REGENCY COMMUNICATIONS v. CLEARTEL COMMUNICATIONS

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MEMORANDUM OPINION

Now before the Court are numerous dispositive motions. The underlyingdispute concerns the defendants' provision of long distance phone serviceto the plaintiffs' pay phones. The plaintiffs allege that the defendants'behavior in the provision of long distance services gives rise to claimsfor fraud, breach of contract, and civil RICO. The defendants counterthat the plaintiffs conspired to violate and did in fact violatenon-disclosure clauses in the phone service contracts.

After a full review of the parties' pleadings and memoranda, theapplicable law, and for the following reasons, the holds the following:

With respect to the breach of contract issue, the Court GRANTS theplaintiffs' motion for summary judgement with respect to Cleartel andDENIES the defendants' motion for summary judgment with respect toCleartel. Further, the Court DENIES the plaintiffs' motion for summaryjudgment with respect to Mark Parrella, and correspondingly GRANTS thedefendants' motion with respect to the individually-named defendants.

With respect to the fraud issue, the Court DENIES the plaintiffs'motion for summary judgment and GRANTS the defendants' motion for summaryjudgment.

With respect to the RICO issue, the Court DENIES the defendants' motionfor summary judgment.

With respect to the defendants' counter-claims, the Court GRANTS theplaintiffs' motion for summary judgment.

I. BACKGROUND

A. Regency, Actel, Cleartel, and the Contracts for Long Distance Service

Regency Communications[1] owns pay telephones in the state of NewJersey. Inorder to make a long distance call from a pay phone, the phone must beequipped with long distance service. Cleartel Communications sells longdistance phone services. Long distance phone services, of course, are notconsumable by the general public without a phone. Thus, each partydesiring the services of the other, Regency and Cleartel entered intoseveral contracts throughout the 1990s.[2]

At issue in the instant case are the compensation terms of the parties'contracts. Regency's compensation was a specified portion of "all callcharges . . . captured, billed, and collected by Cleartel" for each longdistance call. Contract, § 2.1. Long distance charges generally areof two types, the "tariff charges" and "location surcharges." The tariffcharge is the amount charged to actually transmit the phonecall, and thelocation surcharge is any regulatory fee applicable to the pay phonebeing used. Under the Regency/Cleartel contracts, Regency was to be paidapproximately 50% of each call's tariff charge, and 100% of any locationsurcharge. For example, a long distance call with tariff charges of $3.00and a surcharge of $1.00 would result in a total payment to Cleartel of$4.00. Cleartel would then pay Regency approximately $2.50 (50% of thetariff charges and 100% of the surcharge).

Because Regency's revenue under the agreement was tied to the chargesfor each phonecall, the contracts required Cleartel to "provide [Regencywith] a summary of gross long distance calls, minutes, and charges byoriginating phone number." Contract § 2.4.

B. Mr. Parrella's Phonecall and the Ensuing Investigation

In August 1996, Regency president Mark Parrella made a long distancephone call from a Regency-owned pay phone. Cleartel billed Mr. Parrella$6.72 for the personal phonecall. When, pursuant to section 2.4 of theapplicable contract, Cleartel provided Regency with a "summary of grosslong distance calls, minutes, and charges by originating phone number,"Regency discovered that Cleartel recorded the charge for Mr. Parrella'sphonecall as $6.22. As such, Regency's compensation from Cleartel would bebased on an amount $.50 less than the amount actually charged.

Based on this event, a broader investigation into Cleartel's billingand payment practices was undertaken. On July 16, 1998, Arthur Cooper,president of co-plaintiff Actel, Inc., had 21 phonecalls placed from 21separate pay phones owned by Actel and served by Cleartel. When Actelcompared the end-user charge to Cleartel's reported charge, Acteldiscovered that Cleartel was consistently charging the end-user$.60-$1.00 more than was reported to Actel. This meant that Cleartel'spayments to Actel would based on an amount lower than actually charged.

