.	RPA Concedes that The Mosher Group Cannot Be Held to Respondeat Superior Liability Under Section 1962(c).....	17
G.	RPA's Association-in-Fact Theory Fails.....	17
	CONCLUSION.....	20

## TABLE OF AUTHORITIES

### Caselaw

<u>Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.</u> , 12 F. Supp. 2d 391 (M.D. Pa. 1998).....	14
<u>B.F. Hirsch v. Enright Refining Co.</u> , 751 F.2d 628 (3d Cir. 1984).....	19
<u>Bank Brussels Lambert v. Credit Lyonnais (Suisse)</u> , 2000 U.S. Dist. LEXIS 16399 (S.D.N.Y. Nov. 9, 2000).....	9, 10
<u>Banks v. Wolk</u> , 918 F.2d 418 (3d Cir. 1990).....	13
<u>Bardsley v. Powell, Trachtman, Logan, Carrle &amp; Bowman, P.C.</u> , 916 F. Supp. 458 (E.D. Pa. 1996).....	13
<u>Brittingham v. Mobil Corp.</u> , 943 F.2d 297 (3d Cir. 1991).....	15, 18
<u>Cedric Kushner Promotions v. King</u> , 533 U.S. 158 (2001).....	19
<u>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</u> , 511 U.S. 164 (1994).....	10
<u>Emcore Corp. v. Pricewaterhouse-Coopers LLP</u> , 102 F. Supp. 2d 237 (D.N.J. 2000).....	19
<u>Farda v. Terranova</u> , 1989 U.S. Dist. LEXIS 7935 (M.D. Pa. June 13, 1989).....	16
<u>Farmers &amp; Merchs. Nat'l Bank v. San Clemente Fin. Group Sec., Inc.</u> , 174 F.R.D. 572 (D.N.J. 1997).....	12
<u>Fortney v. Kuipers</u> , 2001 U.S. Dist. LEXIS 19806 (N.D. Ill. Nov. 30, 2001).....	16
<u>Gasoline Sales, Inc. v. Aero Oil Co.</u> , 39 F.3d 70 (3d Cir. 1994).....	18
<u>Grider v. Keystone Health Plan Central, Inc.</u> , 2003 U.S. Dist. LEXIS 16551 (E.D. Pa. Sept. 18, 2003).....	8, 9

<u>H.J. Inc. v. Northwestern Bell Tel. Co.</u> , 492 U.S. 229 (1989).....	12
<u>Hindes v. Castle</u> , 937 F.2d 868 (3d Cir. 1991).....	13
<u>Hughes v. Consol-Pennsylvania Coal Co.</u> , 945 F.2d 594 (3d Cir. 1991).....	13
<u>Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.</u> , 46 F.3d 258 (3d Cir. 1995).....	17, 18
<u>Kehr Packages, Inc. v. Fidelcor, Inc.</u> , 926 F.2d 1406 (3d Cir. 1991).....	13
<u>Lum v. Bank of Am.</u> , 2004 U.S. App. LEXIS 4637 (3d Cir. March 11, 2004).....	11
<u>Marshall-Silver Constr. Co. v. Mendel</u> , 894 F.2d 593 (3d Cir. 1990).....	11, 13
<u>Menasco, Inc. v. Wasserman</u> , 886 F.2d 681 (4th Cir. 1989) .....	12
<u>National Labor Relations Board v. Phoenix Pipe &amp; Tube, L.P.</u> , 955 F.2d 852 (3d Cir. 1991).....	14
<u>New Jersey Auto. Ins. Plan v. Sciarra</u> , 103 F. Supp. 2d 388 (D.N.J. 1998).....	8, 9
<u>Pennsylvania Ass'n of Edwards Heirs v. Rightenour</u> , 235 F.3d 839 (3d Cir. 2000), <u>cert. denied</u> , 534 U.S. 816 (2001).....	8, 9
<u>Rolo v. City Investing Co. Liquidating Trust</u> , 155 F.3d 644 (3d Cir. 1998).....	8
<u>Saporito v. Combustion Eng'g, Inc.</u> , 843 F.2d 666 (3d Cir. 1988).....	11
<u>Sedima, S.P.R.L. v. Imrex Co.</u> , 473 U.S. 479 (1985).....	17
<u>Sojuzvneshttrans v. Buyanovski</u> , 80 F. Supp. 2d 273 (D.N.J. 1999).....	12

United Board & Carton Corp. v. Britting,  
63 N.J. Super. 517 (Ch. Div. 1959), modified, 61 N.J. Super 340 (App. Div.),  
cert. denied, 33 N.J. 326 (1960)..... 2

vBank v. Check Express, Inc.,  
2003 U.S. Dist. LEXIS 9759 (E.D. Pa. May 8, 2003) ..... 12

**Statutes**

18 U.S.C. 1344..... 9  
18 U.S.C. 1961(1) ..... 9, 10  
18 U.S.C. 1962(a) ..... passim  
18 U.S.C. 1962(b) ..... 16  
18 U.S.C. 1962(c) ..... passim

## **PRELIMINARY STATEMENT**

The Mosher Defendants respectfully submit this reply memorandum of law in further support of their motion pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) for partial dismissal of the Amended Complaint of plaintiffs RPA Associates, Inc. and Mosher & Doran, Inc. t/a RPA/Mosher & Doran (collectively, "RPA").

