UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBBIN LINDSAY TORESCO,

Plaintiff,

v.

AMERICAN HONDA MOTOR COMPANY, INC., a California Corporation, STANLEY JAMES CARDIGES, ROBERT N. RIVERS, ROBERT A. MAZZITELLI, ROGER NOVELLY, RICHARD DiTARANTO, and Does 1-50,

Defendants.

Civil Action No. 94-2248 (WGB)
Return Date: September 26, 1994

BRIEF IN SUPPORT OF DEFENDANT AMERICAN HONDA MOTOR COMPANY, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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PRELIMINARY STATEMENT

Since approximately February 1994, in the U.S. District Court for the District of New Hampshire, approximately 15 former employees of American Honda Motor Co., Inc. (the "Company" or "American Honda") including four of the five individual defendants in this case, have pled guilty to, or been indicted for, among other things, taking kickbacks from vendors of services to American Honda; taking kickbacks from prospective and existing American Honda dealers in return for awarding new dealerships and allocating popular cars; and taking hidden interests in new or prospective dealerships. The various schemes reportedly netted the individuals millions of dollars in cash, goods and other assets.

American Honda itself has not been charged with anything. All of the pleas and indictments which have resulted from this ongoing investigation have described in detail how the Company was victimized and defrauded by a group of former employees who breached their duties of loyalty and fidelity to their employer, and violated as well as several express corporate policies prohibiting their misconduct. The scandal has cost American Honda millions of dollars in expenses and lost business opportunites, not to mention the impact which the investigation has had on the Company's reputation and goodwill.

Plaintiff in this action, who complains primarily that she did not obtain a Honda franchise because she would not pay kickbacks to the individual co-defendants, has done little more in her complaint than "cut and paste" together whole sections and paragraphs of the indictments and plea agreements, with one important difference -- she has added American Honda to the list of co-conspirators in the various schemes rather than concede that American Honda was the principal victim of them. The obvious reason for this is to increase her potential recovery, theoretically at least, by adding a deep corporate pocket to the complaint.

Plaintiff's complaint against American Honda, however, must be dismissed for failure to state a claim upon which relief can be granted essentially because there can be no vicarious liability on the part of the Company in these circumstances for the criminal misconduct

of its employees in victimizing the Company itself. In apparent recognition of this fact, plaintiff has sought in her complaint to portray American Honda as an active participant with the individual co-defendants in its own victimization. As set forth below, this attempt does not survive logical scrutiny under the civil RICO statute or any of the other legal principles on which plaintiff's complaint relies.

Plaintiff's complaint also must be dismissed because, among several defects in her RICO pleading, she lacks standing to assert claims for civil RICO. She was not injured in any real, as opposed to speculative, way by any of the schemes in which she can legally contend that American Honda was a participant. Plaintiff has also failed to allege that she was injured in her business or property "by reason of" the civil RICO violations of which she complains. Plaintiff's pendant state-law claims must be dismissed both because the federal-question claims are insufficient, and because plaintiff does not have any separate legal entitlement to an American Honda franchise, or to damages because she did not obtain one. Nor could American Honda have foreseen that its employees would engage in criminal conduct and misrepresentations in a manner that would have given rise to a duty to intervene in their conduct. Plaintiff has also failed sufficiently to allege proximate cause or compensable injuries related to American Honda's alleged conduct.

Plaintiff's complaint against American Honda amounts to an abuse of the civil justice system. The Company has already been victimized once by the misconduct of several of it employees. The Court should not countenance this plaintiff's attempt to victimize it again by distorting the role of American Honda in its own victimization. The complaint against American Honda should therefore be dismissed.

PROCEDURAL HISTORY

On May 16, 1994, plaintiff Robbin Lindsay Toresco filed an eleven-count complaint in the United States District Court, District of New Jersey, against American Honda and five of its former employees, S. James Cardigos, Robert Rivers, Robert Mazzitelli, Roger Novelly and Richard DiTaranto. American Honda was served with the summons and complaint on May 26, 1994 by service upon its registered agent in New Jersey. By stipulation of counsel and proposed form of Order submitted to the Court, this defendant's time to answer or otherwise move was extended to August 30, 1994. To this defendant's knowledge, defendants DiTaranto and Rivers have filed answers, but no motions have been filed previously by any parties.

STATEMENT OF FACTS

A. American Honda's Business.

American Honda markets and sells automobiles in the United States through a national network of authorized independent dealerships divided into ten geographic sections called "zones." Complaint ¶23. To determine whether it is economically feasible to establish a new dealership in a particular zone, American Honda conducts a detailed marketing study. Complaint ¶24. If the marketing study indicates that a new dealership is likely to be profitable, American Honda creates an "open point" for the zone and begins an application process to select a dealer to operate the Honda dealership within the open point. Applications for dealerships are screened by American Honda's district and zone managers, and American Honda's national sales managers make the final selection. Id.

A candidate selected for the new dealership is issued a Letter of Intent ("LOI"). Id. The issuance of an LOI, however, does not automatically guarantee the applicant that American Honda will enter into a final dealership agreement with him or her. American Honda will only enter into a dealership agreement if certain terms and conditions set forth in the LOI are met within a specified period of time. Id.

B. American Honda's Corporate Policies.

Plaintiff acknowledges that American Honda has had two established corporate policies that were designed to prohibit the type of employee misconduct which she describes in her complaint. One policy prohibits employee involvement in situations where personal interest conflicts or appears to conflict with the interest of American Honda. Complaint ¶29. The second policy prohibits employees from awarding LOIs on a partial basis. Complaint ¶28.

Cardiges, a former employee of American Honda, was indicted by a federal grand jury in New Hampshire for a series of criminal racketeering acts which violated these established American Honda's corporate policies. Rivers, Mazzitelli and Novelly pled guilty to some of the charges before formal indictments were handed down against them and are awaiting sentencing. For example, on February 14, 1994, Rivers pleaded guilty to racketeering and admitted, among other things, that:

- He defrauded American Honda and violated American Honda's conflict of interest policy by receiving kickbacks from sales training programs. (A129(f)-130; A145)[1]

- He obtained monetary payments and ownership interests in new Honda dealerships in violation of American Honda's conflict of interest policy. (A131-132)

- He violated American Honda's policy when he did not award the LOI on merit. (A131-132)

Fourteen days later, on February 28, 1994, Mazzitelli pleaded guilty to conspiracy to commit mail fraud and admitted that:

- He defrauded American Honda by converting the LOIs to his own use to the detriment of American Honda. (A177-180; A200)

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[1] Throughout this Brief, references to "A___" refer to pages in the Appendix.

- He received cash payments for issuing LOIs in contravention of American Honda's policy. (A17-183; A200)

- He received kickbacks from marketing and advertising agencies that violated American Honda's conflict of interest policy and converted American Honda's funds. (A183-184; A200)

- He received kickbacks for placing slightly damaged cars with certain dealerships be sold for profit on the market. (A183-184; A200)

Similarly, on March 11, 1994, Novelly pleaded guilty to conspiracy to commit mail fraud. (A215; A250) Like Rivers and Mazzitelli, he admitted to participating in the conversion of American Honda's LOIs by receiving monetary payments and gifts and by obtaining an undisclosed interest in a LOI for himself. He specifically admitted that his interest in the LOI was not disclosed to American Honda and that his actions were not in the best interest of American Honda, but were in the best interest of the individual conspirators. (A232-233)

Throughout the criminal informations, indictments and plea agreements of four of the five individual co-defendants in the present civil action, one theme remains constant: American Honda was the victim of the criminal misconduct of unscrupulous employees.

D. The Civil Action.

In drafting her complaint, plaintiff has turned upside-down the entire theory of the criminal indictments by alleging that American Honda was a co-conspirator in the various fraudulent schemes rather than the primary victim of them. In the process, plaintiff has made it impossible to determine from a fair reading of the complaint -- with its constant references to the "defendants" or "defendants, or some of them" -- exactly what her theory of liability is against American Honda. The main thrust of plaintiff's complaint is that she did not obtain an LOI for a Honda dealership because she refused to pay bribes to the individual co-defendants. But nowhere in her complaint does plaintiff reconcile this claim with the obvious problem that four of

the five other co-defendants in this action have admitted, or have been charged with, soliciting those same bribes in breach of their fiduciary duties to American Honda.