C. Regency's Allegations, Cleartel's Counterclaims, and the Instant Motions

Based on the foregoing events, Regency makes four separateallegations: (1) Cleartel breached the long distance phone servicecontracts, (2) Cleartel defrauded Regency, (3) Cleartel violated section1962(c) of the Racketeer Influenced and CorruptOrganizations Act ("RICO"), 18 U.S.C. § 1962 (c), and (4) Clearteltelviolated section 1962(d) of RICO, 18 U.S.C. § 1962 (d).

Also based on the foregoing events, Cleartel makes two counterclaims:(1) Regency breached the long distance service contracts by violating thenondisclosure clauses therein, and (2) Regency and its co-defendantsconspired to violate the nondisclosure clause of the contracts.

Each side has made dispositive motions. Regency moves for summaryjudgement on two of its own allegations: the breach of contract claim andthe fraud claim. Regency also moves for summary judgment on both ofCleartel's counterclaims: the breach of contract claim and the civilconspiracy claim. Cleartel moves for judgment on the pleadings, or in thealternative, for summary judgment on Regency's breach of contract,fraud, and RICO claims.

Thus, the Court faces four separate issues: the cross dispositivemotions on (1) Regency's breach of contract claim, (2) Regency's fraudclaim, and (3) Regency's RICO claims; as well as Regency's dispositivemotions on (4) Cleartel's counterclaims. The Court now considers theseissues.

II. ANALYSIS

A. Jurisdiction and Choice of Law

The Court has jurisdiction over the plaintiffs' claims and thedefendants' counterclaims pursuant to 28 U.S.C. § 1332. Eachplaintiff is a citizen of a state other than states in which thedefendants are citizens. As well, the amount in controversy exceeds$75,000. The Court also has jurisdiction over the plaintiffs' RICO claimspursuant to 28 U.S.C. § 1331. All contracts in question in this casecontain a choice of law provision designating the law of the District ofColumbia as the law applicable to all disputes over the contract. To theextent the dispute presents a federal question, the Court will applyfederal law.

B. Standard of Review

All of the motions now before the Court are, in effect, summaryjudgment motions.[3] Federal Rule of Civil Procedure 56(c) providesthat a district court shall grant summary judgment "if the pleadings,depositions, answers to interrogatories, and admissions on file, togetherwith the affidavits, if any, show that there is (1) no genuine issue asto any material fact and that (2) the moving party is entitled tojudgment as a matter of law." See Fed. R.Civ.P. 56(c); Anderson v.Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202(1986); Diamond v. Atwood, 43 F.3d 1538, 1540 (D.C.Cir. 1995). To survivea motion for summary judgment, the nonmovant must make a "sufficientshowing to establish the existence of an element essential to thatparty's case." Celotex, 477 U.S. at 322, 106 S.Ct. 2548. A "sufficientshowing" exists when the evidence is such that a reasonable jury couldreturn a verdict for the nonmovant. Anderson, 477 U.S. at 248, 106 S.Ct.2505.

C. The Plaintiffs' Breach of Contract Claim

1. The Plaintiffs' Motion for Summary Judgment

There is no dispute of material fact as to the actions each partyperformedunder the four contracts. Cleartel readily admits that (1) the commissionpaid to Regency and Actel was based on amounts less

than actually chargedto the end user, and (2) it charged the end user more than it reported toRegency and Actel.

The Court finds that the contract is unambiguous and that Cleartelviolated the four contracts in two ways. First, basing Regency andActel's commission payments on amounts less than actually charged to theend user is a violation of section 2.1. Section 2.1 required Regency andActel's compensation to be based on "all call charges . . . captured,billed, and collected by Cleartel." By paying Regency and Actel aspecified percentage of $6.22, for example, instead of $6.72, Cleartel didnot pay Regency and Actel a percentage of "all charges."

