UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Chapter 11
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YOUNGSTOWN OSTEOPATHIC HOSPITAL ASSOCIATION,	:	Case No. 99-40663
Debtor.	:	Judge Russ Kendig
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YOUNGSTOWN OSTEOPATHIC, HOSPITAL ASSOCIATION,	:	Adv. No. 02-6118
	:	
Plaintiff,	:	**MEMORANDUM OF DECISION**
	:	
v.	:	
	:	
JAMES V. VENTRESCO, JR., D.O., *et al.*,	:	
	:	
Defendants.	:	

This adversary proceeding is before the court on a complaint filed by plaintiff, Youngstown Osteopathic Hospital Association (hereinafter "YOHA"), on March 9, 2001. The complaint alleges the following counts against defendant Richard B. White (hereinafter "White"): Count I- Breach of Fiduciary Duty, Count IV- Fraud, Count V- Fraudulent Transfer, Count VI- Misappropriation, Conversion & Unjust Enrichment, Count VII- Concert of Action and Conspiracy, Count VIII- Misrepresentation, and Count IX- RICO. White filed a motion to dismiss all seven counts brought against him pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) on April 25, 2001 and also filed a supplemental motion to dismiss on May 10, 2001 pursuant to Fed. R. Civ. P. 12(b)(7), 12(b)(6) and 9(b). YOHA responded on May 14, 2001 and May 21, 2001. YOHA opposed the motion and supplemental motion to dismiss and additionally requested permission to amend its complaint if the court grants White's motion. White replied to both of YOHA's responses on May 23, 2001 and May 30, 2001.

I. Legal Standard

A complaint will not be dismissed unless the plaintiff has failed to allege facts supporting its claim that, construed in plaintiff's favor, would entitle plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In deciding a motion to dismiss under Fed. R. Civ. P. 12(b), the function of the court is to test the legal sufficiency of the complaint. The court is required to accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), while viewing the complaint in a light most favorable to the plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). "[A] complaint will not be dismissed pursuant to Rule 12(b)(6) unless there is no law to support the

claims made, the facts alleged are insufficient to state a claim, or there is an insurmountable bar on the face of the complaint." *Morrison v. Steiman*, No. 2:01-CV-1143, 2002 U.S. Dist. LEXIS 21507, at *5-6 (S.D. Ohio Sept. 5, 2002). *See generally* 2-12 James W. Moore, Moore's Federal Practice, § 12.34 (3d ed. 2002).

The court **DENIES** the dismissal of Counts I, V, VI, VII and VIII. The court **GRANTS** the dismissal of Counts IV alleging fraud and IX alleging violations of The Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, and **GRANTS** YOHA the right to amend its complaint as to Counts IV and IX through February 14, 2003.

II. Analysis

White argues that all seven counts brought against him should be dismissed. White contends that Count I should be dismissed because he never owed YOHA a fiduciary duty. White asserts that the Management Agreement between Montrose Management (hereinafter "Montrose") and YOHA controls, and if any duty was owed, it was owed by Montrose. Additionally, in his supplemental motion to dismiss, White argues that YOHA has failed to join Montrose as an indispensable party thereby requiring Count I against him to be dismissed. White avers that Counts IV and IX should be dismissed for failure to plead with particularity pursuant to Fed. R. Civ. P. 9(b). Additionally, White asserts that Counts V - VIII are cumulative of Count IV and should be dismissed either for their cumulative nature or for failure to plead with particularity under Fed. R. Civ. P. 9(b).

A. Count I- Breach of Fiduciary Duty

1. White owed a fiduciary duty to YOHA.

White argues that he did not owe a fiduciary duty to YOHA, that he was acting not in his individual capacity but in his capacity as president of Montrose. White signed the Management Agreement between Montrose and YOHA in his capacity as president of Montrose. White claims that YOHA hired Montrose, not White, and any obligation to YOHA was owed only by Montrose. White argues because he was not a party to the Management Agreement he does not owe YOHA a fiduciary duty. White's argument is contrary to Ohio law. Fiduciary duties do not arise solely out of contracts. White held a management position in YOHA in which he managed the day-to-day operations of the hospital and was authorized to conduct transactions up to $15,000.00.

