Multiple Documents

Part	Description
1	22 pages
2	Proposed Order (PDF Only)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02912-CMA-KMT

REGAS CHRISTOU
R.M.C. HOLDINGS, L.L.C. D/B/A THE CHURCH,
BOUBOULINA, INC D/B/A VINYL,
MOLON LAVE, INC. D/B/A 2 A.M.,
CITY HALL, LLC,
1037 BROADWAY, INC. D/B/A BAR STANDARD F/K/A THE SHELTER,
776 LINCOLN ST., INC. D/B/A FUNKY BUDDHA LOUNGE,
1055 BROADWAY, INC. D/B/A THE LIVING ROOM

Plaintiffs,
v.

BEATPORT, LLC,
BRADLEY ROULIER,
BMJ&J, LLC D/B/A BETA NIGHTCLUB AND BEATPORT LOUNGE,
AM ONLY, INC.,

Defendants.

DEFENDANT BEATPORT, LLC'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

Defendant Beatport, LLC, by and through its counsel, submits its Motion to Dismiss Plaintiffs' Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), and states as follows:

INTRODUCTION

Plaintiffs allege violations of Sections 1 and 2 of the Sherman Act, a violation of RICO, and assert a claim for theft of trade secrets and civil conspiracy against Beatport. The thrust of Plaintiffs' allegations is that the Defendants, including Beatport, conspired

to violate the law in an effort to damage SOCO's nightclubs. Plaintiffs assert the following claims against Beatport: (1) Unlawful Tying; (2) Conspiracy to Monopolize; (3) Conspiracy to Eliminate Competition by Unfair Means; (4) Theft of Trade Secrets; (5) a RICO violation; and (6) Civil Conspiracy.[1] Despite containing 42 pages of allegations spanning 166 paragraphs, Plaintiffs' complaint fails to plausibly state any claim upon which relief can be granted against Beatport. Sheer volume does not state a claim. *See, e.g.,* ***Tonkovich v. Kansas Bd. of Regents***, 159 F.3d 504, 534 (10th Cir. 1998) ("[F]acts by the truckload are simply not enough to meet a plaintiff's burden…"). The Court should dismiss Plaintiffs' claims against Beatport with prejudice.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8 requires a "short and plain statement of the claim showing that the pleader is entitled to relief…." Fed. R. Civ. P. 8(a)(2). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 555 (2007) (citations and internal quotations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the

[1] It is unclear from Plaintiffs' Complaint whether they intend to assert additional claims against Beatport. Claims for relief 2, 3, and 8 do not purport to assert any claim against Beatport, but include allegations referencing Beatport. Beatport reserves its right to address any such additional claims in its Reply in Support of its Motion to Dismiss or at any other appropriate stage of this litigation.

allegations in the complaint are true (even if doubtful in fact)." ***Id.*** Put another way, Fed. R. Civ. P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." ***Ashcroft v. Iqbal***, 129 S.Ct. 1937, 1949 (U.S. 2009). Courts are "not bound to accept as true legal conclusions couched as factual allegations…." ***Id.*** at 1950 (quoting ***Twombly***, 550 U.S. at 556). "Rule 8(a)'s short and plain statement mandate requires that a plaintiff allege enough factual matter that, taken as true, makes his claim to relief … plausible on its face." ***Bryson v. Gonzales***, 534 F.3d 1282, 1286 (10th Cir. 2008) (internal quotations and citations omitted).

In ***Twombly***, the Supreme Court considered allegations of violations of the Sherman Act. ***Id.*** at 551. Plaintiffs alleged that the defendants "entered into a contract, combination or conspiracy to prevent competitive entry…and ha[d] agreed not to compete with one another." ***Id.*** Despite including relatively detailed allegations, *see* ***Twombly v. Bell Atlantic Corp.***, 313 F.Supp.2d 174 (S.D.N.Y. 2003), the Supreme Court found plaintiffs' claims deficient for purposes of Fed. R. Civ. P. 8 because the alleged "parallel action" could just as easily be explained by lawful free market behavior. ***Twombly***, 550 U.S. at 567. "When, in ***Twombly***, the Supreme Court emphasized the need for plausibility in the complaint rather than 'wholly conclusory statement[s]' it warned particularly of the high costs and frequent abuses associated with antitrust discovery." ***Christy Sports, LLC v. Deer Valley Resort Co., Ltd.***, 555 F.3d 1188, 1191 (10th Cir. 2009) (citing ***Twombly***, 550 U.S. at 558) (internal citations omitted). "[P]lausibility in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent,

then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" ***Robbins v. Oklahoma***, 519 F.2d 1242, 1247 (10th Cir. 2008) (quoting ***Twombly***, 550 U.S. at 570); *see also*, ***Twombly v. Bell Atlantic Corp.***, 313 F.Supp.2d 174 (S.D.N.Y. 2003) (discussing plaintiffs' allegations in detail).