### **ARGUMENT**<sup>1</sup>

#### **POINT I.**

#### **THE BREACH OF RESTRICTIVE COVENANT CLAIM (COUNT I) SHOULD BE DISMISSED**

The breach of restrictive covenant claim asserted in Count I plainly fails as to defendants Jane F. Francz, Frank S. Radosin, Robert C. Davis, Gerald K. Van Pelt, Jr. and Ronald M. Siegler. Nothing in RPA's opposition papers supports a contrary conclusion. Indeed, if those papers establish anything, it is that RPA lacked a good faith basis for bringing this ill-conceived claim in the first place.

##### **A. Francz**

RPA's penchant for refusing to squarely address the Amended Complaint's pleading defects is clear from the outset, as RPA inexplicably refuses to acknowledge that it has not alleged and cannot allege a viable restrictive covenant claim against Francz. Had it simply conceded that Francz was incorrectly included as part of Count I as a result of sloppy draftsmanship, RPA at least would have won points for candor. Unfortunately, RPA has elected to take an entirely different approach, pursuing a strategy of obfuscation in which it attempts to blur the line between the restrictive covenant claim (Count I) which is at issue here and its duty

---

<sup>1</sup> For the Court's convenience, the LEXIS decisions cited herein are attached hereto in alphabetical order.

of loyalty claim (Count XV) which is not at issue.

There should be no mistake on this point: the Mosher Defendants have no quarrel with the legal sufficiency of the common-law duty of loyalty claim asserted against Francz in Count XV; instead, the Mosher Defendants' dispute is with the contract-based restrictive covenant claim in Count I, which carries the heading "Injunctive Relief: Breach of Restrictive Covenants." See Amended Complaint at page 29. Thus, RPA's extended argument in support of its duty of loyalty claim is, at best, irrelevant. See Opposition Brief at 21-24. RPA does not and cannot dispute the fact that Francz never entered into any contract with RPA containing a non-compete provision. Moreover, RPA provides no authority for the wholly counter-intuitive proposition that Francz could have breached a non-existent restrictive covenant provision, nor is there any such authority.

The most charitable thing that can be said of RPA's reliance on the 44-year-old Chancery Division decision in United Board & Carton Corp. v. Britting, 63 N.J. Super. 517 (Ch. Div. 1959), modified, 61 N.J. Super. 340 (App. Div.), cert. denied, 33 N.J. 326 (1960), to salvage its restrictive covenant claim is that its reliance is wildly misplaced. See Opposition Brief at 24-25. The United Board & Carton decision cannot be read to support RPA's apparent position (alleged nowhere in the Amended Complaint) that Francz breached some form of constructive restrictive covenant. The Court will read the decision in vain for any reference to the concept of a "constructive restrictive covenant." United Board & Carton is a duty of loyalty case, not a restrictive covenant case. It provides no legal foothold whatsoever for RPA's baseless restrictive covenant claim against Francz.

**B. Radosin, Davis, Van Pelt and Siegler**

Mercifully, RPA does not dispute the fact that the terms of Radosin, Davis, Van Pelt and Siegler's employment under their respective Employment Agreements expired on

September 24, 2000 -- i.e, nearly thirty months prior to those defendants' departures from RPA. There being no dispute on this pivotal fact, the issue of whether RPA has stated a viable restrictive covenant claim against these four defendants presents a straightforward question of contract interpretation.

The restrictive covenants relating to Radosin, Davis, Van Pelt and Siegler expired in September 2000 along with their contractual terms of employment. RPA contends, however, that Section 5(b) of the Employment Agreements "automatically extend[s] the Covenant Not To Compete" if any of these defendants "are ultimately found liable for breaching, or merely threatening to breach their Employment Agreements . . . ." See Opposition Brief at 27. Section 5(b) does not salvage the restrictive covenant claim. As a matter of logic, for a restricted period to be "extended," that restricted period necessarily must not yet have expired. Because the restricted period relating to these defendants expired in September 2000, it was not susceptible to "extension" under the circumstances presented here because the wrongful competitive conduct RPA attributes to these defendants is alleged to have occurred in or about early 2003.

RPA's interpretation of Section 5(b) runs contrary to common sense. RPA would have the Court apply Section 5(b) not to extend the restricted periods but to renew or resurrect those that already had expired prior to the relevant time period. This clearly was not the parties' intention in using the term "extended" in Section 5(b). RPA knew how to use the word "renew" when that was its intention, as it did in Sections 5(c)(iv), 5(c)(v) and 12 of the Employment Agreements. It did not do so with respect to the non-compete provision. Thus, although the defendants' non-contractual common-law duty of loyalty may have survived the expiration of the Employment Agreements, their contractual obligations under the non-compete provision plainly did not.

RPA's convoluted assertion that Section 5(c) of the Employment Agreements somehow saves the restrictive covenant claim also fails. Indeed, it misses the Mosher Defendants' argument entirely. Based on the fact that Section 5(c) does not expressly provide for the termination of Section 5(b)'s extension provision, RPA infers that the parties intended Section 5(b)'s "automatic extension provision to extend beyond the original term of the Employment Agreement." *Id.* at 27. Even assuming that this is a reasonable inference, it does not rebut the argument that there could be no "extension" of the restricted periods because they already had expired by the relevant time period. *See, supra*, at page 3.

