

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

KENNETH DAVID ARONOFF,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01126-JDT-WTL
	)	
JOSEPH A. DIBRUNO, JR.,	)	
JOSEPH A. DIBRUNO, SR.,	)	
JACK D. JONES JR,	)	
WILLIAM E. WINTERS,	)	
K.B. RECORDS, INC,	)	
LELA L. DIBRUNO,	)	
NICHOLAS A. DIBRUNO,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

KENNETH DAVID ARONOFF, )  
 )  
 Plaintiff, )  
 )  
 vs. ) 1:04-cv-1126-JDT-WTL  
 )  
 JOSEPH A. DiBRUNO, JR.; JOSEPH A. )  
 DiBRUNO, SR.; NICHOLAS A. DiBRUNO; )  
 LELA L. DiBRUNO; K.B. RECORDS, INC.; )  
 WILLIAM E. WINTERS; and JACK D. )  
 JONES, JR., )  
 )  
 Defendants. )

**ENTRY ON MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT JOSEPH A. DiBRUNO, JR. (Docket No. 54)<sup>1</sup>**

Plaintiff Kenneth David Aronoff brings this lawsuit against Defendants Joseph A. DiBruno, Jr.; Joseph A. DiBruno, Sr.; Lela L. DiBruno; Nicholas A. DiBruno; Jack D. Jones, Jr.; William E. Winters; and K.B. Records, Inc. (collectively “Defendants”), alleging substantive and conspiratorial violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.*; violations of federal and state securities laws; violations of state fraudulent transfer laws; breach of contract; and several related causes of action. The RICO and federal securities claims invoke federal-question jurisdiction; the state law claims are supported by diversity of citizenship as well as pendent jurisdiction. Now before the court is Plaintiff’s motion for

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<sup>1</sup> This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

summary judgment against Defendant Joseph A. DiBruno, Jr., (hereinafter “DiBruno Junior”).<sup>2</sup>

## I. BACKGROUND

This case brings to mind the familiar adage regarding deals that sound too good to be true. Plaintiff Aronoff is a professional rock-and-roll drummer who has worked along side artists such as John Mellencamp, Willie Nelson, Melissa Etheridge, and the Smashing Pumpkins. In March of 2003, he traveled to North Carolina to record with a fledgling band. It was at that point when he first met DiBruno Junior. The complaint alleges that DiBruno Junior is one member of a family of confidence artists and hucksters, but that Aronoff was clueless about their conniving ways when he first became involved with DiBruno Junior. Shortly after their initial meeting, DiBruno Junior began soliciting Aronoff by telephone and mail to invest in International Food Tech, Inc. (“IFT”), which he claimed was an existing company formed by his father, Joseph DiBruno, Sr. (“DiBruno Senior”), for the purpose of developing and selling a one-of-the-kind flavored milk product utilizing the sucralose sweetener Splenda®.<sup>3</sup> (Aronoff Decl. ¶ 8.) The investment was described as a “sure thing” with “zero risk.” (*Id.*) To that end,

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<sup>2</sup> Plaintiff moves for summary judgment on all counts in the Amended Complaint except for the two conspiracy counts. Thus, he moves for summary judgment in his favor on Counts I, III, IV, VI, VII, VIII, IX, and X.

<sup>3</sup> DiBruno Junior represented that the milk product would be sold to schools throughout the United States, and that he already had some contracts in place to that effect. (Aronoff Decl. ¶ 8.)

DiBruno Junior personally guaranteed Aronoff's investment, offering to reimburse any losses out of his own pocket. (*Id.*)

The interstate telephone calls during which these representations were made by DiBruno Junior occurred over the course of several days in the spring of 2003. (*Id.* ¶ 9.) Aronoff eventually responded on April 21 by sending DiBruno Junior a check for \$100,000 made payable to IFT ("the first investment"). (*Id.* ¶ 10.) Notably, however, DiBruno Junior did not file Articles of Incorporation for IFT with the North Carolina Department of the Secretary of State until April 23, 2003—the day after he received Aronoff's check via Federal Express. (*Id.* ¶ 12.) Sometime after May 2, 2003, Aronoff received in the mail a stock certificate for 50,000 shares of IFT, which DiBruno Junior signed as "President." (*Id.* ¶ 14.)