In the context of civil RICO claims, most courts impose more stringent pleading requirements than would be applicable to other claims. *See, e.g.,* ***Cayman Exploration Corp. v. United Gas Pipe Line Co.***, 873 F.2d 1357, 1362 (10th Cir. 1989) ("[T]he threat of treble damages and injury to reputation[,] which attend RICO actions justify requiring plaintiff to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis for the predicate acts."); ***Saine v. A.I.A., Inc.***, 582 F. Supp. 1299, 1302 (D. Colo. 1984) ("Because [RICO] is a complicated statute that covers conduct ranging from sports bribery to white slavery, a defendant needs a substantial amount of information to prepare a response….RICO should not be construed to give a pleader license to bully and intimidate nor to fire salvos from a cannon."). RICO claims are particularly susceptible to abuse and the high incidence of actual abuse resulting in almost 70 percent of those claims dismissed on motions to dismiss or by summary judgment: Bucy, "Private Justice," 76 *So. Cal. L. Rev.* 1, 22 (2002). In this case and in light of the Supreme Court's direction in ***Twombly*** and ***Ashcroft***, Plaintiffs' allegations fail to meet the appropriate standard.

ARGUMENT

I. First Claim for Relief – Sherman Act § 1 – Unlawful Tying

Section 1 of the Sherman Act states, "[e]very contract, combination in the form of

trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal...." 15 U.S.C. § 1 (2003). The Act proscribes anticompetitive conduct as part of concerted action or a conspiracy. ***Nobody in Particular Presents, Inc. v. Clear Channel Comm's, Inc.***, 311 F. Supp. 2d 1048, 1091 (D. Colo. 2004) (citing ***Systemcare, Inc. v. Wang Labs. Corp.***, 117 F.3d 1137, 1139-40 (10th Cir. 1997)). There is no prohibition against unilateral action. ***Id.*** "A tying arrangement exists when a seller conditions the purchase of a highly desirable product on the purchase of an additional product." ***Id.*** The elements are: (1) two separate products; (2) a tie, or conditioning of the sale of one product on the sale of another; (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market. ***Multistate Legal Studies, Inc. v. Harcourt Brace, Inc.***, 63 F.3d 1540, 1546 (10th Cir. 1995). Plaintiffs do not allege a typical tying arrangement, where a single seller conditions purchase of product A on the purchase of product B. Rather, Plaintiffs allege that Beatport tied access to its on-line music downloading store (the alleged tying product) to live performances at Beta (the alleged tied product). [Doc No. 1 ¶¶ 69-78]; *see* ***Sports Racing Servs., Inc. v. Sports Car Club of America, Inc.***, 131 F.3d 874, 888-89 (10th Cir. 1997).

Here, Plaintiffs' claim suffers from a number of defects. Plaintiffs' allegations are nothing more than the sort of "unadorned, the-defendant-unlawfully-harmed-me accusation" prohibited by ***Ashcroft***, 129 S.Ct. at 1949. Despite Plaintiffs' prolix allegations, the majority are nothing more than legal conclusions couched as facts. Plaintiffs allege that Beatport "exercise[s] substantial market power in the market for the

sale of Electronic Dance Music, and in the sub-market for the paid online downloading of high-fidelity DRM-free Electronic Dance Music." [Doc. No. 1 ¶ 72]. But, merely saying it does not make it so. There is absolutely no indication in the complaint what percentage of these two alleged markets Beatport occupies. Accordingly, there is no way to assess whether Plaintiffs' allegations are even remotely plausible. Plaintiffs also allege that the Defendants "acted in concert to advance a tying arrangement whereby A-list DJs would perform live within the Denver metro area only at Beta…." [Doc. No. 1 ¶ 73]. However, there is scant indication of ***how*** Beatport allegedly acted in concert with anyone. To avoid this problem, Plaintiffs frequently lump Beatport in with the other Defendants and assert, without any specificity of who allegedly did what, that the "Defendants" engaged in illegal conduct. [*See, e.g.*, Doc. No. 1 ¶¶ 34, 48, 49, 60, 62, 66, 67, 72-74, 76, 78]. The problem with this approach is that it does not allow Beatport to respond in any reasonable fashion to what ***Beatport*** supposedly did wrong.

