UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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Roy Den Hollander

Plaintiff, Docket No. 03 CV 2717 (PKC)

-against-

Flash Dancers Topless Club, et al.,

Defendants.
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Memorandum of Law In Opposition to Defendant Bank of Cyprus' Motion to Dismiss

Roy Den Hollander
Attorney at Law
545 East 14 Street
New York, New York 10009

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I. Preliminary Statement

A. Litigation of Personal Destruction

Throughout its memorandum, the Bank of Cyprus arrogantly and insultingly interjects ad hominem remarks that have no bearing on the issues of a motion to dismiss by foisting advice and criticism it has no right to make. For example, "He [the plaintiff] must look else where for the cause of his misfortune, including to himself." (Defendant Bank Memo. p 2-1); "The match seems not to have been made in heaven…." (id. p 1-2); the calculated use of the word "believe" in place of "allege" (id. p 1-2); and "Plaintiff's beliefs are unbelievable," (id. p 2-1). Such subjective and snide remarks are meant to taint the plaintiff. It's a subtle form of litigation by personal destruction, but just as malicious in its attempt to mock a party and distract the Court. The plaintiff, therefore, requests the Court admonish the Bank of Cyprus and other Enterprise movants who engage in the same, shared strategy.

B. Nomenclature

This memorandum of law (Plaintiff Opposition Bank) answers the Bank of Cyprus' memorandum in support of its separate motion to dismiss (Defendant Bank Memo.). Other defendants, who have appeared in this case, except for Anastasia and Nicolay Vasilyeva, have joined in a joint memorandum in support of dismissal (Defendants Joint Memo.) and a joint reply memorandum (Defendants Joint Reply). Those defendants are Flash Dancers Topless Club; Jay-Jay Cabaret, Inc.; Lepofsky-CEO Jay-Jay Cabaret, Inc.; Barry-Night Manager Flash Dancers; Flash Dancers Managers 1 to 5 (collectively "FlashDancers"); Cybertech Internet Solutions; Kuba, Mundy & Associates; Mundy; Petrovich; Shipilina; Paulsen; and Henning. The defendants FlashDancers, Cybertech, Shipilina, Paulsen and Henning have also submitted short papers concerning issues specific to them in their motions to dismiss and replies; Cybertech did not submit a separate reply. The plaintiff submitted an opposition memorandum (Plaintiff Opposition Memo.)

to defendants' joint memorandum and the short papers submitted by FlashDancers, Cybertech, Shipilina, Paulsen and Henning. The plaintiff has also served a motion to strike extraneous material from defendants' motions to dismiss papers (Plaintiff Strike Motion) and defendants have submitted an opposition memorandum.

In this memorandum, the term "Enterprise movants" or "movants" refers to all the defendants that are moving for a motion to dismiss. When this memorandum refers to fewer than all the Enterprise movants, the term "Enterprise movant" is followed by the person or persons' names, such as Enterprise movant Bank of Cyprus, or the memorandum only states the movants name, such as Bank of Cyprus or Bank. Other defendants in this action who are not presently moving to dismiss are collectively referred to as "other mafia defendants" or individually as "mafia defendant" followed by the person or persons' names.

Cites to the Bank of Cyprus' memorandum of law are in parentheses stating "Defendant Bank Memo." followed by the page number and a hyphen that indicates the paragraph on that page whether a full paragraph or not. For example, (Defendant Bank Memo. p 4-1) refers to page 4, the first group of lines on that page. Cites to the Complaint are in parentheses stating "Complaint" followed by the paragraph number. For example, (Complaint ¶ 633) refers to the numbered allegation 633, which deals with the Bank of Cyprus laundering money.

The numbers and letters used for denoting sections in this memorandum follow those used in the Bank of Cyprus memorandum to make it easier for comparison.

The plaintiff uses the term "Russian mafia" to mean the Russian International Crime Organization or the "Enterprise" as stated in paragraph one of the Complaint. The "Russian mafia" includes those identified as Russian Mafiosi in the media and by law enforcement agencies; the targets of the Federal Bureau of Investigation's unit on Russian organized crime; various Russian, Chechen, American, Cypriot and Mexican gangsters along with those of other nationalities; assorted

Chechen Islamic terrorists; and the more than thirty Russian gangs now operating in the US, most notably New York, Miami, San Francisco, Los Angles and Denver, Robert I. Friedman, Red Mafiya: How the Russian Mob Has Invaded America, p. xix-xx, Little Brown & Company (2002). The defendants in this action comprise part of the Russian mafia. (Complaint 15)

C. "We don't drink your Kool-Aid here."

The Bank of Cyprus has joined with other Enterprise movants in a strategy that is as clear as it is improper for a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Under the disguise of motions to dismiss, they present in their memoranda of law and exhibits allegations of fact that belong in answers, or allege findings of facts that belong in summary judgment motions. In doing so, the Bank and other Enterprise movants hope to obtain a Rule 12(b)(6) dismissal by having the Court consider extraneous material as part of the Complaint even though the plaintiff did not rely on such. Such a ploy circumvents the plaintiff's opportunity to refute the movants' assertions and claims that motions for a judgment on the pleadings or summary judgment provide. Very tricky, this Star Chamber type of procedure that eviscerates the plaintiff's due process rights to reply to counterclaims, or move to reply to answers and amend the complaint, or to a reasonable opportunity to make his record before the Court.

The Bank of Cyprus and other movants use a two-pronged assault to achieve their aim of circumventing the plaintiff's rights. On one flank, they try to impeach the credibility of the plaintiff with character assassination. Throw enough mud and maybe some will stick, which, as in the Spanish Inquisition, includes claims the plaintiff is guilty of alleged misdeeds because he has not proven his innocence through his Complaint or memorandum of law. That's a bizarre function for the papers in a motion to dismiss, not to mention a judicial proceeding in a non-feudal country.