Following the first investment, DiBruno Junior placed another series of interstate phone calls to Aronoff wherein he alerted the latter to the fact that more IFT shares had become available and that the milk product was presently being sold to prisons in three states. (*Id.* ¶ 15.) DiBruno Junior also reiterated that he would personally guarantee Aronoff's investment. (*Id.*) Aronoff responded on May 12, 2003, by again sending a check for \$100,000 made payable to IFT ("the second investment"). (*Id.* ¶ 16.) As before, a few days later he received a stock certificate for 100,000 shares of IFT signed by DiBruno. (*Id.* ¶ 18.)

Matters did not end there. DiBruno Junior continued to solicit Aronoff's investment from May to July of 2003. (*Id.* ¶ 19.) DiBruno Junior predicted that Aronoff

would likely receive a 400% rate of return and urged the musician to take advantage of even more shares that had recently become available. (*Id.*) Aronoff complied and forward DiBruno Junior a final check on July 24 for \$250,000 made payable to IFT (“the third investment”). (*Id.* ¶ 20.) Like clockwork, a few weeks later Aronoff received a stock certificate for 250,000 shares of IFT, with DiBruno Junior again acting as signatory. (*Id.* ¶ 22.)

As one might have predicted given the case under discussion, Aronoff’s investment in IFT went sour. In fact, Aronoff claims that IFT is a shell corporation, with no assets, no employees, no sources of revenues, no operations, and no books or records of any kind, save its Certificate of Incorporation and a bank account that was open for three weeks in 2004. (*Id.* ¶¶ 23, 25.) DiBruno Junior never deposited Aronoff’s three checks totaling \$450,000 in any IFT account and instead diverted the funds to bank accounts held by K.B. Records.<sup>4</sup> (*Id.*, Exs. D, G, J.) From there, DiBruno Junior wrote checks to himself, made multiple cash withdrawals from various ATMs, and withdrew large sums of money in order to purchase jewelry and a variety of luxury automobiles. (Pl.’s Am. Mot. Prelim. Inj., Exs. 2, 3, 7-11.)

As indicated, IFT did maintain a bank account for about three weeks in 2004. The account was opened by DiBruno Junior on April 30, 2004, and funded with just over \$60,000. (*Id.*, Ex. 12.) Of that amount, DiBruno Junior personally withdrew over

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<sup>4</sup> As a side note, Nicholas DiBruno testified under oath that he was employed by K.B. Records and received regular paychecks from the company. (Tr. Prelim. Inj. at 133-34.) However, Nicholas also admitted that he never filed any tax returns during the period of such employment. (*Id.* at 134.)

\$12,000. (*Id.*, Ex. 13.) He also wired \$17,000 from the account to a company in Florida called Dairene International for the alleged purpose of helping Dairene meet some of its financial obligations. (*Id.*, Ex. 14.) DiBruno Senior has been involved with a “Dairene” enterprise in one form or another for many years. For instance, he filed for a Certificate of Authority to do business in North Carolina on behalf of Dairene Industries Limited in 1977 and was once one of the company’s vice-presidents. (*Id.*, Ex. 15.) The current manifestation of Dairene is a corporation registered with the SEC. In its most recent filing with that agency, Dairene indicates that in the last twenty years it has done little as it “has been in the development stage since inception (October 12, 1982)” and its “[r]evenues to date have been minimal.” (*Id.*, Ex. 16.) “Minimal” is perhaps an understatement. Dairene had no revenues from 2000 to 2002, and in the company’s twenty year history it has generated a total of only \$107,746 in revenues. On the other hand, Dairene has had close to a million dollars in accumulated losses.

On May 5, 2004, counsel for Aronoff sent DiBruno a letter demanding that his client be allowed to inspect IFT’s records. (Am. Compl., Ex. X.) On May 10, just three business days after receiving the demand letter, DiBruno Junior closed the IFT account and used a bank check to withdraw all remaining funds. (Pl.’s Am. Mot. Prelim. Inj., Ex. 18.) Lela DiBruno then took that bank check and, after taking \$500 in cash, used the remaining funds to open an account at the First Gaston Bank for a company named “First Intertech Corp.” (*Id.*, Exs. 19, 20.) This account was set up so that Lela had sole

and exclusive control over it.<sup>5</sup> The very next day, May 11, DiBruno Junior received a check for \$118,375 made payable to IFT – the company Aronoff originally thought he was investing in and the company whose only bank account had just been closed by DiBruno Junior. (Am. Compl., Ex. Z.) Shortly thereafter, Lela DiBruno wrote no fewer than sixteen checks to DiBruno Junior from the First Intertech account, some of which were in amounts as high as \$15,000. (Pl.’s Am. Mot. Prelim. Inj., Ex. 22.)