Second, reporting call charges to Regency and Actel which were lessthan what was actually charged violated section 2.4. Section 2.4 requiredCleartel to "provide [Regency with] a summary of gross long distancecalls, minutes, and charges by originating phone number." By reporting$6.22 to Regency, for example, but charging the end-user (Mr. Parrella)$6.72, Cleartel failed to provide a complete summary of the "charges" foreach phonecall.

In making this conclusion, the Court necessarily rejects several ofCleartel's arguments. First, the Court rejects the argument thatCleartel's behavior is sanctioned by section 2.3 of the contracts.Section 2.3 addresses the high incidence of unpaid bills by end users inthe long distance call market. Although the contracts accounted for acertain amount of unpaid bills — known as "uncollectibles", section2.3 addressed the possibility that uncollectibles may increase at anygiven point. Thus, if the uncollectibles were to unexpectedly rise,Cleartel had the "right to charge Customer for their actualuncollectibles plus an allocation of unidentified uncollectibles not toexceed seven percent (7%) of Customer's total charges plus surcharges."Contract, § 2.3.

This argument is pierced at its core because it is an undisputed factthat, in referring to the "customer", the contract is referring toRegency or Actel, not the pay phone callers. Thus, section 2.3 does notgrant Cleartel any right to increase the charges to end users. But evenif it did, Cleartel would still have a duty under section 2.1 to payRegency and Actel a commission based on "all call charges." (emphasisadded). Further, Cleartel would still have a duty under section 2.4 toreport to Regency and Actel "a summary of gross long distance . . .charges."

Cleartel's second argument fails for the same reason. Cleartel arguesthat, even though the contracts did not affirmatively grant Cleartel "theright to charge end users for its uncollectibles, it is clear that noneof the [contracts] prohibited Cleartel from charging the end users." SeeBrief for Cleartel, Dec. 4, 2000, at 8. This is a true statement; it isalso an irrelevant one. As explained above, Cleartel's alleged right tocharge the end user directly fails to relieve it of its duties to Regencyand Actel under sections 2.1 and 2.4.

The Court therefore finds that summary judgment should be granted infavor of Regency and Actel against Cleartel. In ruling as such, the Courtis careful to distinguish the companies and individual

employees named inthe suits. Mark Parrella, although president of Regency, was notpersonally bound by any of the long distance contracts. Thus, theplaintiffs' motion for summary judgment with respect to Mark Parrella onthe breach ofcontract claim is denied.[4] Similarly. Cleartel employees Ulysses G.Auger, Barton R. Groh, and Stephen Roberts were not personally bound byany of the long distance contracts. The plaintiffs' motion for summaryjudgment with respect to the individually named defendants is thereforedenied. See Defendants' Motion for Judgment on the Pleadings, or in theAlternative for Summary Judgment, Nov. 13, 2000, Exhibit E (affidavits ofUlysses G. Auger, Barton R. Groh, and Stephen Roberts).

2. Cleartel's Motion for Summary Judgment

The foregoing consideration of the plaintiffs' motion for summaryjudgment on the breach of contract issue makes the ruling on this motiona foregone conclusion. As dictated by the above discussion. Cleartel'smotion for summary judgment on this issue is denied with respect toRegency and Actel, and granted with respect to Mark Parrella, Ulysses G.Auger, Barton R. Groh, and Stephen Roberts. See Defendants' Motion forJudgment on the Pleadings, or in the Alternative for Summary Judgment,Nov. 13, 2000, Exhibit E (affidavits of Ulysses G. Auger, Barton R.Groh, and Stephen Roberts).

D. The Plaintiffs' Fraud Claim

1. The Plaintiffs' Motion for Summary Judgment

Using only a single paragraph, the plaintiffs "respectfully submit[]"that the defendants' breach of contract also gives rise to tort liabilityfor fraud. Brief for Plaintiffs, Nov. 13, 2000, at 17. The Court findsthat the common law fraud claim is duplicative of the contract claim, andtherefore must be dismissed.