Plaintiffs' complaint, however, suffers from more than simply a problem of pleading. Even when taken as true, Plaintiff's allegations against Beatport fail to state a claim as a matter of law. First, Plaintiffs lack standing. There is no allegation that Plaintiffs ever purchased on-line music downloads (the alleged tying product) or purchased live performances by A-list DJs playing Electronic Dance Music (the alleged tied product). ***Sports Racing Servs., Inc.***, 131 F.3d at 888-89 (discussing the direct purchaser doctrine and noting that it is the tied purchaser who may suffer an antitrust injury as the result of an unlawful tie-in); *see also*, ***Four Corners Nephrology Assoc., P.C. v. Mercy Med. Ctr. of Durango***, Civil Action No. 05-cv-02084-JAP-LFG, 2008 WL

622815 *7-8 (D. Colo. 2008) (discussing standing for tying claim and noting that the antitrust laws "were enacted 'for the protection of *competition[,]* not *competitors.*') Because they purchased neither the tying nor the tied product, Plaintiffs' tying claim is a non-starter. Plaintiffs may argue that they are asserting a tying claim based on their alleged status as a competitor who is being foreclosed from the market for live performances by A-List DJs. ***Id.*** But, such a theory simply does not fit here because Plaintiffs are neither DJs (who have purportedly been paid less) nor the concert-going public (who have purportedly paid higher ticket prices). Further, Plaintiffs' allegation that they have lost business as the result of Beatport's alleged tying of access to and promotion on its web-site with live performances at Beta is entirely conclusory. There is no indication anywhere in the complaint how much business Plaintiffs claim to have lost, what portion of the market Beta has gained, or whether and to what extent other clubs that play similar music have been affected.

Further demonstrating the implausibility of Plaintiffs' claims, Plaintiffs do not allege that Beatport has any economic interest in requiring artists who post or download music on its web-site to perform only at Beta. When a third party is involved in selling the tied product to the plaintiff (even if such a theory fit), courts require that the tying product seller have a direct economic interest in the sale of the tied product before an illegal tying arrangement can be found. *See, e.g.,* ***Beard v. Parkview Hosp.*****,** 912 F.2d 138, 140-44 (6th Cir. 1990) (no tying arrangement when hospital required patients to purchase radiological services from a single third party because no direct economic benefit); ***White v. Rockingham Radiologists, Ltd.***, 820 F.2d 98, 104 (4th Cir. 1987)

(same); ***Roberts Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.***, 732 F.2d 1403, 1407-08 (9th Cir. 1984) (no tying when airline offered discount airfares only if the customer purchased car rental services from a designated third party); ***Keener v. Sizzler Family Steak Houses***, 597 F.2d 453, 456 (5th Cir. 1979) (no tie where defendant seller of franchise trademark required franchisee to use particular contractor to construct building). To make any economic sense, Beatport must somehow benefit from requiring artists to perform at Beta versus at another club. Plaintiffs' allegations stop short of alleging any such benefit. Plaintiffs also do not allege that they are prohibited from creating their own competing web-site. ***Total Renal Care***, 2009 WL 2596493 * 8 (entry barriers may be necessary component to an antitrust violation).

Moreover, even assuming that Plaintiffs properly defined the relevant market and that Beatport indeed possesses monopoly power in that market, Plaintiffs fail to allege with anything more than conclusory labels that the purported monopoly power enjoyed by Beatport has anything to do with any "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." ***United States v. Grinnell Corp.***, 384 U.S. 563, 570-71 (1966). Without alleging some ***conduct*** by Beatport suggesting it willfully acquired or maintained a monopoly, it would be illogical to allow a claim for an alleged tie-in to proceed when Beatport would not be liable for monopolization.

Finally, Plaintiffs identify themselves collectively as "SOCO." [Doc. No. 1 ¶¶ 3-4]. The bulk of Plaintiffs' allegations, however, appear to be based on alleged business losses at The Church and Vinyl. Plaintiffs' oversimplification of who are proper parties-

plaintiff fails to recognize that there are virtually no allegations in the complaint regarding 2 A.M., City Hall, Bar Standard, Funky Buddha Lounge, The Living Room, or Mr. Christou and how they have allegedly been harmed.

