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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

99CV2010-B (AJB)

MARCI IMBER, as Guardian ad litem
for ANDRE IMBER, On Behalf of
Themselves and All Others Similarly
Situating,

Plaintiffs,

vs.

NINTENDO OF AMERICA, INC.,
WIZARDS OF THE COAST, and
4KIDS ENTERTAINMENT, INC.,

Defendants.

ORDER:

(1) DISMISSING PLAINTIFFS'
RICO CLAIM WITHOUT
LEAVE TO AMEND; and

(2) DISMISSING WITHOUT
PREJUDICE ALL PENDENT
CLAIMS

INTRODUCTION

Plaintiffs herein, alleged residents of New York and California, claim to be purchasers, or the guardian ad litem of purchasers, of trading cards. Plaintiffs allege that they purchased trading cards in the hope of winning "chase"¹ cards, redeemable in bonus cash prizes. Defendants are alleged residents of New York, Washington and Japan. On April 18, 2000, this Court ordered Plaintiffs to show cause as to why the claim brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§

¹ Plaintiffs refer to the cards as "chase cards" because collectors allegedly "chase" these limited edition trading cards which may be worth hundreds or thousands of dollars.

1 1961-1968, should not be dismissed for lack of standing under § 1964(c) of RICO. The
2 hearing for this Court's Order to Show Cause ("OSC") was held on June 7, 2000 with
3 counsel for all parties present.

4 The Court re-reviewed all pleadings, motions, and briefs heretofore filed as well as
5 all briefs filed in response to the OSC. The Court, having heard oral argument by counsel
6 and being fully advised in the premises, now therefore issues the following ORDER:

7 (1) The RICO claim is dismissed pursuant to Fed. R. Civ. P. 12(c) without
8 leave to amend on the ground that Plaintiffs lack standing as required by §
9 1964(c) of RICO; and

10 (2) All pendent claims are dismissed without prejudice pursuant to 28 U.S.C
11 § 1367.

12 (3) The Clerk shall close the file.

13 DISCUSSION

14 A. Standing Requirement under 18 U.S.C. § 1964(c)

15 Pursuant to this Court's April 18, 2000 Order to Show Cause, the issue before this
16 Court is whether Plaintiffs have met the requirement of 18 U.S.C. § 1964(c) in order to
17 have standing to bring a lawsuit against Defendants for their alleged gambling activity.
18 Standing under 18 U.S.C. § 1964(c) requires an ability to state a claim for harm to a
19 person's "business or property" resulting from conduct violative of 18 U.S.C. § 1962.

20 1. Section 1964(c)

21 Section 1964(c) provides in pertinent part: "Any person *injured in his business or*
22 *property* by reason of a violation of section 1962 of this chapter may sue therefore in any
23 appropriate United States district court and shall recover threefold the damages he sustains
24 and the cost of the suit, including a reasonable attorney's fee" 18 U.S.C. § 1964(c)
25 (emphasis added). Federal courts have established that RICO was "intended to combat
26 organized crime, not to provide a federal cause of action and treble damages to every tort
27 plaintiff." Oscar v. University Students Cooperative Assn., 965 F.2d at 783, 786 (9th Cir.
28 1992). Although this additional requirement of a showing of "business or property" injury

1 is not imposed upon governmental entities, it is required in order for a *private party* to have
2 standing to recover under RICO.

3 **2. "Injury" to Business or Property under 18 U.S.C. § 1964(c)**

4 In their reply papers, Plaintiffs set forth several arguments which skirt the immediate
5 issue before this Court of whether there has been a showing of injury to their "business or
6 property" sufficient to meet the standing requirements of § 1964(c).²

7 Plaintiffs appear to equate the issue of whether they have set forth a proper showing
8 of a pattern of racketeering activity under § 1962 with whether they have satisfied the
9 requirements of standing under § 1964(c). Plaintiffs also discuss at length the issue of
10 "causation," a separate issue under § 1964(c) that is premature to the analysis before this
11 Court.