On the other flank, movants try to impeach the Complaints' allegations and the plaintiff's memorandum of law by using numerous misrepresentations, mischaracterizations, prevarications,

half-truths, edited quotes, dissembling and transposing quotes concerning one issue to a different issue.[1]

For instance, the Enterprise movants claim—over and over—that with the following statement: "… Kuba, Mundy and Petrovich claim their only connection with the defendants in this case is with Enterprise movant Shipilina. I don't know that and neither does this Court because there has been no discovery," (Plaintiff Opposition Memo. p 29-2) I withdrew the Complaint's allegations against those defendants as being members of the Enterprise. I did not. The movants say these sentences are admissions that no connection exists between Kuba, Mundy, Petrovich and the Enterprise—they are not. Enterprise movants will twist my words, as they do frequently, and exploit any unskillfully composed turn of a phrase. They make overly much of an inartfully drafted paragraph in their apparent adherence to the adage that by making a misrepresentation often enough, it may be believed. But by those quoted sentences; I was not withdrawing my allegations against Kuba, Mundy and Petrovich as members of the Enterprise (Complaint 27-34), which is evident by a later paragraph (Plaintiff Opposition Memo. p 102-2) the movants ignore, "The evidence of the full extent of the connections is within the Enterprise movants knowledge and will come out in discovery." My Complaint's RICO allegations stand. It's not the defendants' version of the facts that are assumed true in a motion to dismiss but those alleged in the Complaint.

The Bank of Cyprus and other movants are simply trying to detour the Court away from Rule 12(b)(6)'s question of law into a landscape of conflicting fact allegations where only alleged members of the Russian mafia are to be believed even though their statements lack evidentiary foundation or are untested by cross examination. For example, the Bank flatly claims an ultimate

[1] The willingness of Enterprise movants' counsel to hide the truth was demonstrated just before the July 13, 2004 conference before your Honor. Vikrant Pawar, attorney for movant Henning, approached Roy Den Hollander, attorney and pro se plaintiff, in the hallway outside the courtroom and said with a grin, "I hope you survive this motion to dismiss." The plaintiff responded, "That's an inappropriate remark." Pawar smilingly retorted, "I'll just deny it."

fact: “Plaintiff’s beliefs are unbelievable.” (Defendant Bank Memo. p 2-1) With such pronouncements of so-called facts, the Enterprise movants hope to slip by under the cloak of a motion to dismiss to their goal of obtaining a ruling that would really be either (1) a judgment on the pleadings without the plaintiff having the opportunity to respond to movants’ answers simply because there are no formal answers, although there are before the Court the allegations that the movants would have included in their answers only those are now found in movants’ memoranda of law. Or (2) a summary judgment in which the Court views movants’ memoranda’s assertions as findings of fact that the plaintiff had no opportunity to rebut because the movants brought motions to dismiss. The Bank and other movants appear to have adopted the old Russian folk saying, “the law is like a wagon axle, it goes in any direction you want to pull it.” That might have been true under the Communists and Tsars but not under the Federal Rules of Civil Procedure. “Whether a complaint states a cause of action on which relief could be granted is a question of law….” Bell v. Hood, 327 U.S. 678, 682, 90 L.Ed. 939, 66 S.Ct. 773, 776 (1946).

The plaintiff requests the Court not accept or consider any extraneous material in deciding the motions to dismiss. Extraneous material is information that the plaintiff did not rely on in bringing suit. As the Second Circuit stated, “[W]e reiterate here that a plaintiff’s reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court’s consideration of the document on a dismissal motion; mere notice or possession is not enough.” Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). If the Court, however, decides to go the route of conversion, then the plaintiff requests notice and a reasonable opportunity to show that genuine issues of material facts do exist. Davis v. Bryan, 810 F.2d 42, 45 (2d Cir. 1987)(citations omitted). In such event, the plaintiff preserves his right to appeal any possible conversion decision at the appropriate time.

D. RICO—Not Domestic Relations

The allegations against the Bank of Cyprus are for violating RICO through its conduct of engaging in financial transactions involving money from illegal Enterprise activities in order to hide the origin and ownership of the funds and avoid U.S. reporting requirements in violation of 18 U.S.C. 1956(a)(1)(B)(i) & (ii); transferring funds from illegal Enterprise activities in order to hide the origin and ownership of the money and avoid U.S. reporting requirements in violation of 18 U.S.C. 1956(a)(2)(B)(i) & (ii); and using international facilities to distribute the proceeds from unlawful Enterprise activities in aid of a racketeering enterprise under 18 U.S.C. 1952. (Compliant ¶¶ 633-37)

The Complaint does not allege the Bank culpable for errant matchmaking as the Bank's memorandum infers with "Defendants did not marry Ms. Shipilina. Plaintiff did. Defendants did not divorce her. Plaintiff did." (Defendant Bank Memo. p 2-1) True, it would have been better them than me, but that's not what the Bank is accused of doing. The Complaint alleges the Bank furthers the Russian mafia's Scheme of infiltrating and expanding the mob's activities in America by laundering the illegal funds made by mafia prostitutes, pimps, pornographers and pushers. (*See* Complaint ¶¶ 2, 13, 15) The Bank's marriage to the underworld of the former Soviet Union clearly produces heavenly benefits in the form of lucrative profits. A divorce between these powerful entities seems unlikely unless the purpose of RICO is fulfilled in eradicating organized crime, which is a "highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct … ," Beck v. Prupis, 529 U.S. 494, 496, 146 L.Ed.2d 561, 120 S.Ct. 1608, 1611(2000)(citing Organized Crime and Control Act of 1970, Pub.L. 91-452, 84 Stat. 922). Such a parting of the ways would be fortunate, not just for the plaintiff, but others victimized by the Russian mob. (Complaint ¶ 874(b, d, j, k))

The Bank of Cyprus complains that a RICO suit with over sixty defendants residing on three continents in this age of a global economy and the crime that preys on it requires dismissal because it is not plausible. (Defendant Bank Memo. p 2-2) If anything, the suit responds to the business acumen of modern day organized crime and how far and deep it reaches. The Enterprise in this case consists of domestic and foreign corporations, partnerships, individuals, government officials, law firms, organized crime gangs (including American, Russian and Chechen) and an Islamic terrorist and crime clan, (Complaint ¶ 11), working together as one big extended family to maximize and protect profits. The defendants in this RICO action comprise relatively few in the overall web of the Russian mafia.