Needless to say, none of Aronoff’s funds were ever used for IFT’s benefit, nor did they ever appear on IFT’s capital account. The only document ever produced in response to Aronoff’s demand letter was IFT’s two-page Articles of Incorporation. To date, DiBruno has not returned any of Aronoff’s investment.

This action commenced on July 7, 2004, with Aronoff claiming that he has been systematically defrauded by the Defendants. On December 22, 2004, the court, after conducting an evidentiary hearing, issued a preliminary injunction against members of the DiBruno family. At the injunction hearing, testimony was received from Aronoff, DiBruno Senior, Lela DiBruno, Nicholas DiBruno, and others. DiBruno Junior has never testified during this litigation, choosing instead to invoke his Fifth Amendment right to remain silent.

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<sup>5</sup> Lela DiBruno denies opening this account, despite the fact that she is the sole signatory on the relevant Account Opening form and wrote several checks on the account. (Pl.’s Am. Mot. Prelim. Inj., Ex. 19, 22.) Lela’s purported lack of knowledge regarding a DiBruno-affiliated company does not stop with First Intertech. At the preliminary injunction hearing in this case, Lela denied any affiliation with a company called Internet Business Design Group (“IBDG”) despite being listed as one of its shareholders and directors along side her son, Nicholas DiBruno. (Tr. Prelim. Inj. at 114-18.)

## II. DISCUSSION

### A. Evidentiary Dispute

Before turning to the merits of the case, the court must first address certain evidentiary disputes between the parties. DiBruno Junior maintains that the primary evidence offered by Aronoff in support of his summary judgment motion must be excluded on the grounds of hearsay, authenticity, and foundation. Of course, it is axiomatic that only evidence admissible at trial may be considered at the summary judgment stage. *Smith v. City of Chicago*, 242 F.3d 737, 741 (7<sup>th</sup> Cir. 2001). But it is equally true that material offered into evidence without objection thereby becomes admitted, subject only to review for plain error. *See United States v. Nobles*, 69 F.3d 172, 183 (7<sup>th</sup> Cir. 1995).

Here, most of the statements and exhibits that DiBruno objects to were admitted into evidence *without objection* at the preliminary injunction hearing on December 20, 2004. (Pl.'s Reply Br., Ex. A.) Other exhibits complained about, such as the official records of the incorporation of K.B. Records, came from official sources with the State of North Carolina. The remaining assertions made by Aronoff are fully supported by his sworn Declaration or deposition testimony, or merely provide background information unrelated to the present lawsuit. Thus, to the extent that an evidentiary dispute ever existed, it is now a fiction.

## **B. Effect of DiBruno Junior Invoking the Fifth Amendment.**

As already noted, DiBruno Junior has invoked his Fifth Amendment rights in this case. The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . .” U.S. Const. amend. V. This privilege extends beyond just the criminal law realm and protects a person from being compelled “to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

The effect of a defendant’s invocation of the privilege in a civil case has been addressed by the Seventh Circuit in *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387 (7<sup>th</sup> Cir. 1995). Specifically, in that case the Court analyzed the interplay between the Fifth Amendment and a local rule which provided that “[a]ll material facts set forth in the statement required by the moving party [in summary judgment proceedings] will be deemed to be admitted unless controverted by the statement of the opposing party.” *LaSalle Bank*, 54 F.3d at 389. Here, Southern District of Indiana Local Rule 56.1 contains similar language: “For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted . . . except to the extent that such facts . . . are specifically controverted [by the opposing party]. . . .” The *LaSalle Bank* Court began its discussion by noting that

although “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them,” an analysis of that evidence is nonetheless required. Silence is a relevant factor to be considered in light of the proffered evidence, but the direct inference of guilt from silence is forbidden.

