UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SIERRA NATIONAL INSURANCE HOLDINGS, INC., et al., Plaintiffs, v. ALTUS FINANCE, S.A., et al., Defendants.	CASE NO. CV 01-01339 AHM (CWx) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs are Sierra National Insurance Holdings, Inc., a dissolved Delaware corporation and Georgia Lee, as receiver for Sierra National Insurance Holdings, Inc. They bring suit against the same defendants as in *Low v. Altus Finance, S.A.*, *et al.*, and based on the same course of fraud alleged in that case.[1] This Court's prior Orders in the *Low* case summarize those allegations. *See Low v. Altus Finance, S.A.*, *et al.*, 136 F.Supp. 2d 1113 (C.D.Cal.2001). Briefly, in *Low*, the California Commissioner of Insurance alleges that the defendants defrauded him and the Conservation Court by misrepresenting their ownership structure,

[1] Those defendants are Credit Lyonnais S.A., Altus Finance S.A., C.D.R. Enterprises, MAAF Assurances, MAAF Vie S.A., Omnium Geneve S.A., Consortium de Realisation, S.A., Francois Pinault, Jean-Claude Seys, Jean-Francois Henin, Jean Irigoin, Artemis S.A., Artemis Finance S.N.C., Artemis America, New California Life Holdings, Inc. and Aurora National Life Assurance Company, Inc.

thereby inducing him to accept their bid for the assets of Executive Life Insurance Company ("ELIC"), a failing insurance company in rehabilitation. The Commissioner seeks damages, including the return of those assets. Sierra was a rival bidder for the ELIC assets. In this case Sierra alleges that:

> Plaintiff Sierra National Insurance Holdings, Inc. was ultimately the only competing bidder for Executive Life. As such, it was the principal victim of defendants' deceptions. But for their wrongful conduct, Sierra would have acquired Executive Life and realized the profits which defendants illegally secured for themselves.

Complaint, ¶ 4.

The complaint, originally filed in the state court and removed to this Court by defendant Aurora National Life Assurance Company, Inc. ("Aurora"), asserts six causes of action against the defendants: (1) for intentional interference with economic expectancy; (2) for negligent interference with economic expectancy; (3) for abuse of process; and (4-6) three separate RICO violations.

This case is before the Court on the motion of Aurora, joined by co-defendant Credit Lyonnais S.A., to dismiss plaintiffs' complaint in its entirety for failure to state claims upon which relief can be granted. Aurora makes three primary arguments for dismissal. First, two California statutes and federal preemption law immunize defendants from liability for their alleged misrepresentations, because those statutes "focus[] any remedies where they belong — in administrative or criminal proceedings brought under the express provisions of the regulatory statutes at issue." Motion to Dismiss, p.1. Second, as a matter of law disappointed bidders, like Sierra, cannot recover lost profits from the winner of a government contract, especially a contract which, as here, required judicial approval, because they cannot establish standing or any concrete injury. *Id.* at 2. Third, the statute of limitations bars plaintiffs' suit because their own complaint asserts that as early as 1991, Sierra suspected that defendants' ownership structure precluded their eligibility to own the ELIC assets.

SUMMARY OF RULING

A. Immunity Defenses

1. California Insurance Code § 12919 does not immunize defendants from liability to Sierra.

2. As currently pled, California Civil Code § 47(b) does preclude Sierra from pursuing its California-based (as opposed to federal) claims. However, plaintiffs may amend their complaint if they can in good faith plead facts involving non-privileged conduct.

3. The Court does not find, on the current record, that *Buckman Co. v. Plaintiffs' Legal Committee* _________ U.S. _______, 121 S.Ct. 1012 (2001) preempts claims arising out of statements made to the Federal Reserve.

B. Defenses to State Law Claims Based on Standing and No Injury

The decisions in *Savini Construction v. Crooks Brothers Construction,* 540 F.2d 1355 (9th Cir. 1974) and *Blank v. Kirwan*, 39 Cal. 3d 311, 216 Cal. Rptr. 718 (1985) do not preclude plaintiffs from establishing standing.

C. RICO Claims

While the case defendants rely on most, *Imagineering v. Kiewit*, 976 F.2d 1303 (9th Cir. 1992) does not preclude plaintiffs from alleging a RICO claim, other decisions establish that Sierra has not alleged, and probably cannot allege, injury to business or property within the meaning of RICO. Plaintiffs will be allowed to amend their claim, however, if they can do so in good faith.

D. Statute of Limitations

The November 12, 1991 memorandum creates no bar to plaintiffs' claims.

E. Other Claims

The claims for negligent interference with business expectancy and abuse of process are defective and must be dismissed with prejudice.

DISCUSSION

A. Immunity from Suit for Misrepresentations

1. California Insurance Code § 12919

Defendants assert that under California Insurance Code § 12919 plaintiffs' state and federal causes of action fail because all of defendants' alleged misrepresentations to the Commissioner respected facts concerning Aurora, then an applicant for an insurance license, and therefore "no proceeding" may "lie for" the alleged communications. California Insurance Code § 12919 provides that :

> [c]ommunications to the commissioner or any person in his office in respect to any fact concerning the holder of, or applicant for, any certificate or license issued under this code are made to him in official confidence within the meaning of Sections 1040 and 1041 of the Evidence Code. Liability shall not exist and no action or proceeding shall lie for or on account of any such communication or the making thereof, but the existence of such communication shall not be deemed to dispense with or nullify any requirement of notice, hearing or production of evidence before the commissioner as otherwise required by law.

Although plaintiffs allege that the defendants lied to the Commissioner about Aurora's true ownership structure under section 12919, defendants are not immune to suit for their alleged lies. The provision clearly applies to confidential communications to the Commissioner about licensees and applicants, not false statements to the Commissioner by licensees and applicants about themselves. It was designed to encourage confidential communications to the Commissioner and immunize the maker of these communications from liability, such as for defamation, to the persons or businesses about whom the communication was made.