II. Fourth and Fifth Claims for Relief – Sherman Act §§ 1 and 2 – Conspiracy to Monopolize and Conspiracy to Eliminate Competition by Unfair Means

Plaintiffs' fourth and fifth counts allege that Beatport conspired to monopolize the market for live performances by A-list DJs within the Denver metro area or to eliminate competition by unfair means in that market.[2] [Doc. No. 1 ¶¶ 109-122]. Plaintiffs' fourth claim for relief attempts an action for conspiracy to monopolize in violation of section 2 of the Sherman Act, "which is a separate offense under section 2, requiring less in the way of proof than the other section 2 offenses." ***Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.***, 891 F.2d 1473, 1484 (10th Cir. 1989). Conspiracy to monopolize requires a plaintiff to "show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." ***Id.***

Plaintiff's fifth claim for relief attempts an action for conspiracy to eliminate competition by unfair means in violation of section 1 of the Sherman Act. "To state a claim for a violation of section one the plaintiff must allege facts which show: the defendant entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market." ***Total Renal Care***, 2009 WL 2596493 * 4 (quoting ***TV Commc'ns Network, Inc. v. Turner Network Television, Inc.***, 964 F.2d 1022, 1027

[2] For purposes of this Motion, Beatport takes as true Plaintiffs' allegations of the supposed relevant markets. In the event further proceedings are necessary, Beatport reserves its right to challenge Plaintiffs' definition of the relevant markets.

(10th Cir. 1992)). In a section 1 analysis, the Court must determine whether the challenged conduct "constitutes a *per se* violation of the statute" or whether the conduct should be analyzed to see if it "create [s] an **unreasonable** restraint of trade" - the so-called "rule of reason." ***Id.*** Here, there is no indication under which theory the Plaintiffs attempt to proceed.

Plaintiffs conclusorily allege that Beatport had the specific intent to monopolize the market for live performances of electronic music. [Doc. No. 1 ¶¶ 111, 121]. In support of these allegations, Plaintiffs assert that "Defendants engineered exclusive dealing and reciprocal dealing arrangements…; schemed to allocate DJs within the Denver metro area…; coordinated a group boycott of SOCOs nightclubs; and Defendants leveraged Beatport's monopoly over the market for digital downloads of [EDM] to coerce A-list DJs to play within the Denver metro area exclusively at Beta." [Doc. No. 1 ¶¶ 110, 118]. Notably absent, however, is any description of the alleged exclusive and reciprocal dealing arrangements, who participated in the agreements, who participated in the alleged "two-tiered scheme," who boycotted SOCOs nightclubs, when any of this occurred, or how the parties benefitted.

Moreover, as instructed by the Supreme Court in ***Twombly***, there must be some allegation that the alleged antitrust violation cannot be explained by lawful free market behavior. ***Twombly***, 550 U.S. at 567. The complaint contains no facts to suggest that any of the impacts about which Plaintiffs complain cannot be explained by lawful behavior. Rather than the vast conspiracy Plaintiffs allege, the decision by some artists

to perform at Beta can just as easily be explained by the fact that in 2008 Beta was a new club that generated intense interest in the marketplace.

It also makes no sense under any analysis that Beatport would conspire to monopolize the market for live performances of electronic dance music. Beatport runs a web-site for downloading electronic dance music. [Doc. No. 1 ¶ 13]. Plaintiffs do not allege that Beatport is even a participant in the market for live performances at clubs or that it in any way seeks to enter that market. There is no allegation that Beatport would derive any economic benefit if A-list DJs performed only at Beta. This simple reality belies the notion that Beatport conspired with anyone to monopolize any market in violation of either section 1 or section 2 of the Sherman Act.

Finally, Plaintiffs claims fail because related entities and individuals cannot, by definition, conspire with each other to violate the antitrust laws. ***Copperweld Corp. v. Independence Tube Corp.***, 467 U.S. 752, 777 (1984) (parent and wholly-owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act."); ***H.R.M., Inc. v. Tele-Communications, Inc.***, 653 F. Supp. 645, 648 (D. Colo. 1987) (extending ***Copperweld's*** rationale to section 2 claims because such claims require at least two participants); *see also*, ***Surgical Care Center of Hammond, L.C. v. Hosp. Serv. Dist. No 1 of Tangipahoa Parish***, 309 F.3d 836, 840-41 (5th Cir. 2002) ("a corporation and its agent…are incapable of conspiring with one another to violate the antitrust laws"); ***Vollrath Co. v. Sammi Corp.***, 9 F.3d 1455, 1463 (9th Cir. 1993) (dismissing § 1 and § 2 conspiracy claims among related corporations).