"The term 'fiduciary relationship' has been defined by the Ohio Supreme Court as a relationship in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Schory & Sons, Inc., v. Franci*, 75 Ohio St. 3d 433, 442 (1996), citing *In re*

Termination of Employment of Pratt, 40 Ohio St. 2d 107, 115 (1974). White functioned like an officer of YOHA and is one of only two non-board members named as a defendant in this litigation.[1] By controlling the day-to-day operations of YOHA and authorizing transactions up to $15,000.00 YOHA entrusted a special confidence in White's integrity and fidelity which placed White in a position of superiority and influence equal to that of a YOHA officer. Ohio law does not require a formal arrangement between parties for a fiduciary relationship to be created. *Schory*, 75 Ohio St. 3d at 442, citing *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St. 2d 282, 286 (1979). White owed a fiduciary duty directly to YOHA, therefore he can be sued directly, and YOHA does not have to pierce the corporate veil of Montrose in order to reach White individually.

2. Montrose is not required to be joined as an indispensable party to this action.

White's supplemental motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(7), asserts that Count I- Breach of Fiduciary Duty should be dismissed for failure to join Montrose as an indispensable party pursuant to Fed. R. Civ. P. 19. White asserts that Montrose is an indispensable party because the Management Agreement between Montrose and YOHA provides protection for White against the counts brought against him. White is not a party to the contract therefore he is unable to enforce those rights and argues that Montrose must be joined to assert those rights on his behalf. Montrose is not an indispensable party in this litigation, therefore White's argument is without merit.

Rule 12(b)(7) allows for the following:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or a third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (7) failure to join a party under Rule 19.

Fed.R.Civ.P. 12 (2002). Rule 19 of the Federal Rules of Civil Procedure requires a court to analyze whether a person is an indispensable party to an action. Under Rule 19(a) the court must determine whether the person is a necessary party who should be joined if feasible. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1345-46 (6th Cir. 1993). If a person is subject to service of process and his joinder will not destroy the court's jurisdiction over the case, the court

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[1] The other is Michael Suhadolnik, YOHA vice president of finance and chief financial officer.

should consider the following factors in determining whether a person should be joined:

> (1) if, in the person's absence, complete relief cannot be accorded among those already parties; or
>
> (2) whether the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> > (i) as a practical matter impair or impede the person's ability to protect that interest; or
> >
> > (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P.19(a) (2002). If either of these two provisions apply, the person should be joined if feasible.

White contends that both provisions are met in that the relief sought by YOHA "is controlled by a contract to which Richard White is not a party," Supplemental Motion to Dismiss, pg. 5, and that Montrose "has an interest relating to the subject of this action because the Management Agreement provides for, *inter alia*, indemnification of Montrose Management in case of litigation . . . ." *Id*.

a. Montrose has no interest in this litigation.

White's argument that Montrose has an interest in this action due to an indemnification clause in the Management Agreement is wholly without merit. White himself cites to the following paragraph in the Management Agreement which negates the proposition that Montrose has an interest in this action.

> [YOHA] shall protect, indemnify and save [Montrose] harmless from and against all and any liability and expense of any kind, including reasonable attorneys fees, arising from injuries or damage to persons or property in connection with the operation of the hospital's business, **unless such liability resulted from willful misconduct or gross negligence by [Montrose], its employees or agents in management of the hospital's business.**

White's Exhibit A, Management Agreement, pp. 14-15, ¶ 17 (emphasis added). All counts brought by YOHA are based on actions of "willful misconduct or gross negligence" by White, an employee and agent of Montrose. The cited language exempts Montrose from any indemnification for the claims in this adversary if it were to be joined as a party to this action. White's argument that Montrose should be joined as a party because it has an interest in indemnification for litigation of actions which are clearly listed as exempt from indemnification does not fulfill the requirement of Fed.R.Civ. P. 19(a)(2)(ii).

b. Montrose is not an indispensable party pursuant to Fed. R. Civ. P. 19(a)(1) because relief can be granted by the current parties to the action.

