

8.0 Comment

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A plaintiff may bring a private civil action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). *See* 18 U.S.C. § 1964(c). The RICO statute prohibits four types of activities: (1) investing in, (2) acquiring, or (3) conducting or participating in an enterprise with income derived from a pattern of racketeering activity or collection of an unlawful debt, or (4) conspiring to commit any of the first three types of activity. 18 U.S.C. § 1962(a)-(d). RICO was “intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff.” *Oscar v. Univ. Students Co-op. Ass’n*, 965 F.2d 783, 786 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005). However, the statute is to “be liberally construed to effectuate its remedial purposes.” *Odom v. Microsoft Corp.*, 486 F.3d 541, 546 (9th Cir. 2007).

As to the element of causation, a plaintiff must prove that the defendant’s unlawful conduct was the proximate cause of the plaintiff’s injury. *Harmoni Int’l Spice, Inc. v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019).

RICO claims are most commonly brought under 18 U.S.C. § 1962(c) and (d), the conduct and conspiracy prongs of the statute.

18 U.S.C. § 1962(c)

To recover under § 1962(c), a plaintiff must prove (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as “predicate acts”), (5) causing injury to the plaintiff’s “business or property” by the conduct constituting the violation. *See Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)).

Conduct: The conduct element of § 1962(c) requires that the defendant have some part in directing the affairs of the enterprise. Liability is not limited to those with primary responsibility for the enterprise’s affairs, nor is a formal position within the enterprise required. However, the defendant is not liable under § 1962(c) unless the defendant has participated in the operation or management of the enterprise itself. *See Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (holding that the accountants hired to perform audit of a cooperative’s records did not participate in “operation or management” of the cooperative’s affairs by failing to inform the cooperative’s board of directors that the cooperative was arguably insolvent). In determining whether the conduct element has been satisfied, relevant questions include whether the defendant “occup[ies] a position in the ‘chain of command,’” “knowingly implement[s] [the enterprise’s] decisions,” or is “indispensable to achievement of the enterprise’s goal.” *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (holding that attorney’s performance of services for alleged associated-in-fact enterprise was not sufficient to satisfy § 1962(c)’s conduct element).

Enterprise: An “enterprise includes any individual, partnership, corporation, 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 “definition is not very demanding.” *Odom*, 486 F.3d at 548. RICO does not require that either the racketeering enterprise or the predicate acts of racketeering be motivated by an economic purpose. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994).

For purposes of § 1962(c), a single individual or entity cannot be both the RICO enterprise and an individual defendant. *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (holding that the plaintiff could not assert a RICO claim against the defendant bank because the bank was also alleged to be a RICO enterprise). However, “the inability of a corporation to operate except through its officers is not an impediment to section 1962(c) suits.” *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (holding that individual officers of a corporation could be named as defendants even though the corporation was alleged to be an enterprise and could not act without its officers); *see United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir. 1986) (stating that the corporate form is the “sort of legal shield for illegal activity that Congress intended RICO to pierce”).

An organizational defendant can be a member of a larger associated-in-fact enterprise. *See Living Designs*, 431 F.3d at 361 (stating that an associated-in-fact enterprise could be formed between the defendant corporation, law firms employed by it, and expert witnesses retained by the law firm). An associated-in-fact enterprise is “a group of persons associated together for a common purpose of engaging in a course of conduct.” *Boyle v. United States*, 556 U.S. 938, 945-46 (2009) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). Its existence is proven through evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit. No particular organizational structure, separate or otherwise, is necessary for an associated-in-fact enterprise. *Odom*, 486 F.3d at 551 (concluding that plaintiffs had sufficiently alleged associated-in-fact enterprise between defendant software manufacturer and co-defendant retailer when defendants established cross-marketing scheme for transferring plaintiffs’ personal information from the retailer to the manufacturer to allow the manufacturer to improperly charge plaintiffs for services); *see also Boyle*, 556 U.S. at 946 (“It is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.”).

Defendants in RICO actions must have had “some knowledge of the nature of the enterprise . . . to avoid an unjust association of the defendant[s] with the crimes of others,” but the requirement of a common purpose may be met so long as the defendants were “each aware of the essential nature and scope of [the] enterprise and intended to participate in it.” *United States v. Christensen*, 801 F.3d 970, 985 (9th Cir.), *opinion amended and superseded on denial of reh’g*, 828 F.3d 763 (9th Cir. 2015). A RICO enterprise is not defeated even when some of the enterprise’s participants lack detailed knowledge of all the other participants or their

activities. Instead, “it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role.” *Id.* (quoting *United States v. Eufrazio*, 935 F.2d 553, 557 n. 29 (3rd Cir. 1991)). In particular cases, “the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise” may overlap. *Boyle*, 556 U.S. at 947. However, “enterprise” and “conduct” are two separate and necessary elements of a civil RICO claim. *Odom*, 486 F.3d at 549 (“The ‘enterprise’ is the actor, and the ‘pattern of racketeering activity’ is an activity in which that actor engages.”).

Pattern: A pattern is defined as “at least two acts of racketeering activity” within ten years of each other. 18 U.S.C. § 1961(5). Proving two predicate acts is a necessary condition for finding a violation but may not be sufficient. See *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989). To establish a “pattern of racketeering activity,” the predicate acts must be both “related” and “continuous.” *Id.*; *Sever*, 978 F.2d at 1529. Related conduct “embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” *H.J., Inc.*, 492 U.S. at 240. Relatedness of the alleged or proven predicate acts is rarely an issue. See *Medallion Television Enters., Inc. v. SelecTV of Cal., Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987) (concluding alleged predicate acts were related when all were directed toward inducing the plaintiff to enter the joint venture and provide funds to obtain certain rights). However, merely alleging that the predicate acts share the same participants is insufficient to establish that they are related. See *Howard v. Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000) (stating that when the purpose, result, victim, and method of one set of predicate acts were “strikingly different” from those of the other set of alleged predicate acts, even when both sets of predicate acts implicated the same participants, the evidence was not enough to establish relatedness).