Plaintiffs allege the Defendants, including Beatport, have been able to accomplish their anti-competitive goals by leveraging "the overlapping ownership among Defendants and the power of Beatport to coerce DJs to boycott SOCO's venues and to play only at Beta." [Doc. No. 1 ¶ 34]. Plaintiffs allege that Beatport and Beta "have been and remain closely tied through common ownership and history." [Doc. No. 1 ¶ 43]. Plaintiffs also allege that Mr. Roulier "is a co-founder of Beatport, and upon information and belief, Mr. Roulier remains a member of Beatport. Mr. Roulier is also the founder and a member of Beta." [Doc. No. 1 ¶ 6]. It is not legally possible for Beatport, Beta, and Mr. Roulier to have conspired to do anything. Plaintiffs may argue that AM Only is not alleged to be part of the purported Beatport/Beta/Roulier family. However, there is no allegation anywhere in the complaint that AM Only did anything other than communicate with its artists and with the various clubs in Denver at which those artists might perform. There is simply nothing to suggest that Beatport had any intent to conspire with anyone to monopolize any market.

III. Sixth Claim for Relief – C.R.S. § 7-74-101, *et seq.* – Theft of Trade Secrets

Plaintiff asserts that Beatport misappropriated certain trade secrets in the form of The Church and Vinyl's MySpace "friends" list, a customer e-mail address list, and a list of personal cell phone numbers and e-mail addresses for the world's top DJs, agents, and promoters (hereinafter "Lists"). [Doc. No. 1 ¶¶ 125-127]. Under Colorado law, to prove misappropriation of a trade secret, a plaintiff must show: (1) that he or she possessed a valid trade secret, (2) that the trade secret was disclosed or used without consent, and (3) that the defendant knew, or should have known, that the trade secret

was acquired by improper means. ***Gates Rubber Co. v. Bando Chemical Indus., Ltd.***, 9 F.3d 823, 847-48 (10th Cir. 1993). "The breach of a duty of trust or confidence 'is the gravamen of such trade secret claims….'" ***Id.*** (quoting ***Computer Associates Int'l, Inc. v. Altai, Inc.***, 982 F.2d 693, 717 (2nd Cir. 1992)). Courts consider several factors in assessing trade secret status, including whether: (1) proper and reasonable steps were taken by the owner to protect the secrecy of the information; (2) access to the information was restricted; (3) employees knew customers' names from general experience; (4) customers commonly dealt with more than one supplier; (5) customer information could be readily obtained from public directories; (6) customer information is readily ascertainable from sources outside the owner's business; (7) the owner of the customer list expended great cost and effort over a considerable period of time to develop the files; and (8) whether it would be difficult for a competitor to duplicate the information. ***Hertz v. Luzenac Group***, 576 F.3d 1103, 1115 (10th Cir. 2009) (citing ***Colorado Supply Co. v. Stewart***, 797 P.2d 1303, 1306 (Colo. App. 1990)).

Here, Plaintiffs' claim for misappropriation of trade secrets fails to state a claim because the complaint contains insufficient allegations to suggest that Plaintiffs' Lists constitute trade secrets. Even if the Lists are trade secrets, no allegation exists that Beatport knew or should have known they were acquired by improper means.

Plaintiffs conclusorily allege "[e]ach of these lists and web profiles are secured and safeguarded by SOCO to prevent access to or use by anyone other than those limited personnel requiring access to promote SOCO's businesses." [Doc. No. 1 ¶ 129]. However, this allegation does not describe any of the steps taken to protect the Lists.

Under ***Twombly*** such an allegation is insufficient to state a claim. Moreover, the complaint fails to allege even basic facts respecting any of the other ***Colorado Supply*** factors with regard to the three Lists. Merely asserting that the Lists constitute protected trade secrets is not enough to state a claim. Notably, The Church and Vinyl assert that their MySpace web profiles constitute trade secrets. The notion that a person's or businesses' social networking web-pages could constitute trade secrets finds no support in any of the ***Colorado Supply*** factors. Broadcasting information via the internet and encouraging members of the public to become MySpace "friends," is anathema to the notion that such information could be considered a trade secret.