"There is virtually an endless stream of American cases from variousappellate courts discussing the relationship of tort and breach ofcontract." 1 Stuart M. Speiser et al., The American Law of Torts §1:20, at 65 (1983). A common formulation is as follows:

The distinction between a claim ex contractu [in contract] and one ex delicto [in tort] is found in the nature of the grievance. Where the wrong results from a breach of a promise, the claim is ex contractu. However, if the wrong springs from a breach of a duty either growing out of the relationship of the parties, or imposed by law, the claim is ex delicto.

Jefferson County v. Reach, 368 So.2d 250, 252 (Ala. 1978). Whiledetermining which of the two doctrines to apply is difficult enough, itis even more difficult to decipher when both doctrines apply; that is,when does a contractual relationship give rise to tort and contractliability.

In the field of fraud, the tort with which this Court is presented,there is a "general reluctance to allow a claim of fraud to proceed when`the fraud contemplated by the plaintiff does not seem to be extraneousto the contract, but rather on the performance of the contract itself.'"Triple Point Technology, Inc. v. D.N.L. Risk Management, Inc., 2000 WL1236227, at *5 (D.N.J. 2000) (basing its conclusion on a "survey ofrecent contract/fraud decisions by courts in other states") (quotingJewish Ctr. of Sussex Cty. v. Whale, 86 N.J. 619, 432 A.2d 521 (1981)).

The most cogent formulation of when a fraud claim may proceed alongsideacontract claim was issued by the Second Circuit in 1996. InBridgestone/Firestone v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2dCir. 1996), the court stated three instances where a fraud claim maystand together with a breach of contract claim:

To maintain a claim of fraud [in addition to a claim of breach of contract], a plaintiff must either:

(i) demonstrate a legal duty separate from the duty to perform under the contract;

(ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or

(iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.

Bridgestone/Firestone, 98 F.3d at 20. These factors have been utilized,whether in part or whole, by numerous courts throughout the country.See, e.g., Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, 729 F.2d 1530,1550 (5th Cir. 1984) ("[The plaintiff] has cited no case, however, inwhich misrepresentations in the performance of a contract permitted aplaintiff to recover for fraud as well as breach of contract. Our ownresearch has only turned up cases involving fraud in the inducement orinception of a contract rather than fraud in the performance.");Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1161 (S.D.N.Y.1996) ("To maintain a claim for fraud, a plaintiff must allege . . . alegal duty separate and apart from the contractual duty to perform.)";Erlich v. Menezes, 21 Cal.4th 543, 87 Cal.Rptr.2d 886, 981 P.2d 978(1999); Just's Inc. v. Arrington Constr., 99 Idaho 462, 583 P.2d 997,1003 (1978) ("A tort requires the wrongful invasion of an interestprotected by the law, not merely an invasion of an interest created by theagreement of the parties."); Sheppard v. Yara Engineering Corp.248 Ga. 147, 281 S.E.2d 586 (1981); Nelson v. Northwestern Savings &Loan Assoc., 146 Mich. App. 505, 381 N.W.2d 757 (1985); see also Keetonet al., Prosser and Keeton on Torts, § 92, at 657 (5th ed. 1984)("There is no tort liability for nonfeasance, i.e., for failing to dowhat one has promised to do in the absence of a duty to act apart fromthe promise made.").

In the case at hand, the Court finds none of these circumstancespresent. First, Cleartel's duty to report and pay on "all charges" is aduty that arises specifically under the parties' contracts. There is notort duty that requires this behavior. The contracts were negotiated andentered into at arms length, and as such, no fiduciary relationshiparises. of course, Cleartel had a duty to act in good faith,

see Paul v.Howard University, 754 A.2d 297, 310 (D.C. 2000), but this duty, being animplied term of the contract, its not "separate from the duty to perform"under the contract." Bridgestone/Firestone, 98 F.3d at 20. To thecontrary, it is one of Cleartel's contractual duties.

