

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

GENTLE WIND PROJECT, et. al.,

Plaintiffs

v.

JUDY GARVEY, et al.,

Defendants

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) Civil Action Docket
) No. 2:04-cv-00103-GC
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**CONDITIONAL MOTION TO DISMISS FOR FAILURE TO STATE A
COGNIZABLE CLAIM FOR RELIEF BY
DEFENDANTS STEVE GAMBLE, EQUILIBRA, IVAN FRASER AND THE
TRUTH CAMPAIGN
(WITH INCORPORATED MEMORANDUM OF LAW)**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Steve Gamble, Equilibra, Ivan Fraser and The Truth Campaign (the “Moving Defendants”) move to dismiss the complaint against them on the grounds that it fails to state a cognizable claim for relief under federal law, and that the remaining pendent state law claims should be dismissed under the doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 728 (1966).¹ This motion is based on the arguments below, and the complaint.

The Moving Defendants have filed a motion under F.R.Civ.P. 12(b)(2) to dismiss the complaint against them for lack of personal jurisdiction. To preserve their Rule 12(b)(2) motion, the Moving Defendants have filed this Rule 12(b)(6) motion on a conditional basis, and request that this Court first resolve their motion to dismiss for lack of personal jurisdiction under F.R.Civ.P. 12(b)(2), addressing this motion only if the Court is unable to grant the Rule 12(b)(2) motion.

¹ As materials submitted in connection with the Moving Defendants Rule 12(b)(2) motion indicate, neither Equilibra nor The Truth Campaign is a juridical entity. However, because in a Rule 12(b)(6) motion the Court is confined to the allegations of the complaint, this motion assumes for the sake of argument that Equilibra and The Truth Campaign are business entities separate from, respectively, Gamble and Fraser.

The Moving Defendants adopt the arguments set forth by Defendants Garvey and Bergin in their motion to dismiss complaint under F.R.Civ.P. 12(b)(6), and raise the following additional points below.

The asserted basis for jurisdiction in this Court is federal question jurisdiction. Compl. ¶ 21.² There are two counts to the complaint that invoke federal law. In Count I, Plaintiffs contend that the Moving Defendants are liable under RICO for having engaged in the predicate crime of wire fraud (18 U.S.C. § 1343) by making false statements about plaintiffs and their Gentle Wind Project “healing instruments” from defendants’ web sites and (in the case of Fraser) in his periodical and e-mails. Compl. ¶133. The Complaint alleges, without further elaboration, that plaintiffs have been injured in “their business and property” by the defendants statements on their web site and in e-mails, and thereby are liable to plaintiffs under the RICO statute, 18 U.S.C. § 1964(c). Compl. ¶ 139.

In Count II, Plaintiffs contend that the Moving Defendants’ criticisms of the Gentle Wind Project and its “healing instruments” contained “false and misleading statements of fact,” Compl. ¶ 142, made “in connection with goods or services,” and ostensibly violated the Lanham Act, 15 U.S.C. § 1125(1)(B).

A. The Complaint Fails to Plead Facts That If True Would Provide Plaintiffs with Standing to Obtain Relief under RICO

RICO affords a cause of action to a plaintiff only if he or she is "injured in his [or her] business or property by reason of a violation of section 1962 of this chapter...." 18 U.S.C. § 1964(c). In the context of predicate claims based on wire fraud, such as those claimed here, the plaintiffs, in order to have standing under RICO, must plead and prove

² Diversity jurisdiction is lacking. Plaintiff Gentle Wind Project is identified as a Maine non-profit corporation, Compl. ¶ 2, and Defendants Bergin and Garvey are identified as citizens of Maine. Compl. ¶¶ 9-10.

that they relied on fraudulent representations, and thereby suffered injury to their “business or property” (not their reputations):

When the predicate act giving rise to civil liability under RICO [is] alleged to have been mail [or wire] fraud, prospective plaintiffs must, in order to demonstrate their standing to sue, plausibly allege both that they detrimentally relied in some way on the fraudulent mailing [or wiring], and that the mailing [or wiring] was a proximate cause of the alleged injury to their business or property.

Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 (4th Cir.1996). See *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 794 (1st Cir. 1990) (“We do not believe the deceptive scheme to obtain ATC-IATA approval can somehow be transformed into a scheme to deceive [the plaintiff] . . . [w]hile deceiving [ATC-IATA] may have been part of a larger plan having an adverse impact upon [plaintiff], this fact did not make [plaintiff] the object of an act of mail or wire fraud”).³

In this case, there is no allegation that Gentle Wind Project or its affiliated plaintiffs have relied to its or their detriment on any false misrepresentation of its “healing instruments” or their *modus operandi*. Plaintiffs thus lack standing to complain of injury resulting from alleged wire fraud causing reliance by others.