! When the Section was first enacted, the Commissioner stated that it "[a]uthorizes confidential communications to [the] Commissioner re licensees or applicants for license, free of liability under libel and slander laws." *Sixty-Ninth Annual Report of the Insurance Commissioner of the State of California*, p. XXVII, ¶ 37 (1936) (Plaintiffs' Appendix of Authority). As plaintiffs point out, a statutory provision providing protection from suits for defamation cannot bar a suit against persons who told lies about themselves, because "the

notion that Defendants ... might sue themselves for defamation unless Section 12919 protects their falsehoods — is preposterous." Opposition, p. 10.

- Defendants' sole authority for their contention that § 12919 precludes claims for fraud arising out of their communications is an opinion of the Legislative Counsel of California. 78 S.J. 14596 (1978). That opinion merely confirms that actions *for defamation* may not be brought based on communications to the Commissioner regarding licensees or applicants.

- The first line of section 12919 defines "official confidence" by reference to Evidence Code sections 1040 and 1041. Both these provisions fall under Article 9 of the Evidence Code, entitled "Official Information and Identity of Informer," and section 1041 is the statutory provision that establishes the privilege to refuse to disclose the identity of informers. Section 12919's express reference to and reliance on statutory provisions protecting informers confirms that it is meant to encourage third party informers to communicate to the Commissioner regarding license applicants or holders, and to protect them.

- The final clause of § 12919 ("but the existence of such communication shall not be deemed to dispense with or nullify any requirement of notice, hearing or production of evidence before the Commissioner as otherwise required by law") confirms the statute's clear purpose. The clause mandates that although the communicator may not be sued, he may still be required to attend a hearing or produce evidence supporting his allegations, lest the Commissioner pursue an alleged wrongdoer without support.

- Section 12919 falls under the Insurance Commissioner's "Powers and Duties" in the Insurance Code. Yet defendants' reading of the statute, which would preclude not only plaintiffs from suing defendants, but the Commissioner as well, would severely restrict, not fortify, the Commissioner's powers.

Plaintiffs correctly distill defendants' distortion of the section: "Defendants would turn a law intended to shield reports *of* wrongdoing into a shield *for* wrongdoing." Opposition, p.10.

2. California Civil Code § 47(b)

Defendants assert that their alleged misrepresentations to the Conservation Court, the Commissioner and Sierra relating to the ELIC rehabilitation proceedings are absolutely privileged under California Civil Code § 47(b)(2). They also assert that under § 47(b)(3) their alleged misrepresentations in obtaining licenses and approvals from the Commissioner and the Federal Reserve are privileged. They argue, therefore, that under § 47(b), all of plaintiffs' state law claims are barred.[2] California Civil Code § 47 provides in relevant part:

> A privileged publication or broadcast is one made:
> (a) In the proper discharge of an official duty.
> (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 ...

In *Silberg v. Anderson,* 50 Cal.3d 205 (1990), the California Supreme Court described the scope and rationale of this "litigation privilege."

> In furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47(b) has been given broad application. Although originally enacted with reference to defamation, the privilege is now held applicable to any communication, whether or not it amounts to a publication, and all torts except malicious prosecution. Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.
> The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Silberg, 50 Cal.3d at 211-212 (internal citations omitted). The principal purpose of the privilege:

> is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. Section 47(2) promotes the effectiveness of judicial proceedings by encouraging "open channels of communication and the presentation of evidence" in judicial proceedings. A further purpose of the privilege "is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy

[2] Defendants do not argue that the state law privilege under § 47 bars plaintiffs' federal RICO claims.

> wrongdoing." ... Since the "external threat of liability is destructive of this fundamental right and inconsistent with the effective administration of justice," courts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings ... Section 47(2) further promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients' interests. It is desirable to create an absolute privilege ... not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions...
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> Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result ...

Id. at 213 - 215 (internal citations omitted).

These pronouncements confirm that in California the litigation privilege is extremely broad. Plaintiffs nevertheless proffer four reasons why the § 47 privilege does not reach their allegations.

a. <u>Conduct/Communication</u>

First, Sierra contends that the litigation privilege applies only to statements, not conduct, and its claims all have an independent basis in defendants' conduct. Opposition, p.12. Sierra argues that its claims for tortious interference would stand if defendants had made no misrepresentations, but simply submitted a bid they knew they could not lawfully perform and received assets they knew they could not legally possess. . ." and if defendants took "numerous intentional steps to promote their bid and prevent Sierra's bid from being accepted." Opposition, p. 7; Complaint, ¶ 94.

In short, Sierra contends that the fundamental wrong that defendants committed was to acquire ownership of ELIC's assets in violation of the Federal Bank Holding Company Act ("BHCA") and the California Insurance Code. Under Sierra's view, that defendants acquired such ownership through a years-long campaign of misrepresentations, lies and omissions allegedly made to the Conservation Court or as part of that court's proceedings is incidental.

However, defendants correctly state the law that "the absolute privilege of Section 47(b)

applies where the gravamen of the plaintiff's complaint is communicative acts." Reply, p.12. In *Rubin v. Green,* 4 Cal.4th 1187 (1993), the California Supreme Court applied the distinction between "communicative acts" and "noncommunicative conduct." Plaintiff alleged that the defendant law firm improperly:

> had engaged in a pattern of soliciting residents of several mobilehome parks for the purpose of commencing litigation against park owners. Allegedly, the firm's modus operandi was to arrange for an invitation to meet with park residents to help negotiate a resolution of complaints regarding park conditions with the owner; this, in turn, would lead to a promise by the firm to obtain substantial monetary settlements for those residents who agreed to join in litigation against the owner. A lawsuit, preceded by a "form" notice of suit, followed.

Id. at 1192. The Court rejected plaintiff's argument that he had alleged acts - - conduct - - not communication, and thus his claims were not barred by the litigation privilege.

> Judging from the allegations of the amended complaint, plaintiff's claims, however styled, are founded essentially upon alleged misrepresentations made by the law firm (and Green) to Cedar Village residents . . . and the subsequent filing of pleadings in the lawsuit itself. Whether these acts amounted to wrongful attorney solicitation or not, they were communicative in their essential nature and therefore within the privilege of section 47(b).