White's argument under Fed.R.Civ. P. 19(a)(1) that relief cannot be fully awarded without the joinder of Montrose is inaccurate. White argues that as an employee of Montrose he is entitled to the contractual protections bargained for in the Management Agreement between Montrose and YOHA. White asserts that Montrose must be joined as a party to assert these rights on his behalf because he cannot enforce them on his own because he is not a party to the contract. White claims a right to a defense based in contract law, but the counts brought against him are premised in tort. The Management Agreement provides no defense to White for a breach of the fiduciary duty he owed to YOHA. As discussed above, White directly owed a fiduciary duty to YOHA, therefore, he can be sued in his individual capacity and Montrose is not a party without which relief cannot be granted.

B. Count IV- Fraud

In order to properly plead fraud "the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). While Fed. R. Civ. P. 9(b) is to be liberally construed in conjunction with Fed. R. Civ. P. 8, the Sixth Circuit requires a plaintiff to allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants and the resulting injury to the plaintiff in order to satisfy the pleading standard. *Morrison v. Steiman*, No. 2:01-CV-1143, 2002 U.S. Dist. LEXIS 21507, at * 5 (S.D. Ohio Sept. 6, 2002), citing *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1992).

The Sixth Circuit has defined a scheme to defraud as "intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the designed end." *Bender v. Southland Corp.*, 749 F.2d 1205, 1215-16 (6th Cir. 1984). Later Sixth Circuit decisions have interpreted this to require a plaintiff to show that "the defendant made a material misrepresentation of fact that was calculated or intended to deceive persons of reasonable prudence and comprehension," and that

"the plaintiff in fact relied upon that material misrepresentation." *VanDenBroeck, et al., v. Commonpoint Mortgage Co.*, 210 F.3d 696, 702 (6th Cir. 2000) citing *Kentry v. Bank One, Columbus, N.A.*, 92 F.3d 384, 390 (6th Cir. 1996).

YOHA asserts that it met this burden, alleging that White was hired to manage the day-to-day and financial operations of YOHA because it was experiencing financial losses. As part of White's plan, a number of for-profit corporations (which YOHA refers to as "White Corporations" with no indication as to which corporations White owned an interest in or how much that interest was) were established to provide peripheral hospital functions that were projected to increase the volume and profitability of YOHA. YOHA claims that its cash reserves declined in excess of $2,000,000.00 during this time. YOHA asserts that White loaned YOHA funds to these corporations which were not repaid and entered into agreements with the corporations which were breached. YOHA provides no facts to show how White, not the corporations who received the loans, was at fault for the lack of repayment. Generally, in the absence of other facts it is not the fault of the loaner of money but the receiver of the loan when funds are not repaid. YOHA states that White received management fees from YOHA and several of the start-up corporations, thereby alleging self-interest. Self-interest cannot be the sole basis for an allegation of fraud. YOHA also claims White materially misrepresented his intent to help YOHA out of financial losses and induced YOHA to rely on these statements. Again, YOHA provides no evidence of particular statements nor how it was induced into reliance.

YOHA's allegations set out a cause of action for breach of fiduciary duty. The facts may support a claim that White was self-interested and had poor business judgment, but they do not set out facts that support a claim of fraud. They provide no specific facts relating to fraudulent misrepresentation, inducement and reliance, and intent to deceive. That is, what was specifically misrepresented, how and when it was misrepresented, and so on. The complaint does not draw the distinctions and acts separating bad business from the elements of fraud. Defendants and courts may be required to connect the dots in notice pleading. These allegations provide the pen and paper and require the court and defendant to visualize the dots, place them, and connect them. The rules require intuition but do not place the fundamental burden of creation of the core elements on defendants or the courts.

YOHA failed to plead facts in its complaint to establish a claim of fraud, therefore Count IV of YOHA's complaint is dismissed with leave to re-plead.