In addition, the complaint contains no allegation that anyone at Beatport, aside from Mr. Roulier, knew anything about the alleged misappropriation of Plaintiffs' trade secrets. Rather, Plaintiffs allege that Mr. Roulier used the purported trade secrets "in his personal capacity, as an agent and officer of Beta, and as an agent and officer of Beatport…." [Doc. No. 1 ¶ 135]. Plaintiffs assert, in essence, that Beatport can be held strictly liable for Mr. Roulier's alleged misappropriation of trade secrets by simply employing a person who allegedly possesses Plaintiffs' trade secrets (assuming the Lists can even be considered trade secrets). A recent decision in this District addressed and rejected this very contention. ***Ciena Comm's, Inc. v. Nachazel***, Case No. 09-cv-02845-MSK-MJW, 2010 WL 3489915 * 4 (D. Colo. Aug. 31, 2010) (granting dismissal of trade secrets claim against new employer of person alleged to possess plaintiff's trade secrets because no allegations existed to support the notion that new employer knew anything about plaintiff's purported trade secrets). Similarly, here,

Plaintiffs assert nothing suggesting Beatport knew or should have known that Mr. Roulier allegedly possessed Plaintiffs' purported trade secrets. The complete lack of any basis upon which to pursue this claim demonstrates bad faith and warrants an award of attorneys' fees and costs to Beatport pursuant to C.R.S. § 7-74-705.

IV. Seventh Claim for Relief – 18 U.S.C. § 1962 – RICO

Plaintiffs also assert a claim for an alleged violation of RICO. [Doc. No. 1 ¶¶ 137-154]. Plaintiffs' claims fail because they lack: (1) sufficient factual allegations pursuant to Fed. R. Civ. P. 8 to support the generic allegations of a pattern of racketeering activity; (2) sufficient specificity pursuant to Fed. R. Civ. P. 9(b) as to the generic RICO predicate-act allegations of mail, wire, and bank fraud, as well as theft;[3] and (3) any RICO "enterprise" distinct from the named defendants themselves. Due to the seriousness of this claim, the Court should review it with a critical eye, and the pleader should be well-armed before his fingers reach the keyboard. This claim should not be used to address sour grapes, as here, where lack of popularity is attributed to racketeering. This Court is not the appropriate place to address popularity contests, and Plaintiffs' claims are legally inadequate to elevate Defendants' conduct to unlawful acts.[4] RICO was enacted in part to eliminate infiltration of organized crime and racketeering activities into legitimate businesses. It was not intended to reach "every

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[3] Theft is not a predicate act for purposes of RICO. *See* ***Toms v. Pizzo***, *infra.* at 183.

[4] Further, it must be shown that racketeering caused the injury. ***Id.*** *(citing* ***Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.***, 101 F.3d 900, 903-04 (2nd Cir. 1996).

act of corruption or petty crime committed in a business setting." ***Toms v. Pizzo***, 4 F. Supp. 2d 178, 182 (W.D.N.Y. 1998), *aff'd*, 172 F.3d 28 (2nd Cir. 1998).

Plaintiffs' allegations fail to set forth a sufficient factual predicate pursuant to Fed. R. Civ. Pro. 8. To establish a civil RICO claim Plaintiffs must plead sufficient facts to make plausible: (1) commission of predicate acts of racketeering; (2) commission of at least two such predicate acts as part of a continuing pattern; and (3) that Beatport is a "person," which means Beatport must be an entity distinct from the alleged RICO "enterprise." *See* 18 U.S.C. § 1962(c). The fundamental flaw of Plaintiffs' complaint is their use of legal conclusions masquerading as factual allegations to describe the required elements. [Doc. No. 1, pp. 35-39]. Although it is obvious that Plaintiffs are unhappy that Beta has been more successful booking A-list DJs and that Plaintiffs believe this was done in an "illegal" manner, there are no true factual allegations of any kind to even suggest how the booking process was conducted in an ongoing pattern of "intimidation" or mail and wire fraud, bank fraud and theft – other than to say that the Defendants repeatedly "interacted among each other…" [Doc. No. 1 ¶ 140], and "communicated to patrons at live performance[s]," [Doc. No. 1 ¶ 141].

