2007 WL 738545
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

S.A. THOMAS and E.P. Gibson, Plaintiff,
v.
Leroy BACA, et al., Defendants.

No. CV 06-06981 DDP(SHX). | Feb. 28, 2007.

Attorneys and Law Firms

Joseph Reichmann, Jr., Marion R. Yagman, Stephen Yagman, Yagman Yagman & Reichmann, Venice, CA, for Plaintiff.

Justin W. Clark, Paul B. Beach, Franscell Strickland Roberts & Lawrence, Glendale, CA, for Defendants.

Opinion

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SANCTIONS

PREGERSON, J.

[Motion filed on November 27, 2006]

***1** This matter is before the court on motion by defendant Sheriff Leroy Baca (Sheriff) and his counsel to dismiss the complaint for failure to state a claim and for sanctions against plaintiffs' counsel Stephen Yagman for bad faith misconduct directed at opposing counsel. After reviewing the submissions by both parties, the Court grants the Sheriff's motion to dismiss, grants the motion for sanctions, and adopts the following order.

I. BACKGROUND

This matter results from two underlying lawsuits. First is *Rutherford v. Baca,* (CV 75-04111), a thirty-year-old civil rights case addressing conditions at the Los Angeles County Jail. The plaintiff in that action is represented by the ACLU Foundation of Southern California. Over the years, the Court has issued orders and the parties have entered into stipulations addressing disputes arising from the management of the jail. As part of the cooperative efforts of the parties in the *Rutherford* action, a panel (the "Rutherford Panel") was created and charged with, among other matters, monitoring conditions and developing long-term plans for improving conditions at the jail. An order in the *Rutherford* action prohibits, with certain exceptions not important here, the practice of having inmates sleeping on the floor. *See* Judgment *Rutherford v. Pritchess,* CV 75-04111, at 1 (C.D. Cal., Feb 15, 1979) (Gray, J.). The Sheriff is obligated, as part of this process, to prepare reports documenting incidences of inmates being required to sleep on the floor.

The second lawsuit is *Thomas v. Baca,* (CV 04-08448). This suit, referred to herein as *Thomas I,* also involves conditions at the jail, but focuses specifically on seeking damages for inmates who have been required to sleep on the floor. Mr. Yagman represents the plaintiffs in *Thomas I.* The Court previously ordered that Mr. Yagman be given copies all reports generated in the *Rutherford* action documenting incidences of inmates being required to sleep on the floor. (Mot. at 2.) These reports were provided to Mr. Yagman until October 2005, when the Sheriff asserts all floor-sleeping in the jail had ceased.

Mr. Yagman, in the declaration attached to his opposition, asserts that by early October 2006 he had received hundreds of communications from detainees asserting that they had slept on the floor beyond the last report he had received. (Yagman Decl. ¶ 3.) Mr. Yagman wrote defense counsel and requested a meeting to discuss the purported failure of the Sheriff to continue to provide Mr. Yagman with the reports. (Yagman Decl. ¶ 4.) Counsel for the Sheriff, Mr. Clark, met with Mr. Yagman on October 26, 2006. During the meeting, Mr. Clark represented that he had been advised by his client that the reports had not been produced because there had been no floor sleeping to report. (Clark Decl. ¶ 4.) Mr. Clark also advised Mr. Yagman that he would further investigate the matter and would confirm his representation in writing if, indeed, there had been no floor sleeping about which to report. (Clark Decl. ¶ 4.) Mr. Clark wrote Mr. Yagman on November 8, 2006 and confirmed his representation. (Yagman Decl. Ex. 3.) Unbeknownst to Mr. Clark, Mr. Yagman filed this RICO complaint on November 1, 2006, referred to herein as *Thomas II.* (Compl.) Mr. Yagman did not mention and the Court has no way of knowing whether Mr. Yagman was contemplating filing the RICO complaint when he met with Mr. Clark on October 26.