C. Counts V - VIII

In his supplemental motion to dismiss, White argues that Count V- Fraudulent Transfer, Count VI- Misappropriation, Conversion and Unjust Enrichment, Count VII- Concert of Action and Conspiracy, and Count VIII- Misrepresentation, should be dismissed on the basis that they are all cumulative of Count IV- Fraud, or on the alternative grounds that these claims are required to be pleaded with particularity pursuant to Fed. R. Civ. P. 9(b).

1. Count V - Fraudulent Transfer

Several Ohio cases have drawn the distinction between a cause of action for common law fraud and a statutory claim of fraudulent transfer under O.R.C. §1336.01. *See Wagner v. Galipo*, 50 Ohio St. 3d 194 (1990); *Carter-Jones Lumber Co. v. Denune,* 132 Ohio App. 3d 430 (Ohio App. 10th Dist. 1999). In order to state a claim for fraud at common law, a plaintiff must show (1) a materially false representation, (2) knowingly made, (3) with the intent to induce reliance, (4) reasonable reliance upon misrepresentation by the plaintiff, and (5) damages proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs*., 23 Ohio St. 3d 69, 73 (1986), citing *Cohen v. Lamko, Inc.*, 10 Ohio St. 3d 167, 169 (1984). In order to establish a fraudulent transfer under O.R.C. §1336.04(A)(1) a plaintiff only needs to show standing as a creditor and the occurrence of a transfer to hinder, delay or defraud the collection by the creditor. Additionally, fraudulent transfer can also be established under either O.R.C. §1336.04 or §1336.95 by the plaintiff proving that the debtor was insolvent or would be made so by the transfer at issue and that the transfer was made without fair consideration. Neither intent of the debtor nor knowledge of the transferee need to be proven. *Sease v. John Smith Grain Co., Inc*., 17 Ohio App. 3d 223, 225 (Ohio App. 2d Dist. 1984).

> Comparing the elements of common-law fraud with the statutory action of fraudulent transfer, it is immediately apparent that the causes bear very little relation to one another. In particular, the element of misrepresentation, which must be present *ab initio* in a common-law action for fraud, is not found in the statute. . . . [T]here is a substantial difference between an action for common-law fraud and a statutory action for fraudulent conveyance. As a result, many of the considerations which lead to the requirement of pleading with particularity under Civ.R. 9(b)[2] in cases of common law fraud are not present in an action for fraudulent conveyance.

Id. at 434. Count V alleging fraudulent transfer is not cumulative of Count IV for fraud, nor does Count V need to be pleaded with particularity; therefore, dismissal of Count V is denied.

2. Count VI - Misappropriation, Conversion and Unjust Enrichment

a. Misappropriation and Conversion

The Ohio Supreme Court has defined conversion as the wrongful exercise of dominion

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[2] Ohio Rule of Civil Procedure 9(b) is identical to Fed. R.Civ. P. 9(b).

over property in exclusion of the right of the owner or withholding it from the owner's possession under a claim inconsistent with the owner's rights. *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 226, *rev'd on other grounds*, (1977). The elements of conversion are: (1) plaintiff's ownership or right to possession of property at the time of conversion; (2) defendant's unauthorized disposition of plaintiff's property rights; and (3) damages. *NPF IV, Inc. v. Transitional Health Services*, 922 F. Supp 77, 81 (Ohio S.D. 1996) citing *Haul Transport of Va. Inc. v. Morgan*, No. 14859, 1995 Ohio App. LEXIS 2240 (Ohio App. 2nd Dist. June 2, 1995). These elements are completely different from those needed to state a cause of action for fraud, therefore this claim is not duplicative of the fraud claim. Also, a cause of action for conversion does not deal with circumstances of fraud or mistake and is therefore not required to be pleaded with particularity pursuant to the literal language of Fed.R.Civ.P. 9(b).

b. Unjust Enrichment

The Ohio Supreme Court determined the following to be the elements of a cause of action for unjust enrichment (or quasi-contract): (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984). These elements are distinctly different than those of a fraud action; therefore, a cause of action for unjust enrichment is not duplicative of fraud. Additionally, a claim of unjust enrichment does not deal with circumstances of fraud or mistake and is therefore not required to be pleaded with particularity pursuant to Fed.R.Civ.P. 9(b).