The absence of factual allegations sufficient to plausibly suggest that Beatport engaged in two or more predicate acts requires dismissal of Plaintiffs' RICO claim. ***Goren v. New Vision Int'l, Inc.***, 156 F.3d 721, 727 (7th Cir. 1998) (claimant cannot simply state boilerplate RICO elements but must allege sufficient facts to support each element); ***Toms***, 4 F. Supp. 2d at 183 (same); ***Boone v. Carlsbad Bancorp. Inc.***, 972 F.2d 1545, 1555-56 (10th Cir. 1992) (affirming dismissal for insufficiency of "pattern"

allegations); ***Brooks v. Bank of Boulder***, 891 F. Supp. 1469, 477-78 (D. Colo. 1995) (dismissing RICO claims for insufficiency of "pattern" and "predicate act" allegations).

As to the third element, requiring a distinction between the named defendant and the alleged RICO "enterprise," it is "well-settled in this circuit, as in most others, that for purposes of 18 U.S.C. § 1962 (c), the defendant 'person' must be an entity distinct from the alleged 'enterprise.'" ***Switzer v. Coan***, 261 F.3d 985, 992 (10th Cir. 2001) (dismissing RICO claim alleging that the racketeering enterprise "is simply the group of individual defendants accused of engaging in racketeering."); ***Brannon v. Boatmen's First Nat'l Bank of Omaha***, 153 F.3d 1144, 1147 (10th Cir. 1998) (quoting ***Emery v. American Gen. Fin., Inc.***, 134 F.3d 1321, 1323-24 (7th Cir. 1998) ("The firm must be shown to use its agents or affiliates in a way that bears at least a family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality."). Here, however, Plaintiffs have not identified any distinct "enterprise" at all, which is fatal both from the perspective of Fed. R. Civ. P. 8 and 12(b)(6). Instead, Plaintiffs allege that the individual Defendants are directly engaged in racketeering (a notion Beatport strenuously disputes). Such allegations fail to state a claim under 18 U.S.C. § 1962(c).

Plaintiffs also tout the notion that Defendants have engaged in "fraud." Fed. R. Civ. P. 9(b) requires specificity as to any claims of fraud, providing that the "circumstances constituting fraud … be stated with particularity." When a RICO claim is allegedly based upon the commission of predicate acts of wire or mail fraud, as here, this requirement of Rule 9(b) is stringently imposed. ***Farlow v. Peat, Marwick, Mitchell***

& Co., 956 F.2d 982, 989-90 (10th Cir. 1992) (RICO predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *see also*, ***Smith v. Figa***, 2003 WL 21465495 (10th Cir. 2003) (unpublished) (affirming dismissal under Rules 9(b) and 12(b)(6) of a RICO claim unaccompanied by any "details or specifics of the predicate mail/wire fraud acts.").[5]

Plaintiffs' failure to reach even the level of specificity required by Fed. R. Civ. P. 8 demonstrates that their unsupported and conclusory allegation(s) of mail, wire, and bank fraud (as well as theft), simply do not even approach the specificity requirements of Fed. R. Civ. P. 9(b). Again, Plaintiffs assert legal conclusions rather than factual allegations to "support" their claims. The mere use of a telephone or e-mail to conduct business does not implicate wire fraud. [Doc. No. 1 ¶¶145-146]. The result of Plaintiffs' overuse of legal conclusions couched as facts is that, upon close inspection, there are no allegations anywhere in the complaint as to any ***facts*** that could constitute mail or wire fraud, let alone allegations as to which of the several Defendants committed each such act or as to when each such act took place.

V. Ninth Claim for Relief – Civil Conspiracy

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[5] A RICO plaintiff alleging predicate acts of mail and wire fraud must allege the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff, and plaintiff must satisfy these requirements twice. *See* ***Goren***, *supra* at 728-729. Further, the "lumping together" of defendants is clearly insufficient to state a RICO claim. ***Id.*** at 730. Plaintiff wholly fails to allege fraud with the specificity required by ***Goren***, and repeatedly makes reference to "Defendants" in his RICO claim, lumping them together rather than identifying which Defendant purportedly participated in the predicate act(s). [Doc. No. 1 ¶¶ 142-146].