The Mosher Defendants do not dispute that under certain circumstances not presented here (i.e., if the allegedly breaching conduct had occurred during the life of the employment contract), the restricted periods could extend beyond the employment terms. Here, however, RPA allowed the employment terms (along with the restricted periods provided for therein) to expire and only then are these defendants alleged to have engaged in the offending competitive conduct. Under the circumstances, the restricted periods had expired and could not, as a practical and textual matter, be "extended." Moreover, RPA's reliance on Section 5(c) is bizarre because a subsection of that portion of the contract -- Section 5(c)(v), the controlling provision here -- expressly provides that the restricted period applicable to these defendants would end "on the date of the expiration of the then current term" of the defendants' contractual term of employment.

Finally, RPA's reliance upon the survival clause set forth at Section 18 of the Employment Agreements is contrary to the plain language of the very contract RPA itself drafted. *See* Opposition Brief at 28. Section 18 provides that Section 5 (i.e., the restrictive covenant provision) will survive a termination of the Employment Agreements "in accordance

with its terms.” Section 5, in turn, expressly provides that if the Employment Agreements are terminated, the covenants not to compete contained therein at most would continue until “three (3) months following the date that the then current term of the Employment Period would have expired . . . .” (emphasis supplied). See Employment Agreement § 5(c)(i)-(iv). The reality is, of course, that under the circumstances presented here (i.e., where RPA elected not to renew the employment contracts), the Employment Agreements provide for no such three-month extension; instead, in the event of RPA’s non-renewal of the contract, the Employment Agreements expressly provided for the restricted periods to “end . . . on the date of the expiration of the then current term of the Employment Period” -- i.e., September 24, 2000. Id. § 5(c)(v). Nevertheless, affording RPA the benefit of every doubt, Section 18 at best only extended the non-compete provision of Section 5 to December 24, 2000 -- i.e., three months after the date on which the Employment Agreements indisputably expired on September 24, 2000 and still fully seventeen months prior to the mass employee defections giving rise to this dispute.<sup>2</sup>

---

<sup>2</sup> If there was any doubt that at the relevant time RPA considered these defendants to be at-will employees free and clear of any obligations under the expired Employment Agreements, one need look no further than the company’s conduct in terminating Siegler’s employment in February 2003. See Declaration of Ronald M. Siegler, dated July 3, 2003, at ¶ 22. (For the Court’s convenience, a copy of this Declaration was attached as Exhibit D to the Declaration of William S. Gyves submitted to the Court in support of this motion.) RPA did not offer Siegler any severance payment or other compensation to soften the blow of his dismissal. Instead, Siegler was merely given the unused vacation pay owed to him and told that the termination of his employment was effective immediately. Id. ¶ 23. Had RPA considered the terms of the Employment Agreement to be in effect when it terminated Siegler’s employment without cause, pursuant to Section 3 of that contract it would have had to provide Siegler either with thirty days’ notice, which it did not do, or at least thirty days of severance pay, which it did not do either. Id. ¶ 62.

## POINT II.

### PLEADING DEFICIENCIES COMPEL THE DISMISSAL OF THE FRAUD CLAIM (COUNT VIII)

RPA pursues a futile approach in attempting to salvage its fraud claim. RPA rehashes at length the same deficient allegations that doom this claim to dismissal. See Opposition Brief at 31-33. In the end, however, RPA's opposition is most significant for what it does not say about the fraud claim. Specifically, RPA does not even acknowledge -- much less attempt to explain away -- the glaring pleading defects discussed at pages 30-34 of the Mosher Defendants' opening brief.

#### **A. No Misrepresentations Are Attributed to Radosin, Van Pelt, Davis, Siegler or Francz**

RPA would have the Court believe that the Mosher Defendants are quibbling over picayune details involving "the specific date, place or time of each fraudulent act . . . ." Id. at 29. This is nonsense. The pleading deficiencies undermining the fraud claim are graver than RPA cares to acknowledge. RPA asserts a fraud claim against a raft of defendants without specifically attributing to Radosin, Van Pelt, Davis, Siegler or Francz a single misrepresentation that even theoretically could give rise to a cause of action for fraud. See Mosher Defendants' Opening Brief at 30-34. RPA also fails to attribute any specific misrepresentations to The Mosher Group, Inc. or Frederick K. Mosher, Inc. The fraud claim against these defendants is hollow at its core.

This motion is not, as RPA would suggest, a persnickety attack on missing minutia relating to specific dates and times of the underlying misrepresentations or the locations at which those misrepresentations were made. The Mosher Defendants' challenge to RPA is far more basic: What single misrepresentation -- regardless of date, place, time or any other detail -- did Radosin, Van Pelt, Davis, Siegler, Francz, The Mosher Group, Inc. or Frederick K. Mosher,

Inc. make that could give rise to a fraud claim here? This challenge stands unanswered. RPA has pointed to nothing in the Amended Complaint demonstrating that it adequately has alleged this key element of the fraud claim against these seven defendants.