Second, the alleged fraudulent representation in this case is not"collateral or extraneous to the contract." Bridgestone/Firestone, 98F.3d at 20. Cleartel's alleged withholding of information and funds isbehavior directly related to the contract; in fact, it is the specificbehavior the contract required of Cleartel.

Third, the Court finds that the plaintiffs are not seeking any "specialdamages . . . that are unrecoverable as contract damages."Bridgestone/Firestone, 98 F.3d at 20. It might be argued that, since theplaintiffs' request "threefold their actual damages" in their prayer forrelief, the plaintiffs are requesting such "special damages." The Courtconcludes otherwise. The plaintiffs' prayer for treble damages stems fromtheir RICO claims,which represent counts II and III of their complaint. To say that one isseeking "special damages . . . that are unrecoverable as contractdamages" merely because a separate count in a multi-count complaint praysfor damages not available in a single-count contract action would be aformalistic and illogical reading of precedent. It is illogical to thinkthat a plaintiff, by merely appending a RICO or other such claim to hiscomplaint, may instantly render his fraud claim nonduplicative of thecontract claim. It is much more logical to reason that a plaintiff seeks"special damages . . . that are unrecoverable as contract damages" whenthe plaintiff can point to damages caused by the contract's breach that,under applicable contract law, would be nonrecoverable in a single-countcontract action. The plaintiffs in the instant case point to no suchdamages.

Thus, to summarize, the Court finds that the plaintiffs' fraud claimfails as a matter of law. The claim is duplicative of the breach ofcontract claim. Even if the claim were not duplicative, however, theclaim would still fail with respect to the individual parties. MarkParrella, as an individual pay phone user, was not personally owed anyduty by Cleartel. Similarly, Ulysses G. Auger, Barton R. Groh, andStephen Roberts did not personally defraud Regency or Actel in any way.See Defendants' Motion for Judgment on the Pleadings, or in theAlternative for Summary Judgment, Nov. 13, 2000, Exhibit E (affidavits ofUlysses G. Auger. Barton R. Groh, and Stephen Roberts).

2. The Defendants' Motion for Summary Judgment

As the foregoing discussion suggests, the Court finds the defendants'motion for summary judgment is merited. The fraud claim is duplicative ofthe breach of contract claim. Further, even if it were not, theplaintiffs' claims with respect to the individual parties must fail. Thereis insufficient evidence Mark Parrella was defrauded in his personalcapacity, and insufficient evidence that Ulysses G. Auger, Barton R.Groh, and Stephen Roberts defrauded Regency and Actel in their personalcapacity. See Defendants' Motion for Judgment on the Pleadings, or in theAlternative for Summary Judgment, Nov. 13, 2000, Exhibit E (affidavits ofUlysses G. Auger, Barton R. Groh, and Stephen Roberts).

E. The Plaintiffs' RICO Claims

The plaintiffs claim that the defendants violated 18 U.S.C. § 1962(c) and 1962(d). The defendants move for summary judgment on severalgrounds. The Court rejects all of the defendants' arguments, andaccordingly denies the defendants' motion.[5] Before explaining itsreasoning, however, the Court first undertakes a sua sponte evaluation ofwhether the dismissal of the plaintiffs' fraud claim affects theviability of its RICO claims.

1. The Plaintiffs' RICO Claims in Light of the Dismissed Fraud Claim

The plaintiffs allege that the defendants' "pattern of racketeeringactivity" was made up of a series of mail frauds. Given the Court'sdismissal of the plaintiffs common law fraud claim, it might be thoughtthat the plaintiffs are without a fraudulent act necessary for their RICOclaims. The Court finds otherwise.