54 F.3d at 390 (citation omitted). Indeed, what *LaSalle Bank* permits where a civil defendant invokes his or her Fifth Amendment privilege and refuses to rebut any material fact is that the “defendant’s silence be weighed *in light of other evidence* rather than leading directly without more to the conclusion of guilt or liability.” *Id.* at 391 (emphasis in original). In the context of the local rule under discussion—which deemed admitted un rebutted, evidentiarily supported facts—this meant to the Seventh Circuit that a particular “inference . . . could in any event be reasonably drawn from Fifth Amendment silence in the face of such evidence—that the facts it reveals are true.” *Id.* The court finds that this approach is also well suited to Indiana Southern District Local Rule 56.1, and accordingly it will be utilized in the present case.<sup>6</sup>

### **C. Standard of Review**

The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus.*

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<sup>6</sup> As *LaSalle Bank* also noted in a footnote, the inference at issue in the local rule (i.e., that facts revealed by an opponent’s evidence are true) “seems to be among the more conservative of inferences that might be drawn from Fifth Amendment silence, because it does not give any separate and additional evidentiary weight to the silence itself. 54 F.3d at 391 n.7. This court agrees that to do otherwise and actively draw an inference against DiBruno Junior for invoking his Fifth Amendment privilege at the summary judgment stage would “be in tension with the ordinary summary judgment rule that all reasonable inferences must be drawn in favor of the nonmovant.” *Id.*

*Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, and other materials demonstrate that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court considers those facts that are undisputed and views additional evidence, and all reasonable inferences drawn therefrom, in the light most reasonably favorable to the nonmoving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7<sup>th</sup> Cir. 1999). However, once a properly supported motion for summary judgment is made, the non-movant “cannot rest on the pleadings alone, but must identify specific facts to establish that there is a genuine triable issue.” *Donovan v. City of Milwaukee*, 17 F.3d 944, 947 (7<sup>th</sup> Cir. 1994); see Fed. R. Civ. P. 56(e).

#### **D. Federal RICO claims (Counts I & III)**

The Federal RICO statute prohibits various activities associated with the operation of an “enterprise” by means of a “pattern of racketeering activity.” 18 U.S.C. § 1962(a)-(d). Aronoff alleges counts of substantive RICO violations based on §1962(c) and §1962(a).<sup>7</sup> Section 1962(c) provides that “[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity. . . .”

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<sup>7</sup> Aronoff also alleges conspiratorial RICO violations, but these are not the subject of his present motion.

By contrast, a § 1962(a) violation “requires ‘the receipt of income from a pattern of racketeering activity, and the use of that income in the operation of an enterprise.’”

*Vicom, Inc. v. Harbridge Merch. Serv., Inc.*, 20 F.3d 771, 778 (7<sup>th</sup> Cir. 1994). Aronoff’s claims under both provisions will be addressed in turn.

***i. 18 U.S.C. § 1962(c)***

The elements of a § 1962(c) violation consist of (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C. § 1962(c); *Corley v. Rosewood Care Ctr., Inc.*, 388 F.3d 990, 1002 (citations omitted). A “pattern of racketeering activity” means the commission of at least two predicate acts of racketeering within a ten-year time period. 18 U.S.C. § 1961(5). In this case, Aronoff alleges predicate acts of both mail and wire fraud. 18 U.S.C. § 1961(1)(B). Mail or wire fraud requires the defendant’s participation in a scheme to defraud, the defendant’s intent to defraud, and the defendant’s use of the mail or wire services in furtherance of the scheme to defraud. 18 U.S.C. §§ 1341, 1343; *Corley*, 388 F.3d at 1005 (citations omitted); *Am. Auto. Accessories, Inc. v. Fishman*, 175 F.3d 534, 542 (7<sup>th</sup> Cir. 1999). As demonstrated below, a thorough review of the record reveals that DiBruno Junior engaged in a pattern of racketeering activity as a matter of law.

