

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHARLES E. ORTEGO, *et al.*,

Plaintiff,

v.

LUMMI ISLAND SCENIC ESTATES
COMMUNITY CLUB, INC., *et al.*,

Defendant.

No. C14-1840RSL

ORDER DISMISSING RICO CLAIM
BASED ON MISREPRESENTATIONS
TO LISECC MEMBERS

This matter comes before the Court on “Defendants’ Motion for Partial Summary Judgment Regarding RICO Claims.” Dkt. # 109. Plaintiffs allege that certain officers and directors of the Lummi Island Scenic Estates Community Club (“LISECC”) have engaged in a scheme to defraud the general membership of the homeowners’ association and have asserted a claim under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1961 *et seq* based on that conduct.¹ Defendants seek summary judgment on this claim, arguing that there is no evidence of a scheme or specific intent to defraud.²

¹ Two plaintiffs, Charles Ortego and Anna Ponomareva, have asserted a separate RICO claim related to actions directed specifically at them and their property. This motion for summary judgment does not address that portion of the RICO claim.

² In their reply memorandum, defendants belatedly challenge plaintiffs’ standing to assert a claim on behalf of part-time residents and/or non-water users. The Court has not considered this argument.

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Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that show the absence of a genuine dispute of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S. at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

RICO is a remedial statute and should be liberally construed to effectuate its purposes of preventing and remedying the infiltration of legitimate businesses by organized crime. Odom v. Microsoft Corp., 486 F.3d 541, 546-47 (9th Cir. 2007). To establish a claim under 18 U.S.C. § 1962(c), plaintiffs must show “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). Defendants

1 contest the fourth element, arguing that, although plaintiff have properly identified wire and mail
2 fraud as the predicate acts of “racketeering,” they have failed to raise a genuine issue of fact
3 regarding fraudulent intent. Wire or mail fraud consists of (a) the formation of a scheme or
4 artifice to defraud (b) using or causing the use of the United States wires or mail in furtherance
5 of the scheme (c) with specific intent to deceive or defraud. Sanford v. MemberWorks, Inc., 625
6 F.3d 550, 557 (9th Cir. 2010). An essential element is “a recognizable scheme formed with
7 intent to defraud:” the scheme need not include an affirmative misrepresentation of fact, but it
8 must be “calculated to deceive persons of ordinary prudence.” U.S. v. Bohonus, 628 F.2d 1167,
9 1172 (9th Cir. 1980).

10 In their Second Amended Complaint, plaintiffs generally allege a scheme through which
11 certain officers and directors of LISECC conspired to trick members of the homeowners’
12 association into paying dues and/or water service fees as a means of offsetting the amounts that a
13 fraction of the community, including many of the defendants, would otherwise have to pay to
14 maintain and upgrade the community water system. The two main avenues through which the
15 alleged scheme was carried out were by continuing to charge dues and fees after LISECC’s
16 authority to act on behalf of the homeowners had ended and by reducing dues and fees
17 associated with bound lots. The Court has now found that those activities were authorized by and
18 consistent with the plats through which LISECC was created and its governing documents.
19 Although certain plaintiffs convinced themselves that LISECC had no authority to charge dues
20 or fees after 1990, plaintiffs offer no evidence from which a reasonable jury could conclude that
21 defendants believed that the sunset provision applied or were intentionally defrauding the
22 community in that regard.

23 In response to defendants’ motion for judgment on the RICO claim, plaintiffs identify a
24 number of false statements made by one or more defendants over a two year period and
25 challenge certain business decisions related to funding and water reserves. For example,
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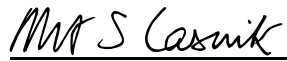
1 plaintiffs argue that defendant Sexton mischaracterized a recorded Notice of Right to Impose
2 Liens as a “court document” and misstated its legal impact. Plaintiffs also argue that LISECC
3 violated its contract with Washington State and that defendants engaged in self-dealing when
4 they suspended contributions to a reserve fund and simultaneously gave dues relief to the owners
5 of bound lots. The Court has carefully reviewed all of the documents submitted by plaintiffs.³
6 With regards to most of the identified misstatements, plaintiffs have failed to show that the
7 statement was false or that the speaker knew it was false at the time it was made. With regards to
8 LISECC’s decisions regarding how to allocate resources, raise funds, and meet its contractual
9 obligations, RICO cannot be used to second-guess an entity’s non-fraudulent business
10 judgments. More fundamentally, no reasonable jury could conclude that the named defendants
11 were trying to hide or obfuscate their efforts to spread the costs of the community water system
12 to every member of the community. That object was debated and announced on numerous
13 occasions. Plaintiffs simply disagree with the policy choices LISECC has made and argue that
14 the majority of homeowners who voted to support defendants’ proposals must, *ipso facto*, have
15 been misled by defendants. This argument is unsupported and does not raise a genuine issue of
16 material fact regarding either a scheme or intent to defraud.

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23 ³ Despite the obvious evidentiary and procedural problems with plaintiff’s response and many of
24 the proffered documents, the Court has assumed that the authenticity of and foundation for the
25 documents could be established at trial. Defendants’ request to strike (Dkt. # 122 at 15) is therefore
26 DENIED. Counsel’s narrative description of events and documents, however, is not evidence, is often
inaccurate, and has been ignored.

1 For all of the foregoing reasons, defendants' motion for summary judgment (Dkt. # 109)
2 is GRANTED. Plaintiffs' RICO claim based on misrepresentations to LISECC members is
3 hereby DISMISSED.

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5 Dated this 21st day of November, 2016.

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8 Robert S. Lasnik
9 United States District Judge
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