In the RICO context, it is well-accepted that "the scope of fraud under[the wire and mail fraud] statutes is broader than common law fraud."McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786 (1stCir. 1990). It is also well-accepted that a simple breach of contractclaim, uncolored by any acts of deception, does not constitute a mailfraud. See Gregory P. Joseph, Civil RICO, A Definitive Guide 86 (2d. ed.2000) ("A simple breach of contract, breach of fiduciary duty,anticompetitive behavior, and even violation of statute do not constituteactionable wire or mail fraud, unless the plaintiff has been deceived.")(emphasis added); see also Morda v. Klein, 865 F.2d 782 (6th Cir. 1989)("[A] breach of fiduciary duty alone, without the `something more' offraudulent intent, cannot constitute mail fraud.") (emphasis added);Hilton, Sea, Inc. v. DMR Yachts, Inc. 750 F. Supp. 35 (D.Me. 1990) ("Afailure to perform [a contract] as promised does not, without more,constitute fraud.") (emphasis added). Thus, the touchstone question forthe Court in this case is whether the defendants' breach of contract wasaccompanied by "something more" which amounted to deception.

The Court finds that enough evidence exists for a reasonable jury tofind that the defendants utilized the mail to deceive the plaintiffs.There is credible evidence that the defendants, on successive occasionsover a many year period, omitted material information from the reportssubmitted to the plaintiffs. Further evidence permits the reasonableinference that this omission enabled the defendants to withhold moniescontractually due to the plaintiffs.

Thus, there is ample evidence to conclude that the defendants intendedto take the plaintiffs' money by deception. As such, the dismissal of theplaintiffs' fraud claim does not require the dismissal of the plaintiffs'RICO claims.

2. The Defendants' Intended Target Argument

The defendants argue that the plaintiffs' RICO claims must fail becausethe plaintiffs were not the

intended targets of the alleged racketeeringactivities. The Court disagrees.

To state a valid RICO claim, a plaintiff must allege, inter alia, twoor more predicate acts that constitute a "pattern of racketeeringactivity." 18 U.S.C. § 1961. On its face, the RICO statute does notrequire proximate causation; that is, the statute does not expresslyrequire the "predicate acts" designated in section 1961 to proximatelycause the "injury" designated in section 1962. The United States SupremeCourt, however, read such a clause into the statute in Holmes v.Securities Investor Protection Corp., 503 U.S. 258, 112 S.Ct. 1311, 117L.Ed.2d 532 (1992).

Since Holmes, lower courts have explored the nature of proximatecausation in the RICO context. One factor that has emerged is the"target" requirement; that is, for proximate causation to exist, theplaintiff must have been the "intended target[] of the RICO violation." Inre American Express Co. Shareholder Litigation, 39 F.3d 395, 400 (2dCir. 1994). American Express involved the repercussions of a scheme byAmerican Express executives to defame one of its competitors. The schemebackfired, and eventually forced American Express to pay a $10 millionsettlement. Faced with a shareholders' derivative claim under RICO, theSecond Circuit found causation lacking, explaining that

the shareholders of American Express were certainly not the intended targets of the RICO violations. Quite the contrary, the RICO violations were intended to benefit American Express by injuring one of its competitors.

Id. Since American Express, the "intended target" requirement has beenrepeatedly endorsed. See Abrahams v. Young & Rubicam, Inc.,79 F.3d 234, 239 (2d Cir. 1996); Meng v. Schwartz, 116 F. Supp.2d 92(D.D.C. 2000); BCCI Holdings (Luxembourg), Societe Anonyrne v. Pharaon.43 F. Supp.2d 359, 366 (S.D.N.Y. 1999); Medgar Evers Houses TenantsAssociation v. Medgar Evers Houses Associates, 25 F. Supp.2d 116, 122(S.D.N.Y. 1998).

In the instant case, the Court has little hesitation finding thatRegency and Actel were the intended targets of the alleged RICOviolations. Every dollar that Cleartel failed to pay to Regency and Actelunder the contract was a dollar that Cleartel itself retained. Thus,Regency and Actel were directly affected by the alleged violation.Cleartel argues that, since the disputed charges were levied against theend users, not Regency and Actel, the targets of the charging scheme werethe end users, not Regency and Actel. This argument entirely misses thepoint. By charging end users extra fees, and not reporting or paying onthese fees, Cleartel was able to retain funds it would otherwise owe toRegency and Actel. Thus, Regency and Actel were the specific victims ofCleartel's conduct.