In terms of the elements of the alleged predicate acts of mail and wire fraud, “[t]he words ‘to defraud’ . . . mean ‘wronging one in his property rights by dishonest methods or schemes’ and ‘usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.’” *Corley*, 388 F.3d at 1005 (citations omitted). “Intent to

defraud requires a wilful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Britton*, 289 F.3d 976, 981 (7<sup>th</sup> Cir. 2002). Here, DiBruno Junior committed the predicate acts of mail and wire fraud when he fraudulently induced Aronoff to send him three checks totaling \$450,000<sup>8</sup> over the course of approximately five months in 2003. With each check, DiBruno Junior told Aronoff that the money was for an investment in IFT, which, according to his representations, was an existing, operating company with its own books and business records. The representations were certainly false at one point because when Aronoff sent in his first check, IFT did not exist. It was not until after DiBruno Junior received Aronoff's first check that IFT was incorporated.<sup>9</sup> Then, instead of depositing Aronoff's checks in an account held by IFT, DiBruno Junior endorsed and deposited them in the account of a different company, K.B. Records, without Aronoff's knowledge or permission. After diverting Aronoff's checks into the K.B. Records account, DiBruno Junior withdrew over \$150,000 in funds by cashing checks made out to himself and through personal ATM withdrawals. Finally, DiBruno Junior added to the level of chicanery by issuing and signing worthless stock certificates for "shares" of IFT and then mailing them to Aronoff via the United States mail.

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<sup>8</sup> All of Aronoff's checks were made payable to IFT.

<sup>9</sup> Furthermore, though IFT maintained a bank account for a period of a few weeks, no business records of any kind save its Articles of Incorporation have ever been produced.

The next issue is whether the foregoing predicate acts constitute a “pattern” of racketeering activity. “[T]he term ‘pattern’ . . . requires a showing of (1) a relationship between the predicates, and (2) the threat of continuing criminal activity.” *Id.* (citing *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). The necessary relationship simply requires that “the predicate acts be ‘committed somewhat closely in time to one another, involve the same victim, or involve the same type of misconduct.’” *Vicom, Inc.*, 20 F.3d at 779 (citation omitted). All of these elements are present in this case: Aronoff is the only alleged victim, the predicates occurred within a five-month period, and the predicates were all of the same type.

The continuity prong of the pattern test is a bit more complicated. Continuity is “both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” *H.J., Inc.*, 492 U.S. at 241-42. Closed-ended continuity refers to a “series of related predicates extending over a substantial period of time.” *Id.* at 242. This is not an issue in the present case primarily because all of the predicates were committed in a five-month period. The Seventh Circuit makes clear that closed-ended continuity will rarely be found when the period of time in which the predicate acts were committed was less than one year in duration. See *Vicom, Inc.*, 20 F.3d at 780; *Midwest Grinding Co., Inc.*, 976 F.2d 1016, 1024 (7<sup>th</sup> Cir. 1992). Moreover, the Seventh Circuit disfavors finding closed-ended continuity where, as in this case, the only predicates consist of multiple acts of mail and wire fraud. See *Vicom, Inc.*, 20 F.3d at 781.

Aronoff is on better ground with respect to open-ended continuity. Open-ended continuity exists when “(1) ‘a specific threat of repetition’ exists, (2) ‘the predicates are a regular way of conducting [an] ongoing legitimate business,’ or (3) ‘the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.’” *Id.* at 782 (citations omitted). In this case there was a specific threat of repetition. The scheme utilized by DiBruno Junior did not have a “clear and terminable goal” nor “a natural ending point.” *Id.* Rather, DiBruno engaged in the practice of fraudulent solicitation as long as Mr. Aronoff was willing to send checks to IFT. Once Aronoff made inquiries into the legitimacy of IFT, the brief life of IFT’s only bank account was quickly terminated. There is no indication that any of DiBruno Junior’s fraudulent activity would have ceased before Aronoff became suspicious. Thus, given all the surrounding circumstances, it is clear that DiBruno Junior engaged in a pattern of racketeering activity featuring open-ended continuity.

However, the court must further determine whether DiBruno Junior conducted a RICO enterprise. Aronoff’s treatment of this issue in his brief is remarkably slight, stating only that DiBruno Junior “operated an enterprise consisting of IFT and K.B. Records. . . .” (Pl.’s Br. at 19.) But the concept of a RICO enterprise can hardly be passed over with just limited discussion. “Enterprise” is defined as including “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). An enterprise “must be more than a group of people who get together to commit a ‘pattern of racketeering activity.’” *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 964 (7<sup>th</sup>

Cir. 1996) (citation omitted). It “requires ‘an ongoing “structure” of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.’” *Id.* (citation omitted). In addition, “there must be ‘an organization with a structure and goals separate from the predicate acts themselves.’” *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7<sup>th</sup> Cir. 2000) (citation omitted).