**B. RPA's Improper Group Pleading Is Fatal to the Fraud Claim**

Similarly, rather than squarely address the issue of its improper group pleading, RPA ignores the question altogether. Nowhere in its brief does RPA attempt to demonstrate (as it must) that the Amended Complaint adequately ties the fraudulent conduct alleged therein to specific defendants rather than the undifferentiated mass of wrongdoers into which it has lumped those defendants. See Mosher Defendants' Opening Brief at 30-34. Ironically, the opposition brief merely echoes the deficiencies of the Amended Complaint in that therein RPA continues to attribute the alleged fraudulent scheme to the "Mosher Defendants" or, even worse, simply the "Defendants." See Opposition Brief at 31-36. The courts consistently have rejected fraud claims supported solely by allegations against multiple defendants where those allegations are so broad as to leave each defendant in the dark as to the specific fraudulent acts he is alleged to have committed. See Mosher Defendants' Opening Brief at 19-20; Memorandum of Law in Support of the Joint Motion of Defendants Berkowsky and Associates, Inc. and Kitchen & Associates Architectural Services, P.A. for Partial Dismissal of the Amended Complaint, at 14-17.

The Mosher Defendants respectfully submit that even after modifying and/or adding twenty-six paragraphs to its initial Complaint, RPA still has not identified the alleged fraudulent acts that each of the Mosher Defendants, with the exception of Fred Mosher, are said to have committed. Therefore, the fraud claim should be dismissed with prejudice.

### POINT III.

#### **RPA'S OPPOSITION HIGHLIGHTS THE DEFECTS IN ITS ILL-CONCEIVED RICO CLAIMS (COUNTS III-VI)**

Far from salvaging its RICO claims, RPA's opposition papers serve only to underscore the grossly over-reaching nature of those causes of action. Confronted with the adverse Third Circuit authority it should have consulted before commencing this action (and certainly before amending the initial Complaint), RPA makes a futile attempt to sidestep the clear pleading defects undermining its RICO causes of action. RPA engages in rambling and disjointed analyses that, once parsed, point the Court to nothing in the Amended Complaint sufficient to salvage the RICO claims.

##### **A. RPA Continues to Cling to Its Frivolous Aiding and Abetting Claim**

For reasons known only to RPA and its counsel, RPA simply refuses to acknowledge the obvious -- i.e., that there is no legal basis whatsoever for its RICO aiding and abetting claim. Even in the face of two sanctions motions, RPA continues to stand by this baseless claim. Tenacity is no virtue in this instance. RPA only further compounds its frivolous pursuit of this claim by bobbing and weaving to avert the effect of Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir. 1998). There is no escaping the consequence of this authority. Rolo represents the Third Circuit's final word on the issue of whether a private cause of action for aiding and abetting under RICO is cognizable. In Rolo, the Third Circuit flatly declined to recognize a private cause of action for aiding and abetting under RICO. No court within the Third Circuit has since wavered on the issue. See, e.g., Pennsylvania Ass'n of Edwards Heirs v. Righenour, 235 F.3d 839, 843 (3d Cir. 2000), cert. denied, 534 U.S. 816 (2001); New Jersey Auto. Ins. Plan v. Sciarra, 103 F. Supp. 2d 388, 413 (D.N.J. 1998); Grider v. Keystone Health Plan Central, Inc., 2003 U.S. Dist. LEXIS 16551, at \*80 (E.D. Pa. Sept. 18,

2003).

RPA attempts to distinguish Rolo by claiming that it “did not evaluate claims arising under 18 U.S.C. 1962(a)” and therefore only applies to claims asserted pursuant to Section 1962(c). See Opposition Brief at 79. Once again, RPA has it all wrong. In the wake of Rolo, the courts of the Third Circuit consistently have rejected RICO aiding and abetting claims no matter what substantive RICO violation is alleged. See Rightenour, 235 F.3d at 841, 843 (alleged violations of Sections 1962 (b), (c) and (d)); Sciarra, 103 F. Supp. 2d at 411-13 (alleged violations of Sections 1962 (a), (b), (c) and (d)); Grider, 2003 U.S. Dist. LEXIS 16551, at \*70-80 (alleged violations of Sections 1962 (a), (c) and (d)).

RPA also attempts to distinguish Rolo by contending that, therein, the Third Circuit did not evaluate claims “for predicate violations of the statutes identified in § 1961(1).” See Opposition Brief at 79. Scrambling to avoid controlling authority that could not be clearer, RPA reaches beyond the Third Circuit and latches onto a decision of the Southern District of New York. The desperation of this tactic is manifest. RPA would have the Court believe that the court in Bank Brussels Lambert v. Credit Lyonnais (Suisse), 2000 U.S. Dist. LEXIS 16399 (S.D.N.Y. Nov. 9, 2000), found Rolo to be “applicable when evaluating whether there was an implied right of action for violations of 1962, but it was not controlling when evaluating predicate violations of 1961(1)” including bank fraud under Section 1344. See Opposition Brief at 79. Based on such a rationale, RPA asserts that “aiding and abetting bank fraud would be a cognizable predicate offense under RICO” here. Id. at 79-80.

While it may be permissible in the Southern District of New York to assert a claim for aiding and abetting predicate acts, the court in Bank Brussels Lambert expressly found that the Third Circuit has taken the opposite view. In so doing, the court emphasized that the

Rolo “court’s language in describing the dismissed RICO violations makes it clear enough that it was a dismissal of claims of aiding and abetting predicate acts that it was affirming.” Bank Brussels Lambert, 2000 U.S. Dist LEXIS 16399, at \*15. At the same time, the court underscored what the Mosher Defendants maintain here -- i.e., that the Third Circuit in Rolo held that a private cause of action for aiding and abetting under RICO did not survive the Supreme Court’s decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). See id.

