

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

RESOLUTE FOREST PRODUCTS, INC.,)
RESOLUTE FP US, INC,)
RESOLUTE FP AUGUSTA, LLC,)
FIBREK GENERAL)
PARTNERSHIP, FIBREK U.S.,)
INC., FIBREK INTERNATIONAL)
INC., and RESOLUTE FP)
CANADA, INC.,)
Plaintiffs,)

v.)

CASE NO. 1:16-cv-00071-JRH-BKE

GREENPEACE INTERNATIONAL (aka)
"GREENPEACE STICHTING)
COUNCIL"), GREENPEACE,)
INC., GREENPEACE FUND,)
INC., FORESTETHICS,)
DANIEL BRINDIS, AMY)
MOAS, MATTHEW DAGGETT,)
ROLF SKAR, TODD PAGLIA,)
and JOHN AND JANE DOES 1-)
20,)
Defendants)

REPLY BRIEF OF GREENPEACE FUND, INC. IN SUPPORT OF
ITS MOTION TO DISMISS

Greenpeace Fund, Inc. ("GP-Fund") submits this reply in support of its motion to dismiss for failure to state a claim upon which relief can be granted. (Docket Item 61) In this reply brief, GP-Fund responds only to those portions of Plaintiffs' Response Brief, as filed November 11, 2016 (Docket Item 75, hereinafter "Response") as are addressed to GP-Fund's motion under Federal Rule of Civil Procedure 12(b)(6). GP-Fund does not address issues of personal jurisdiction or venue, except in that, if Plaintiffs' federal claims against GP-Fund fail to state a claim, their ancillary state law claims against GP-Fund should be dismissed as well.

Furthermore, GP-Fund adopts all arguments of co-defendants Greenpeace International, Greenpeace, Inc. ("GP-Inc."), Daniel Brindis, Amy Moas, Matthew Daggett, and Rolf Skar in their reply brief, to the extent that they address issues applicable to all Defendants. This brief further supports the particular arguments made by GP-Fund in its separate motion and brief, in light of what little there is in Plaintiffs' Response that addresses them.

1. Plaintiffs' purported federal claims do not state any claim against GP-Fund.

Plaintiffs continue to assert that their scanty, wholly conclusory and implausible allegations of GP-Fund's involvement in the "scheme" they allege are adequate to meet the heightened pleading requirements, not only of *Ashcroft v. Iqbal*, 556 U.S. 662 (2007) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but also specifically for a federal RICO claim as recognized by the Eleventh Circuit in such cases as *Burgess v. Religious Technology Center, Inc.*, 600 Fed. Appx. 657 (11th Cir. 2015). Plaintiffs rely heavily on the 2006 opinion in *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006), to urge the Court to allow this matter to survive to the summary judgment stage. *Williams*, however, was decided under the "no set of facts to support a claim [standard]...which the Supreme Court categorically retired in *Twombly*." *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702 (11th Cir. 2014). Plaintiffs' allegations as to GP-Fund are plainly insufficient to meet current applicable pleading standards.

Plaintiffs' Response claims that "the scheme's misconduct included ubiquitous misrepresentations. . . .as well as fabricated evidence, extortive threats, cyber-attacks, crippling tortious boycotts and other illegal conduct." ***GP-Fund is not alleged directly to have committed any of these supposed tortious actions, including alleged misrepresentations.***

Plaintiffs' allegations as to GP-Fund boil down to three contentions: (1) that GP-Fund gave money to GP-Inc., another Defendant; (2) that GP-Fund received money from donors

motivated by allegedly fraudulent statements by GP-Inc. about Resolute; and (3) that GP-Fund's executive director, Annie Leonard, participated in the alleged tortious scheme through her duties as executive director of GP-Inc. None of these is a proper basis for holding GP-Fund liable for a RICO conspiracy or anything else.

a. That GP-Fund may have donated funds to another Defendant does not make GP-Fund a member of a supposed RICO conspiracy by the recipient of its donations.

It is permissible for GP-Fund, which Plaintiffs acknowledge is a 501(c)(3) charitable organization, to make grants to other nonprofits engaged in advocacy. Complaint (Docket Item 1), Paragraph 33. As pointed out in GP-Fund's original brief, this does not make GP-Fund liable for the activities of the beneficiaries of its grants. To extend liability for the torts of an advocacy group, to anyone (big or small) who has donated to the group, would be a surprising infringement of the First Amendment. Not only have Plaintiffs failed to sufficiently plead actionable claims against any of the Defendants in this case, it would also be completely inconsistent with the principle recognized in *In re MasterCard Int'l, Inc., Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D. La. 2001), that transferring money is insufficient to confer RICO or other liability alleged by Plaintiffs. In attempting to distinguish this case, Plaintiffs claim that theirs is different because they have alleged that GP-Fund "approved and edited the misinformation and exercised some control over the parameters of the scheme." Response (Docket Item 75), p. 64 fn 27. As shown below, this is exactly what Plaintiffs have *not* done herein with respect to GP-Fund.

b. The allegations of the complaint do not make GP-Fund a plausible defendant on the theory of solicitation of donations by fraudulent statements.