In seeking a dismissal, the Bank even belittles the harm allegedly done to the plaintiff by the Russian mob, calling it a "personal misfortune common to half of the population…." (Defendant Bank Memo. p 2-1) I would not put the number anywhere that high, but the statement does indicate the Bank possesses information concerning other victims of the Russian mafia. Regardless of the Bank's effort at denigration, the Complaint alleges harm to the plaintiff's business and financial interests, (Complaint ¶¶ 900-907), which does "pertain to a particular individual," the definition for "personal" in the American Heritage Dictionary, Second College Edition, p 925, definition 1. The Bank, however, might be using "personal" in the sense of "personal injury," Black's Law Dictionary, 8th Ed., p 1179. The complaint does not request recovery for personal injuries. Still, the Bank seems compelled to provide legal advice to the plaintiff on just that issue when it states, "he must seek a personal recovery." The Bank then goes on to provide legal advise to the Court by stating it "should facilitate this recovery by dismissing the within Complaint with prejudice." I am unaware of such a legal standard that calls for the dismissal of a RICO suit because it will in some mysterious fashion aid in the recovery for personal injury, especially when the Complaint clearly states the harm to the plaintiff from the Russian mafia's Scheme was to his business and financial

interests. Perhaps the Bank's real intent was to personally belittle the plaintiff for seeking from the Court redress of the harm caused by the Enterprise.

The Bank's tactics copycat other Enterprise movants in their continuing and pervasive ploy to create a heighten standard for the plaintiff's allegations when the Bank states the plaintiff "has not and can not (sic) **show** that the Bank caused his loss," (Defendant Bank Memo. p 2-1, emphasis added). "Show" means to make clear by evidence or to prove, Black's Law Dictionary, 8th Ed. p 1413, but the purpose of a motion to dismiss is not to assay the weight of the evidence that might be offered, Geisler v. Petrocelli**,** 616 F.2d 636, 639-40 (2d Cir. 1980).

By allowing the case to proceed, the Court can prevent more than a measure of injustice to the plaintiff.

II. Statement of Facts

The Bank of Cyprus has picked up on the objection, often repeated by other Enterprise movants, that the plaintiff has filed papers that are too long.[2] (Defendant Bank Memo. p 2-2) The Complaint is only so long as necessary to provide fair notice of the claims against the movants. The more complex the litigation becomes, the greater the amount of information that will appear in the pleadings. Wright & Miller, Fed. Prac. & Proc.: Civ 2d 1281, p 521.

Complaining about length is just one of the movants many ploys. The Bank's characterization of the Complaint as alleging the defendants "combined to cause the marriage of Plaintiff to Alina Shipilina and their subsequent divorce" (Defendant Bank Memo. p 2-2) is reminiscent of and just as misleading as the other movants asserting the Complaint alleges they all banded together in order to specifically target the plaintiff for exploitation (Defendants Joint Memo. p 48-3). "Where a racketeering enterprise intends no specific harms to any particular individual, but

[2] The Complaint was filed April 18, 2003, not April 13, and it was served on the Bank of Cyprus on February 25, 2004, not one year later as stated by the Bank. The foreseen delay was explained to Chief Judge Mukasey at the initial conference on July 23, 2003. Transcript p 5 ln 7-14.

causes harm by the creation of substantial risk of harm, the victim injured by that enterprise's harm may have standing…." Baisch v. Gallina, 346 F.3d 366, 376 (2d Cir. 2003). Each defendant has its place in furthering the Russian mafia's Scheme to infiltrate its assets into hard currency markets, keep them there and make lots of money doing so. (Complaint ¶¶ 2, 13, 14) Some use narcotics and prostitutes to create fraudulent marriages; some engage in immigration fraud, white slavery, importing pornography, bribery; some traffic in drugs; some use coercion, intimidation, murder-for-hire, perjury and official misconduct to protect the Enterprise; and others maximize profits with tax evasion and, as alleged, launder money with the Bank of Cyprus while some engage in various combinations of those criminal acts. (Complaint ¶¶ 19, 21-38, 40-42, 46-52, 54-57, 59-62, 64-69, 71, 73-78, 80-89, 91-104, 106-110, 112-115,117-120, 122-127) But all the defendants further the Enterprise's Scheme.

The Bank dismisses such criminal conduct as merely "colorful." (Defendant Bank Memo. p 2-2) Perhaps the Bank does not consider the Russian mafia or organized criminals in general as a threat to civilized societies, but Congress does. The impact of organized crime is to "weaken the stability of the Nation's economic system…threaten the domestic security, and undermine the general welfare of the Nation and its citizen." Beck, 529 U.S. at 496 (quoting the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 922, 923).

Another Bank ploy is the use of misrepresentations, such as claiming the service of the Complaint was defective. (Defendant Bank Memo. p 2 n 1) The Bank was served in accordance with the Hague Convention on Service of Judicial and Extra Judicial Documents and as directed by the Cypriot Consul General. Exhibit A The Bank gives no specifics for its claim of defective service. All it offers the Court is a haughty statement that "the Bank seeks decision on the merits to vindicate its professional and commercial reputation … not a dismissal on mere procedural grounds." (Defendant Bank Memo. p 2, n 1, p 3-3) Since "merits" means "the substantive

consideration to be taken into account in deciding a case, as opposed to … procedure," Black's Law Dictionary, 8th Ed. p 1010, and a Rule 12(b)(6) motion is procedural: "Federal Rules of Civil Procedure … cover the procedural aspects of civil litigation in the United States district courts…," Fed. R. Civ. P. 18 U.S.C. 1 to 11, Explanation, p v., then the Bank must agree with the plaintiff that its motion to dismiss should be denied; otherwise, there will be no decision on the merits and no vindication for the Bank.