At present, the court finds that the most appropriate course of action would be to reserve ruling on whether DiBruno Junior conducted a RICO enterprise until after the parties have had an opportunity to address the court at oral argument and/or provide additional briefing on this subject. Several reasons compel this approach. First, given Aronoff’s allegations it is difficult to discern whether IFT had a structure or goals separate from the predicate acts that it facilitated. Based on the record, it appears IFT was set up for the *sole* purpose of assisting with the commission of the predicate acts. When DiBruno stopped making fraudulent representations, IFT also stopped its activities. There is no evidence that IFT ever engaged in activities separate from the predicates.<sup>10</sup>

Additionally, the record is ripe with evidence that shows some degree of connection between DiBruno Junior and the rest of the DiBruno Defendants. But whether this connection amounts to an on-going structure joined together for a common

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<sup>10</sup> There are insinuations in the record that K.B. Records was a legitimate recording company. However, details about its structure, hierarchy, and overall purpose are sketchy at best.

purpose remains less clear. For example, the only evidence tending to show that DiBruno Senior was affiliated with IFT came from the mouth of DiBruno Junior, who purportedly told Aronoff of his father's involvement. And while Nicholas DiBruno has been shown to be affiliated with K.B. Records, there is no evidence that such affiliation also led to his involvement with IFT. In short, more factual development is necessary before the court can conclude that DiBruno Junior conducted a RICO enterprise. It may very well be that Aronoff can direct the court's attention to undisputed facts in the record that show summary judgment would be appropriate on this issue, but the court will reserve ruling until he has done so.<sup>11</sup>

**ii. 18 U.S.C. 1962(a)**

Section 1962(a) makes it unlawful for a person to receive income from a pattern of racketeering activity and use that income in the operation of an enterprise. 18 U.S.C. § 1962(a). Though the court has concluded that DiBruno Junior engaged in a pattern of racketeering activity, the issue of whether he operated an enterprise has been taken under advisement pending additional briefing and/or oral argument.<sup>12</sup> Therefore, the

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<sup>11</sup> The court believes that a rigorous approach to each element in a RICO case is necessary so that the statute does not become a surrogate for actions regarding "garden-variety" fraud, routine commercial business disputes, or sporadic criminal activity that belong in state court. See *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1022 (7<sup>th</sup> Cir. 1992). "While it is clear that the scope of civil RICO extends beyond the prototypical mobster or organized crime syndicate, it is equally evident that RICO has not federalized every state common-law cause of action available to remedy business deals gone sour." *Id.* at 1025 (citation omitted).

<sup>12</sup> See Section II.D.i *supra*.

court will decline to hold whether summary judgment is appropriate on Aronoff's § 1962(a) claim until a later date.

#### **E. Federal Securities Claim (Count VI)**

Aronoff claims that DiBruno Junior violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. To prove such a claim, Aronoff must establish that: (1) DiBruno Junior made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities (5) upon which Aronoff justifiably relied (6) and that the false statement proximately caused Aronoff's damages. *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7<sup>th</sup> Cir. 1997). A misstatement or an omission is material if a substantial likelihood exists that a reasonable investor would find the misstated or omitted facts significant in deciding whether to buy or sell a security. *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1233 (7<sup>th</sup> Cir. 1988). Reliance exists where a plaintiff's belief in the defendant's misstatement or omission played a substantial part in plaintiff's investment decision and such belief is reasonable. *Id.* The causation requirement actually refers to two types of causation: transaction causation and loss causation. *Caremark, Inc.*, 113 F.3d at 648. Transaction causation refers to the situation where a plaintiff would not have invested in a security if the defendant had stated truthfully the material facts at the time of the sale. *Id.* On the other hand, loss causation simply requires the plaintiff to show that he or she was in fact injured by the misstatement or omission at issue. *Id.* at 649. Finally, "scienter" is present when the defendant acted with the intent to defraud. *Rowe*, 850

F.3d at 1238. The only element that DiBruno disputes is the whether Aronoff's reliance was justifiable. Accordingly, that is the issue on which the court will focus its attention.