3. The Defendants' Remaining RICO Arguments

The defendants make several arguments, all of which the Court rejects.First, the defendants argue that the plaintiffs' second amended complaintcharacterizes Cleartel as both a "person" and an "enterprise." This,argues the defendants, violates Circuit precedent which holds that thesame entity

cannot simultaneously serve as a RICO defendant and a RICOenterprise. See Confederate Memorial Association, Inc. v. Hines,995 F.2d 295, 300 (D.C.Cir. 1993). Although the plaintiffs do allege inone place that "[e]ach of the defendants is a person within the meaningof 18 U.S.C. § 1961 (3)", other portions of the complaint suggestthat Cleartel is not alleged to be a person for purposes of RICOliability. See Complaint, Sept. 25, 1998, at ¶ 43. For instance,paragraph 44 begins by alleging Cleartel to be an "enterprise as definedin 18 U.S.C. § 1961 (4)" and then separately refers to the "RICOdefendants" as "Auger, Groh, and Roberts." See Second Amended Complaint,at ¶ 44. While the list of RICO defendants is not purported to beexhaustive, the Court finds that the best reading of the plaintiffs'complaint is that Cleartel is alleged to be an "enterprise", and not aRICO defendant with "person" status.

Second, the defendants argue that Cleartel, Regency, and Actel cannotbe considered a single enterprise. This argument is irrelevant, as theplaintiffs' complaint clearly contemplates that Cleartel is an enterprisein its own capacity. See Second Amended Complaint ¶ 44 ("Cleartel,whether viewed as an isolated entity, or in conjunction with Actel and/orRegency, constitutes an `enterprise' as defined 18 U.S.C. § 1961(4).").

Third, the defendants argue that the individually-named defendants donot constitute an "association-in-fact" enterprise. Assuming, withoutdeciding, that this were true, it would not be fatal to the plaintiffs'case. The plaintiffs clearly have designated Cleartel as the "enterprise"for the purpose of RICO liability. It is thus irrelevant whether theindividually-named defendants also constitute an enterprise.

Fourth, the defendants argue that the acts alleged by the plaintiffs donot constitute a "pattern of racketeering activity." 18 U.S.C. § 1962(c), 1962(d). InH.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893,106 L.Ed.2d 195 (1989), the Supreme Court explained the requirements fora showing of a "pattern of racketeering activity." First, a "plaintiffmust show that the racketeering predicates are related and that theyamount to or pose a threat of continued criminal activity." Id. at 239,109 S.Ct. 2893 (emphasis in original). Predicate acts are "related" wherethe acts have "the same or similar purposes, results, participants,victims, or methods of commission, or otherwise are interrelated bydistinguishing characteristics and are not isolated events." Id. at 240,109 S.Ct. 2893. Continuity can be demonstrated either by "a closed periodof repeated conduct" or "past conduct which by its nature projects intothe future with a threat of repetition." Id. at 241, 109 S.Ct. 2893.

The Court finds that the plaintiffs have adequately alleged a "patternof racketeering activity." The plaintiffs allege that the defendantsdeceived them by withholding information and monies multiple times over aseveral year period. The alleged predicate acts all stemmed fromidentical long distance service contracts between the parties. As such,the predicate acts are clearly "related" and constitute a "closed periodof repeated conduct." The defendants' motion on this issue is thereforedenied.