Id. at 1196. Here, too, defendants' alleged wrongful acts, as delineated in plaintiffs' complaint, "were communicative in their essential nature." *See* Complaint ¶ 3 ("Based on defendants' misrepresentations, the Commissioner ... accepted their bid for Executive Life."); *id.* at ¶ 49 ("Defendants repeatedly misrepresented to Sierra and others that no agreement such as the portage agreements existed. The false statements referenced in paragraphs 50-82 below are examples only and do not recount all of defendants' misrepresentations."). Indeed, according to the allegations it was those acts, those misrepresentations, which enabled defendants to injure Sierra. Would Sierra have sued these defendants if the "contrats de portage" had been disclosed and the Commissioner, the Conservation Court and the Federal Reserve Bank nevertheless had approved the Altus/MAAF bid?

Plaintiffs cannot avoid the application of § 47 on the basis that their claims, as alleged, challenge conduct as opposed to communications.

b. <u>Non-Judicial Purpose and Non-Judicial Filings</u>

Plaintiffs argue that "the litigation privilege does not apply to administrative filings made for 'dual purposes,' one judicial and one not." Opposition, p.12. They rely exclusively on *Stacy & Witbeck v. City and County of San Francisco,* 36 Cal.App. 4th 1074 (1995). In that case, a municipal contractor, Stacy, brought a Government Code claim seeking to recover losses caused by delay in work on a contract. Stacy stated that in detailing its damages claim, "[t]his letter represents an effort on our part to avoid litigation ..." *Id.* at 475. The letter ultimately resulted in the Public Utilities Commission barring Stacy from receiving contracts, because the Commissioner determined the claim was false. Stacy sued, asserting the claim was privileged under § 47 because it was submitted in anticipation of litigation. Finding that Stacy had submitted the claim for dual purposes, one administrative and one to be able to pursue litigation, the Court framed the issue as "whether a publication filed for dual purposes is privileged in both the judicial and administrative arenas." *Id.* at 1090. The Court noted that "the privilege operates as a limitation on *civil liability* stemming from the protected communication" and stated that:

> To rule that the litigation privilege would bar administrative actions by public entities when the publication was submitted to the entity for a nonlitigation purpose does not make sense. An agency should not be hamstrung from fulfilling its oversight duties simply because the target of the administrative action also contemplated litigation.

Id. at 1091. Therefore, "[t]o expand the statutory immunity to bar the use of otherwise privileged communications in disciplinary and related administrative proceedings reaches too far." *Id.*[3]

Stacy is of no real support to plaintiffs. The court there was explicitly intent on not expanding the scope of the § 47 bar to interfere with public agencies' rights to use administrative procedures to carry out their responsibilities, in that case a PUC action akin to a

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[3] One federal district court has noted that "the California Supreme Court has not adopted the "dual purpose" test in *Stacy.* Rather, California's highest court requires only that a prelitigation communication have 'some relation to an anticipated lawsuit.'" *Nestle v. Virtual Integration Tech,* 2000 W.L. 727859 (C.D.Cal.) (Pregerson, J.) (applying § 47(b)(2) privilege to prelitigation copyright application).

debarment proceeding. Here, there was no mere administrative proceeding, because all of defendants' communications were directed toward procuring the ELIC assets, which could only be done with the approval of the Conservation Court. Therefore, all of the statements have a logical relation to the Rehabilitation proceeding. *See Silberg,* 50 Cal.3d at 212. Indeed, as defendants point out, "as a conservator, the commissioner acts as a minister of the superior court in its statutory responsibility to protect the public interest and conserve the rights of the creditors and policyholders of the conservatee." *In re Pacific Standard Life Insurance Co.,* 9 Cal.App.4th 1197, 1201 (1992). To classify the filings before the Commissioner as administrative and deem them as wholly separate from the proceedings in the Conservation Court would be mistaken.[4]

Plaintiffs also point out that "many of Defendants' false statements were made in documents not filed in any court proceeding." Opposition, p.13. However, the litigation privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." *Silberg,* at 212. Plaintiffs do not argue that these misrepresentations were not made to achieve the objects of the litigation or that they had no connection or logical relation to the action. *Id.* Thus, in this case and under those allegations, even misrepresentations made to the Commissioner or Sierra in the course of procuring a license would be covered by the privilege.

As to statements defendants made to the Federal Reserve Board, it is not clear from either the complaint or the parties' briefs how those alleged misrepresentations came to be

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[4] This would not necessarily be the conclusion if § 47(b) had been asserted as a bar to the Commissioner's claims. Unlike Sierra, but like the Public Utilities Commission in *Stacy,* in managing the ELIC estate, the Commissioner carried out numerous administrative responsibilities that went beyond selling ELIC's assets, and defendants' alleged conduct interfered with those responsibilities. Moreover, on these motions (understandably enough) no party has briefed the question of whether as a matter of public policy the scope of § 47(b) should be narrowed when the plaintiff is an elected public official seeking to vindicate the rights of consumers and citizens.

made - - *i.e.*, how the Board's involvement in enforcing the BHCA affects or implicates the analysis under § 47(b). It does appear, however, that those submissions were necessary, or at least helpful, in obtaining Rehabilitation Court approval. If so, state law claims based on the submissions would be subject to the same § 47(b) analysis.

c. Extrinsic Fraud

As plaintiffs state, the litigation privilege does not shield conduct amounting to "extrinsic fraud." *Silberg,* 50 Cal.3d at 214. "Extrinsic fraud" is a "narrowly circumscribed" exception to the application of § 47(b). A judgment has been obtained by extrinsic fraud where " 'the aggrieved party [has been] deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' " *Moore v. Conliffe*, 7 Cal.4th 634 n.5 (1994) (quoting 8 Witkin, California Procedure § 204 (3d ed. 1985)). Examples of extrinsic fraud include: "Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest." *Kimes v. Stone,* 84 F.3d 1121, 1127 (9th Cir. 1996).