Despite the findings of Bank Brussels Lambert, whether allegations of aiding and abetting a predicate act will survive under Third Circuit law is of no moment here for the single reason that, in the Amended Complaint, RPA does not allege a claim for aiding and abetting a predicate act; instead, it asserts a claim for aiding and abetting a RICO violation. This distinction is dispositive. The fact of the matter is that the (non) issue of the viability of a claim for aiding and abetting a predicate act is wholly the product of RPA’s counsel which, in turn, is based on purported allegations pled nowhere in the Amended Complaint. In fact, the allegations of the Amended Complaint contradict such a contention. There, the Mosher Defendants are alleged to have aided and abetted each other in violation of Section 1962 and not any particular predicate violation of Section 1961(1). See Amended Complaint, ¶¶ 159, 160. RPA clearly is grasping at straws in attempting to salvage this frivolous claim.

**B. RPA Ignores the Group Pleading Issue, Hoping the Court Will Do Likewise**

In its opposition, RPA states that it has “adequately pled claims of mail fraud, and wire fraud RICO in the [Amended] Complaint.” See Opposition Brief at 82. Saying this is the case, of course, does not make it so. The proof of the adequacy of the underlying fraud allegations lies not in the legal argument of RPA’s counsel but within the four corners of the

Amended Complaint itself. Such proof is sorely lacking. Nowhere in its opposition does RPA even attempt to refute the Mosher Defendants' contention that it has engaged in improper group pleading fatal to the fraud allegations at the heart of the RICO claims. Indeed, RPA ignores this substantial defect entirely, apparently hoping the Court will overlook the issue.

As demonstrated in their opening brief, it is impossible to determine from the Amended Complaint what each Mosher Defendant is accused of doing in connection with the alleged mail and wire fraud to which the RICO claims are pegged. By merely regurgitating various paragraphs from the Amended Complaint, RPA underscores this pleading defect. The Mosher Defendants continue to be left with only the allegations in which they are all clumped together as "Mosher and/or the Mosher Defendants" or "Defendants Mosher, Davis, Radosin, Van Pelt and Piro." See Amended Complaint, ¶¶ 134 (e), (f) and (k). Such group pleading is contrary to the particularity requirement of Rule 9(b) -- a proposition RPA does not and cannot dispute -- thereby dooming RPA's RICO claims to dismissal. See Lum v. Bank of Am., 2004 U.S. App. LEXIS 4637, at \*17 (3d Cir. March 11, 2004); Saporito v. Combustion Eng'g, Inc., 843 F.2d 666, 675 (3d Cir. 1988).

**C. RPA Does Not Adequately Allege  
a "Pattern" of Racketeering**

Notwithstanding all of the convoluted argumentation set forth in RPA's sprawling opposition brief, a review of the Amended Complaint itself reveals that RPA has alleged no facts sufficient to satisfy the "continuity" prong of the pattern element. The continuity requirement plays an absolutely critical role in the RICO statutory framework. It is intended to "constrain[ ]" the reach of the RICO statute. Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593, 596 n.3 (3d Cir. 1990). As the Third Circuit has observed:

The "pattern" requirement is more than incidental to the operation of the RICO statute. In providing a remedy of treble damages for

injury “by reason of” RICO’s substantive provisions . . . Congress “contemplated that only a party engaging in widespread fraud would be subject to such consequences . . . . The pattern requirement in § 1961(5) thus acts to ensure that RICO’s extraordinary remedy does not threaten the ordinary run of commercial transactions [and] that treble damage suits are not brought against isolated offenders for their harassment and settlement value[.]”

Id. (quoting Menasco, Inc. v. Wasserman, 886 F.2d 681, 683 (4th Cir. 1989)) (emphasis supplied). Absent adequate allegations of continuity, RPA cannot satisfy the pattern element. If the pattern element is not satisfied, all of RPA’s RICO claims are legally infirm and should be dismissed for failure to state a claim. See Mosher Defendants’ Opening Brief at 21-25.

In its opposition, RPA does manage to clarify at least one issue by stating that its RICO claims are based on an open-ended (as opposed to closed-ended) scheme of racketeering activity. See Opposition Brief at 50 (“Mosher Defendants’ analysis is . . . defective since they claim that the scheme alleged was close-ended”) and 53 (“plaintiffs have asserted a claim of open-ended continuity”). To plead an open-ended pattern of racketeering, RPA in its Amended Complaint must allege facts sufficient to support the conclusion that the Mosher Defendants’ “regular way of conducting [their] ongoing legitimate business” was to engage in the sort of predicate acts attributed to them in that pleading. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243 (1989).