Plaintiffs assert a claim for civil conspiracy against Beatport. [Doc. No. 1 ¶¶ 160-166]. In particular, Plaintiff alleges "Defendants, amongst themselves, agreed by words and conduct to accomplish unlawful goals as outlined above, including the goal of monopolizing the market for live performances of A-list DJs in the Denver metro area." [Doc. No. 1 ¶ 161]. Plaintiff also alleges "Defendants, amongst themselves, agreed by words and conduct to accomplish a goal by unlawful means, including the goal of increasing Beta's market share in the market for live performances by A-list DJs in the Denver metro area at the expense of SOCO's clubs." [Doc. No. 1 ¶ 163].

A claim for civil conspiracy includes the following elements: (1) two or more persons, and for this purpose a corporation is a person; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof. ***Jet Courier Serv., Inc. v. Mulei***, 771 P.2d 486, 502 (Colo. 1989). Plaintiffs assert the conduct they claim constitutes violations of the antitrust laws, RICO, and the Colorado trade secrets statute also forms the basis for their conspiracy claim. [Doc. No. 1 ¶¶ 162, 164]. Plaintiffs allege, in unadorned fashion, that "Defendants performed one or more unlawful acts to accomplish this goal…" and refer to the complaint's previously asserted unlawful conduct. [*Id.*]. Plaintiffs' civil conspiracy allegations add nothing new and fail for the same reasons Plaintiffs' antitrust, RICO, and trade secrets claims fail.

In addition, Plaintiffs' civil conspiracy claim appears to be nothing more than an attempt to hold Beatport liable for the acts of the other Defendants.[6] *See* ***Anesthesia Advantage, Inc. v. The Metz Group***, 708 F. Supp. 1180, 1182 (D. Colo. 1989) ("Each member of a combination or conspiracy is liable for his coconspirator's acts as long as he remains an active participant in the conspiracy."). Demonstrating their inability to properly state any claims against Beatport, the Court should reject this attempted end-run of the Federal Rules of Civil Procedure's pleading requirements.

CONCLUSION

For all of the foregoing reasons, Defendant Beatport, LLC respectfully requests that the Court dismiss Plaintiff's claims against it in their entirety with prejudice, that the Court award Beatport reasonable attorneys' fees and costs incurred in defending this action, and for all other and further relief as this Court deems just and appropriate.

CERTIFICATION OF CONFERENCE

Pursuant to D.C.Colo.LCivR 7.1.A, in light of the nature of the relief sought by this Motion, no conference was required.

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[6] Beatport does not mean to suggest that any of Plaintiffs' claims against any of the Defendants have merit. However, to any extent any of the other Defendants is ultimately found to bear some liability to any of the Plaintiffs, Beatport should not be dragged into such a morass solely by virtue of Plaintiffs' unfounded and wholly conclusory civil conspiracy claim.

Respectfully submitted this 12th day of January, 2011.

s/ Katherine M.L. Pratt

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2011, I electronically filed the foregoing **DEFENDANT BEATPORT, LLC'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)** with the Clerk of the Court using the CM/ECF system which will send notification to such filing to the following e-mail addresses:

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and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

s/ Cheryl Stasiak
_____
Cheryl Stasiak

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02912-CMA-KMT

REGAS CHRISTOU
R.M.C. HOLDINGS, L.L.C. D/B/A THE CHURCH,
BOUBOULINA, INC D/B/A VINYL,
MOLON LAVE, INC. D/B/A 2 A.M.,
CITY HALL, LLC,
1037 BROADWAY, INC. D/B/A BAR STANDARD F/K/A THE SHELTER,
776 LINCOLN ST., INC. D/B/A FUNKY BUDDHA LOUNGE,
1055 BROADWAY, INC. D/B/A THE LIVING ROOM

Plaintiffs,
v.

BEATPORT, LLC,
BRADLEY ROULIER,
BMJ&J, LLC D/B/A BETA NIGHTCLUB AND BEATPORT LOUNGE,
AM ONLY, INC.,

Defendants.

ORDER RE: BEATPORT, LLC'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6)

The Court, having considered the positions of the parties and being fully advised in the premises, hereby **GRANTS** Beatport's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs' claims against Beatport are dismissed in their entirety with prejudice. Beatport is entitled to its attorneys' fees and costs.

Dated this _____ day of January, 2011.

BY THE COURT:

_____
United States District Court Judge

General Information

Case Name	Christou et al v. Beatport, LLC et al
Docket Number	1:10-cv-02912
Court	United States District Court for the District of Colorado
Nature of Suit	Statutes: Antitrust
Related Opinion(s)	2011 BL 41212 849 F. Supp. 2d 1055