Plaintiffs provide insufficient basis to support a finding of extrinsic fraud. They quote from a brief the Commissioner evidently submitted to the Magistrate Judge in a discovery dispute in the related *Low v. Altus* case:"[d]efendants took great pains outside the Courtroom to insure that nobody inside the courtroom, *not even their own attorneys,* knew the truth." This is an allegation of intrinsic, not extrinsic, fraud. *See Kachig v. Boothe,* 22 Cal.App.3d 626, 634 (1971) ("in a litigated case the concealment or suppression of material evidence is held to constitute intrinsic fraud"); *Edwards v. Centex,* 53 Cal.App.4th 15, 41 (1997)("Intrinsic fraud ... is a fraud which goes to the merits of the litigation. Unlike 'extrinsic' fraud, it does not preclude any party from raising a claim or defense; nor does it prevent a party from knowing about or attending a proceeding.")

d. **Litigation Privilege Summary**

The foregoing analysis leads to the conclusion that Aurora's § 47(b) arguments are sound, although the Court is troubled that the result would be that an alleged fraudulent wrongdoer might escape state law-based liability to its victim. But this Court cannot skew its decision to avoid a troubling outcome. Nevertheless, and in any event, standard principles of pleading entitle Sierra to attempt to amend the complaint to allege state-based claims for relief that do not so directly and inextricably depend on or relate to privileged communications in the Conservation Court proceedings. Plaintiffs should evaluate very carefully whether it is feasible to do so. An amended complaint that basically and in a mechanical manner merely deleted references to the Conservation Court proceedings surely would invite a renewed, and probably meritorious, motion to dismiss.

3. **Fraud on the Federal Reserve**

Plaintiffs allege that defendants also made fraudulent statements to the Federal Reserve pursuant to their scheme. Complaint, ¶¶ 81-82. Defendants assert that under the reasoning of *Buckman Co. v. Plaintiffs' Legal Committee,* __________ U.S. ________, 121 S.Ct. 1012 (2001), plaintiffs are barred from pursuing state law claims to the extent they are premised on these allegations. In *Buckman,* the Supreme Court held that

> the plaintiffs' state-law fraud- on-the-FDA claims conflict with, and are therefore impliedly pre-empted by federal law. The conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Agency, and that this authority is used by the Agency to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Agency can be skewed by allowing fraud-on-the-FDA claims under state tort law.

Id. at 1017. Defendants argue that *Buckman* applies because: **1)** under the BHCA, the Federal Reserve Board was authorized to require defendants' disclosures and has the power to investigate and remedy, through statutorily provided civil and criminal penalties, "any false or misleading report of information," 12 U.S.C. §§ 1844, 1813(q), 1818(b),(g),(i),(n), 1847(a),(d)(3); **2)** the BHCA provides no private right of action and gives the Federal Reserve Board exclusive jurisdiction over BHCA issues; and **3)** by seeking remedies not provided for in

the statutes, plaintiffs' tort claims based on misrepresentations to the Federal Reserve Board "conflict" with the BHCA.

Plaintiffs respond, first, that "*Buckman* is limited to cases where state law liability is based entirely on violation of a federal statute. It applies only where the state law cause of action is nothing more than an added penalty for violation of federal law under the 'fraud on the agency' doctrine." Opposition, p.8. Here, the fraud on the Federal Reserve Board is alleged in an introductory portion of the complaint and incorporated into *all* of the ensuing claims for relief. So plaintiffs' argument does not deal with whether their claims are preempted *to the extent they allege violations of the BHCA*.

Plaintiffs' other argument is that *Buckman* does not apply to defendants' representations to entities other than the Federal Reserve Board, a proposition which defendants do not dispute.

Although it appears that the Federal Reserve Board does have powers of enforcement and that there is no private right of action for BHCA violations, it does not necessarily follow that conflict preemption applies. The *Buckman* court relied on several factors specifically applicable to the FDA, and defendants' analysis concerning the submissions to the Federal Reserve Board is too cursory to establish that a conflict exists. Because the record is incomplete, the Court declines to issue an opinion on the preemption issue. In any event, the Complaint does not allege an independent claim for relief based solely on alleged misrepresentations to the Federal Reserve. Moreover, to establish defendants' motive and intent for the allegedly secret agreements to disguise Credit Lyonnais's control, such facts would appear to be admissible.

B. Sierra's Standing and Injury (State Law Claims)

1. General Observations

Although this motion ostensibly challenges the sufficiency of a complaint, defendants have proffered a detailed history, supposedly supported by numerous exhibits, to establish a foundation for their arguments challenging Sierra's standing to sue. They contend that in late

1991 the Commissioner selected and the Conservation Court approved the Altus/MAAF bid because it was the best bid. And, they argue, in large part it was the best bid because it provided for rehabilitation on a "bonds out" basis - - *i.e.*, it enabled the Commissioner to sell the [mostly junk] bonds and thereby relieve the policyholders of the then-perceived great risk of default. Defendants quote the Commissioner, the Rehabilitation Court and the Court of Appeal to prove not only the superior merit of their proposal, but also that Sierra's "bonds-in" bid was unacceptable to the Commissioner and the courts. From all this, defendants reach their inexorable conclusion: that neither the Conservation Court nor the Commissioner would have accepted Sierra's bid. That being so, they argue, Sierra wasn't cheated out of anything; it never would have obtained the ELIC assets regardless of defendants' conduct.

Plaintiffs posit the background differently. Also pointing to evidence outside the complaint, they argue that the Commissioner had committed to sell the ELIC assets to Sierra if the Altus bid was unsuccessful and in fact he would have done so, had he known of the secret control allegedly exercised by Credit Lyonnais.

Both positions are flawed. The pronouncements to which defendants point were issued *after* the decision to award the deal to Altus/MAAF had been made; before that, the decision by no means had been inevitable. Although the Court perhaps *could* take judicial notice of these Conservation Court proceedings at the pleading stage, I decline to do so; too many facts and inferences are disputed. The issues require full briefings, such as on motions for summary judgment. (If, for example, there were admissible evidence from the Commissioner or the Conservation Court that undermined Sierra's contention that its bid would have been accepted, this case would have to be dismissed.). As to plaintiffs' argument, it fails to sufficiently appreciate the role of the Conservation Court. As stated in *In re Pacific Standard Life Ins. Co.*, 9 Cal.App. 4th 1197, 1201 (1992): in insurance conservatorship proceedings, "[o]nly by express judicial authorization and prescription of sales terms may a legally cognizable interest be created in any potential buyer in this statutory context." In *Pacific Standard Life*, the Insurance

Commissioner, as conservator, petitioned the Superior Court for an order authorizing him to sell an asset to "LOA" on agreed-to terms. Thereafter, other bidders submitted a higher offer, which the Commissioner presented to the court. Over LOA's objection, the court authorized the sale to the later bidders. LOA appealed. The Court of Appeal held that LOA was not an aggrieved party and lacked standing to appeal. It stated that under the Insurance Code, as to sales of assets worth more than $20,000, the Superior Court, not the Commissioner "holds the exclusive authority . . . ." The court noted that "Indeed, had there been but a single offer, the court could have, in any event, rejected it." *Id.* at 1702.