Keeping cadence with other Enterprise movants, the Bank objects the Complaint is "nonspecific." (Defendant Bank Memo. p 2-3, p 3-2) The Complaint alleges the Bank is intricately involved with Russian mafia activities by knowingly transferring some of the mob's revenues from illegal activities in order to facilitate tax evasion, conducting financial transactions with mob money in order to disguise the source and ownership of the funds and aid in avoidance of U.S. reporting requirements, using Bank transactions to promote illegal activities and employing the international telephone and wiring system to distribute Russian mafia revenues into other overseas accounts. (Complaint 101-103, 456-458, 633-637, 682, 683 and 827-830). Sounds pretty specific, and a lot more harmful than the "unfortunate affair" such activities make up, which is how the Bank of Cyprus patronizingly considers them. (Defendant Bank Memo. p 2-3)

Furthermore, allegations should be set forth in the pleadings in general terms. Wright & Miller, Fed. Prac. & Proc.: 2d Civ 1281 p 519. Allegations are restricted to the task of general notice giving while the deposition-discovery process serves the "vital role in the preparation for trial…. for ascertaining information as to the existence or whereabouts of facts, relative to [the] issues." Hickman v. Taylor, 329 U.S. 495, 501, 91 L.Ed. 451, 67 S.Ct. 385, 388 (1947). A claimant is not required to set out in detail the facts on which he bases his claims." Conley v. Gibson, 355 U.S. 41, 47, 2 L.Ed.2d 80, 78 S.Ct. 99, 103 (1957). In Conley, the Supreme Court rejected the defendants' argument that dismissal was proper because "the complaint failed to set

forth specific facts to support its general allegations…." Conley at 47. Besides, lack of specific detail should be handled by a motion for a more definite statement. Swierkiewiz v. Sorema N.A., 534 U.S. 514, 152 L.Ed.2d 1, 122 S.Ct. 992, 998 (2002); Porter v. Karavas, 157 F.2d 984, 986 (10th Cir. 1946).

Still, the Bank insists on detail and allegedly provides some of its own. It's affidavits claim it does not engage in any "financial transactions" at its 80 Broad Street office. (Defendant Bank Memo. p 3 n 2) But makes no mention that at least one public hotel in the Wall Street area advertises its proximity to the Bank's Broad Street office as a plus for its hotels guests, Exhibit B, which raises the question of just what type of business is none there. Moreover, the Bank is again invoking the Enterprise movants' strategy to use a Rule 12(b)(6) motion to effectively obtain a judgment on the pleadings or a summary judgment by submitting extraneous material, which is also disingenuous. The Sofianou affidavit at ¶ 3 creates the false impression the Bank is a minor international player even though it provides global Internet and telephone banking services that include financial transactions, such as money transfers, and, through a wholly owned subsidiary, CISCO, operates a brokerage and manages investment funds. Exhibit C Such an electronic global reach must make it difficult for the Bank to "know its clients" as Sofianou declares at ¶ 3. The affidavits of Kypri and Hadjimitis at ¶ 3 claim a search of "all relevant Bank [of Cyprus, Ltd.] records." The Bank of Cyprus, Ltd is just part of the Bank of Cyprus Group, which also includes Bank of Cyprus Mutual Funds Ltd, CISCO and other legal entities. Exhibit D Did the search also include those since movant Shipilina has a Global Equity Fund account. (Complaint ¶ 450) The Bank's affidavits also omit it is the leading financial institution in the banking and tax haven of Cyprus, has procedures for keeping secret the real owners of an enterprise, maintains a branch in the offshore center of the Channel Islands, runs an office of "intense activity" in Moscow, and has over 2300 correspondent relationships mostly with international banking institutions. Exhibit E

Cyprus' "banking and corporate secrecy, little or no taxes, and simplified incorporation procedures have made it easy for … terrorist groups, and organized crime groups to … launder funds." U.S. International Crime Threat Assessment. But all this is extraneous material for a Rule 12(b)(6) motion and more appropriately addressed in discovery, Hickman, 329 U.S. 495, 501.

In addition to mixing up pleading with discovery, the Bank confuses an allegation against movant Shipilina as one against the Bank. (Complaint ¶ 450) The Bank's chivalrous act of spending time, money and effort to aid movant Shipilina with two affidavits must be greatly appreciated by her, but raises the question as to why the Bank would try to help a person it considers is just one of many "disparate" defendants. (Defendant Bank Memo. p 1-2) Actually, it looks more like a family member helping out one to whom it is joined at the pocketbook. The Bank's affidavits that refute the allegations against movant Shipilina in the Complaint at ¶¶ 450, 451, 452, 540 and 767 raise more questions than they answer, which can only be resolved in discovery.

After magnanimously assisting a fellow "disparate" movant, the Bank states, "Nor has the Bank ever done business in New York with the plaintiff or any defendant." (Defendant Bank Memo. p 3-2) The plaintiff never alleged he did any business with the Bank. But the real purpose behind the Bank's statement is to improperly interject this so-called fact into a motion to dismiss. A motion to dismiss raises only an issue of law, Wright & Miller, Fed. Prac. & Proc.: 2d Civ 1357 p 303, not of facts. Other Enterprise movants do the same thing as though they were in the principal's office or state court trying to argue the factual righteousness of their cause whenever they open their mouths rather than following the proper procedure. There's a time and place for everything. Trying to three card monte so-called facts before the Court on a motion to dismiss is procedurally incorrect. The facts will be determined through discovery. Hickman at 501.

I am not sure what Counsel for the Bank means by saying the Complaint is "structurally flawed, fatally so." Sounds more relevant to a building construction action.