The continuity requirement reflects Congress’s concern in RICO with long-term criminal conduct. See *H.J., Inc.*, 492 U.S. at 242. Plaintiffs must prove either “open-ended” or “closed-ended” continuity—that is, a plaintiff must either prove a series of related predicate acts committed over a substantial period of time (known as closed-ended continuity) or show past conduct that by its nature projects into the future with a threat of repetition (known as open-ended continuity). See *id.* at 241-42; *Howard*, 208 F.3d at 750. There is no bright line rule for what period of time will establish closed-ended continuity, but activity spanning only several months is unlikely to satisfy the requirement. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (noting that it would be “misguided” to state as a “hard and fast rule” that to establish closed-ended continuity, the pattern of activity must extend more than a year, but also stating that activity spanning only several months without threatening any future criminal conduct does not meet continuity requirement); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (“[T]he alleged activity continued for six months at most We have found no case in which a court has held the [closed-ended continuity] requirement to be satisfied by a pattern of activity lasting less than a year.”). Open-ended continuity is shown through “predicate acts that specifically threaten repetition or that become a regular way of

doing business.” *Allwaste*, 65 F.3d at 1528; *see, e.g., Ikuno v. Yip*, 912 F.2d 306, 308 (9th Cir. 1990) (concluding that open-ended continuity was established based on two filings of false annual trading reports for a phantom commodity trading company and no evidence that the defendant would have stopped filing false annual reports if the company had continued to do business); *Medallion*, 833 F.2d at 1364 (concluding that the continuity requirement was not satisfied because the fraud at issue posed no threat of future activity).

Racketeering Activity: To constitute racketeering activity, the relevant conduct must consist of at least one of the indictable predicate acts listed in 18 U.S.C. § 1961. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) (noting that “racketeering activity” consists of no more and no less than commission of a predicate act”). Predicate acts must be proved by a preponderance of the evidence. *See Wilcox v. First Interstate Bank*, 815 F.2d 522, 531-32 (9th Cir. 1987).

Business or Property: Section 1964(c) “explicitly permit[s] recovery for harms to business and property, [and] it implicitly excludes recovery for harm to one’s person.” *Med. Marijuana, Inc. v. Horn*, 145 S. Ct. 931, 939 (2025). “A plaintiff has been ‘injured in his business or property’ if his business or property has been harmed or damaged. Section 1964(c) requires nothing more.” *Id.* (quoting 18 U.S.C. § 1964(c)); *accord Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (en banc) (per curiam). “[T]he ‘business or property’ requirement operates with respect to the *kinds* of harm for which the plaintiff can recover, not the *cause* of the harm for which he seeks relief.” *Med. Marijuana*, 145 S. Ct. at 939. “For example, if the owner of a gas station is beaten in a robbery, he cannot recover for his pain and suffering. But if his injuries force him to shut his doors, he can recover for the loss of his business.” *Id.* “In short, a plaintiff can seek damages for business or property loss regardless of whether the loss resulted from a personal injury.” *Id.*

18 U.S.C. § 1962(d)

A RICO conspiracy under § 1962(d) may be established by proof of an agreement to commit a substantive violation of RICO. *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass’n*, 298 F.3d 768, 774-75 (9th Cir. 2002) (“It is the mere agreement to violate RICO that § 1962(d) forbids; it is not necessary to prove any substantive RICO violations ever occurred as a result of the conspiracy.”) (citation omitted). The conspirator need not have agreed to commit or facilitate each and every part of the substantive offense. *Howard*, 208 F.3d 741, 751 (9th Cir. 2000) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997)). However, the conspirator must have been “aware of the essential nature and scope of the enterprise and intended to participate in it.” *Id.* (citing *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir. 1993)). The “agreement need not be express as long as its existence can be inferred from words, actions, or interdependence of activities and persons involved.” *Oki Semiconductor Co.*, 298 F.3d at 775. If a RICO conspiracy is demonstrated, “[a]ll conspirators are liable for the acts of their co-conspirators.” *Id.* (citation omitted).

A defendant can be held liable for a RICO conspiracy if the evidence shows that he or she “knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise.” *United States v. Fernandez*, 388 F.3d 1199, 1229-30 (9th Cir. 2004) (citation omitted). There is no requirement that the defendant have actually conspired to operate or manage the enterprise himself or herself. *Id.* (affirming conviction under § 1962(d) of defendant who collected money on behalf of member of enterprise, facilitated communications between conspirators and accepted payment for drugs sold through enterprise).

Section 1962(d) applies to intracorporate, as well as intercorporate conspiracies; thus, it is possible for a corporation to engage in a RICO conspiracy with its own officers and representatives. *Webster v. Omnitron Int’l*, 79 F.3d 776, 787 (9th Cir. 1996) (quoting with approval *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1998), for the proposition that “intracorporate conspiracies . . . threaten RICO’s goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits”).

For model jury instructions that may be helpful, see Eleventh Circuit Pattern Jury Instructions—Civil Cases (2024), Instructions 7.1 *et seq.* These instructions may be accessed at:

or

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