For purposes of the State law claims, the Court construes the issue to be whether a disappointed bidder (Sierra) may maintain suit for lost profits against the successful bidder when the Commissioner had indicated a commitment to pick one of the two - - although the Rehabilitation Court was not bound to approve either bid.

2. *Savini* and *Iconco*

Defendants argue that under state law, 1) plaintiffs have no property interest in the assets awarded to defendants and 2) their asserted injury is speculative. In addition to *In re Pacific Standard Life Insurance Co.*, *supra*, defendants rely primarily on *Savini Construction v. Crooks Brothers Construction,* 540 F.2d 1355 (9th Cir. 1974), for the proposition that a disappointed bidder may not sue for lost profits. In *Savini,* an unsuccessful bidder filed suit against the successful bidder, claiming conspiracy to misrepresent the successful bidder as a small business in order to obtain a canal construction project. Several months after the contract was awarded to the defendants, the Small Business Administration determined that defendants did not qualify as small businesses; however, they were permitted to complete the project. Plaintiff brought suit to recover lost profits, overhead and punitive damages. The Ninth Circuit affirmed the district court's dismissal of plaintiff's suit on the ground that there is no private right of action under the Small Business Act.

In a footnote relied on by defendants, the Ninth Circuit stated that in any event lost

profits were not available to plaintiff.

> Even were a cause of action to be inferred, an award of lost profits would be improper since a contract neither came into existence between plaintiff and the government, nor would have been certain to come into existence, but for the alleged wrongdoing of defendants. It is unchallenged in the instant case that plaintiff submitted the next lowest bid. However, numerous factors in addition to the amount of the bid are considered in determining the suitability of a particular bidder for a contract award. The contracting officer must consider, among other factors, the bidder's size, skill, financial condition, and capacity to perform the particular job. In fact, there is no assurance that the contract would have been awarded to any of the five remaining bidders had defendants been eliminated from the competition, since the contracting agency is free to reject all bids. It would therefore be impossible for the district court to determine with any certainty that the contract would have been awarded to plaintiff, and lost profits could thus not be the measure of damages in a suit against defendants. The proper measure of damages in such a suit would be the costs plaintiff incurred in preparing its bid.

Id. at 1359 n.9 (internal citations omitted).

Plaintiffs correctly note that the language relied on by the defendants is dicta. They also attempt to distinguish *Savini* on the grounds that here the Commissioner had committed to choosing either the defendants' or Sierra's bid. Complaint, ¶ 42. Whether that is factually correct is hotly disputed, but defendants have proffered no Ninth Circuit authority citing the *Savini* dicta, and certainly not for the proposition that under no set of facts could a second-place bidder ever establish by a preponderance of the evidence that it would have received the contract. Other cases have been allowed to proceed to trial on just that contention. *Iconco v. Jensen Construction Co.,* 622 F.2d 1291 (8th Cir. 1980), is a good example. Iconco, the plaintiff, was the second lowest bidder on a small-business "set aside" contract let by the Corps of Engineers. Jensen, the low bidder, won the contract. Later, as a result of an unrelated inquiry, the Small Business Administration determined that Jensen did not qualify as a small business and so notified the Corps. Iconco learned about this development, protested to the Corps and demanded that Jensen relinquish the contract. Jensen refused. Iconco sued and prevailed at trial. On appeal, Jensen's primary argument was

> that an unsuccessful bidder on a small-business set-aside contract, as a matter of law, has no claim against the successful bidder who did not qualify as a small business.

Id. at 1294-95. Both parties agreed that under the Small Business Act there was no civil remedy

for an unsuccessful bidder. So the question was whether under Iowa law Iconco stated a claim of unjust enrichment or fraud. Speaking for the court, Judge Arnold distinguished *Savini* as having dealt with whether a federal civil cause of action could be inferred from the Small Business Act,

> an issue which is not before us. To the extent, however, that [its] language . . . supports the conclusion that any private suit by an unsuccessful bidder against a successful one is inconsistent with Congressional intent and would jeopardize the proper administration of the government's contract procurement system, we respectfully disagree . . .

Id. at 1299. The court then turned to the issue of damages. It noted that as to the contract in question "the award of the contract to the low bidder, or to any bidder, is not automatic . . . [and] all bids may be rejected if the head of the agency determines that rejection is in the public interest." *Id.* at 1300. Judge Arnold then rejected Jensen's position, which was the same as defendants' here: "a claim for last profits under these circumstances is speculative and improper." *Id.* He wrote,

> The more logical approach, in our view, is to put the unsuccessful bidder to its proof; if it proves by a preponderance of the evidence that it would have received the contract award absent the successful bidder's wrongdoing, we find no persuasive reasons why recovery should be denied.

Id. At trial, the individual who had the authority to award the contract had testified in response to a hypothetical question that the contract would have been awarded to the second lowest bidder. The Eighth Circuit concluded that this "opinion was proof sufficient to allow the jury to conclude that the . . . contract could have been awarded to Iconco had it not been awarded to Jensen." *Id.* at 1301.

This approach is sensible and fair. Whether Sierra needs to obtain the testimony of Judge Lewin (the Rehabilitation Court judge), and if so whether Sierra can obtain it (in light of the privilege afforded to judges against testifying about their decisions), are questions for another day.