In their Response, Plaintiffs now claim that GP-Fund acted “together with GP-Inc.” to “publish and disseminate” what they call “more than fifty false and misleading reports about Resolute under the collective name Greenpeace USA”, in order to raise money. Response (Docket Item 75), pp. 49, 64. Plaintiffs have failed to sufficiently plead how GP-Fund, as opposed to GP-Inc., did this. No statements bear the name of GP-Fund, nor is there anything to indicate that they were published or disseminated by GP-Fund. The statements at issue are part of what Plaintiffs call the “campaign against Resolute”, which Plaintiffs have alleged was conducted by GP-Inc., not by GP-Fund. Plaintiffs have not pled that any employees of GP-Fund authored any of the statements at issue. Only those who actually are involved in creating the publication can be held responsible. *Universal Commc’n Sys., Inc. v. Turner Broad. Sys., Inc.*, 168 F. App’x 893 (11th Cir. 2006) (*per curium*). In short, even if these statements were actionable, which they are not, the allegation that they were issued by GP-Inc. “together with GP-Fund” is exactly the sort of conclusory, unsupported pleading that was the target of *Iqbal*, *supra*, and *Twombly*, *supra*.

c. The Complaint contains no plausible allegations tying GP-Fund to the “scheme” through Annie Leonard.

Plaintiffs’ third contention, relating to the alleged activities of Annie Leonard, furnish no basis for holding GP-Fund to be part of a scheme, campaign or conspiracy for purposes of federal RICO liability or otherwise, even if such a scheme, campaign or conspiracy took place, and it did not. Plaintiffs have pleaded no plausible basis for imputing any such actions of Ms. Leonard to GP-Fund. To support their claim that the alleged actions of Ms. Leonard are those of GP-Fund, Plaintiffs rely entirely and exclusively on the fact that Ms. Leonard, the executive director of GP-Fund, is also the executive director of GP-Inc., a different Defendant, and as

Plaintiffs acknowledge, a separate legal entity. This is far from sufficient to charge GP-Fund with liability for alleged actions of Ms. Leonard which are never shown or even alleged to have been made in the course of Ms. Leonard's performing her duties as an officer of GP-Fund.

It is undisputed that Ms. Leonard serves as executive director of GP-Fund and also as executive director of GP-Inc. From this fact alone, and without any further support of any kind, Plaintiffs seek to draw the unwarranted conclusion that any liability for her supposed acts as an officer of GP-Inc. can plausibly be imputed to GP-Fund. (Plaintiffs' assertions that GP-Fund intended to profit from these defamatory acts also depends exclusively on Ms. Leonard's joint status, as no other allegation connects GP-Fund with Plaintiffs' alleged scheme.) However, it is textbook law that "identity of officers does not make one corporation liable for acts done by its officers in their discharge of similar duties toward the other company," and this is true even though "they act in that respect by reason of information derived in the discharge of similar duties as officers of such company." 3 Fletcher Cyc. Corp., Section 961. There is no trace in common law of the theory that two corporations can be held to have conspired, or that Corporation A can be held liable for the act of Corporation B, simply because of the act of a common officer, in the discharge of her duties to corporation B. No law prohibits Ms. Leonard from acting as executive director of GP-Fund and GP, Inc. Plaintiffs simply allege no basis for their unsupported conclusion that Ms. Leonard, whatever her connection with or responsibility for acts of GP, Inc., acted for GP-Fund in doing such acts.¹

2. Because Plaintiffs' purported federal claims do not state any claim against GP-Fund, Plaintiffs' supplemental jurisdiction state law claims should be dismissed.

¹ In making this argument, GP-Fund in no way concedes that the activities Plaintiffs allege against GP-Inc. and the other Defendants are sufficient to charge any of them with a RICO conspiracy or otherwise.

The only basis alleged in the complaint for jurisdiction in this Court over Plaintiffs' state law claims (RICO and common law) is 28 U.S.C. Section 1367. Complaint (Docket Item 1), Paragraph 21. Since Plaintiffs' purported federal claims against GP-Fund fail at the pleading stage, their supplemental jurisdiction claims should be dismissed. *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088 (11th Cir. 2004) ("We have encouraged district courts to dismiss any remaining state law claims when, as here, the federal claims have been dismissed prior to trial"). This case clearly meets the criteria for dismissal of supplemental jurisdiction claims stated by the Eleventh Circuit in *Ameritox, Ltd. V. Millennium Laboratories, Inc.*, 803 F.3d 518, 531-531 (11th Cir. 2015).

3. Plaintiffs' Georgia RICO claims fail for the same reasons that their federal RICO claims fail.

Even if Plaintiffs had alleged an independent jurisdictional basis for their Georgia RICO claims, other than supplemental jurisdiction, these claims should be dismissed for the same reason that Plaintiffs' federal claims should be dismissed. Plaintiffs do not dispute the general proposition that federal RICO authority is persuasive as to the interpretation of the Georgia RICO law, and they do not attempt to differentiate their Georgia RICO claims in any way from their federal RICO claims. Since Plaintiffs have failed to meet federal pleading standards sufficient to sustain a federal RICO claim against a Rule 12b(6) motion, Plaintiffs have also failed to meet federal pleadings standards sufficient to sustain a state RICO claim against the same motion. For the reasons stated in the Greenpeace Defendants' Motion to Dismiss and Motion to Strike; the remaining state law claims must be dismissed against GP-Fund, as well.

4. Conclusion

GP-Fund does not belong in this lawsuit. To keep it in the lawsuit would violate the heightened pleading standards applicable to RICO cases and the First Amendment rights of GP-Fund and its donors. As to GP-Fund, the complaint should be dismissed for failure to state a claim upon which relief can be granted against GP-Fund.

/s/ James S. Murray

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CERTIFICATE OF SERVICE

This is to certify that on this day, I electronically filed the forgoing Greenpeace Fund, Inc.'s Motion to Dismiss and have served all parties in this case using the CM/ECF System which will automatically generate an email notification of such filing to all the attorneys of record listed with the Clerk of Court.

This 23rd day of January, 2017

/s/ James S. Murray

JAMES S. MURRAY

Georgia Bar No.: 531801