Finally, the defendants argue that the plaintiffs have not sufficientlyshown that the

individually-named defendants "conspired" to deceive theplaintiffs, and therefore violated section 1962(d). To the extent thedefendants challenge the face of the plaintiffs' complaint, thedefendants' challenge must fail. The plaintiffs refer numerous times inthe complaint to the conspiratorial behavior of the individually-nameddefendants. See Second Amended Complaint, Sept. 25, 1998, at ¶¶ 13,16, 18, 44, 46, 53, 57. To the extent the defendants challenge thesufficiency of the plaintiffs' evidence for summary judgment purposes,the defendants' challenge must also fail. Numerous affidavits provideextensive information which would enable a jury to reasonably infer thatthe individually-named defendants conspired. See Affidavit of MarkParrella, Nov. 13, 2000; Affidavit of Arthur Cooper, Nov. 13, 2000.

F. The Plaintiffs' Motion for Summary Judgment on the Defendants' Counterclaims

The defendants make two counterclaims. First, they allege that theplaintiffs violated the non-disclosure requirements of the four longdistance service contracts. Second, they allege that the plaintiffscommitted civil conspiracy by conspiring to violate the non-disclosurerequirements. The plaintiffs move for summary judgment on thecounterclaims, and the Court grants that motion.

It is axiomatic that, in order to survive a motion for summaryjudgment, the non-moving parties must come forward with affidavits,depositions, answers to interrogatories, or admissions on file to make a"showing sufficient to establish the existence of an element essential tothat party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106S.Ct. 2548, 91 L.Ed.2d 265 (1986). The defendants have come forward withnothing of the sort in response to the plaintiffs' motion for summaryjudgment. Without a sworn statement of some sort alleging thatconfidential information was inappropriately shared, the plaintiffs'motion should be granted. Accordingly, the plaintiffs' motion for summaryjudgment on the conspiracy charge is also granted.

III. CONCLUSION

Today, the Court rules on a multitude of motions. First, on the breachof contractissue, the Court GRANTS the plaintiffs' motion for summary judgement withrespect to Cleartel; and accordingly DENIES the defendants' motion withrespect to Cleartel. However, the Court DENIES the plaintiffs' motion forsummary judgment with respect to Mark Parrella, and correspondinglyGRANTS the defendants' motion with respect to the individually-nameddefendants.

Second, on the fraud issue, the Court DENIES the plaintiffs' motion forsummary judgment and GRANTS the defendants' motion for summary judgment.

Third, on the RICO issue, the Court DENIES the defendants' motion forsummary judgement.

Fourth, on the defendants' counter-claims, the Court GRANTS theplaintiffs' motion for summary judgment.

Thus, the majority of claims in this case have been herein resolved.The RICO claims and the damages for breach of contract, however, remainfor further disposition.

A separate order consistent with this Opinion shall issue this date.

1. Actel, Inc. is a co-plaintiff in this suit and is similarlysituated to Regency in all material respects. Mark Parrella, thepresident and sole shareholder of Regency Communications, is also aco-plaintiff in this suit. For ease of reference in this section, theCourt often refers to the plaintiffs collectively as "Regency."

2. More specifically, the parties entered into four separatecontracts. The Contracts were, for the most part, identically organized,and contained identical terms. See Exhibits to Plaintiffs' Motion forSummary Judgment, November 13, 2000.

3. Although the defendants move for judgment on the pleadings, or inthe alternative, for summary judgment", a judgment on the pleadings isonly semantically distinguishable from a motion for summary judgment.See Kevin Clermont, Civil Procedure 88 (2d ed. 1988). Thus, the Courttreats the defendants' motion as a motion for summary judgment.

4. It is unclear from the plaintiffs complaint whether Mark Parrella,in his individual capacity, alleges a breach of contract. The Court, outof caution and completeness, ad dresses the issue as though theplaintiffs were moving for summary judgment with respect to Mr. Parrellaas well.

5. As the Court denies the defendants' summary judgment motion on thisissue, it also denies the defendants' motion to dismiss the plaintiffs'claim for attorneys' fees. See Brief for Defendants, Nov. 13, 2000, at34. That claim was predicated on the RICO claim, and therefore maycontinue as the RICO claim continues.