12 When Plaintiffs do narrow in on the § 1964(c) "injury" issue, their arguments are
13 not persuasive. Plaintiffs begin by essentially claiming that the allegation of unlawful
14 gambling, without more, is sufficient to demonstrate standing under § 1964(c). For
15 example, Plaintiffs contend that "a person's property interest in the money spent to gamble
16 is in no way diminished because he or she may have received 'something of value' for the
17 opportunity to play." See Pls.' Reply to OSC at 10:7-9. Plaintiffs cite to cases which
18 support Plaintiffs' allegation that Defendants' conduct constituted illegal gambling or
19 lottery. See inter alia People ex rel. Ellison v. Lavin, 179 N.Y. 164, 168-74 (1904). These
20 cases, however, are otherwise inapposite since they do not discuss whether the conduct of
21 illegal gambling *per se* automatically confers a showing of injury for purposes of §
22 1964(c).

23 Plaintiffs appear to argue that, by the mere fact that there is a property interest
24 involved (the consideration tendered in exchange for a pack of trading cards), such
25 consideration constitutes an economic loss sufficient to constitute a § 1964(c) injury to
26 one's "business or property." This is a circular contention, however, one which seems to
27

28 ² For example, Plaintiffs rely on this Court's prior erroneous findings to argue that the §
1964(c) standing requirements have been met. See Pls.' Reply to OSC at 8-12.

1 overlook the precise issue facing this Court: *Have Plaintiffs suffered an economic injury or*
2 *loss; or have they in fact received the benefit of their bargain -- the pack of cards and a*
3 *chance to win?*

4 In trying to devise a § 1964(c) standing argument, Plaintiffs appear to equate
5 property interest (i.e. the consideration tendered during a gambling act) with property
6 injury (i.e. a lost opportunity to win as would be the case, for example, with a “rigged” or
7 fraudulent gambling mechanism). For example, Plaintiffs argue that because they “have
8 more than adequately alleged a property interest under RICO based upon traditional
9 common law,” this interest is sufficient to satisfy the § 1964(c) requirement. See Pls.’
10 Reply to OSC at 9:9-13 (citing Beck v. Prupis, No. 98-1480, 2000 U.S. LEXIS 2999 at *13
11 (April 26, 2000)).

12 Plaintiffs further erroneously equate their alleged common law state cause of action
13 with a showing of “injury” under RICO’s statutory framework. Plaintiffs argue that since
14 they state a cause of action under state common law to recover gambling losses because of
15 the illegality of Defendants’ gambling conduct, this common law remedy is sufficient in
16 and of itself to show injury, and thus standing, under the federal RICO framework.

17 The Court agrees that the consideration tendered by Plaintiffs constitutes a property
18 “interest” as defined under state law.³ However, for a private cause of action, RICO
19 requires a showing of an “injury” to one’s business or property as defined by the RICO
20 statute. While Plaintiffs may in fact possess a common law right of redress, this fact,
21 without more, is not helpful to Plaintiffs’ case. The right to redress that Plaintiffs may
22 enjoy under California state law to sue individually for their gambling losses does not
23 equate with the standing requirement of § 1964(c).

24 Moreover, although this Court agrees that Plaintiffs have stated a cause of action for
25 illegal gambling by Defendants, the act of gambling *per se* is not sufficient to show an
26 injury to one’s business or property under RICO. To confer standing under § 1964(c),

27 ³ Plaintiffs argue that “under RICO, ‘whether a particular interest amounts to property is
28 quintessentially a question of state law.’” See Pls.’ Reply to OSC at 8:7-9 (citing Doe v. Roe, 958
F.2d 763, 768 (7th Cir. 1992)).

1 Plaintiffs must show that they have suffered an economic harm to business or personal
2 property that would constitute the sort of injury contemplated under § 1964(c) as, for
3 example, in the case of a fraudulent gambling scheme.