III. Argument

A. The Complaint States a RICO Cause of Action Against the Bank of Cyprus

The Bank of Cyprus asserts knowledge that only the Russian mafia and movant Shipilina could possess: "The dispute, if there is one, is between Plaintiff and his ex-wife. Organized Crime did not cause Plaintiff's misfortune." How is it that the Bank knows the Russian mafia did not cause the plaintiff's alleged harm? Is the Bank omnipresent or perhaps, more tellingly, on intimate terms with the Russian mafia.

The Bank further objects to allegations in the Complaint as "stigmatizing," "unsupported" and "conclusory." (Defendant Bank Memo. p 3-3) The Bank, just as other Enterprise movants so often do, fails to state the specific allegations to which it refers. Perhaps the movants want the Court to do their work for them. Anyway, "[a]s for stigma, a civil RICO proceeding leaves no greater stain than do a number of other proceedings." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 492, 87 L.Ed.2d 346, 105 S.Ct. 3275, 3283 (1985). And as for "unsupported," the operative definition for the word "support" is "to furnish corroborating evidence," American Heritage Dictionary, Second College Edition, p 1222. "It is a familiar rule of pleading … that evidence by which an allegation is sought to be established need not be pleaded.… Such matters [of evidence], however, are for proof and we doubt the propriety, much less the necessity of their allegation." Cater Constr. Co. v. Nischwitz, 111 F.2d 971, 973 (7th Cir. 1940).

Under the "conclusory" opprobrium, the Bank falls into step with the other movants by objecting that the Complaint's allegations provide "[n]o factual detail," are "factually groundless" and therefore "conclusory." (Defendant Bank Memo. p 3-1, 2, 3; p 7-3) But "[w]hether these charges [in the complaint] be called 'allegations of fact' or 'mere conclusions of the pleader,' we

hold that they must be taken into account in deciding whether the [plaintiff] is entitled to have its case tried." U.S. v. Employing Plasterer's Ass'n, 347 U.S. 186, 188, 98 L.Ed. 618, 74 S.Ct. 452, 454 (1954). For "the ancient distinction between "facts" and "conclusions" is no longer significant." Oil, Chem. & Atomic Workers Int'l Union v. Delta Ref. Co., 277 F.2d 694, 697 (6th Cir. 1960)(citing U.S. v. Employing Plasterer's Ass'n, 347 U.S. 186, 188). The plaintiff need only give the defendants notice of the claims. *See* Leatherman v. Tarrrant County Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168, 122 L.Ed.2d 517, 113 S.Ct. 1160, 1163 (1993). "A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts. The federal rules require (with irrelevant exceptions) only that the complaint state a claim not that it plead the facts if true would establish … that the claim was valid." Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002)(Posner, J.)(citation omitted). And "what may be insufficient in New York courts need not necessarily be insufficient" in Federal court. Mueller v. Rayon Consultants, 170 F.Supp 555, 558 (S.D.N.Y. 1959). The pleader need only "disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." Wright & Miller, Fed. Prac. & Proc.: Civ 2d 1216, p 165 (citing October 1955 Report of the Judicial Conference of the United States).

The U.S. Supreme Court disagrees with the Bank and other movants efforts to do away with the modern Federal standard of notice pleading:

> "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of

> both claim and defense and to define more narrowly the disputed facts and issues. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 47-48, 2 L.Ed.2d 80, 78 S.Ct. 99, 102-03 (1957).

The archaic pleading practice relied on by the Bank and other movants once existed under the codes and common law in which pleadings served four functions (1) provided notice of the claim; (2) stated the facts that each party believed existed; (3) narrowed the issues; and (4) supplied a means for speedy disposition of sham claims. Wright & Miller, Fed. Prac. & Proc.: Civ 2d 1202, p 68. As a result, many cases were disposed of on a pleading defect unrelated to the merits. Id. at p 69. In olden days, the complaint was required to state only facts, not conclusions, a distinction of degree only that placed the pleader at a disadvantage:

> "A pleader who complied with the spirit and command of the code pleading system was obliged to walk defenseless while a hidden enemy sniped at him; he committed himself unreservedly to a course of action and a factual statement from which he could not deviate because of [the] rules …." Id. at p 71 (citation omitted).

The Bank of Cyprus and other movants are effectively saying to the Court, "Let's do the time warp again." and dismiss the Complaint for not stating facts as required under the old codes, number (2) above, even though by today's standards, the pleadings function to give notice of the plaintiff's position. Conley at pp 47-48. A notice the Bank and other movants' will be hard press to deny after including many answer type allegations in their memoranda. They clearly are aware of the claims against them. They may not be pleased, but that's no excuse to resort to yesteryear to short circuit modern federal procedure.

The Bank and other movants, however, may be using "conclusory" to mean legal conclusion, another prohibitive act under the old codes. The absurdity of objecting to a complaint for making legal conclusions was stated by Professor James, "If one sought to describe a situation having legal significance entirely in words which were devoid of all legal evaluation, the result would be a series of prolix circumlocutions which would serve neither elegance of style nor ease of understanding." The Objective and Function of the Complaint: Common Law—Codes—Federal Rules, 1961, 14 Vand.L.Rev. 899, 912-918.

The Bank of Cyprus' legal argument also sarcastically labels the Complaint as "tome-like in length." At 91 pages, it may be a large book for the Bank, but that is not a reason to dismiss the case. Federal Rule 8(a)(2) requires a short and plain statement for each claim, not a short complaint. Multiparty litigation with multi-claims will inevitably result in long and complicated complaints. Wright & Miller, Fed. Prac. & Proc.: Civ 2d 1217, p 169.