The conduct RPA attributes to the Mosher Defendants does not even remotely approach the “pattern of racketeering” the courts have deemed adequate to demonstrate open-ended continuity. See, e.g., vBank v. Check Express, Inc., 2003 U.S. Dist. LEXIS 9759, at \*13 (E.D. Pa. May 8, 2003); Sojuzvneshttrans v. Buyanovski, 80 F. Supp. 2d 273, 279 (D.N.J. 1999); Farmers & Merchs. Nat’l Bank v. San Clemente Fin. Group Sec., Inc., 174 F.R.D. 572, 583-84 (D.N.J. 1997). RPA alleges two schemes in the Amended Complaint. One, according to RPA,

was a scheme to pocket its revenue. The second scheme, according to RPA, was designed to hijack its clients. Fatal to RPA's position, however, is the common sense conclusion that, at this late juncture, these alleged schemes either have been achieved or, conversely, they have not and never will be achieved. As discussed in the Mosher Defendants' opening brief at 24-25, these allegations at best claim that the Mosher Defendants engaged in two specific-bounty and single-objective rackets of the kind that cannot be characterized as a regular way of conducting business. As such, they do not satisfy open-ended continuity.<sup>3</sup>

In an attempt to avert this conclusion, RPA contends that the Mosher Defendants' "new" business is actually a continuation of the former business," which under the "continuing enterprise" theory is sufficient to support a finding of open-ended continuity. See Opposition Brief at 48. In so doing, it is plain that RPA is merely attempting to deflect both the thrust of the Mosher Defendants' argument and the basic analysis to be conducted to determine if open-ended continuity exists. Whether the Mosher Defendants engaged in a different, similar or even the

---

<sup>3</sup> See Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 610-11 (3d Cir. 1991) (RICO claim rejected where "Plaintiffs each had but one property to sell; defendants had but one area to acquire" and alleged scheme "was akin to a one-time racket to obtain a specific bounty"); Hindes v. Castle, 937 F.2d 868, 874 (3d Cir. 1991) (affirming dismissal of RICO claim where "the sole objective of the alleged fraudulent scheme was to elect Dale Wolf as Lieutenant Governor" and "that goal was accomplished in [the] November 1988 [election and thus] there ceases to be a threat of continued racketeering activity"); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1417 (3d Cir. 1991) (affirming dismissal of RICO claim where the allegations involved "a short-term attempt to force a single entity into bankruptcy"); Banks v. Wolk, 918 F.2d 418, 422-23 (3d Cir. 1990) (affirming dismissal of RICO claim for failure to adequately allege continuity where the alleged "scheme was an attempt to defraud a single investor of his interest in a single price of real estate" and the scheme deemed to "amount[] to nothing more than an isolated incident of 'garden variety' real estate fraud"); Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593, 597-98 (3d Cir. 1990) (affirming dismissal where scheme was allegedly designed to force a single business entity bankrupt); Bardsley v. Powell, Trachtman, Logan, Carrle & Bowman, P.C., 916 F. Supp. 458, 465 (E.D. Pa. 1996) (dismissing claim where "the alleged plot was hatched for the specific purpose of thwarting plaintiff's bid to exercise his power within the company").

same line of business now as they did during the commission of the fraudulent schemes is irrelevant. The alleged schemes to hijack RPA's revenue and clients are the basis for RPA's RICO claims. What is essential to the continuity analysis is whether these schemes -- not the Mosher Defendants' underlying business -- were sufficiently continuous to support the RICO claims.

Moreover, the cases RPA cites at page 49 of its brief to support the "continuing enterprise" argument are inapposite. Indeed, they are not even RICO cases. These decisions do not discuss the continuity requirement for a RICO claim. RPA's reliance on non-RICO cases to salvage its RICO theory reflects its desperation in opposing this motion. The decision in Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391 (M.D. Pa. 1998), involved successor liability pursuant to the Comprehensive Environmental Response, Compensation and Liability Act. National Labor Relations Board v. Phoenix Pipe & Tube, L.P., 955 F.2d 852 (3d Cir. 1991), involved a labor dispute. One is left to guess what relevance these decisions could possibly have in determining the legal viability of RPA's RICO claims.

The fact remains that most of the allegations to which RPA's counsel cites as support in its opposition brief are all pled in the past tense and therefore do not logically convey any future threat. See Opposition Brief at 50 ("Defendant Mosher . . . misappropriated and converted"), 51 ("Mosher Defendants . . . concealed from Plaintiffs . . . that they converted"), ("Mosher Defendants . . . removed, misappropriated and converted") and 52 ("moved out"). Moreover, certain of these supporting allegations occurred on only one day. See id. at 51 ("[o]n March 7, 2003") and 51 ("[o]n or about March 13, 2003"). Others have specific end dates and thus admittedly cannot continue into the future. See id. at 50 ("continuing to approximately February 28, 2003") and 51 ("continuing until March 6, 2003").

Given RPA's failure to adequately plead the pattern allegations common to all of its RICO claims, the Mosher Defendants respectfully submit that those counts be dismissed with prejudice.

**D. RPA Lacks "Investment Injury"  
Standing to Assert a Section 1962(a) Claim**

RPA points to no allegation of the Amended Complaint sufficient to demonstrate that it has standing to pursue a Section 1962(a) claim. As the Mosher Defendants demonstrate at pages 26 and 27 of their opening brief, RPA at best alleges that its purported "injury" is the result of a reinvestment of corporate profits. This notion of investment injury is contrary to well-settled authority in which the Third Circuit has instructed that alleged injuries flowing from the normal reinvestment of corporate profits cannot establish a claim under Section 1962(a), even where those profits were earned through fraudulent predicate acts. See Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991).