***2** Mr. Yagman asserts that the communications he had received from those in custody contradicted Mr. Clark's representations from the October 26 meeting. (Yagman Decl. ¶ 4.) Mr. Yagman also asserts that the Sheriff had engaged in a ruse to avoid reporting floor sleeping by causing the floor sleeping to occur not in the residential portion of the jail, but rather in the Inmate Reception Center ("IRC"), the central processing facility for inmates at the jail. (Yagman Decl. ¶ 4.)

Mr. Yagman states what followed the meeting with Mr. Clark in his declaration:

> 4. In order to attempt to verify or disprove the information I had, I scheduled and held a discovery meeting with defense counsel on October 26, 2006. To try and resolve the dispute, it was agreed that by November 8 defense counsel would provide information as to November 13, I received Exhibit 3 hereto.[1] On November 13, I responded and made the simple request that defendant's claims set forth in his counsel's November 8 letter be substantiated by a declaration under penalty of perjury. I advised defense counsel that I needed to have this declaration to satisfy our due diligence to the plaintiffs and to class members. I never received any response to that letter or the declaration I requested. This made me very suspicious and, based on the communications I had received as well as the other information regarding how defendant apparently was getting around both the phenomenon of floor-sleeping and recording and reporting it by backing up detainees and holding them in the IRC, it was determined that this action should be filed.
>
> [1] Exhibit 3 is a letter dated November 8 2006 from defendant's counsel Mr. Clark indicating that no records of floor sleeping had been generated because there had not been any floor sleeping since the last time records were produced.
>
> 5. It was determined that attempting to add the claims in this action to *Thomas I* would be strongly opposed, difficult, unduly time-consuming, and might prejudice that class action. Also, it was determined that since section 1983 and RICO are two very different statutes there would be no concern about splitting a cause of action. So, this action, after due deliberating among all four plaintiffs' counsel, was filed.
>
> (Yagman Decl. ¶¶ 4-5.)

It is difficult for the Court to reconcile Mr. Yagman's statements about his attempts to work with defense counsel to resolve the dispute with the fact that the complaint in *Thomas II* was filed on November 1, 2006. This is before the date by which Mr. Yagman asserts he and Mr. Clark had agreed that Mr. Clark would provide additional information.

The plaintiffs in *Thomas II* are the same as *Thomas I:* S.A. Thomas and E.P. Gipson. The complaint names Sheriff Leroy Baca as a defendant and also names as defendants "Unknown Named Defendants 1-20." Mr. Yagman appended the following footnote to the "Unknown Named Defendants 1-20" text of the caption:

> It presently is unknown whether Baca's counsel in *Thomas [I] v. Baca,* 04-08448-DDP(SHx), Franscell, Strickland, Roberts & Lawrence, David D. Lawrence, Paul B. Beach, Justin W. Clark, Nathan Oyster, and others, in that firm or from the Los Angeles County Counsel's Office or elsewhere, participated in any of the wrongful conduct alleged in the complaint, but there is a suspicion that they did. In an abundance of caution, plaintiffs do not now name Baca's counsel as defendants, but will do so *if they uncover any evidence that Baca's counsel participated in any of the misconduct alleged in the complaint* (Emphasis added).

***3** (Complaint n. 1.)

The complaint, on information and belief, alleges among other matters, the following:

> 11. The Los Angeles County Sheriff's Dept. (LASD), is an enterprise within the meaning of 18 U.S.C.1961(4).
>
> ...
>
> 13. Defendants received income, directly and/or indirectly, by way of, *inter alia,* salary, compensation, reimbursement for expenses, *per diem* costs reimbursements, meals, lodging, and/or travel, from the pattern of racketeering activity of the LASD and used that income in the acquisition of an interest in and/or operation of the LASD, in violation of 18 U.S.C.1962(a), and acquired and/or maintained control over said LASD racketeering enterprise through a pattern of racketeering activities, as set forth herein, in a violation of 18 U.S.C.1962(b).
>
> 14. Defendants, being associated with said enterprise, conducted and/or participated in said enterprise's affairs through a pattern of racketeering activities, in violation of 18 U.S.C.1962(c).
>
> 15. The pattern of racketeering activities included a continuous pattern and practice involving activities including, but not limited to, attempted murder, murder, assaultive conduct, kidnapping, extortion, fraud, mail fraud, deceit, dealing in controlled substances, and obstruction of justice in federal proceedings, some chargeable under California law as felonies punishable for more than one year in prison, and others violation [sic] of federal law, in that defendants and others repeatedly committed fraudulent