This central inconsistency resurfaces throughout a careful reading of the complaint. For example, the "racketeering acts" (RAs) described in the complaint at paragraphs 41 through 107 are divided into seven categories involving broad allegations of mail fraud, kickbacks, bribery and extortion:

Racketeering Act 1[2]

RA 1 alleges a scheme by which American Honda employees, including the individual defendants, received kickbacks from sales training seminar vendors. The gist of the offense is that those employees received kickbacks from the vendor in exchange for their choosing the vendor. This breached their fiduciary duties to Honda, and defrauded Honda, who believed that its employees were choosing vendors on the merits rather than on the basis of the payment of bribes. American Honda could not have been both a victim of and a participant in the scheme to defraud, because if American Honda were aware of and condoned the practice, it could not have been defrauded at the same time.

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[2] Throughout the RAs, the complaint cites alleged violations of 18 U.S.C. §§ 1951, 1952, 1956 and 1957, but none of these alleged violations is named as an RA. Section 1951 is the offense of interfering with commerce by threats or violence. Nowhere does the complaint articulate any acts that fall within this statute, which requires "wrongful use of actual or threatened force, violence, or fear, or under color of official right." Section 1952 is the offense of interstate travel in aid of racketeering. No facts are alleged that explain how and when this offense was committed. Sections 1956 and 1957 are money laundering offenses, all of which are predicated on the underlying commissions of mail fraud and bribing.

Racketeering Acts 2-8

RAs 2-8 allege a scheme by which American Honda employees received kickbacks from direct-mail advertising vendors who provided advertising services for Honda dealers under a pooling arrangement in which Honda matched the advertising funds contributed by the dealers. The gist of this scheme, as supported by the allocutions of the Honda employees, was that those employees received kickbacks from the vendors in exchange for their choosing the vendors. This breached their fiduciary duties to American Honda, and defrauded American Honda, who believed that its employees were choosing vendors on the merits rather than on the basis of the payment of bribes. As with RA 1, American Honda could not have been a participant in the scheme to defraud, because if American Honda were aware of and condoned the practice, it could not at the same time have been defrauded.

Racketeering Acts 9-24

RAs 9-24 allege a scheme in which LOIs were awarded on the basis of bribes paid rather than on the merits. Plaintiff claims that the bribe scheme constituted mail fraud and money laundering under federal law, and criminal coercion and commercial bribery under New Jersey law. These are the first RAs by which plaintiff claims to have been injured.

Plaintiff's claim that this scheme constituted criminal coercion under New Jersey law is misplaced, because none of the categories of threats enumerated in N.J.S.A. 2C:13-5 applies to the bribe scheme alleged here. Those categories of threats are substantially similar to the categories of threats contained in N.J.S.A. 2C:20-5, "Theft by Extortion." The official comments to the extortion statute make clear that it is not intended to apply to threats "to refuse to do business or to cease doing business," which is the allegation here.

Moreover, criminal coercion, even if properly alleged, is not a predicate act under 18 U.S.C. § 1961(1). That statute states that an offense of extortion under state law may be a predicate act, but does not enumerate coercion as a predicate act. New Jersey, as discussed above, has an "extortion" statute, which is clearly different from the criminal coercion statute alleged in the Complaint.

It is clear that American Honda was the victim of this scheme. The scheme violated American Honda policies and deprived American Honda of the honest services of its employees, who hid the bribes from their employer, and also deprived American Honda of property because property received by the employees in the course of their employment -- the bribes -- belonged to American Honda.

The complaint alleges that American Honda was a participant in the LOI bribe scheme. American Honda could not, however, have been both a victim of the scheme and a participant. If American Honda knew that its employees were receiving the payments (which would be required for it to be a participant), then those employees did not commit commercial bribery, and did not defraud American Honda.

Racketeering Acts 25-26

These RAs allege that American Honda employees approved the transfer of American Honda dealerships in exchange for payments. This scheme is alleged to have constituted mail fraud, commercial bribery and criminal coercion. For the reasons stated above with respect to RAs 9-24, the criminal coercion statute is not a predicate offense to RICO, and is also inapplicable to a bribery scheme where the only threat is to refuse to do business.

Racketeering Acts 28-34 (there is no RA 27)

These RAs allege that American Honda employees solicited or accepted various benefits from American Honda dealers in return for favorable treatment. For the same reasons set forth above with respect to RAs 9-26, American Honda could not have been a participant in these RAs either.

Additional Unenumerated Racketeering Acts

In addition, plaintiff alleges other racketeering acts, some of which are alleged to involve her directly. At ¶¶ 93-97, plaintiff alleges that American Honda violated N.J.S.A. 2C:21-10, the commercial bribery statute, by soliciting a bribe from her. Even ignoring the complete lack of details as to the time, place or content of the solicitation, the facts alleged could

not constitute an offense of commercial bribery if American Honda were aware of and condoned the practice by its employees.

Plaintiff attempts to plead a violation of subsection (a), which relates, as discussed above, to the violation of a duty to an employer or other enumerated groups, within none of which plaintiff even arguably falls. She also attempts to plead a violation of subsection (b), which applies only to persons who hold themselves out to the public "as being engaged in the business of making disinterested selection, appraisal, or criticism or commodities, real properties or services." The official commentary to this statute makes clear that it is limited to only those persons "being engaged in the business of" making disinterested decisions, such as "professional critics, commercial rating agencies, and the like." American Honda in "in the business of" selling cars, not making disinterested appraisals. Therefore, plaintiff's allegations as to subsection (b) of the commercial bribery statute are misplaced.

One other predicate act involving plaintiff is alleged -- that the former American Honda employees threatened plaintiff that if she did not stop approaching them about obtaining a franchise, that they would "adversely affect" her parents' dealership. This is alleged to constitute criminal coercion. As discussed above, criminal coercion is not a predicate act under RICO, and a threat, in essence, to stop doing business with her parents does not fall within the coercion statute.

The internal inconsistencies in Plaintiff's theory of the main RICO allegations in the case continue through the other factual and legal allegations of the complaint as well. They are discussed in detail below.

E. The Present Motion.

American Honda brings this motion to dismiss each of the eleven counts of the complaint against American Honda for failure to state a claim upon which relief may be granted. In support of this motion, American Honda is submitting copies of the indictments of Cardiges, Rivers, Mazzitelli and Novelly, the written plea agreements entered into by Rivers, Novelly and Mazzitelli, and the transcript of the Rule 11 guilty plea proceedings concerning these three

former employees. Since these materials fall outside of the four corners of the complaint, American Honda's Rule 12(b)(6) motion should be treated as a motion for summary judgment pursuant to Fed.R.Civ.P. 56.

Summary judgment is required under Rule 56, where as here, the pleadings and matters submitted to the Court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 472 U.S. 242, 250 (1986).

LEGAL ARGUMENT

I. PLAINTIFF'S RICO COUNTS FAIL TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED AND SHOULD BE DISMISSED.

Plaintiff has made federal and state (New Jersey and Florida) RICO claims the centerpiece of her complaint[3] and in so doing has attempted to elevate her general complaint that she failed to obtain a American Honda dealership into a broad-ranging racketeering action. Almost ten years ago, the late Justice Thurgood Marshall and three other justices who joined in Justice Marshall's dissent in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) noted the potential harm which could result from exactly this type of abuse of the civil RICO statute:

> In practice, this [civil RICO] provision frequently has been invoked against legitimate businesses in ordinary commercial settings. . . . Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.

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[3] I.e. the First, Second, Third and Fourth Counts, respectively alleging violations of: 18 U.S.C. § 1962(c) (racketeering) and (d) (RICO conspiracy), N.J.S.A. 2C:41-1 (New Jersey RICO) and Fla. Stat. Ann. § 895.01 et seq. For purpose of this brief, the federal RICO decisions are equally applicable to New Jersey and Florida RICO. See, State v. Passante, 225 N.J. Super. 439, 442 (Law. Div. 1987); Colonial Penn Insurance Co. v. Value Rent-A-Car, Inc., 814 F. Supp. 1084 (S.D. Fla. 1992).

Id. at 506.

This Court should not countenance such extortion here. Plaintiff has failed to state a RICO claim under federal or state law for two reasons. First, plaintiff has failed to state claims for the individual predicate acts of which she complains (which, as discussed below, are the fundamental elements of RICO), and has failed to allege fraud with particularity. Secondly, as to the requirements of RICO pleading, she has failed properly to allege (i) RICO injury and standing; (ii) a comprehensible theory of the enterprise as distinct from the corporation and its own employees; and (ii) a comprehensible theory of, much less specific facts in support of, the alleged predicate acts committed by American Honda.