3. Count VII- Concert of Action & Conspiracy

The Ohio Supreme Court defined "conspiracy" in *Unger v. Ohio State Dental Board*, 142 Ohio St. 67 (1943) as "a combination of two or more persons by some concert of action to do an unlawful act or a lawful act by criminal or unlawful means." *Id*. at 79. Conspiracy serves a separate purpose than that of an action for common law fraud and is therefore not duplicative of fraud. Additionally, a cause of action for concert of action and conspiracy does not deal with circumstances of fraud or mistake and is therefore not required to be pleaded with particularity pursuant to Fed.R.Civ.P. 9(b).

4. Count VIII- Misrepresentation

Misrepresentation is defined as follows:

> One, who in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of

> others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating information.

Gutter v. Dow Jones, Inc., 22 Ohio St. 3d 286, 288 (1986) citing 3 Restatement of the Law 2d, Torts, (1977), 126, 127, § 522. While misrepresentation is an element of fraud it is not the same cause of action. One can establish misrepresentation without establishing the remaining elements of common law fraud. The claims are not duplicative, nor does misrepresentation need to be pleaded with particularity pursuant to Fed.R.Civ.P. 9(b).

D. Count IX- RICO

Count XI of YOHA's complaint alleges that White committed acts which violated The Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq*. The RICO statute targets criminal conduct but also contains a cause of action for civil liability pursuant to U.S.C. § 1964(c). In order to state a RICO claim, plaintiff must allege an injury to its "business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962 imposes liability on those engaged "in a pattern of racketeering activity." *See* 18 USC § 1962(a)-(d). In its complaint, YOHA did not specifically allege which section of § 1962 it was bringing its claim under, but in its motion in opposition YOHA asserted a violation of § 1962(b), which provides:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 USC § 1962 (2002). Under this section, YOHA must show that it was harmed by reason of White's acquisition or control of an enterprise through a pattern of racketeering activity. *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 321-29, (6th Cir. 1999). YOHA must allege a specific nexus between control of any enterprise and the alleged racketeering activity. *Id*. Section 1961(4) has defined "enterprise" to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(4). The U.S. Supreme Court interpreted this to be "a group of persons associated together for the common purpose of engaging in a course of conduct." *U.S. v. Turkette*, 452 U.S. 576, 583 (1981). White asserts YOHA failed to plead all essential elements of a claim under § 1962(b).

1. YOHA has failed to allege two or more predicate offenses in order to establish racketeering activity.

In order to establish "pattern of racketeering activity" plaintiff must allege at least two predicate acts that occurred within a ten year time period. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38 (1989). Racketeering activity is defined as "any act which is indictable" under several enumerated statutes in § 1961. *See* 18 U.S.C. §1961(1)(B). Section 1961 (1) provides an extensive list of racketeering activities which constitute predicate acts. A plaintiff must show that there is a pattern, i.e., that the predicate acts are related and that they amount to or pose a threat to continued criminal activity. *H.J. Inc.*, 492 U.S. at 239.

In order to establish this element of a RICO claim under § 1962(b) YOHA generally states in its complaint at ¶104 that, "In the course of perpetrating the conduct described in this complaint, Defendants engaged in racketeering activity. . . ." At ¶105 of the complaint, it further states "[T]he racketeering activity of defendants involved a pattern of separate but related schemes and affected numerous persons and entities including YOH[A]." In its motion in opposition to White's motion to dismiss YOHA more specifically alleges common law fraud and fraudulent transfer as predicate acts. Common law fraud and fraudulent transfer are not particular offenses listed in § 1961 as predicate acts. YOHA asserts these claims fall under § 1961 (1)(D) "any offense involving fraud connected with a case under title 11 . . . ." This section is not applicable to the facts of this case. Case law indicates this section means bankruptcy fraud not any type of fraud alleged in the course of a bankruptcy case.[3] YOHA filed its chapter 11 petition on March 11, 1999. The alleged fraudulent acts were committed prior to the filing of the bankruptcy petition and are in no way related to fraudulent activity within the bankruptcy proceeding.