> and federal action obstructive conduct against plaintiffs, class members, and others.
>
> [The complaint skips numbers 16 to 28]
>
> 29a. Defendants obstructed justice in the federal proceedings entitled *Thomas [I] v. Baca* and *Rutherford v. Baca,* by disobeying the court's May 17, 2006 and July 5, 2006 orders to identify and provide to plaintiffs' counsel those inmates who were subjected to floor sleeping, and thereby concealed thousands of occurrences of prohibited floor sleeping.
>
> 29b. The details of the fraud allegation are that defendants committed fraud as to the plaintiffs and class members by making the materially false representations that, after September 29, 2005, floor sleeping in the County jail system had ceased, pursuant to the *Rutherford* injunction.
>
> ...
>
> 31. The bad acts described in the matters enumerated hereinabove and specifically in averment 29, occurred over a significant period of time, viz., 1978 to present, are related in that they all evidence kidnapping, murder, attempted murder, assaultive conduct, and also amount to and pose a threat of continued criminal activity, have the same or similar purposes, results, participants and kinds and categories of participants, victims, methods of commission, and are otherwise interrelated by their common characteristics and are not isolated events, and each and all constitute a continuing pattern of racketeering activity and constitute a long term threat of racketeering activity.
>
> ***4** ...
>
> 45. The pattern and practice of racketeering activities also included acts of tampering with witnesses, victims, such as plaintiffs herein, and informants in both state and federal proceedings, and retaliating against witnesses, victims, and informants, and kidnapping, as defined by both state and federal law.

(Compl.¶¶ 11, 13-16, 29a-29b, 31, 45.)

The Sheriff filed a motion to dismiss on the grounds that the complaint does not allege a valid claim and concurrently filed a motion for sanctions based on, among other issues, the inclusion of the footnote on the face of the complaint tarnishing the reputations of defense counsel and their firm by asserting the "suspicion" that they may have participated in criminal activity. After the hearing on the motion, Mr. Yagman filed a first amended complaint on February 15, 2007 omitting the footnote.

In his first amended complaint, Mr. Yagman asserts, on information or belief, that the reason he filed the RICO suit is because the Court ignored his request for contempt. He writes:

> 1. Plaintiffs herein are the named plaintiffs in *Thomas [I] v. Baca,* 04-08448-DDP(SHx), and they bring this action *because they attempted to bring on a contempt proceeding on December 18, 2006,* their filing in that regard was not acted upon and was presumably rejected by the court, they believe that initiating a contempt proceeding against all defendants will not provide to them a sufficient remedy for the wrongful conduct alleged herein, and because they wish to obtain compensatory damages, as well as treble damages, and punitive damages, to which they would not be entitled as a matter of law by bringing on a contempt proceeding.
>
> ...
>
> 4. Thereafter, plaintiffs received credible information to the effect that, notwithstanding the representation that floor-sleeping had ceased as of September 29, 2005, and disregarding the early-2006 floor-sleeping caused by the civil disturbances, floor-sleeping had occurred after September 29, 2005 and that those instances of floor sleeping apparently were not recorded, as the court ordered on May 17, 2005, and were not communicated to plaintiffs, as the court ordered on July 1, 2005. Baca's counsel represented in November, 2006 that no floor-sleeping had occurred after September 29, 2005, save and except for the floor-sleeping that resulted from the identified civil disturbances, but when plaintiffs' counsel requested a declaration under penalty of perjury of that representation from defense counsel, defense counsel failed and refused to provide such a declaration. *On December 18, 2006, plaintiffs presented to the court anecdotal evidence of post-September 29, 2005 floor-sleeping and requested an OSC re: contempt issue and that an evidentiary hearing be held, but the court never acted upon that submission, thus leaving plaintiffs with no avenue for redress of this issue.*