3. *Blank v. Kirwan*

Next, defendants cite *Blank v. Kirwan*, 39 Cal.3d 311, 216 Cal. Rptr. 718 (1985) for the proposition that plaintiffs have not alleged and cannot allege the requisite "expectancy" for their claim for intentional interference with prospective economic advantage. In that case the plaintiff claimed he lost the opportunity to profit from the operation of a poker club because the city officials who had the power to grant him the necessary license had conspired with rival bidders to grant the license to them, in return for various "things of value." The complaint failed to identify the other party to the alleged thwarted profitable economic relationship. If the other party was the City, said the Supreme Court, no action would lie because plaintiff and the City would not have had a joint economic relationship in the operation of the poker club. If the other party was the class of potential poker club patrons, ruled the Court, no claim could lie because "[i]n light of the city council's broad discretion to grant or deny a license application, plaintiff . . . can plead no protectable 'expectancy,' but at most a hope for an economic relationship . . . ." *Id*. at 330-31.

Blank v. Kirwan presents an issue quite similar to that presented in *Savini* and *Iconco*: when the plaintiff's contractual rights or economic benefits which were allegedly thwarted had not yet been established with finality, how likely - - how certain? - - must they be to permit recovery? In *Blank v. Kirwan* the Court sensibly found that plaintiff's prospects were just too "iffy." But throughout that opinion the California Supreme Court emphasized the specifics of the plaintiff's allegations, and the *Blank v. Kirwan* holding should not be applied too broadly. A multi-member City Council, such as that involved in *Blank v. Kirwan*, is routinely subject to a host of non-economic (as well as economic) pressures and considerations that are almost always present in municipal licensing and zoning decisions. Those factors exacerbate the inherent uncertainty in that governmental body's decision-making. Here, the public official initially involved in the key decision - - the Commissioner - - is alleged to have *committed* to

selecting either Sierra or the French Group. Complaint, ¶ 42. [5] While that allegation is disputed by defendants, and while the Court, not the Commissioner, had the final say, ¶ 42 and the other background facts alleged in the complaint make Sierra's complaint far less speculative than *Blank v. Kirwan*. For the reasons set forth in the preceding discussion about *Savini* and *Iconoco*, the Court rejects defendants' contentions.

C. <u>RICO Claims</u>

Defendants rely on *Imagineering v. Kiewit,* 976 F.2d 1303 (9th Cir. 1992), to argue that Sierra lacks the standing and the concrete injury to assert its RICO claims. In *Imagineering,*

> [a] plaintiff class of minority and woman-owned business enterprises ("MWBEs") appeal[ed] the dismissal of its action against [various entities known as"Kiewit"], who are prime contractors, challenging an alleged scheme to evade federal and state regulations requiring prime contractors to employ MWBEs on public works construction projects by using phony MWBEs to create the appearance of compliance with the set-aside regulations. Plaintiffs alleged that the scheme violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") ...

Id. at 1305. Plaintiffs alleged that 1) each named plaintiff was an MWBE subcontractor for the lowest complying contractor on at least one project improperly awarded to Kiewit and 2) they lost profits they would have earned as subcontractors on the projects due to Kiewit's illegal scheme. *Id.* at 1306. The Ninth Circuit separately evaluated whether plaintiffs had RICO standing and whether they could show proximate causation of their injuries and, affirming the district court, found against plaintiffs on both issues.

First, the court recited the RICO statutory standard: "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court." *Id.* at 1309; 18 U.S.C. § 1964(c). The Court then stated that:

> [a]lthough plaintiffs characterize their injury as one compensable under RICO, that characterization must be challenged on several bases. First, the facts alleged do not

[5] It is noteworthy that the Commissioner, whose counsel attended the hearing on their motions and addressed the Court, has not refuted this assertion, although in *Low v. Altus* the Commissioner has contended that he was under no compulsion to pick any of the bids that had been tendered and he could have continued to manage the ELIC estate.

> establish "proof of concrete financial loss," let alone show that money was paid out as a result of Kiewit's alleged racketeering activity. Next, even if the type of injury alleged by the MWBEs could be compensable, it is not at all clear that these MWBEs suffered such an injury. Although plaintiffs assert that if specified contracts had not gone to Kiewit those contracts would have been awarded to the plaintiffs' prime contractors, that cannot be established. Indeed, although plaintiffs challenge the district court's reasoning that the next lowest bidder has no claim to the prime contract [under] Washington law . . . their complaint states that:
>
>> The City of Seattle first awarded the Cedar Falls Dam Contract in April 1986 to Morrison-Knudsen, which had designated plaintiff Knighten Brothers as an MBE subcontractor. Kiewit and Global successfully protested this award, and the contract was rebid. On the rebid, Kiewit submitted the low bid, designating Global as an MBE subcontractor.
>
> Even if we assume that the MWBE plaintiffs' prime contractors would have received the contracts and they were obligated to award Imagineering and Knighten Brothers the subcontracting work merely on the basis of "designating" them in the bids, there is no guarantee that the WBE or MBE subcontractor chosen would not be substituted during the pendency of the contract.
>
> Finally, the complaint does not allege specific bids submitted by the MWBE plaintiffs that were accepted by the prime contractors. It is impossible to determine from the amended complaint whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits. <u>Considered as a whole, the amended complaint alleges only a speculative injury, which is not compensable under RICO. Thus, plaintiffs have failed to establish RICO standing; namely that they were injured in their business by reason of Kiewit's conduct.</u>

Id. at 1310-11 (emphasis added).

Next, for similar reasons, the Ninth Circuit found that plaintiffs had not alleged proximate causation of their injuries.

> In order to maintain a cause of action under RICO then, the plaintiff must show not only that the defendant's violation was a "but for" cause of his injury, but that it was the proximate cause as well ... This requires that there must be a direct relationship between the injury asserted and the injurious conduct alleged.

Id. at 1311 (internal citations and quotations omitted). The Court opined that under that standard,

> The direct harm in this case runs to the prime contractors. It was the intervening inability of the prime contractors to secure the contracts that was the direct cause of plaintiffs' injuries. Under *Holmes*, the MWBE plaintiffs are

> missing the direct relationship needed to show Kiewit proximately caused their injuries.[6]

Id. at 1312. The court concluded that:

> Because the MWBE plaintiffs did not adequately allege RICO standing or RICO proximate causation, the district court's Rule 12(b)(6) dismissal of the RICO claims must be affirmed. Plaintiffs' RICO claims were properly dismissed on either ground.