While common law fraud is not listed in § 1961(1), and none of the particular circumstances of fraud were pleaded by YOHA, nonetheless, in order to properly plead fraud "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The court already determined that the fraud count was not pleaded with particularity and dismissed that count. YOHA generally states that the counts pleaded against White are the predicate acts which form the basis of its RICO claim. YOHA has cited no particular acts by White which it perceives as fraudulent or how any of the counts relate to racketeering activity defined under § 1961(1). Nor has it brought forth any particular statements by White which it contends were misrepresentations upon which it relied. YOHA has not properly pleaded two or more predicate acts and is therefore deficient in establishing the elements of a "pattern of racketeering activity."

2. Enterprise Requirement

A violation of § 1962(b) requires that the RICO defendant acquire or maintain an interest

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[3] The case annotations to 18 U.S.C. §1961(1)(D) include only cases of actual bankruptcy fraud. There are no cases listed alleging fraudulent activities unrelated to the actual bankruptcy proceeding as YOHA does here.

in, or control of, an enterprise through the pattern of racketeering activity. *Advocacy Org. For Patients and Providers v. Auto Club Ins. Ass'n* 176 F.3d 315, 328 (6th Cir. 1999), citing *Compagnie de Reassurance D'Ille de France v. New England Reinsurance Corp.,* 57 F.3d 56, 91-92 (1st Cir.), *cert denied*, 516 U.S. 1109 (1995); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1189-90 (3d Cir. 1993); *Danielsen v. Burnside-Ott Aviation Training Ctr*., 941 F.2d 1220, 1230-31 (D.C. Cir. 1991). "Enterprise" is defined as any individual or entity capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(4). In order to successfully plead the enterprise requirement, YOHA must offer facts to support the existence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit. *Turkette*, 452 U.S. at 583. "[T]he 'enterprise' is not the 'pattern of racketeering activity;' it is an entity separate and apart from the pattern of activity in which it engages." *Id.* at 584.

YOHA argues that it (the hospital entity) was the enterprise that White "acquired or maintained" control of "through racketeering activity." White was hired by YOHA to manage the day-to-day operations of the financially struggling company. White held a position of control in which he made managerial and financial decisions that affected the operation of YOHA. White, the physician members of the board and Michael Suhadolnik, YOHA vice president of finance and chief financial officer, (all named as defendants under the RICO count), were a formal organization that functioned as a continuing unit to run YOHA. White held a position of control that would have enabled him to carry out the alleged activities. Assuming *arguendo* that YOHA had met the "pattern of racketeering" element, White had the necessary control of YOHA to establish a specific nexus between control of the enterprise and the alleged racketeering activity, as required under § 1962(b). Therefore, YOHA has sufficiently pleaded the "enterprise" element of § 1962(b).

3. Injury to Business

Section 1964(c) only permits a plaintiff to seek a civil recovery under RICO for injury to business or property by reason of a RICO violation. [I]n order to allege injury 'by reason of' § 1962(b) a RICO plaintiff must demonstrate that the defendant's acquisition or control of an interstate enterprise injured plaintiff. *Auto Club Ins. Ass'n*, 176 F.3d at 330. The injury from the racketeering acts themselves is not sufficient; rather, a plaintiff must plead facts tending to show that the acquisition or control of an interest injured plaintiff. *Id.*

YOHA alleges that White's control of YOHA allowed him to loan YOHA money to businesses in which he held a proprietary interest. This is White's alleged violation of the RICO statute. The separate harm that resulted from this alleged violation of RICO is YOHA's filing of bankruptcy. Again, assuming *arguendo* that YOHA had met its burden on the "pattern of racketeering" element, YOHA has pleaded a separate harm, bankruptcy, that is sufficient to meet the burden of the injury to business element.

III. Conclusion

Counts IV and IX of plaintiff's complaint are dismissed for failure to allege facts sufficient to state a claim.

An appropriate order shall enter forthwith.

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RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

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