(First Amended Compl. ¶¶ 1, 4.) (emphasis added). These assertions are incorrect

***5** Mr. Yagman did indeed file a document captioned "Additional Evidence of Los Angeles County Jail Floor-Sleeping, as Supplemental Opposition to Defendant's Summary Judgment and Class Decertification Motions; *Request* for Hearing and OSC RE: Contempt." (emphasis added). In what the Court assumes Mr. Yagman intended the operative part of that document to be, Mr. Yagman writes:

> Plaintiffs respectfully request that the court hold an evidentiary hearing at which both the court and plaintiffs' counsel can question officials to be produced

> by defendant "to determine whether there is floor-sleeping in the IRC, whether its occurrences have been and are being tabulated, and whether it would be appropriate for the court to issue an OSC regarding possible contempt of the court's orders."

(Add'l Evid. of Los Angeles County Jail Floor-Sleeping, as Supp. Opp. to Def's Summ. Judg. and Class Decert. Mot.; Request for Hearing and OSC re: Contempt at 2:11-16.)

Mr. Yagman asked that this Court, in essence, conduct discovery for him by holding an evidentiary hearing with respect to the alleged floor sleeping in the IRC and then issue an OSC re: contempt. The Court did not act because it was not filed as a regular *motion,* but rather as a *request.* Both the Federal Rules and the Local Rules require that requests for orders and hearings must be couched as noticed motions or *ex parte* applications. "An application to the court for an order shall be by motion...." Fed.R.Civ.P. 7(b)(1). "There shall be served and filed with the notice of motion: (a) A brief but complete memorandum in support thereof and the points and authorities upon which the moving party will rely...." Local Civ. R. 7-5. "The Court may decline to consider a motion unless it meets the requirements of L.R. 7-4 through 7-8." Local Civ. R. 7-4.

Mr. Yagman's "request" contains no evidence he complied with Local Rule 7-3 to meet and confer, no memorandum of points and authorities as required by Local Rule 7-5, no declaration of evidence as required by Local Rule 7-6. The "request" is three paragraphs, with no legal analysis, followed by photocopies of printouts from the online version of the *Los Angeles Times* of December 17, 2006.

Even if properly filed, Mr. Yagman's argument in his "Response to the Court's Comments" and in paragraphs 1 and 4 of the first amended complaint are beside the point. *Thomas I* was filed November 1, 2006. The "request" was filed on December 18, 2006. It is impossible to reconcile the idea that this Court's inaction prompted the filing of the suit with the fact that the "request" for this Court to act in *Thomas I* was filed six weeks after *Thomas II.*

II. DEFENDANT'S MOTION TO DISMISS

Notwithstanding plaintiffs' filing of a first amended complaint prior to this Court's ruling on the complaint, the defect of a failure to state a claim may still remain. Thus the Court will analyze the first amended complaint under the motion to dismiss.

A. Legal Standard

***6** Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Newman v. Universal Pictures,* 813 F.2d 1519, 1521-22 (9th Cir.1987) (quoting *Hishon v. King & Spaulding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). Review is limited to the complaint, and the Court must "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 923 (9th Cir.2001) (citation omitted). However, the Court need not accept conclusory legal assertions cast in the form of factual allegations as true if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir.1994).

B. Application

RICO prohibits, among other activities, the conducting of an enterprise's affairs through racketeering activity. 18 U.S.C. § 1962(c). A prima facie RICO case requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *E.g., Miller v. Yokohama Tire Corp.,* 358 F.3d 616, 620 (9th Cir.2004). Furthermore, there must be an injury to a specific business or property interest. 18 U.S.C. § 1964(c); *Diaz v. Gates,* 420 F.3d 897, 900 (9th Cir.2005)(en banc).

Both the complaint and the first amended complaint name the Sheriff in his individual and official capacities as a defendant. The Sheriff in his official capacity is not a proper RICO defendant. Suing a government official in his official capacity is the equivalent of suing the government, and the government cannot form the requisite criminal intent to be sued under RICO. *Pedrina v. Chun,* 97 F.3d 1296, 1300 (9th Cir.1996) (citation omitted). However, the complaint names Sheriff Baca in his official and individual capacities. Therefore, *Pedrina* only addresses that particular defect.