Id.

Defendants assert that *Imagineering*'s standing analysis applies because just as Washington law permitted the awarding agency in *Imagineering* to reject all bids and readvertise, "[h]ere, not only could the Commissioner have rejected a single bidder and required rebidding under Ins. Code § 1037 (for example, for additional bonds-out bids, albeit at a lower price than Altus paid), so could the Conservation Court." Motion, p. 15-16.

Plaintiffs seek to restrict *Imagineering* to its facts. They emphasize that "[i]n that case, the court upheld the dismissal of a RICO claim by a disappointed bidder on the ground that the plaintiff was not a competitor of the successful bidder but rather a prospective *subcontractor* of the bidder who had lost out as a result of the defendant's wrongful conduct." Opposition, p. 15. Plaintiffs rely on *Pharmacare v. Caremark,* 965 F.Supp.1411(D.Haw.1996), to support this distinction. In *Pharmacare,* plaintiffs alleged that defendants had engaged in a scheme of commercial bribery in violation of RICO by paying doctors for referrals and that, but for their scheme, plaintiffs would have received those referrals and the resulting profits. The court held that plaintiffs asserted a "first-tier injury," distinguishing *Imagineering* on the ground that the plaintiffs there had asserted only a "second-tier" injury. *Id.* at 1420-21.

To support its finding that plaintiffs had no standing, the *Imagineering* court pointed to four problems with their allegations: 1) no proof of concrete financial loss, much less that money was paid out as a result of Kiewit's alleged racketeering activity; 2) plaintiffs could not establish that their prime contractors would have received the contracts absent defendants'

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[6] The parties do not sufficiently address the RICO proximate cause requirement. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), where the Supreme Court discussed three reasons for the directness requirement.

fraud, because the awarding agency could have rejected all the bids; 3) no guarantee that even if the plaintiffs would have been chosen as subcontractors they would not be substituted during the pendency of the contract; and 4) the complaint did not allege specific bids submitted by the MWBE plaintiffs that were accepted by the prime contractors. *Id.* at 1310-11. The *Imagineering* court did not hold that each of the factors it relied on independently compelled dismissal; instead, "[c]onsidered as a whole, the amended complaint alleges only a speculative injury, which is not compensable under RICO." *Id.* at 1311.

Imagineering does not compel finding as a matter of law that plaintiffs' asserted injury is too speculative to be redressed. Only two of the factors present in that case, one and two, apply here. Nevertheless, just because *Imagineering* does not compel the court to find that plaintiffs have not pled a non-speculative injury does not mean they have pled an injury cognizable under RICO. RICO plaintiffs must allege injury to their "business or property." 18 U.S.C. § 1964(c). While *Imagineering* focused primarily on whether the plaintiff MWBE's had suffered any injury at all, here there remains the question of whether the injury allegedly suffered was of the type compensable under RICO. *Id.* at 1310-11.

Plaintiffs have not clarified whether they are alleging injury to "business" or "property." Although the distinction has not been adequately briefed, the Court proffers its view that plaintiffs cannot properly plead either.

In determining whether a particular interest is a property right for RICO purposes, courts look to whether the law has recognized and enforced it as a property right. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (finding confidential business information to be property because it "has long been recognized as property"); *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994) ("to determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right"); *United States v. Evans*, 844 F.2d 36, 42 (2d Cir. 1988) ("[t]hat the right at issue here has not been treated as a property right in other contexts, and that there are many basic

differences between it and common-law property are relevant considerations in deciding whether the right is property under the federal fraud statutes").

Sierra's interest, as a disappointed bidder, in the ELIC assets awarded to defendants does not appear to be a legally cognizable property interest. The authority most directly on point suggests that a disappointed bidder's interest in assets awarded to another bidder during insurance conservation proceedings is not legally cognizable property. *Pacific Standard*, *supra*, 9 Cal.App. 4th at 1201, ("[o]nly by express judicial authorization and prescription of sales terms may a legally cognizable interest be created in any potential buyer in this statutory context. [The disappointed bidder, though it alleged that the Commissioner had committed to award it the assets] never attained that status and was no more than an offeror"). Moreover, cases expressly addressing whether, under RICO, disappointed bidders have property interests in assets awarded to others or in an uncorrupted bidding process, indicate that they do not. In *United States v. Henry*, 29 F.3d 112, 114-115 (3d Cir. 1994), for example, the court dismissed an indictment alleging a RICO fraud based on the theory that public officials had corruptly steered deposits to one bank, thereby victimizing competing banks. The court stated,

> once the Commission's deposits actually were awarded to one of the bidding banks, they legally would be considered the property of that bank . . . Here, however, the money had not yet been deposited, and there is no way of knowing to which, if any, of the bidding banks it would have gone. Even in a fair process, Bank, A [the bank which actually received the deposits] might still have won the deposits. The issue, therefore, is whether the competing banks' interest in having a fair opportunity to bid for something that would become their property if and when it were received is in itself property. We conclude that it is not. The competing banks' interest in a fair bidding opportunity does not meet [the test of whether the law traditionally has recognized the particular interest as property.] Clearly, each bidding bank's chance of receiving property . . . was, at least in part, dependent on the condition that the bidding process would be fair . . . . Violation of this condition may have affected each bidding bank's possible future receipt of property, but that does not make the condition property.

Id. at 114-115. In light of the cited authorities, the Court agrees with the statement made by the Court in *United States v. Berlin*, 707 F.Supp. 832, 835 (E.D. Va 1989), that "[i]t seems

intuitively obvious that other companies, whoever they may be, have no cognizable property interest in the mere expectation of a contract that the government may award to any or none of them."

Concerning the remaining prong of section 1964(c), as a matter of common sense Sierra would appear to be restricted from asserting an "injury to business," because Sierra has conceded that it was not an ongoing concern prior to the ELIC conservation proceedings, but was instead formed solely to pursue the ELIC assets.

Given the foregoing analysis, the Court rules that as currently framed the RICO claims must be dismissed. Plaintiffs may attempt to amend them, but only if they can in good faith succeed in framing allegations that do not run afoul of the cases and principles discussed in this section.[7]

D. <u>Statute of Limitations</u>

Defendants argue that all plaintiffs' claims are barred by the applicable statutes of limitation because the complaint shows they were on notice of defendants' allegedly illegal ownership structure as of 1991.