In an ill-fated attempt to remedy this fatal defect, RPA struggles mightily to articulate some version of investment injury. The result is virtually incomprehensible. RPA acknowledges (as it must) that for its Section 1962(a) claim to survive, the Amended Complaint "must" allege that RPA "was injured by the use or investment of income derived from a pattern of racketeering activity, not merely that it was injured by predicate racketeering acts." See Opposition Brief at 67 (emphasis supplied). But on the following pages, RPA then proceeds to tie its alleged injury directly to the predicate racketeering acts.<sup>4</sup> See id. at 68 ("Defendants'

---

<sup>4</sup> Moreover, rather than direct the Court to specific passages of the Amended Complaint in which it adequately alleges the requisite investment injury, RPA merely refers the Court generally to portions of its "Counter-Statement of Facts." See Opposition Brief at 69-70. The concept of "investment injury" is not addressed anywhere in those pages, nor does RPA's "Counter-Statement of Facts" contain a citation to a single allegation in the Amended Complaint that even arguably could support the conclusion that RPA has adequately alleged such investment injury.

contentions disregard the distinct injury that plaintiffs incurred from the predicate acts” (emphasis added)) and 69 (“[t]he injury to Plaintiffs from those predicate acts of racketeering” (emphasis added)). By RPA’s own admission as well as the relevant law of the Third Circuit, this plainly is not the “investment injury” required under Section 1962(a).<sup>5</sup>

Accordingly, the Mosher Defendants respectfully submit that even if the Court determines that RPA has pled fraud with the requisite particularity and adequately alleged the pattern and other substantive elements of a Section 1962(a) claim, that claim nonetheless should be dismissed with prejudice for lack of standing.

**E. RPA Lacks “Acquisition Injury”  
Standing to Assert a Section 1962(b) Claim**

RPA does not even attempt to establish that it has adequately alleged standing to bring the Section 1962(b) claim. RPA concedes (as it must) that to establish Section 1962(b) standing it “must show injury from the defendant’s acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts.” See Opposition Brief at 68 (emphasis added). That, however, is as far as it goes. Nowhere in its opposition does RPA even bother to engage in the futile exercise of attempting to specify where in the Amended Complaint it actually alleges the requisite acquisition injury.

Under the circumstances, the Mosher Defendants respectfully submit that, even if the Court concludes that RPA has pled fraud with the requisite particularity and adequately alleged the pattern and other substantive elements of a Section 1962(b) claim, that claim

---

<sup>5</sup> In further attempting to articulate some theory of investment injury, RPA at pages 70-71 of its opposition brief relies upon two cases. Farda v. Terranova, 1989 U.S. Dist. LEXIS 7935 (M.D. Pa. June 13, 1989), pre-dates the Third Circuit’s controlling decision in Brittingham by two years and thus is entitled to no weight here. The Northern District of Illinois decision in Fortney v. Kuipers, 2001 U.S. Dist. LEXIS 19806 (N.D. Ill. Nov. 30, 2001), not only is clearly distinguishable on its facts but, in any event, is contrary to Brittingham and thus entitled to no weight.

nonetheless should be dismissed with prejudice for lack of standing.

**F. RPA Concedes that The Mosher Group Cannot Be Held to Respondeat Superior Liability Under Section 1962(c)**

RPA does not even attempt to dispute the assertion that its stab at holding The Mosher Group vicariously liable under Section 1962(c) is directly contrary to long-standing Third Circuit authority. See Mosher Defendants' Opening Brief at 13-14. RPA at page 60 of its brief correctly argues that respondeat superior liability is recognized in the context of a Section 1962(a) claim. This argument is meaningless, however, because the Mosher Defendants never have taken a position to the contrary. The Mosher Defendants' respondeat superior argument is directed solely at RPA's purported Section 1962(c) claim.

**G. RPA's Association-in-Fact Theory Fails**

The Mosher Defendants at pages 14-17 of their opening brief demonstrate that RICO's "distinctiveness" requirement defeats RPA's attempt to impose liability on The Mosher Group based on its alleged participation in an "association-in-fact." In its opposition, RPA claims that the "the precedential weight" of the decisions upon which the Mosher Defendants rely for this argument "is substantially reduced" by the Third Circuit's decision in Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3d Cir. 1995). See Opposition Brief at 63. Specifically, RPA claims that the Third Circuit overruled its interpretation of distinctiveness under Section 1962(c) "by holding that it is improper to focus on whether the alleged enterprise is a victim." Id. at 62.

RPA is consistent in misconstruing Third Circuit authority in the RICO context. While it is true that the Third Circuit in Jaguar Cars did find this basis for the distinctiveness requirement to be undermined by the U.S. Supreme Court's decision in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), what RPA neglects to acknowledge is that the Third Circuit also

found that “[t]his court, nonetheless, properly continued after Sedima to apply a distinctiveness requirement, since Enright’s holding was also based on § 1962(c)’s textual directive.” Jaguar Cars, 46 F.3d at 263. It is indeed this “textual directive” that is the focus of the Mosher Defendants’ distinctiveness argument and not whether The Mosher Group was a victim of racketeering activity. See Mosher Defendants’ Opening Brief at 13-14. As with its attempt to salvage the aiding and abetting claim in the face of Rolo, RPA’s portrayal of Third Circuit authority in the RICO context is strained and, ultimately, inaccurate. Jaguar Cars does not undermine the Mosher Defendants’ argument.