Moreover, the complaint alleges no facts that the “business or property” of the natural person plaintiffs was injured in any way by Gamble or Fraser’s statements on their respective United Kingdom web sites. The natural person plaintiffs do not allege

³ See also *Blue Cross & Blue Shield, Inc. v. Philip Morris, Inc.*, 113 F.Supp.2d 345, 369 (E.D.N.Y.2000) (“A plaintiff alleging predicate acts sounding in fraud—such as those instances of mail fraud and wire fraud alleged by [plaintiffs] here—must prove justifiable detrimental reliance to establish factual causation.”); *Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir.1992) (“to establish the required causal connection, the plaintiff [must] . . . demonstrate that the defendant’s misrepresentations were relied on”); *Shaw v. Rolex Watch U.S.A., Inc.*, 726 F.Supp. 969, 973 (S.D.N.Y.1989) (“any injury suffered by Shaw must result from reliance on defendants’ alleged fraud in order to meet the causation requirements of Section 1964(c)”); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F.Supp. 1277, 1291-92 (D.S.C.1992) (plaintiff claimed that defendants supplied false information to rate bureau, and that the rates thus approved injured plaintiff’s ability to compete against defendants; standing denied because plaintiff did not rely on any detrimental misrepresentations).

that they are in any business at all, or have suffered any loss of property. Nor are any facts pleaded that the non-profit Gentle Wind Project was injured in its “business or property.” Gentle Wind Project essentially denies that it is engaged in commerce, alleging that it “does not sell its healing instruments, but are given free of charge to those who request them....” Compl. ¶ 25. This philanthropic approach is inconsistent with the proposition that Gentle Wind Project has been injured in its “business or property” in the RICO sense.

B. The Complaint Fails to Plead Facts That If True Would Provide Plaintiffs with Standing to Obtain Relief under the Lanham Act

In Count II, only Gentle Wind Project is seeking relief under the Lanham Act’s Section 43(a). The natural person plaintiffs are not. The Lanham Act’s Section 43(a) provides a plaintiff with a cause of action for false advertising only for competitive injury. *Telecom Intern. America, Ltd. v. AT & T Corp.*, 280 F.3d 175, 197 (2nd Cir. 2001);⁴ *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir.1995) (“[T]o have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.”)⁵

In this case, the allegations in the complaint belie the proposition that Gentle Wind Project is engaged “in commerce” and in competition with Gamble or Fraser. As

⁴ *Id.* (“Because AT&T’s alleged misrepresentations were made in its role as an equipment and service provider to a reseller, rather than in its later-acquired role of a call-turnaround provider to ultimate consumers, AT&T and TIA were not competitors when the alleged false statements were made. Therefore, TIA does not have standing to raise the false advertising claim under the Lanham Act.”)

⁵ See also *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 569 (7th Cir.1993) (“Heath alleged that AT&T’s ad falsely misrepresented the nature and qualities of AT&T’s equipment and services. In order to have standing to allege a false advertising claim, however, the plaintiff must assert a discernible competitive injury. Because Heath is not in the computer business and thus is not a competitor of AT&T, Heath does not have standing to raise the false advertising claim”); *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (false representation about a film did not violate the Lanham Act because the party making the false representation was not in competition with the victim; the victim, although suffering a form of injury to reputation, had not suffered a competitive injury.)

noted above, the complaint asserts that “Gentle Wind Project does not sell its healing instruments. . . [i]nstead, the instruments are given free of charge to individuals who request them, while a suggested donation is requested . . . [its] income comes entirely from donations,” Compl. ¶ 25, and that “Gentle Wind Project has never publicly advertised its products.” Compl. ¶ 26. On the face of the complaint, Gentle Wind Project is simply not engaged in competition with anyone, including Gamble and Fraser.⁶

CONCLUSION

The Court should dismiss the complaint against Steven Gamble, Equilibra, Ivan Fraser and The Truth Campaign for failure to state a cognizable federal claim, and dismiss the remaining state law claims under the doctrine of *United Mine Workers v. Gibbs, supra*. See *McInnis-Misenor v. Maine Medical Center*, 319 F.3d 63 (1st Cir. 2003) (“When federal claims are dismissed before trial, state claims are normally dismissed as well.”)

Date: August 30, 2004

/s/ Robert S. Frank

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⁶ This is patently the case for Fraser, whose actionable conduct, according to the complaint, arises from his publication of The Truth Campaign newsletter and follow-up e-mails about the Project. Compl. 15, 84-100. Nor, conversely, are any facts pleaded to indicate that any revenue-generating activities of either Gamble or Fraser are adversely affected by Gentle Wind Project’s distribution of “healing products.”

CERTIFICATE OF SERVICE

The above signed person hereby certifies that on August 30, 2004, I electronically filed on behalf of Plaintiffs the foregoing document with the Clerk of Court, using the CM/ECF system which will send notification of such filing(s) to the following persons:

Daniel Rosenthal, Verrill & Dana, counsel for plaintiffs

Jerrold Crouter, Drummond, Woosdum, counsel for Defendants Garvey & Bergin

and the above person further certifies that on the same date, filed, he caused a copy of this document to be served on the following persons, by first class mail postage pre-paid:

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