Plaintiffs allege that "[o]n November 12, 1991, Sierra sent a memorandum to the Commissioner raising concerns that Altus and Credit Lyonnais might in fact be controlling MAAF and the other entities that allegedly would be purchasing and operating Executive Life's business." Complaint, ¶ 55. Based on this pleading and the referenced memorandum, defendants argue that plaintiffs were on notice of the alleged wrongdoing as of the date of the memo. Plaintiffs contend that defendants "overcame [plaintiffs'] suspicions by a campaign of lies and deceptions" and that in fact the Commissioner determined -- albeit mistakenly -- that

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[7] The Court acknowledges that there is an apparent tension between permitting the intentional interference claim to proceed and provisionally dismissing the RICO claims. However, there are important differences between the statutory language of RICO ("business or property") and the common law development of legal rights based on an "expectancy." Linguistically and practically, the latter phase contemplates something less concrete than the former.

plaintiffs' suspicions were "groundless," and rebuked "self-appointed regulators" for "attempt[ing] to second guess" him. Opposition, p. 20; Complaint, ¶ 69. The issue, therefore, is whether the statutes of limitation bar claims when the plaintiff was suspicious of wrongdoing but those suspicions were allayed by the fraudulent concealment of defendants.

Defendants cite California cases addressing the doctrine of inquiry notice. "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing ... So long as suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly v. Eli Lilly,* 44 Cal.3d 1103, 1110-11 (1988); *California Sansome v. U.S. Gypsum,* 55 F.3d 1402, 1409 n.12 (9th Cir. 1995) ("The doctrine of fraudulent concealment [for the tolling of the statute of limitations] does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, [if] a plaintiff is on notice of a potential claim."). A plaintiff "has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements." *Norgart v. Upjohn Co.,* 21 Cal.4th 383, 398 (1999). A plaintiff "has reason to suspect when he has notice or information of circumstances to put a reasonable person on inquiry." *Id.*

Although Sierra's memo suggests suspicion, it would be inappropriate at the pleading stage to dismiss Sierra's claims on that basis. First, plaintiffs had no knowledge of the *contrats de portage,* which is the central basis for their claims and which plaintiffs allege defendants assiduously concealed. Plaintiffs' objection, as a competing bidder, to defendants' bid was based purely on the structure of defendants' proposed deal; what was proposed was not itself illegal and plaintiffs could not have filed a meritorious suit challenging it. Moreover, according to plaintiffs' allegations, defendants immediately responded to plaintiffs' concerns. So did the Commissioner, who rebuked plaintiffs. *See Conmar Corp. v. Mitsui,* 858 F.2d 499, 504-05 (9th Cir. 1988) (criminal indictment of defendant not sufficient to "excite inquiry." Moreover, "it would not have been unreasonable for Conmar to rely upon Mitsui's contention that the customs investigation was a mistake."). Under these circumstances, it is not clear that

plaintiffs were obligated (or even able) to go over the Commissioner's head when they did not know about the *contrats de portage* which form the basis of their suit. Had plaintiffs sued for fraud based merely on suspicions they might have invited sanctions -- or at least defendants likely would have so contended.

E. Other Claims

1. Negligent Interference with Business Expectancy

Defendants assert that plaintiffs cannot state a cause of action for negligent interference with business expectancy because, as competitors for the ELIC assets, defendants owed plaintiffs no duty of care. *Stolz v. Wong Communications,* 25 Cal.App. 4th 1811, 1825 (1994) ("complaint did not allege such a duty, nor could it, since it was plain that plaintiff and defendants were competitors"). Plaintiffs do not address *Stolz*, but instead rely on language from the California Supreme Court's seminal case on negligent interference, *J'aire Corp. v. Gregory,* 24 Cal.3d 799 (1979).[8] That case stated that "[w]hether a duty is owed is simply a shorthand way of phrasing ... the essential question [of] whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* at 803. The Court also asserted that "[r]ather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability." *J'aire* announced a six-factor test for determining duty: 1) the extent to which defendant's conduct was intended to harm plaintiff, 2) the foreseeability of the harm, 3) the certainty that plaintiff actually suffered harm, 4) the closeness of the connection between the conduct and the harm, 5) the moral blame attached to defendant's conduct and 6) the policy of preventing future harm. *Id.* at 804. A mechanical application and weighing of those factors could warrant a finding of duty here, but that would expand the theoretical scope of this tort far beyond its sensible boundaries. Not only were Sierra and defendants (at least the MAAF and Aurora parties) competitors, but they also did not have any kind of dependence on the other's conduct to carry on their own respective business -

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[8] *Stolz* fails to analyze duty under *J'aire.*

- unlike the lessee's dependence on the contractor finishing on time in *J'Aire*. There being no "duty" (from either a practical or legal perspective), the negligence claim cannot survive. See *Limandri v. Judkins*, 52 Cal. App. 4th 326, 60 Cal. Rptr. 2d 539, 551 (1997).

2. Abuse of Process

Defendants argue that plaintiffs' abuse of process claim is clearly barred by the one year statute of limitations because plaintiffs' complaint establishes that they knew of the basis for this claim on February 18, 1999 (the date the Commissioner publicized the existence of the *contrats de portage*) but did not file their claim until January 30, 2001. Plaintiffs respond that the statute of limitations has not begun to run on its abuse of process claim because defendants' wrongful conduct in the Conservation Court is ongoing. But plaintiffs' complaint does not allege any ongoing wrongful conduct. The statute of limitations bars this claim.

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motion to dismiss plaintiffs' first cause of action (intentional interference with business expectancy) and plaintiffs' third, fourth and fifth causes of action (RICO), with leave to amend.

For the foregoing reasons, the Court GRANTS with prejudice defendants' motion to dismiss plaintiffs' second cause of action (negligent interference with business expectancy) and plaintiffs' sixth cause of action (abuse of process).

IT IS SO ORDERED.

DATE: June 20, 2001

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A. Howard Matz
United States District Judge