A. Plaintiff has failed to allege any actual, non-speculative injury to herself, proximately caused by American Honda, and she therefore lacks standing to make a RICO claim.

The Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., creates a federal civil action for treble damages and other relief in favor of a person injured in his property or business by reason of a violation of the statute. 18 U.S.C. § 1964. The New Jersey statute is identical in this regard. N.J.S.A. § 2C:41-4(c).[4] Plaintiff, however, has not alleged any damages to her which have arisen "by reason of" a violation of RICO, and, to the extent that she attempts to do so, those damages are only speculative. Thus, she lacks standing as a matter of law to make a RICO claim.

1. Plaintiff has alleged no actual injuries to herself, and thus lacks standing to make a RICO claim.

Before considering the plaintiff's failure to meet the substantive pleading requirements of a valid RICO claim, the Court must consider whether she has even made out an

[4]The Florida statute uses the term "aggrieved person," Fla. Stat. Ann. § 895.05(6), but the standing and proximate cause requirements are the same under Florida RICO as under federal RICO. See Arabian American Oil Co. v. Scarfone, 713 F.Supp. 1420 (M.D. Fla. 1989); O'Malley v. St. Thomas University, 599 So 2d.999 (Fla. App. 1992).

allegation that she has suffered any RICO injury. It is clear from the face of her complaint that plaintiff has not done so because most of her allegations are irrelevant to her, and the injuries she claims are neither injuries to her property or business, nor injuries which are concretely ascertainable.

As set forth in detail in the Statement of Facts, virtually none of allegations of scheme and frauds made by plaintiff throughout the complaint have anything to do with her. It is axiomatic that a plaintiff in any action must allege injury resulting from the claimed offense, and, as set out above, all the RICO statutes explicitly require that the plaintiff be injured as a result of a violation of the statute. Two claims of injury to plaintiff herself are alleged: the rejection of plaintiff's applications for American Honda dealerships in Florida and New Jersey (¶¶ 12(a) and (b); 89-103; 105-107); and the threat to harm her parents' own American Honda dealership (¶¶ 12(c); 105). Neither of these is cognizable under any theory of recovery, much less under RICO.

Although the second alleged injury described above (the threat to plaintiffs' parents' car dealership), involves plaintiff at least in some attenuated way, her concern for her parents' welfare is not cognizable here. Her parents have not brought suit and they are the only ones, by definition, who can make a claim based on the alleged threats to their dealership.[5] See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) (litigants must be able to show injury to themselves to have standing).

The only at least theoretical basis, therefore, for RICO injury to the plaintiff is her claim that, as a result of RICO predicate acts, she was wrongfully deprived of some "right" to a American Honda dealership. As explained below, this claim must fail as a matter of law for three reasons: (i) No one has a legal right to a business opportunity; (ii) a RICO plaintiff only

[5]This allegation also fails to meet RICO's "continuity" requirement, since there is no allegation that similar threats were used in any of the other predicate acts. Thus the "pattern" which the federal courts have held is a necessary element of a federal RICO claim is absent. See Sedima v. Imrex, supra, 473 U.S. at 496, n.14. New Jersey RICO's "pattern" requirement is explicitly required by statute. N.J.S.A. § 2C:41-1d(2); see State v. Passante, 225 N.J. Super. at 442-3.

has standing if she has pleaded an actual injury "by reason" of the RICO violation; and (iii) RICO does not provide relief for speculative injuries, i.e., the possible profits the plaintiff may have made if she had been entitled to a dealership.

As to the first of these, it is black-letter law that businesses have the right to deal with whom they choose, absent a scheme in illegal restraint of trade (which, as discussed infra, plaintiff has failed to allege sufficiently here). See, e.g., Woodbury Daily Times Co., Inc. v. Los Angeles Times-Washington Post News Service, 616 F. Supp. 502 (D.N.J. 1985).

2. Paintiff's putative injuries are speculative, for which RICO provides no remedy

Regarding the second two defects in the present complaint, it is well recognized that RICO does not provide relief for prospective or speculative injuries. Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1311 (9th Cir. 1992). In the Imagineering case, various minority- and woman-owned businesses sued a number of prime construction contractors under RICO, alleging that the contractors were involved in a scheme to evade minority set-aside laws. The district court dismissed the RICO claims on the grounds that (i) the plaintiffs lacked standing because they failed to establish a property right in the contracts they allegedly would have received, and (ii) they did not allege proximate cause because of the speculative nature of their claimed damages. The Ninth Circuit affirmed, holding that notwithstanding the liberal rules for construing RICO claims, "not all injuries are compensable" under § 1964. (Section 1964 allows for a private right of action only for one "injured in his business or property by reason of" a RICO violation.) magineering 976 F.2d at 1310 (emphasis added). "A showing of injury,'" continued the court, "requires proof of concrete financial loss." Id. Since the complaint alleged only a speculative injury, and since it would be impossible to determine "whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits," the plaintiffs had failed to allege that they were "injured in their business 'by reason of'" the prime contractors' conduct. Id. at 1311. Here, too, plaintiff has not alleged any "concrete" financial

loss. She only alleges that she "lost" the business opportunity she sought. No mention is made in the complaint of how she was injured by this, or what damages she suffered.

3. Plaintiff fails to allege that her putative injuries were proximately caused by American Honda.

Even as to the speculative "injuries" alleged in her complaint, plaintiff has failed to show any damage proximately caused by American Honda and her claims therefore should be dismissed. On the issue of proximate cause, the Ninth Circuit in Imagineering noted that "there must be a direct relationship between the injury asserted and the injurious conduct alleged" under RICO, citing Holmes v. Securities Investor Protection Corp., __ U.S. __, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). Explaining the relationship between "concreteness" and proximate cause, the court again cited the Supreme Court's Holmes opinion to the effect that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the [RICO] violation, as distinct from other, independent factors." 976 F.2d at 1312. "But for" causation of loss, the court held, was insufficient to allege a valid claim under RICO. A claim of proximate causation is required, and that requirement is not satisfied by an allegation of speculative injuries. Id. at 1311.

In an analogous situation, "whistleblowers" who sue their former employers for injuries sustained as a result of their refusal to participate in racketeering schemes have typically been denied relief. See e.g., Casper v. Paine Webber Group, Inc., 787 F.Supp. 1481, 1499 (D.N.J. 1992). "Whistleblowers," like plaintiff here, allege that they were harmed by their refusal to join in the alleged scheme and their threats to expose the alleged scheme, not as a legal result of, or "by reason of," the alleged scheme.

Here the injuries are even more speculative, and thus lacking in proximate cause, than the ones rejected as a basis for standing in Imagineering. While the plaintiffs in that case alleged that were it not for the alleged scheme, the minority prime contractors would have been awarded the subject contracts, id. at 1310, the plaintiff here never alleges (nor could she) that she -- and not some other prospective dealer -- would have been awarded a American Honda

dealership if not for the alleged scheme. To the contrary, she alleges that the ultimate recipients of the dealerships were "equally qualified," suggesting that they stood at least an even chance of being awarded those dealerships anyway. [¶ 61.] In other words, her "loss" may have had nothing to do with the allegations here. The complaint fails to demonstrate proximate cause as well as "but for" cause.

Plaintiff's allegations fall far short of pleading the loss of some property right, or other concrete, proximately-caused injury necessary to sustain a valid RICO claim. Her RICO allegations therefore should be dismissed. See, e.g., Hartman v. Blinder, 687 F.Supp. 938, 944 (D.N.J. 1987) (proximate cause an "accepted principle" of RICO as in most liability claims); Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 599 (W.D. Pa. 1987) (hypothetical possibility of future tax prosecution does not confer RICO standing in suit against accounting firm alleged to have provided false tax data to plaintiff and government).

B. Plaintiff has failed adequately to allege a RICO enterprise.

RICO prohibits the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, supra. Plaintiff has failed to plead an adequate enterprise, and the RICO claim should be dismissed for this reason as well.

A RICO enterprise is "any individual, partnership, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The alleged RICO enterprise is completely muddled in the present complaint. American Honda is alternatively "and additionally" defined, along with the individual defendants, as an enterprise [¶ 37], and as an entity which acted "together with" the other defendant's association-in-fact [¶ 38]. Neither of these approaches can withstand scrutiny under settled law in this Circuit as to the applicability of civil RICO claims to corporations in situations such as the one alleged here.