1. Standard for a Motion to Dismiss

The Bank affirmatively states only part of the standard for deciding a motion to dismiss (Defendant Bank Memo. p 4-2) while conveniently leaving off the part that courts take a complaint's allegations as true, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515, 30 L.Ed.2d 642, 92 S.Ct. 609, 614 (1972); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)(citation omitted). The Second Circuit case relied on by the Bank states, "the well pleaded material allegations of the complaint are taken as admitted; but … unwarranted deductions of fact are not admitted." First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994). The Bank artfully included the "unwarranted deductions" part of that quote but not the "allegations … taken as admitted" part. It also failed to distinguish First Nationwide Bank from the present case against it.

The Second Circuit applied the "unwarranted deductions" principle with "greater force" because the issue was whether the defendants fraudulently overstated the value of rental properties as loan collateral. Id. Fraud requires more stringent pleading requirements under Rule 9(b), but there are no predicate act allegations of fraud against the Bank. A further distinction is that First Nationwide found the complaint's method used for estimating the amount of overstated value involved so many variables and estimates that no reasonable inference other than an "unwarranted deduction" from the allegations could be drawn to come up with a certain amount of damages. Id. at 770-72. The predicate act allegations against the Bank of Cyprus are not so complex—simply money laundering and using international facilities to aid a racketeering enterprise. (Complaint ¶¶ 633-635)

"The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L.Ed.2d 90, 94 S.Ct. 1683, 1686 (1974).

2. Standard for Pleading RICO

First the Bank of Cyprus misstates what the Supreme Court in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 87 L.Ed.2d 346, 105 S.Ct. 3275, 3285 (1985), requires for alleging a civil RICO violation, then claims the Complaint does not comply to the Bank's misstatement.

The Complaint alleges all the RICO elements against the Bank that the Second Circuit requires: (1) defendant (Complaint ¶¶ 101-103) (2) through the commission of two or more predicate acts (Complaint ¶¶ 633-635) (3) constituting a pattern (Complaint ¶¶ 875-85) (4) of racketeering activities [those are predicate acts] (Complaint ¶¶ 633-635) (5) directly or indirectly invests in, or maintains an interest in, or participates in (Complaint ¶ 636) (6) an enterprise (Complaint 1, 10-15) [allegations as to the existence of a RICO enterprise must meet only the notice

pleading requirements of Fed. R. Civ. P. 8. In Re Sumitomo Copper Litigation, 995 F.Supp. 451, 454 (S.D.N.Y. 1998)(J. Pollack)] (7) the activities of which affect interstate or foreign commerce (Complaint 874) and, in addition, the plaintiff was injured in his business or property by reason of violations of 18 U.S.C. 1962 (Complaint ¶¶ 900-907).

The Bank continues misstating the law and misrepresenting the Complaint when it claims, "Plaintff also fails to plead adequately certain predicate acts alleged in the Complaint as a basis for his RICO claims. These acts include violations of 18 U.S.C. 371 (conspiracy), 26 U.S.C. 7201 (tax evasion), Sections 1801 and 1804 of the New York State Income, Earnings and Corporate Taxes Law (failure to file tax returns and filing of false returns, respectively), and Sections 105 and 470 of the New York Penal Code (conspiracy and money laundering, respectively)." (Defendant Bank Memo. p 4, n 4) The Complaint does not claim any of the acts cited in that footnote are predicate acts. The Complaint contains one section listing predicate acts that starts at ¶ 466 and is titled Defendants Predicate Acts and a separate section beginning at ¶ 684 called Other Criminal Acts by Defendants. The titles are in bold print and the word "other" means of a different character or quality. I just can't see how the Bank missed that unless it is trying to sneak something passed, but I cannot figure out what it is.

a. Use of Income from Racketeering Activities, 1962(a)

The plaintiff incorporates his argument from Plaintiff Opposition Memo. pp 85-88 that a violation of 18 U.S.C. 1962(a) or (b) does not require a "racketeering injury"; that is, injury flowing from the investment of income produced by a pattern of racketeering, Busby v. Crown Supply, Inc., 896 F.2d 833, 837-38 (4th Cir. 1990); Goold Electronics Corp. v. Galaxy Electronics, Inc., 1993 WL 427727 (N.D.Ill.), or from racketeering activity used to keep a stake in an enterprise, *see* Haroco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 395-399 (7th Cir. 1984).

If the Court concludes that RICO 1962(a) requires a racketeering injury, the Complaint, contrary to the Bank's false statement that it "makes no such allegation" (Defendant Bank Memo. p 5-1), alleges injury from the investment of racketeering income. The Bank engages in predicate acts constituting a pattern of racketeering activity that makes money (Complaint ¶¶ 633-636, 875, 881); the income from that racketeering activity goes into the Bank's operations, including the facilities for laundering money, that affect interstate commerce (Complaint ¶¶ 636, 874); and the plaintiff suffered damages as a result (Complaint 900-908).

The Bank wrongly objects that the money from racketeering activities must be invested in the criminal enterprise. RICO 1962(a) is violated when racketeering money is used in the operation of an organization whether the criminal enterprise or another organization. Batista, Civil RICO, 2003 Cumulative Supplement, 4.41, p 133; *see* 18 U.S.C. 1961(4). The Bank is an organization that is alleged to use money from predicate acts to run its operations (Complaint ¶ 636), so RICO 1962(a) is violated.

b. Racketeering to Maintain an Interest in the Money Laundering Business, 1962(b)

The Bank of Cyprus' cite to Dubai Islamic Bank v. Citibank, N.A., 126 F.Supp.2d 659, 670 (S.D.N.Y. 2000), which found persuasive the argument that a plaintiff must allege the defendant "acquired or maintained control over the alleged RICO enterprise…," shows the Bank continues its misguided claim that the only enterprise to which 1962(a) & (b) apply is the RICO enterprise. Congress did not confine the reach of RICO "to only narrow aspects of organized crime." U.S. v. Turkette, 452 U.S. 576, 590, 69 L.Ed.2d 246, 101 S.Ct. 2524, 2532 (1981). The use of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, whether the RICO enterprise or another business, violates 1962(b).