4 Here, Plaintiffs allege no fraud or dishonesty with respect to Defendants' gambling
5 activity. Plaintiffs struck a bargain with Defendants and received the benefit of their
6 bargain. They paid for a pack of cards which included a *bona fide* "chance to win." See
7 Allard v. Flamingo Hilton (In re Chomakos), 69 F.3d 769, 770 (6th Cir. 1995). Plaintiffs
8 knew when they made their purchase that they might not draw a "chase card" and that the
9 most they might receive would be a pack of non-chase trading cards.

10 There is no allegation that Defendants have engaged in any sort of fraudulent or
11 dishonest conduct such as misrepresenting to purchasers the odds of winning a chase card.
12 Significantly, Plaintiffs concede that in this case they would not claim any injury to their
13 business or property if Defendants' alleged gambling activity were legal under state law.
14 Plaintiffs' reliance on Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985), is
15 misplaced. In Sedima, the plaintiff was defrauded out of proceeds of a joint venture with
16 Imrex because of fraudulent billings for electronic components charged by Imrex. Clearly,
17 Sedima suffered injury to its business, unlike the instant case which contains no allegation
18 of fraud or dishonesty by Defendants.

19 Plaintiffs' last argument involves the "verboden" nature of gambling activity. State
20 law may proscribe gambling irrespective of whether or not it causes injury to business or
21 property of persons within the meaning of § 1964(c) (i.e. that elements of fraud are
22 present). A state may base its gambling prohibition on public policy grounds, which may
23 include religious, cultural, or moral considerations. However, notwithstanding a state's
24 condemnation of such racketeering activity for policy reasons, the Court must look to a
25 different test. Section 1964(c) gives standing to private persons not because of the
26 objectionable nature of the racketeering conduct, but because a person's business or
27 property is injured by the activity. Since Plaintiffs have not alleged such injury, the Court
28 dismisses the RICO cause of action from each of the pending cases. Moreover, the Court

1 takes into consideration the fact that Plaintiffs have had the opportunity to amend their
2 complaint for many months, including the past several weeks during which they have been
3 on notice of this procedural defect. They have failed to allege even a scintilla of fraudulent
4 conduct by Defendants. Therefore, the Court dismisses the RICO claim without leave to
5 amend. See Price v. Pinnacle Brands, Inc., 138 F.3d 602 (5th Cir. 1998).

6 **3. § 1962 RICO Claim**

7 Having determined that Plaintiffs lack standing under § 1964(c), the Court need not,
8 and therefore does not, analyze further the elements required by § 1962. See Id.

9 **B. Jurisdiction over State Law Pending Claims**

10 The complaint alleges residence facts which rule out diversity jurisdiction under 28
11 U.S.C § 1332. The Court, having dismissed Plaintiffs' RICO cause of action, now also
12 lacks federal subject matter jurisdiction over these cases under 28 U.S.C § 1331. It
13 declines to exercise supplemental jurisdiction over the pendent state claims under 28 U.S.C
14 § 1367 and dismisses them herewith without prejudice.

1 **CONCLUSION**

2 Having re-reviewed the pleadings and memoranda heretofore filed, the papers in
3 response to the Court's OSC, having heard oral presentations by the parties on June 7,
4 2000, and being fully advised in the premises, NOW THEREFORE,

5 **IT IS HEREBY ORDERED:**

- 6 (1) The RICO claim is dismissed pursuant to Fed. R. Civ. P.
7 12(c) without leave to amend on the ground that Plaintiffs lack
8 standing as required by § 1964(c) of RICO; and
9 (2) All pendent claims are dismissed without prejudice
10 pursuant to 28 U.S.C § 1367.
11 (3) The Clerk shall close the file.

12 **IT IS SO ORDERED.**

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15 DATED: 6-21-00



16 UNITED STATES SENIOR DISTRICT JUDGE
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20 cc: All Parties
21 Magistrate Judge
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