1. American Honda cannot be a RICO enterprise as well as a defendant.

It is well established in this Circuit that a:

> corporation which is alleged to be a RICO enterprise under 18 U.S.C. § 1962(c) cannot be vicariously liable for RICO violations committed by its employees if the employees are the § 1962(c) persons named in the complaint as having conducted the affairs of the enterprise through a pattern of racketeering activity.

Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1351 (3d Cir. 1987). Accord, Lorenz v. CSX Corp., 1 F.3d 1406 (3d Cir. 1993); Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991); Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991); Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991).

As explained in Petro-Tech, section 1962(c) of RICO, which prohibits conducting the affairs of an enterprise through a pattern of racketeering activity, was meant to address the situation where a corporation was infiltrated and "either drained of its own money or used as a passive tool to extract money from third parties." 824 F.2d at 1359. This, of course, is precisely what has happened to American Honda here. The individual defendants used their power with, and the trust reposed in them by American Honda to extract tribute from third parties. American Honda cannot be both the enterprise which was victimized by the individual wrongdoers as well as a party vicariously liable for its own victimization.

Under any logical reading of the scenario alleged in the complaint, the primary victim was American Honda. The dealers ultimately were willing to bargain, albeit illegitimately, for franchises, which they presumably anticipated would still be profitable enough to justify payment of the bribes. Those prospective dealers such as plaintiff who would not pay were theoretically denied the opportunity to have their applications considered, but lost nothing. Only American Honda suffered a tangible harm -- the loss of the opportunity to consider all applicants for franchises, and the credibility of its business practices as a result of the individual defendants' actions.

The Petro-Tech decision does allow a corporate defendant to be a RICO enterprise when the employer or subsidiary was an active participant in the individuals' predicate acts, id., 824 F.2d at 1351, but the decisions of the Third Circuit subsequent to Petro-Tech have closed

that loophole in all but the most extreme cases.[6] In the Brittingham case, the Court of Appeals noted that, to be both a defendant and an enterprise, an employer corporation would have to be "the active perpetrator " of the scheme. 943 F.2d at 302 (emphasis added). In its most recent statement on the subject, Lorenz, the Court wrote that in a case involving a corporation and its subsidiary, "the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity . . . [S]tating that the parent directed the subsidiary's act does not satisfy the distinctive requirement . . . " 1 F.3d at 1412. The court noted also that:

> We have subsequently interpreted [the] language [of Petro-Tech] very narrowly as leaving open only the 'theoretical possibility that a corporation can take a separate, active role in RICO violations also committed by its employees . . . [E]xcept in extraordinary circumstances, a parent corporation cannot be the defendant and its subsidiary the enterprise under section 1962(c).

Id. at 1413, n.4. See also Casper v. Paine Webber Group, Inc., 787 F. Supp. 1480 (D.N.J. 1992) (corporation must have taken a "separate and active role" in racketeering activities).

Plaintiff does not even attempt to allege the active, knowing corporate malfeasance required by the cases for a corporation to be held liable as a RICO enterprise. The complaint falls far from painting the picture of a scheme orchestrated by American Honda and executed by its employee patsies, the scenario envisioned by the "extraordinary circumstances" of Petro-Tech and its progeny. As a whole, plaintiff's allegation that American Honda was both the enterprise and a defendant must fail.

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[6]The complaint's allegation that American Honda "benefited" from the alleged scheme, besides being a fabrication, is by its own terms unconvincing. If American Honda benefited from "reduced executive salary expense," which is entirely speculative, it is just as easy to speculate that it lost potential income it could have collected if these (or larger) amounts, allegedly paid as bribes, were charged by American Honda as legitimate franchise fees. Nor does the allegation explain how American Honda either benefited from "multiplication of dealerships beholden to Defendants" or achieved "control of the dealership body through bribery and extortion" when the money and influence was, by the terms of the complaint, in the hands of the individual defendants.

2. American American Honda cannot be a participant/member in a RICO association in fact as well as a defendant

Plaintiff attempts to salvage her RICO claim by alleging in the alternative that "the individual defendants formed an association in fact . . . as defined in 18 U.S.C. §1961(4), which was engaged in, and the activities of which, together with American American Honda, affected interstate and foreign commerce . . ." Complaint ¶38 (emphasis added). As a threshold matter, this allegation by its own terms does not allege that American Honda was a participant in a RICO enterprise by association in fact within the meaning of §1961(4), only that American Honda acted somehow "together with" an association in fact comprised of the individual defendants. This allegation is therefore insufficient on its face to state a RICO claim against American Honda on "association-in-fact" grounds.

Even if American Honda had been properly pleaded as a party to the "enterprise by association in fact," the claim could not withstand scrutiny under Petro-Tech for two reasons: First, an association in fact must be more than alleged and named. It must, at least in some general sense, describe some real entity which has an existence separate from the normal affairs of the corporation, since a corporation "must always act through its employees and agents, and any corporate act will be accomplished through an 'association' of these individuals or entities." Brittingham, 943 F.2d at 301. Merely making a facial allegation of distinctiveness -- of racketeering activity conducting by the enterprise, as an enterprise separate from the corporation -- will not save a complaint from dismissal. Id. at 302; Casper, 787 F. Supp. at 1503.

Secondly, the use of the association-in-fact language only begs the question. Brittingham makes clear that the "definition of [an enterprise as an association in fact] does not affect the separate inquiry into whether the alleged enterprise is distinct from the defendant." 943 F.2d at 300. In other words, no special association-in-fact analysis is needed if the alleged enterprise is identical to the corporate defendant. Here it is not, and thus plaintiff has failed adequately to allege the existence of a RICO enterprise.

A. American Honda cannot be held liable for the alleged RICO violations under a theory of respondeat superior.

Although plaintiff has not explicitly pleaded it, she may argue that American Honda is responsible for the alleged acts of the individual defendants under the theory of respondeat superior. But respondeat superior, as well as aiding and abetting liability, is not available under §1962(c) because "it renders the employer -- i.e. the enterprise -- responsible for the acts of the employees -- i.e. the persons." Petro-Tech, 824 F.2d at 1359. Ultimately the problem with respondeat superior is that vicarious liability offends the RICO person/enterprise distinctness requirement, since it is premised on the legal identity of the actor and the party to whom the acts are imputed. Whether defined as an enterprise or an association in fact, there can be no respondeat superior involving a collective entity composed of a corporation and its employees. Brittingham, 943 F.2d at 302; Kehr Packages, 926 F.2d at 1411.

B. Plaintiff has failed to allege specific predicate acts by American Honda to sustain a RICO claim.

The predicate acts alleged by plaintiff are so broadly and vaguely worded that they fail fairly to advise the defendants and the Court of the particular criminal activity alleged to have been committed and to have formed the necessary "pattern of racketeering activity." Courts have held that RICO predicate acts based upon allegedly fraudulent conduct must be pled with the same degree of particularity as allegations of common law fraud under Fed. R. Civ. P. 9(b). See, e.g., Schreiber Dist. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400-01 (9th Cir. 1986); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 19 (2d Cir. 1983); Hartman v. Blinder, 687 F. Supp. at 944. Cf. Rose v. Bartle, 871 F.2d 331, 356 (3d Cir. 1989) (non-fraud predicates in particular do not need to be pled with greater particularity).