While admitting that "Aronoff's claim may be strong," (Def.'s Br. at 9), DiBruno Junior argues that Aronoff could not have reasonably relied on any misrepresentations by the Defendant because Aronoff had only met DiBruno Junior briefly, had no idea what office DiBruno Junior held with IFT, had never met DiBruno Senior, and had never seen any IFT products. In support of his contention, DiBruno Junior cites *Marine Bank v. Meat Counter, Inc.*, 826 F.2d 1577, 1580-81 (7<sup>th</sup> Cir. 1981). That case is easily distinguishable. In *Marine Bank*, summary judgment entered against the plaintiff bank seeking to enforce a guaranty was held improper where, after the defendant claimed reliance a misrepresentation by the bank when signing the guaranty, the bank offered evidence of an "alternative motivation" for the defendant's execution of the guaranty. 826 F.2d at 1581. By contrast, in the instant case DiBruno Junior offers no "alternative motivation" for Aronoff to write three checks totaling \$450,000 payable to IFT except – as Aronoff has stated—as an investment in IFT in response to representations by the Defendant. Under these circumstances, Aronoff has established that his reliance was reasonable as a matter of law. Aronoff's motion for summary judgment on his federal securities claim (Count VI) will be **GRANTED**.

#### **F. Indiana Securities Claim (Count VII)**

The Indiana Securities Act makes it

unlawful for any person in connection with the offer, sale or purchase of any security . . . (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in light of circumstances under which they are made, no misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Ind. Code. § 23-2-1-12. DiBruno Junior again only disputes the question of reliance.

However, for the reasons described in Section E above, DiBruno Junior's actions also constitute a violation under Indiana's securities fraud statute. DiBruno Junior schemed to defraud Aronoff of his investment of \$450,000 by making materially false statements and omissions regarding IFT and issuing worthless stock certificates. Therefore, Aronoff's motion for summary judgment on his Indiana securities law claim (Count VII) will be **GRANTED**.

#### **G. Conversion (Count IV)**

Count IV of Aronoff's complaint charges DiBruno Junior with the tort of conversion. Under Indiana law, "[i]n order to maintain an action for conversion, the plaintiff must establish the appropriation of personal property by another for the party's own use and benefit in exclusion and defiance of the owner's rights." *Shourek v. Stirling*, 621 N.E.2d 1107, 1109 (Ind. 1993). "The essential elements of the plaintiff's claim are an immediate, unqualified right to possession resting on a superior claim of title." *Id.* (citation omitted). Money can be the subject of a conversion action, however "it must be capable of being identified as a special chattel" and in the form of "a

determinate sum with which the defendant was entrusted to apply to a certain purpose.” *Stevens v. Butler*, 639 N.E.2d 662, 666 (Ind. Ct. App. 1994) (citation omitted).

In this case, Aronoff sent DiBruno Junior three checks totaling \$450,000 made payable to IFT for an investment in IFT. DiBruno Junior never deposited those funds into an account for IFT (none existed) and instead endorsed the checks over to a K.B. Records account. However, as soon as those funds were deposited into the K.B. Records account, they were commingled with other funds and thus “ceased to be a separate, specifically identifiable chattel . . .” *Id.* Aronoff’s motion for summary judgment on his conversion claim (Count IV) is therefore **DENIED**.

#### **F. Rescission (Count VIII)**

Under Indiana law, a party can rescind the purchase of stocks if he shows that the seller made a material misrepresentation or omission. Ind. Code. § 23-2-1-19(a); *Kelsey v. Nagy*, 410 N.E.2d 1333, 1335 (Ind. Ct. App. 1980). Here, DiBruno Junior’s sale of shares in IFT to Aronoff was fraudulent as indicated in Sections E and F above. DiBruno Junior argues only that Aronoff’s rescission claim is against IFT, not DiBruno Junior. However, the relevant statutory provision speaks of any “person” who fraudulently offers or sells a security, which may include both individuals and corporations. Ind. Code. § 23-2-1-19(a).