The Third Circuit in Jaguar Cars also concluded that “the essential holding in Enright remains undisturbed -- a claim simply against one corporation as both ‘person’ and ‘enterprise’ is not sufficient.” Jaguar Cars, 46 F.3d at 268. Moreover, as RPA noted in its opposition brief at 60, the Third Circuit in Jaguar Cars also found that a corporation may be found liable under Section 1962(c) “only if it engages in racketeering activity as a ‘person’ in another distinct ‘enterprise.’” Id. (emphasis supplied). Consequently, despite RPA’s argument to the contrary, the Jaguar Cars decision fully supports the core of the Mosher Defendants’ distinctiveness argument.<sup>6</sup>

As discussed in detail in the Mosher Defendants’ opening brief, the corporation must “take a separate ‘active’ role in RICO violations also committed by its employees” for it to be found liable. Brittingham v. Mobil Corp., 943 F.2d 297, 302 (3d Cir. 1991); see Gasoline

---

<sup>6</sup> Moreover, the finding of the Third Circuit in Jaguar Cars evaluated the liability under Section 1962(c) of the officers and employees acting through a corporate enterprise and not, as raised by the Mosher Defendants here, the liability of the corporation itself. See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995) (finding that plaintiff “has not brought a claim against [the corporation], but instead seeks recovery from the defendants, as persons operating and managing the [corporation’s] enterprise through a pattern of racketeering activity”).

Sales, Inc. v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir. 1994) (finding this “‘narrow,’ ‘theoretical’ and rare exception to the Brittingham rule” not to have been alleged). Nowhere does RPA dispute the fact that The Mosher Group is alleged to have played precisely the same role and engaged in precisely the same conduct as its officers, employees and attorneys -- i.e., the other participants in the alleged association-in-fact. See Mosher Defendants’ Opening Brief at 16-17. Those allegations clearly are inadequate under RICO’s distinctiveness requirement and thus The Mosher Group cannot be found liable based on RPA’s association-in-fact theory.<sup>7</sup>

---

<sup>7</sup> The Supreme Court’s decision in Cedric Kushner Promotions v. King, 533 U.S. 158 (2001), cited at page 63 of the opposition brief, does not help RPA. The scenario at issue in Kushner was the flip side of the scenario presented here. In Kushner, the Supreme Court addressed the issue of whether an individual defendant who was the sole owner of a corporate defendant could escape liability where that corporation was alleged to be both a “racketeer” and “enterprise” under RICO. Kushner does not address the separate and distinct issue presented here of whether, consistent with the “distinctiveness” requirement, a corporate defendant (i.e., The Mosher Group) can be alleged to be both a racketeer and part of the RICO enterprise. Notwithstanding Kushner, Third Circuit precedent on this issue stands and compels the conclusion (discussed at pages 13-17 of the Mosher Defendants’ opening brief) that a plaintiff may not name a single corporation as both a racketeer and RICO enterprise under Section 1962(c). See B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984); Emcore Corp. v. Pricewaterhouse-Coopers LLP, 102 F. Supp. 2d 237, 256 (D.N.J. 2000). Neither the Third Circuit nor any District Court within the Circuit has ever construed Kushner to permit a plaintiff to skirt the distinctiveness requirement and allege a corporate defendant to be both a “person” and “enterprise” for purposes of Section 1962(c) liability.

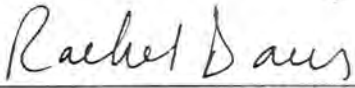
**CONCLUSION**

For the reasons set forth above, as well as in their initial moving papers, the Mosher Defendants respectfully request that the Court enter an Order: (a) dismissing with prejudice Count I (breach of restrictive covenant) as to defendants Davis, Radosin, Van Pelt, Siegler and Francz; (b) dismissing with prejudice Counts III-VI (RICO) as to all of the Mosher Defendants; (c) dismissing with prejudice Count VIII (fraud) as to defendants The Mosher Group, Inc., Frederick K. Mosher, Inc., Radosin, Van Pelt, Siegler, Davis and Francz; (d) dismissing with prejudice Count XVII (rescission) as to defendants Davis, Radosin, Van Pelt, Siegler and Francz; and, (e) awarding to the Mosher Defendants any and all further relief as the Court deems appropriate and just under the circumstances.

Dated: April 23, 2004

Respectfully submitted,

ENTWISTLE & CAPPUCCI LLP  
Attorneys for the Mosher Defendants

By:   
WILLIAM S. GYVES (WG-2770)  
RACHEL A. DAVIS (RD-1007)  
30 Columbia Turnpike  
P.O. Box 95  
Florham Park, New Jersey 07932  
(973) 236-0666

**CERTIFICATE OF SERVICE**

I, Rachel A. Davis, hereby certify that on April 23, 2004, I caused a copy of the attached Reply Memorandum of Law in Further Support of the Mosher Defendants' Motion For Partial Dismissal of the Amended Complaint to be served by Federal Express upon all counsel of record as follows:

Gregory D. Saputelli, Esq.  
Obermayer, Rebmann, Maxwell & Hippel, LLP  
20 Brace Road, Suite 300  
Cherry Hill, New Jersey 08034  
Attorneys for Plaintiffs

Marc D. Haefner, Esq.  
Connell, Foley LLP  
85 Livingston Avenue  
Roseland, New Jersey 07068  
Attorneys for Defendants Peter A. Piro  
and Hack, Piro, O'Day, Merklinger,  
Wallace & McKenna



RACHEL A. DAVIS