There is no particularity at all about the predicate acts which are plead in the present complaint, much less the enhanced level of particularity necessary to meet the

requirements of these cases and Rule 9(b).[7] First, American Honda is alleged to have "participated in, condoned or [to have been] recklessly indifferent to the conduct of its key officers and employees." [¶ 108] Further, American Honda is alleged, upon information and belief, to have been "aware of" or to have "participated in" the illegal schemes. [¶ 109] Basically, American Honda is alleged to have affirmatively ignored the individual defendants' conduct and somehow, by doing so, advanced its own corporate interests. [¶ 110] The complaint alleges that "[a]t least twelve high level officers and employees of American Honda, four of whom are Defendants herein, were involved" in the alleged schemes (none of the non-defendants are named). [¶ 11] And finally, as discussed above, American Honda is alleged to have reaped the benefits of the scheme by paying its executives less money. [¶ 112]

These words are all characterizations of events, but none of them describes events, places, people, or any meaningful detail, as discussed infra. As to the "participation" allegations of ¶¶ 108 and 109, there is no explanation of how American Honda "participated in" the alleged scheme; in fact, the facts previously pled establish that American Honda was "cut out of the deal" by the individual defendants. Nor does the complaint allege any facts which would support plaintiff's claim that American Honda condoned the scheme, or was recklessly indifferent to it, or was responsible for any other formulation of those allegations. No statements, conversations, documents, meetings or other facts are alleged, whose existence could turn these impermissably conclusory allegations into the kinds of fact specific allegations sufficient to satisfy Rule 9(b). See McLendon v. Continental Group, Inc., 602 F.Supp. 1492, 1510 (D.N.J. 1985). A RICO predicate act must be pled with sufficient facts to put defendants on notice of what conduct of the

[7]As set forth supra in the Statement of Facts. it is never clear when the complaint is referring to all defendants, as opposed to some or all of the individual defendants. While the term "defendants" is used throughout the first 30 pages of the complaint, which suggests that all are included, the first paragraph in a section of the complaint entitled "American Honda's Association with the Enterprise," ¶108, refers to "the above-described unlawful conduct of [American Honda's] key officers and employees" -- suggesting that all the foregoing allegations did not mean to include American Honda. That is the presumption on which this analysis proceeds.

type enumerated in the RICO statute has been committed. Seville v. Industrial Machinery Corp. v. Southwest Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984); Hartman, 687 F. Supp. at 945.

Nor does plaintiff explain how American Honda's alleged failures to act rise to the level of RICO predicate acts. At most, plaintiff's claims seem to make out a case of corporate mismanagement. But "managerial incompetency . . . is not a crime, let alone a predicate act" under RICO. Lange v. Hocker, 940 F.2d 359, 362 (8th Cir. 1991). Because of the vagueness of the predicate acts alleged in the complaint, the RICO count fails to state a cause of action and should be dismissed.

C. Plaintiff has failed to state a claim for RICO conspiracy.

Plaintiff's allegation of RICO conspiracy in violation of 18 U.S.C. §1962(d), which makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section" suffer from the same maladies as their predecessors: They are unintelligible, and even under the most generous characterization of them, they fail to make out a claim.

In this instance, a careful examination of the allegations suggest that American Honda is not even alleged to have been involved in the alleged RICO conspiracy. Paragraph 123 alleges that "Defendants as persons employed by or associated with the Enterprise and/or Enterprise by Association-in-Fact" conspired to violate 18 U.S.C. §1962(c) (emphasis added). American Honda, by definition, could not have been a person "employed" by the enterprise or the association in fact, however those words are defined. And as discussed supra, American Honda cannot be both the enterprise itself and a participant in an enterprise consisting of itself and its own officers and employees. Furthermore, the phrase "associated with the . . . Association in Fact" makes no sense. Logically one who is associated with an enterprise "by association in fact" is part of the enterprise. Paragraph 38 alleges only that American Honda worked together" with the association in fact, and was not part of it. Thus none of these formulations reaches American Honda.

Nonetheless, if the Court construes these allegations as relevant to American Honda in some way, they fail to state a claim against American Honda. It is axiomatic that, having failed to state a claim under §1962(c), the dependent claim under §1962(d) must fall as well. Kehr Packages, 926 F.2d at 1411, n.1. Stated otherwise, the deficiencies of the substantive racketeering claim -- including lack of standing, lack of injury, and lack of proximate cause -- are fatal here as well.

In addition, plaintiff's allegations fail to state a RICO conspiracy claim because (i) there can be no RICO conspiracy between a corporate entity and its employees, (ii) the complaint fails to allege knowledge by American Honda that the predicate acts were part of a pattern of racketeering activity, and (iii) the mere agreement to commit predicate acts is not sufficient to support a claim for RICO conspiracy. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166-7 (3d Cir. 1989); Greenberg v. Tomlin, 816 F.Supp. 1039, 1050 (E.D. Pa. 1993).

As discussed more fully later in this brief, it is fundamental that a corporation cannot conspire with its own employees. Greenberg, id. at 1050. "Consequently, the majority rule is that a conspiracy cannot lie against the corporate entity for the concerned action of its employees, officers or directors who violate RICO on its behalf." Id. Therefore, for this reason alone no RICO claim can stand against American Honda based on the allegations of this complaint.

Secondly, this Circuit has long held that when pleading RICO conspiracy, a plaintiff must set forth, in addition to the usual elements of conspiracy, "agreement to commit the predicate acts and knowledge that the defendants' acts were part of a pattern of racketeering activity." Glessner, supra, 952 F.2d at 714. Here, as in Glessner, plaintiff has failed to allege specific facts suggesting either agreement or knowledge on the part of American Honda of the alleged schemes.

And, as the Third Circuit pointed out in Glessner, "[E]ven if an 'agreement' to commit predicate acts could be inferred from the complaint . . . mere agreement to commit predicate acts is not sufficient to support a charge of conspiracy under §1962(d)." Id., quoting

Seville, 742 F.2d at 892, n.8 (internal quotation marks omitted). Here the RICO conspiracy complaint alleges no facts other than those which make up the other counts of the complaint. Where a complaint alleges only that the defendants conspired to commit the acts which constitute the alleged pattern of racketeering activity, without alleging facts which indicate agreement to knowingly further the affairs of the enterprise, a claim under §1962(d) will be dismissed. Seville, id.

D. The plaintiff's claims under Florida RICO should be dismissed because New Jersey law applies.

It is well recognized that for a district court to decide which state's substantive law will govern the issues presented in a given case, the court should look to the laws of the state in which it sits, including that state's choice-of-law rules. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496-97 (1941); System Operations v. Scientific Games Development Corp., 555 F.2d 1131, 1136 (3d Cir. 1977). Therefore, to decide which of the three possible states' law will govern the issues in this case, this Court should look to the laws of the State of New Jersey, including New Jersey's relevant choice-of-law rules.

To determine which state has the most significant contacts, New Jersey gives primary consideration to the standard set forth in Restatement (Second) of Conflict of Laws, §188. See, e.g., Winter Motors, Inc. v., Jaguar Rover Triumph, Inc., supra, at 672-73. Restatement §188 dictates that the jurisdiction with the most significant relationship to both the parties and the underlying transaction will be the jurisdiction whose law applies. See, e.g., State Farm Mutual Automobile Ins. Co. v. Estate of Simmons, 84 N.J. 28, 34-37 (1980); McCabe v. Great Pacific Century, 222 N.J. Super. 397, 399-400 (App. Div. 1988).

Considering these factors, there is simply no basis to apply Florida law to this case. Plaintiff resides in New Jersey. Complaint, preamble. At all relevant times, she worked in New Jersey. Complaint ¶ 1. American Honda's regional office is in New Jersey. Complaint ¶ 2. None of the defendants is alleged to be a Florida resident. No specific acts involving plaintiff are alleged to have taken place in Florida. Plaintiff alleges that she wanted to obtain a American

Honda dealership in Florida and made "preliminary plans for building an appropriate facility" [¶90] but a New Jersey plaintiff cannot create substantive rights for herself under the statutes of each of the 50 states by alleging that she "made plans" to do business in each of them. Id. Florida has no contacts with the parties or the supposed "transactions," and New Jersey law should apply. The Florida RICO count should therefore be dismissed.

II. THE FIFTH COUNT OF THE COMPLAINT FAILS TO SET FORTH A CAUSE OF ACTION UNDER SECTION 2(c) OF THE ROBINSON-PATMAN ACT.

The Fifth Count of the complaint alleges that "defendants," again without distinguishing among them, demanded kickbacks from prospective American Honda dealers in return for "favorable business treatment such as the grant of an LOI or favorable allocation of popular cars." Complaint ¶ 147. Plaintiff alleges that these kickbacks constituted price discrimination against her in the award of an LOI in contravention of section 2(c) of the Robinson-Patman Act.V (15 U.S.C. 13(c)) Complaint ¶¶ 147-149.

A. The Robinson-Patman Act is inapplicable to the acts complained of by plaintiff.

Even if plaintiff had alleged sufficient facts to support the inclusion of American Honda in this claim, the purpose of section 2(c) of the Robinson-Patman Act is to "prohibit the payment of commissions or brokerage except for services rendered in connection with the sale or purchase of goods, wares, or merchandise." Miyano Machinery USA, Inc. v. Zonar, No. 92 C 2385, 1993 U.S. Dist. LEXIS 963, at *3 (N.D. Ill. Jan. 29, 1993) (citing 15 U.S.C. § 13(c)). The principal injury that plaintiff asserts --- failure to obtain an LOI --- falls outside of the scope of the Act because it did not constitute "the sale or purchase of goods" within the meaning of the Act. Miyano Machinery at *7.