Contrary to the Bank's assertions in its memorandum at p 5-2, the Complaint alleges the Bank operates a money laundering business for the Russian mafia (Complaint ¶¶ 15, 101-103, 456-

58), that the Bank engages in the predicate acts necessary to launder and hide Russian mafia money (Complaint at ¶¶ 633-635) in order to maintain its money laundering business in which it has a property interest (Complaint at ¶ 636), and the plaintiff suffered damages as a result (Complaint 900-908). An "interest" in 1962(b) includes "all property and interests, as broadly described, which are related to the violations" H.R.Rep. No. 1549, 91st Cong., 2d Sess. 57, reprinted in U.S. Code Cong. & Ad.News 4007 (1970).

c. Participating in the Conduct of the Russian Mafia's Affairs, 1962(c)

In order to participate, directly or indirectly, in the conduct of an enterprise's affairs, a defendant must play some part in directing those affairs. Reves v. Ernst & Young, 507 U.S. 170, 179, 122 L.Ed.2d 525, 113 S.Ct. 1163, 1170 (1992). The Bank artfully omitted "directly or indirectly" from its statement of the law. (Defendant Bank Memo. p 6-1) "[T]he phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise…," Reves at 179, or that only primary responsibility for the enterprise's affairs is required. What is needed is that a person participates in the operation or management of the enterprise. Reves at 185. But an enterprise is "operated" not just by upper management but also by lower rung participants who are under the direction of upper management or by others associated with the enterprise who exert control; that is, authority. Reves at 184. "One is liable under RICO if he … has 'discretionary authority in carrying out the instructions of the principals.'" Baisch v. Gallina, 346 F.3d at 376 (2d Cir. 2003)(citing US v. Diaz, 176 F.3d 52, 93 (2d Cir. 1999)). In addition, a defendant may also take part in the conduct of an enterprise by knowingly implementing decisions as well as making them. US v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994).

In order to launder money for the Russian mafia, the Bank exerts control over that aspect of the mob's activities by making and knowingly implementing decisions in which it exercises broad

discretion in carrying out the laundering and hiding of illegal funds. (Complaint ¶¶ 15, 101-03, 456-58, 633-636, 874(b), (d), (j), (k), 881)

d. Conspiracy, 1962(d)

The Bank pulls an interesting slide-of-hand when it states that a RICO conspiracy claim "must plead facts alleging that each defendant 'knowingly agreed to participate in the conspiracy.'" The Bank's memorandum at p 6-2 cites Schmidt v. Fleet Bank, 16 F.Supp.2d 340, 347[correct page is 354] (S.D.N.Y. 1998) as authority for this proposition but wrongly claims the Schmidt Court relied on Industrial Bank of Latvia v. Baltic Fin. Corp., 1994 U.S. Dist. Lexis, *8, 93 Civ. 9032, 1994 WL 286162 at *3 (S.D.N.Y.). The Schmidt Court relied on Colony at Holbrook, Inc. v. Strata G.C., Inc., 928 F.Supp. 1224 (E.D.N.Y. 1996), and Colony relied on the Second Circuit's Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 (2d Cir. 1990). "[T]he Second Circuit established that the core requirement of a RICO conspiracy claim is an agreement to commit the predicate act…. [T]he Second Circuit held that a complaint must, at a minimum, specifically plead such an agreement… 'to commit at least two predicate acts.'" Colony at 1238. So in the Second Circuit, a complaint must allege the defendants concurred, consented, settled upon, assented or agreed to the committing of two predicate acts. It is the agreement to commit predicate acts in furtherance of the common purpose of the RICO enterprise that infers a RICO conspiracy. *See* Colony at 1238. And furthering a RICO's purpose can be met by merely adopting the goal of advancing or facilitating violations of RICO 1962(a-c). *See* Salinas v. U.S., 522 U.S. 52, 65, 139 L.Ed.2d 352, 118 S.Ct. 469, 477 (1997). By agreeing to launder and hide money from Russian mafia activities, the Bank, at the very least, advanced and facilitated the Enterprise's criminal endeavors that include violations of 18 U.S.C. 1962(a-c).

The Complaint meets the conspiracy pleading requirements by alleging the Bank "agreed to commit the predicate acts in ¶¶ 633-35…." (Complaint ¶ 637) with the requisite mens rea

(Complaint ¶ 682) and such acts furthered the Enterprise's purpose (Complaint ¶¶ 12, 13, 15, 456, 635).

The Bank also objects the Complaint's conspiracy allegations are "conclusory" and therefore "insufficient." (Defendant Bank Memo. p 6-2) So what is insufficient? Statements claiming only that the defendants engaged in "conspiratorial acts," conspiratorial manner," "conspiratorial method" and "conspiratorial pattern." Colony at 1238 (citation omitted). What is sufficient? A complaint that states the defendants knowingly entered into an agreement, arrangement, concord or compact to commit predicate acts. Dietrich v. Bauer, 76 F.Supp. 2d 312, 349 (S.D.N.Y. 1999). The Complaint does just that for all the Enterprise movants. (Complaint ¶¶ 682-83) The problem with all the movants' memoranda is that they cite legal propositions declaring what allegations can't be, but omit the specifics that give the rules understanding. The movants spit out words, such as "conclusory," "bare," "insufficient" and the like without defining what the courts mean by these terms because if the movants did, then these objections would vanish like the morning haze.