In the present case, it was DiBruno Junior who offered the sale of IFT securities to Aronoff. IFT did not even exist at the time the first sale occurred because DiBruno

Junior had IFT incorporated only after receipt of Aronoff's first check. Aronoff's motion for summary judgment on Count VIII will be **GRANTED**.

**G. Breach of Contract (Count IX)**

The basis of Aronoff's claim for breach of contract against DiBruno Junior stems from the latter's oral guarantee that Aronoff would get his investment back or else be reimbursed. The essential elements of a breach of contract claim are the existence of a contract, the defendant's breach thereof, and damages. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 614 (Ind. Ct. App. 2000).

DiBruno Junior's only argument in response to Aronoff's contract claim is that the oral guarantee is unenforceable under Indiana's Statute of Frauds. According to the Statute of Frauds, "unless the promise, contract, or agreement on which [an] action is based . . . is in writing and signed by the party" to be charged, no action can be brought "charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another." Ind. Code § 32-21-1-1. Because neither side disputes the fact that DiBruno Junior's guarantee was oral, the Statute of Frauds would normally end the discussion in his favor. However, "equity will not permit the Statute of Frauds to be used to perpetuate a fraud." *Ohio Valley Plastics, Inc. v. Nat'l City Bank*, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997).

Equity and the concept of estoppel is where Aronoff pins his hopes on this issue, and as such he must demonstrate

‘that the other party’s refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss’ . . . In other words, neither the benefit of the bargain itself, nor mere inconvenience, incidental expenses, etc. short of a reliance injury so substantial and independent as to constitute an unjust and unconscionable injury and loss are sufficient to remove the claim from the operation of the Statute of Frauds.

*Whiteco Industries, Inc. v. Kopani*, 514 N.E.2d 840, 845 (Ind. Ct. App. 1987) (citation omitted). In this case, Aronoff has clearly lost the benefit of his bargain and suffered other, incidental damages. However, the court cannot conclude as a matter of law that he has suffered such an independent and unconscionable injury so as to remove DiBruno Junior’s oral guarantee from the Statute of Frauds. Aronoff’s motion for summary judgment on his contract claim (Count IX) is **DENIED**.

#### **H. Breach of Fiduciary Duty (Count X)**

Aronoff’s final claim at issue is one for breach of fiduciary duty against DiBruno Junior. While Aronoff undoubtedly is correct that “directors and officers of a corporation act in a fiduciary capacity, and their acts must be for the benefit of the corporation,” the typical vehicle used by a stockholder to enforce a director’s fiduciary duty is a derivative suit filed after demand has been served upon the corporation’s officers. *Griffin v. Carmel Bank & Trust Co.*, 510 N.E.2d 178, 182-84 (Ind. Ct. App. 1987). In this case, Aronoff alleges that IFT existed only as a “sham” corporation, apparently established for the sole purpose of facilitating the underlying scheme to defraud. The only remaining relationship between Aronoff and DiBruno Junior is one of buyer and seller. Thus, while

Aronoff has valid fraud claims, the applicability of a breach of fiduciary duty claim to the facts of this case appears less appropriate. Nonetheless, the court will reserve ruling on this question until after the parties have had the opportunity to present additional briefing and/or to be heard at oral argument.

### III. CONCLUSION

Aronoff has demonstrated that no genuine issues of fact exist and that he is entitled to judgment as a matter of law on his claims for securities fraud (federal and state) and rescission. Therefore, Plaintiff's motion for summary judgment will be **GRANTED** on Counts VI, VII, and VIII of his first amended complaint.<sup>13</sup>

However, the motion for summary judgment is **DENIED** with respect to Counts IV and IX. The court reserves ruling on Counts I, III, and X pending the submission of additional briefing and/or oral argument by the parties on the questions of whether Defendant DiBruno Junior (1) conducted a RICO "enterprise" and/or (2) breached a fiduciary duty.

ALL OF WHICH IS ENTERED this 1<sup>st</sup> day of July 2005.

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John Daniel Tinder, Judge  
United States District Court

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<sup>13</sup> Because the court has reserved ruling on other aspects of Plaintiff's motion for summary judgment, no final judgment will be entered until those matters are resolved. A hearing on damages – along with oral argument related to the court's reserved rulings – will be scheduled at a later date.

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