In Miyano Machinery, the plaintiff manufactured machine tools and related products for sale throughout the United States through a network of distributors it appointed. One of Miyano's employees, Fisher, entered into an arrangement with the other named

defendants for the transfer and sale of one of Miyano's distributorships in return for a kickback. When Miyano learned of the scheme, it brought an action for, inter alia, violation of section 2(c) of the Robinson-Patman Act.

The defendants moved to dismiss, arguing that the purchase of distribution rights or the purchase of a business opportunity was outside of section 2(c) because it did not involve "the sale or purchase of goods."

Plaintiff, on the other hand, argued that since the defendants were buyers and sellers of its goods "the lawsuit had everything to do with the purchase and sale of goods." The court rejected that argument and explicitly found that the kickback scheme "was only tangentially about the purchase and sale of Miyano Machinery's goods" because "Fisher entered into the arrangement with the other defendants for the purchase of distribution rights, and Fisher received kickbacks from that sale." Id. at *7. In language directly applicable to the facts of this case, the court held that "the sale of a business opportunity, even the opportunity to sell goods, does not come within the purview of section 2(c) of the Robinson-Patman Act." Id. (citations omitted).

The parallel between the present case and Miyano Machinery is inescapable. Here, Plaintiff's entire complaint is based on one thing: her failure to obtain a LOI. Thus, as in Miyano Machinery, plaintiff's section 2(c) Robinson-Patman claim should be dismissed for failure to state a cause of action.

B. Plaintiff lacks antitrust standing to bring a suit under section 2(c) of the Robinson-Patman Act.

Even in those cases where section 2(c) of the Robinson-Patman Act applies, it only provides a private right of action to sue for damages to those who have antitrust standing. Federal Paper Board Company v. Amata, 693 F.Supp. 1376, 1386-87 (D. Conn. 1988). It is well settled that "even if an injury is causally related to an antitrust violation, it will not qualify as antitrust injury unless it is attributable to an anticompetitive aspect of the practice under scrutiny." Goold Electronics Corp. v. Galaxia Electronics, No. 91 C 5989, 1991 U.S. Dist.

LEXIS 18421 (N.D. Ill. Dec. 30, 1991); See also, Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92, 96-97 (3d. Cir.), cert. denied, 479 U.S. 821 (1986). Thus, the absence of competitive injury is fatal to an antitrust claim. N.L. Industries, Inc. v. Gulf & Western Industries, 650 F.Supp. 1115, 1123 (D. Ken. 1986); see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. ____, 113 S.Ct. 2578 (1993).

In the present complaint, plaintiff does not even make the perfunctory allegation that she has suffered "anticompetitive injury." Moreover, her conclusory allegations that "defendants violated the antitrust laws" and that she was injured thereby are insufficient to survive a motion to dismiss. Boczar v. Manatee Hospitals & Health Systems, Inc., 731 F.Supp. 1042, 1045 (N.D. Fla. 1990).

In an analagous Robinson-Patman case, Ben Sheftall Distributing Co. v. Mirta de Perales, 791 F.Supp. 1575 (S.D. Ga. 1992), the plaintiff claimed a violation of Section 1 of the Robinson-Patman Act alleging that the defendant's illegal price discrimination caused him to lose his distributorship. The court granted defendant's Rule 12(b)(6) motion and dismissed the plaintiff's complaint, stating: "The simple loss of the distributorship does not establish an antitrust injury where the plaintiff has not shown any facts regarding defendant's share of the market and the percent that defendant's products played in plaintiff's business." Ben Sheftall Distributing Company, 791 F.Supp. at 1584-85.

Here, plaintiff has only alleged that "defendant's" misconduct cost her an LOI without any allegation that any of American Honda's conduct had an anticompetitive purpose or effect, without which she fails to establish an antitrust injury. Here, plaintiff, who did not even own a American Honda dealership, has simply claimed that absent the alleged misconduct, she would have acquired a franchise, ran it successfully and made profit. As set forth above, these allegations, while speculative at best, are manifestly insufficient to support a claim for antitrust injury.[8]

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[8] Plaintiff's broad and conclusory allegations that she and other unnamed Honda dealers have been hurt by the defendants' alleged wrongdoing are also insufficient to establish antitrust injury

C. Section 2(c) of the Robinson-Patman Act is inapplicable to American Honda as it relates to Rivers's, Mazzitelli's and Novelly's actions.

Section 2(c) of the Robinson-Patman Act makes unlawful the payment, by one party to a transaction, of a commission or fee to the agent or broker of the other party. For example, the statute, in pertinent part, states: "It shall be unlawful for any person . . . to pay or grant, or to receive or accept, anything of value . . . except for services rendered . . ." Here, plaintiff has failed to allege that American Honda "paid or granted" or "received or accepted any of value" within the meaning of the statute as it relates to the conduct of Rivers, Mazzitelli and Novelly. This count must be dismissed as to American Honda for this reason alone.

III. THE SIXTH COUNT OF THE COMPLAINT FAILS TO SET FORTH A CAUSE OF ACTION GROUNDED IN FRAUD AND MUST BE DISMISSED.

Plaintiff's fraudulent misrepresentation claim is essentially a claim that "defendants," at an unspecified time and place, "falsely and fraudulently" told her that they would award LOIs "based on an impartial process which considered the merits of each application." Complaint ¶ 152. Based on these representations, she prepared two proposals for dealership applications. Complaint ¶ 154. Presumably thereafter, "plaintiff learned how defendants awarded the dealer points in or about March 1994." Complaint ¶155.

While plaintiff's fraud claim mechanically tracks the elements of common law fraud, her claims of fraudulent misrepresentation must be dismissed for two reasons. First, plaintiff fails to plead fraud with particularity. Second, plaintiff's fraud claim sets forth nothing more than a claim for breach of a quasi-contract.

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because plaintiff has not established, as she must, that she is so closely connected to the other disfavored Honda dealers that their injuries directly harmed her. See, e.g., Ashkanazy v. I. Rokeach & Inc., 757 F.Supp. 1527, 1554 (N.D. Ill. 1991).

A. Plaintiff's fraudulent misrepresentation claim is deficient as a matter of law because it fails to plead fraud with particularity.

Plaintiff's claim is facially deficient as a matter of law because it fails to plead fraud with the particularity required by Fed.R.Civ.P. 9(b). See, e.g., Mayor and Council of the Borough of Rockaway v. Klockner & Klockner, 811 F.Supp. 1039, 1059-60 (D.N.J. 1993). Plaintiff's allegations do nothing more than state that "defendants"[9] made false and fraudulent representations to her. Where, as here, a complaint fails to differentiate among defendants with regard to the acts underlying a claim of fraud, the claim must be dismissed. Klockner & Klockner, 811 F.Supp. at 1160, citing Coronet Ins. Co. v. Seyfarth, 665 F.Supp. 661, 666 (N.D. Ill. 1987); see also, In re Worlds of Wonder Securities Litigation, 694 F.Supp. 1427, 1433 (N.D. Cal. 1988); D & G Enterprises v. Continental Ins. Nat'l Bank & Trust Co. of Chicago, 574 F.Supp. 263 (N.D. Ill. 1983).

For example, in Klockner & Klockner the cross-claimant, like plaintiff in the present case, made a blanket statement that "the defendants deliberately and fraudulently failed to disclose" contamination. Id. at 1060. The court dismissed the fraud count on the grounds that it did not plead fraud with particularity in accordance with Rule 9(b). In doing so, the court instructed:

> Klockner cannot simply "lump" all the defendants together and allege generally that they all committed fraud. It is well established that where multiple defendants are charged with fraudulent

9 Although the Sixth Count alleges fraudulent behavior by "defendants," plaintiff's complaint never addresses how American Honda is rendered liable for the tort of its individual employees; instead, a fair reading of plaintiff's claim leads to the conclusion that plaintiff intends to hold American Honda directly liable as a defendant without ever addressing the doctrine of respondeat superior. This she cannot do. In order for an employer to be liable under the theory of respondeat superior, the plaintiff must show that the employee's acts was within the scope of the employee's employment; that the conduct complained of occurred substantially within the authorized time and space limits; and that the conduct complained of was actuated, at least in part, by a purpose to serve the employer. Cosgrove v. Lawrence, 214 N.J. Super. 670, 674 (Law. Div. 1986). Applying these elements to the facts of this case, it is clear that plaintiff cannot hold American Honda liable for the torts of its employees since she cannot satisfy these three criteria.