Another vanishing objection by the Bank is that the Complaint did not answer its deposition questions: "Into what agreement did the Bank enter? With whom did the Bank agree? What was the conspiracy?" (Defendant Bank Memo. p 6-2) The federal rules, however, restrict pleadings to the task of general notice giving and invest the deposition-discovery process with the vital role of preparing for trial. Conley v. Gibson, 355 U.S. 41, 47-48; Hickman, 329 U.S. 495, 501. The Complaint's conspiracy allegations provide enough information to put the Bank on notice. Moreover, the nature of conspiracies often makes it impossible to provide details in a complaint, Brever v. Rockwell, 40 F.3d 1119, 1128 (10th Cir. 1994)

The Bank follows along with the other Enterprise movants by presumptuously stating there can be no RICO conspiracy, "because Plaintiff has failed to plead any substantive [1962 (a-c)]

RICO violation…." I thought that determination was for the Court rather than the defendants. Apparently, in the movants' "Simon says" view of the law, whenever a defendant simply claims a plaintiff's allegations fail to plead a substantive RICO violation, the conspiracy cause of action must be dismissed. But even adopting the movants "Simon says" ploy, co-conspirators who might not themselves have violated one of the substantive provisions of 1962 can still be sued providing others in the Enterprise were alleged to have done so. Beck v. Prupis, 529 U.S. 494, 506-07, 120 S.Ct. 1608, 1617 (2000). Conspiracy is a mechanism for subjecting co-conspirators to liability for the tortious acts of one of their members, and a tortious act is a 1962(a), (b), or (c) violation or may even be the commission of one predicate act. Beck at 506 n. 10. The Complaint alleges numerous violations of 18 USC 1962 and predicate acts committed by the movants in furtherance of the Enterprise's Scheme. (Complaint 466-547, 556-559)

e. Standing in the Shadows with Gangsters

The Bank of Cyprus once again wrongly imagines what the Complaint and the law state—this time about proximate cause or, more accurately, standing. The Bank claims, "Plaintiff has pleaded no proximate cause. In fact, Plaintiff has pleaded no cause at all." (Defendant Bank Memo. p 7-2) The Complaint at ¶¶ 900-907 alleges the direct injuries to the plaintiff's business and property were caused by a pattern of racketeering activity violating 18 U.S.C. 1962 or by predicate acts, and at ¶ 683 states "[e]ach predicate act was committed on behalf of every Member of the Enterprise, since each act was committed with the knowledge of, or was reasonably foreseeable to, each of the Members." The U.S. Supreme Court held that on a motion to dismiss general factual allegations of injury resulting from defendant's conduct embrace those specific facts necessary to support the claim. NOW v. Scheidler, 510 U.S. 249, 256, 127 L.Ed.2d 99, 114 S.Ct. 798, 803 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L.Ed.2d 351, 112 S.Ct. 2130, 2137 (1992)). The Bank also tries to heighten the pleading requirements for standing to one that tends to

"show" injury. (Defendant Bank Memo. p 7-2) "Show" means to prove, Black's Law Dictionary, 8th Ed., p 1413, but the purpose of the complaint under the federal rules is to give notice, not prove. *See* Hickman, 329 U.S. 495, 501.

In addition, liability for injuries from RICO violations is joint and several among the members of the criminal enterprise. Fleischhauer v. Feltner, 879 F.2d 1290, 1301 (6th Cir. 1989). "Although there is little direct law on this point, there are numerous RICO criminal forfeiture cases which indicate that the nature of the RICO offense mandates joint and several liability." Id. (citing *see also* Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271, 272 (9th Cir. 1988)(civil RICO liability assessed joint and severally). Fleischhauer was not a forfeiture nor a contribution case. A determination of joint and several liability is distinct from a determination of contribution. Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630, 646, 68 L.Ed.2d 500, 101 S.Ct. 2061, 2069 (1981). Further, the allegation of conspiracy to violate 18 U.S.C. 1962(d) includes the allegation of defendants being joint and severally liable, since they are co-conspirators. Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.2d 768, 775 (9th Cir. 2002)(Citations omitted); *See* Pinkerton v. U.S., 328 U.S. 640, 646, 90 L.Ed. 1489, 66 S.Ct. 1180, 1183 (1946). Moreover, there is no reason why persons who actively and knowingly work for an organization that engages in criminal activity should not be liable for the criminal acts of other members. Scales v. U.S., 367 U.S. 203, 226-27, 6 L.Ed.2d 782, 81 S.Ct. 1469, 1485 (1960). The Complaint alleges the Bank is a member of the Russian mafia and furthers the mob's illegal activities with money laundering as a co-conspirator in violating RICO (Complaint ¶¶ 101-03, 456-58, 633-37), so it is joint and severally liable.

The Bank of Cyprus also requests a dismissal because it has "more productive uses for [its] resources." (Defendant Bank Memo. p 7-2) Perhaps it is referring to the lucrative business it conducts with the Russian mafia. The plaintiff, however, can think of no more productive use of

government resources than, as the U.S. Supreme Court stated, "bring[ing] to bear the pressure of private attorneys general on a serious national problem for which public prosecutorial resources are deemed inadequate…." Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143, 151; 97 L.Ed.2d 121; 107 S.Ct. 2759, 2764 (1987).

f. Case or no case

The Bank of Cyprus, patterning other Enterprise movants, again repeats the liturgy that the allegations against them are not "sufficient." Sufficient means that which is necessary for a given purpose. Black's Law Dictionary, 8th Ed., p 1474. So what's the purpose of allegations in a complaint? "[T]o provide the necessary notice to [the] adversary. The evidentiary material supporting these general statements normally should not be set out in the pleadings but rather should be left to be brought to light during the discovery process." Wright & Miller, Fed. Prac. & Proc.: Civil 2d 1281, p 519. The Bank's memorandum and the detailed papers of the other movants belie that they do not have "fair notice of what the plaintiff's claim is and the grounds upon which it rests," Conley, 355 U.S. 41, 47-48.

Finally, the Bank omnipotently concludes that any amendment of the Complaint would have to consist of "conclusory allegations." They don't know that.

IV. Conclusion

The plaintiff requests that the Bank of Cyprus' motion to dismiss be denied, but if granted, then leave be allowed to the plaintiff to amend the Complaint.

Dated: New York, New York
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Respectfully submitted
Attorney plaintiff pro se

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Roy Den Hollander (RDH 1957)
545 East 14 Street
New York, NY 10009
(212) 995-5201