> concealment, the complaint must inform each defendant of the specific fraudulent acts which constitute the basis of the action against the particular defendant.

Id.

Plaintiff's fraud claim is defective for still another reason. Plaintiff conclusorily states that defendants "falsely and fraudulently" made representations to her with the knowledge that they were false. But it is well established that such broad allegations do not satisfy the scienter element of a fraud cause of action. Rocco v. Paine Webber, Inc., 739 F.Supp. 83, 85 (D. Conn. 1990); Songbird Jet Ltd., Inc. v. Amex, Inc., 581 F.Supp. 912, 924-25 (S.D.N.Y. 1984).

For example, in Rocco, the plaintiff alleged that the acts and conduct of PaineWebber, through one of its employees, were done "knowingly with intent to deceive and defraud." The court dismissed the claim pursuant to Rule 12(b)(6) because the plaintiffs, like Plaintiff, did not "provide at least a minimum factual basis for their conclusory allegations of scienter." Rocco, 739 F.Supp. at 85.[10]

B. Plaintiff's fraud claim sets forth nothing more than a claim for breach of a quasi-contract.

As stated above, plaintiff's fraud claim is predicated on her allegation that she prepared two proposals for a LOI based on defendants' representation that LOIs were granted impartially and that sometime after she prepared the proposals, she learned that LOIs were awarded only to these who paid bribes. Under these circumstances, where a claim for the alleged

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10 Not only has plaintiff failed to plead scienter with particularity, her pleadings also show that she will be unable to establish the scienter requirement of the fraudulent misrepresentation count. For example, the scienter element of fraud claim must be proven by demonstrating (a) that the defendant knew of the falsity and (b) that the defendant intended to obtain an undue advantage therefrom. Jewish Center v. Whale, 86 N.J. 619, 625 (1981). Here, giving plaintiff the benefit of the conclusory pleading, even if "defendants" knew that the representations were false, her allegations do not satisfy the second requirement that defendants tried to obtain an undue advantage from these representations. The only thing that plaintiff alleges is that based on the representations, she prepared two proposals and later learned how the dealer points were awarded. There is no explanation as to how defendants sought to obtain an undue advantage based on these representations, since plaintiff alleges that she made it clear, from the outset, that she would not pay any bribes for an LOI.

fraud only pertains to a breach of contract or quasi-contract, the claim fails to state a cause of action for tort. See, Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369 (App. Div. 1960) (failure to fulfill promises to perform acts in the future is a breach of contract and not fraud). But even if plaintiff's claims are contractual in nature, plaintiff is foreclosed from recovering any contract or quasi-contract damages from American Honda. that plaintiff is not entitled to contract damages is clear. Plaintiff and American Honda never had a contractual relationship. Indeed, plaintiff's entire complaint concerns her failure to obtain an LOI.

Moreover, even in the absence of a contract, plaintiff cannot recover any expenses she incurred in preparing the two proposals for an LOI on a quasi-contract or restitution theory. As the United States Supreme Court instructed in Atlantic Coast Line Railroad Company v. Florida, 295 U.S. 301, 311 (1934) (citations omitted):

> Restitution is not of mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip. . . . [T]he simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.

Here, the preparation of proposals for a LOI did not confer any benefit on American American Honda for which any renumeration is required. See, Cohen v. Home Insurance Company,230 N.J. Super. 72, 82 (App. Div. 1989). Moreover, plaintiff alleged neither that she expected to receive compensation for preparing the proposals nor that American Honda intended to compensate her for preparing the proposals. In the absence of these factors, there is no entitlement to quasi-contract damages. Insulation Contracting & Supply v. Kravco, Inc., 209 N.J. Super. 367, 377-78 (App. Div. 1986).

IV. THE SEVENTH COUNT OF THE COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE.

To maintain a cause of action for tortious interference with a prospective business relationship, a plaintiff must show:

(1) a plaintiff's reasonable expectation of economic benefit or advantage;

(2) the defendant's knowledge of the expectancy;

(3) the defendant's malicious, intentional interference with that expectancy;

(4) in the absence of interference, the reasonable probability that the plaintiff would have received the anticipated economic benefits; and

(5) damages resulting from the defendant's interference.

Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 186 (3d Cir.), cert. denied, 113 S. Ct. 1285 (1993); Printing Mart -Morristown v. Sharp Electric Corporation 116 N.J. 739 (1989). Moreover, it is well established that a party cannot interfere with its own contract, and that a tortious interference claim requires the existence of a third-party interloper. Printing Mart-Morristown, 116 N.J. at 752-53; Fregara v. Jet Aviation Business Jets, 764 F.Supp. 940, 955 (D.N.J. 1991).

In this Count, plaintiff alleges that "defendants by their extorsive [sic] and coercive acts against [her] tortiously interfered with [her] present and prospective economic advantage in obtaining and operating a American Honda dealership business." Complaint ¶ 157. This Count must be dismissed because, among other things, it fails to allege that American Honda, as opposed to the individual co-defendants, maliciously interfered with her expectancy of obtaining a dealership contract.

Second, and as briefly mentioned Supra regarding plaintiff's RICO claim, plaintiff has not shown that in the absence of the alleged interference, she would have obtained a

dealership. As also discussed more fully in Point VII(c) infra, plaintiff's cannot credibily maintain that she was assured a dealership.

Finally, plaintiff's claim must fail because she has not established the requisite interference by a third party to the relationship. Fregara, 764 F.Supp. at, 955. For example, in this Count she alleges that "defendants" interfered with her ability to obtain a LOI from American Honda. The court's opinion in Fregara makes it clear that a party cannot interfere with its own contract, and American Honda's former employees (employees at the time of the acts alleged) cannot be characterized as third parties or interlopers for purposes of maintaining this action. See also, Borbely v. Nationwide Mutual Insurance Company, 547 F. Supp. 959 (D.N.J. 1981); Kopp, Inc. v. United Technologies, 223 N.J. Super. 548, 559 (App. Div. 1988).

V. THE EIGHTH COUNT OF THE COMPLAINT GROUNDED IN CIVIL CONSPIRACY MUST BE DISMISSED.

To maintain a cause of action for civil conspiracy, a plaintiff must show:

(1) a combination of two or more persons;

(2) a real agreement or confederation with a common design; and

(3) the existence of an unlawful purpose or of a lawful purpose to be achieved by unlawful means.

Board of Education of City of Asbury Park v. Hoek, 66 N.J. Super. 231, 241 (App. Div.), rev'd in part on other grounds, 38 N.J. 213 (1962). In addition, a plaintiff must show that the underlying wrong , absent the conspiracy, give a right of action. Hoek, 38 N.J. at 238. Thus, there can be no claim for civil conspiracy when the object of the conspiracy is not actionable. Id.

In this Count, Plaintiff again alleges that "defendants" conspired to injure her and her parents' business by demanding kickbacks in return for a LOI; improperly reserving dealership points she had selected; threatening her with blackballing; and violating New Jersey's Law Against Discrimination. Complaint ¶ 159-160. These allegations, however, do not state a cause of action for a number of reasons.

First, plaintiff cannot establish the "combination" element of the tort because it is axiomatic that a corporation cannot conspire with its employees to commit a wrong. Major League Baseball Promotion v. Colour-Tex, 729 F.Supp. 1035, 1053 (D.N.J. 1990); Tynan v. General Motors Corp., 248 N.J. Super. 654, 668 (App. Div.), certif. denied 127 N.J. 548 (1991), rev'd. in part on other grounds, 127 N.J. 269 (1992); Exxon Corp. v. Wagner, 154 N.J. Super. 538, 549 (App. Div. 1977).

Second, as is the case with the majority of plaintiff's claims, plaintiff has neither pleaded specifically that American Honda agreed to join the alleged conspiracy, nor does she allege that American Honda was involved in any specific, independent wrongs separate and apart from what has been admitted by Novelly, Rivers and Mazzitelli.

VI. THE NINTH COUNT OF THE COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION FOR AIDING AND ABETTING.

The Ninth Count of plaintiff's complaint, for "aiding and abetting," is laced with qualifiers. First, it is plead in the alternative, presumably to the Eighth Count which precedes it and which alleges the defendants' participation in a civil conspiracy to harm her. Second, it is pled "upon information and belief," suggesting that it is based -- even more than its predecessors -- more in theory and supposition than in fact. Third, it alleges that American Honda "knew or with reasonable care should have known" that the individual defendants "preyed on prospective and existing franchisees who were susceptible to paying illegal kickbacks." Complaint ¶ 166. Finally, the Count alleges that American Honda either knowingly or recklessly kept the individual defendants "in [employment] positions which enabled them to extort illegal kickbacks." Complaint ¶ 170. Plaintiff concludes that she "was harmed in her business interests and expectation" by American Honda's actions in aiding and abetting the unlawful activities of the individual defendants. Complaint ¶ 170.

While New Jersey law recognizes the existence of a cause of action for "aiding and abetting" under limited circumstances, it is clear that a plaintiff must show: (1) the existence

of a violation by the primary (as opposed to the aiding and abetting) party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation. Rochez Brothers, Inc. v. Rhoades, 527 F.2d 880, 886 (3d Cir. 1975). In addition, a plaintiff must also sufficiently allege that his injury was proximately caused by the complained-of. conduct Armstrong v. McAlpin, 699 F.2d 79, 92 (2d Cir. 1983).

This Count must be dismissed because Plaintiff has not alleged (1) that American Honda had knowledge of the individual defendants' bad acts; (2) that American Honda substantially assisted the individual defendants in their wrongdoing; and (3) that her alleged injury --- the lost "expectation" of an LOI --- was proximately caused by American Honda. Put another way, plaintiff has not alleged that she suffered any legally compensable damages proximately caused by American Honda's aiding and abetting conduct.

A. Plaintiff's claim must be dismissed because American Honda did not substantially assist the individual defendants.

Plaintiff's claim must be dismissed because she does not allege that American Honda substantially assisted in the underlying wrongdoing. As stated above, Plaintiff's claims fall into two categories: American Honda recklessly allowed the individuals to remain employed, when it knew or should have known of their wrongdoing; and American Honda did not remove the individuals after it learned of their wrongdoing. Both allegations, besides being false, are insufficient on their face to meet the requirement to plead "substantial assistance."

In Morin v. Trupin, 711 F.Supp. 97 (S.D.N.Y. 1989), plaintiffs alleged that one of the defendants, a law firm, aided and abetted the tortious conduct of certain of its clients, the other defendants in the action. The basis of the plaintiffs' claims was that the law firm knew of its clients' wrongdoing but did not "blow the whistle." Morin, Id. at 113. The law firm argued, inter alia, that the plaintiffs had failed to show that they substantially assisted their clients in any wrongdoing and moved to dismiss pursuant to Rule 12(b)(6). The court dismissed the plaintiffs'

claim, holding that "mere knowledge and approval of the primary wrongdoing does not constitute substantial assistance." Morin, Id. at 113 (quoting Armstrong v. McAlpin, 699 F.2d at, 92 ; accord, Monsen v. Consol. Dressed Beef Co., Inc., 579 F.2d, 793, 800 (3d Cir. 1978), cert. denied, 439 U.S. 930 (1978).

Moreover, American Honda's failure to remove the individual defendants when it became aware of their wrongdoing does not constitute substantial assistance. According to the Third Circuit's instructions in Monsen, in order for inaction to form the basis of substantial assistance, the aider and abettor either has to have a duty to disclose or "consciously intended to assist in the perpetration of a wrongful act." Monsen, 579 F.2d at 800. Here, American Honda owed plaintiff no duty to disclose, see, e.g., ITT, An International Investment Trust v. Cornfeld, 619 F.2d 909, 927 (2d Cir. 1980), and plaintiff has not alleged that American Honda's inaction was consciously intended to aid the alleged wrongdoing. Under identical circumstances, the court in Morin dismissed the plaintiffs' aiding and abetting cause of action pursuant to Rule 12(b)(6). See id., 711 F. Supp. at 113-14. Therefore, as was the case in Morton, Plaintiff's claim should be dismissed.

B. Plaintiff's Claim Must Be Dismissed Because Acts Of American Honda Did Not Proximately Cause Her Injury.

American Honda cannot be held liable as an aider and abettor unless its actions, i.e., allegedly allowing the individuals to remain employed with knowledge of their conduct, were the proximate cause of plaintiff's failure to receive an LOI. Bloor v. Carro, Spanbock, Lodin, Rodman & Fass, 754 F.2d 57, 62-63 (2d Cir. 1985). "But for" causation will not satisfy this requirement. Armstrong, 699 F.2d at 92. Here, plaintiff admits that even if she were awarded an LOI, certain conditions would have had to be satisfied before she could receive a dealership. Complaint ¶ 24. Therefore, it was not certain, and plaintiff does not even allege that it was certain, that in the absence of any primary and secondary wrongdoing, she would have received an LOI and later a dealership agreement. As a result of this uncertainty, the chain of

causation between American Honda's alleged acts and her loss of an LOI is plainly too tenuous to support liability for aiding and abetting.

VII. THE TENTH COUNT THE COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO STATE A CAUSE OF ACTION FOR NEGLIGENCE.

A. Plaintiff cannot pursue her negligence claim because she seeks to recover purely economic losses.

The Tenth Count of the complaint claims that American Honda's failure to supervise its employees caused plaintiff economic harm. But where a plaintiff suffers purely economic loss as a result of a defendant's negligent failure to perform what amount to contractual or quasi-contractual duties, the plaintiff is precluded from seeking recovery for negligence against the defendant. See Spring Motors Distributors, Inc. v. Ford Motor Co., 98 N.J. 555, 579-80 (1985); Coastal Group v. Dryvit Systems, 274 N.J. Super. 171 (App. Div. 1994).

B. American Honda had no duty to intervene on plaintiff's behalf.

Even if plaintiff's purely economic loss claim were cognizable under a negligent supervision theory, American Honda owed no duty, economic or otherwise, to her.

In determining whether a duty to intervene exists, courts are guided by principles of fairness. Di Cosala v. Kay, 91 N.J. 159, 177 (1982); Johnson v. Usdin Louis Co., Inc., 248 N.J. Super. 525, 529 (App. Div.), certif. denied, 126 N.J. 386 (1991). Inherent in this analysis is a balancing of often competing factors such as the likelihood that injury will occur, knowledge of the employee's dangerous characteristics, the reasonable foreseeability of injury, and the magnitude of imposing a burden on the defendant to prevent the harm. Di Cosala, 91 N.J. at 176-77.

In Harrison v. Dean Witter Reynolds, Inc., 715 F. Supp. 1425 (N.D. Ill. 1989), aff'd in part and rev'd on other grounds 974 F.2d 873 (7th Cir. 1992), two employees of Dean Witter stole money from Harrison, a prospective customer. Harrison sued Dean Witter for damages on the theory that it had negligently supervised its employees. Dean Witter moved for

her discrimination claim. Ballinger v.North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir.), cert. denied, 484 U.S. 897 (1987).

Similarly, in Consor v. Accidental Life Insurance Co., 469 F.Supp. 1110 (N.D. Tex. 1979) the plaintiff filed a Title VII suit alleging that she had been discriminated against because of her sex when the employer did not hire her as a sales representative. In support of her claim, she alleged that the during the interview, the interviewer had made comments about the employer's discriminatory practices. The defendants moved for summary judgment on this claim on the grounds that the plaintiff had not established a prima facie case of failure to hire because she had not shown that it rejected her application. The court was persuaded by the defendant's argument and dismissed the plaintiff's claim. Consor, 469 F.Supp. at 1114-15. Here, plaintiff's allegations are at best analogous to the ones in Consor, and the same result should obtain.

In addition, plaintiff's gender-discrimination claim fails because she cannot show gender was a factor in the "defendants'" decision and that "but for" this factor, the "defendants" would not have made the decision. See Phelps v. Yale Security, Inc., 986 F.2d 1020, 1026 (6th Cir.), cert. denied, 126 L.Ed.2d 135 (1993) (applying this "but for" standard to an age discrimination claim). Plaintiff's own pleadings substantiate this point. For example, she does not allege that "but for" her sex she would have received a LOI, since in the previous 51 pages of allegations, she alleges that she did not receive an LOI because she refused to pay a bribe. The inescapable conclusion that arises from her allegations is that even if she were a man, she would have been denied an LOI for failing to pay a bribe.

CONCLUSION

For the foregoing reasons, defendant American Honda submits that the complaint against it should be dismissed for failure to state a claim upon which relief can be granted.

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