Neither the complaint nor the first amended complaint sufficiently plead a cognizable RICO injury.[2] The first amended complaint alleges the following injury: "Plaintiffs and class members were harmed in that their employments and employment prospects were harmed and in that they were subjected to fraud and obstruction of justice in their federal proceedings, and in that their property interests in federal judicial proceedings were harmed." (First Amended Compl. ¶ 32.) Even assuming all material factual allegations as true, this is not an injury under RICO.

[2] Though not directly addressed by either party in the motion to dismiss or opposition, Mr. Yagman does cite

> to *Diaz v. Gates,* 420 F.3d 897 (9th Cir.2005)(en banc), the most recent Ninth Circuit opinion on RICO injury. It is apparent from the face of the complaint that this standing element is not met, and the Court is entitled to dismiss a claim under Rule 12, even sua sponte, where a claimant cannot possibly obtain relief. *Omar v. Sea-Land Serv., Inc.,* 813 F.2d 986, 992 (9th Cir.1987).

RICO requires, as a threshold for standing, an injury to "business or property." 18 U.S.C. § 1964(c). "Without a harm to a specific business or property interest-a categorical inquiry typically determined by reference to state law-there is no injury to business or property within the meaning of RICO." *Diaz,* 420 F.3d at 900. Plaintiffs allege a business injury based on loss of wages due to obstruction of justice in their federal proceedings, and a property injury based on their property interests in federal judicial proceedings.

***7** While California law does protect the interest in future contractual relations, *id.* at 901, it is difficult for the Court to see how either floor-sleeping in the IRC or failing to report such sleeping, whether proper or not, affects those future relations. The plaintiffs would have been in custody irrespective of the propriety of their floor-sleeping. There is no indication of how floor-sleeping causes financial injuries to a specific interest. Without a financial injury to a business or property interest, RICO does not provide a cause of action. In *Diaz,* the plaintiff alleged he lost economic opportunities due to his being unjustly incarcerated and fighting fictitious charges. *Id.* at 898. There is no dispute in this case that the plaintiffs would have remained in custody regardless of whether they were spending some nights in the IRC on the floor. In short, the issue here relates to the conditions of confinement, not the length or fact of confinement. Floor-sleeping as a matter of law cannot implicate a business or property interest because the plaintiffs were going to be in custody whether they slept on the floor or not, and no economic injuries flow from that condition. Thus, there is no cognizable RICO claim.

Furthermore, there is no "property interest in federal judicial proceedings." (First Amended Compl. ¶ 32.) To allow such a rule would cause every discovery dispute or litigation tactic to give rise to a RICO claim. There are ample means within the "federal judicial proceeding" itself to vindicate any alleged improper conduct by a party.

Aside from the pleading deficiencies noted above, the decision by Mr. Yagman and his firm to file the initial RICO complaint appears to have been motivated by two reasons. First, Mr. Yagman's belief that floor-sleeping was occurring and that the Sheriff had violated the order in *Thomas I* requiring reporting of floor sleeping. Second, rather than using the traditional remedies available to vindicate the perceived failure to provide discovery-such as depositions, motions to compel, and a motion for contempt[3]-Mr. Yagman chose the novel tactic of filing a separate complaint alleging, in essence, that the defendant (and perhaps his attorneys) are part of a racketeering enterprise engaged in a pattern of racketeering activities including, *inter alia,* murder, kidnapping, mail fraud, and obstruction of justice in federal proceedings. It is unprecedented in the Courts's experience to use the judicial process of filing a separate RICO complaint to address a discovery dispute. Mr. Yagman may be technically correct that the RICO statute does not expressly prohibit this tactic, and that he is not compelled to choose one of the traditional means of resolving discovery disputes. However, this tactic, if allowed to continue, has the capacity to additionally burden a bar already struggling with the need to maintain civility between counsel. The tactic also has the capacity to exponentially multiply litigation, to wit: a discovery dispute arises in action one; both plaintiff and defendant file separate RICO actions; a discovery dispute arises in both RICO actions, and the parties file separate RICO actions to address again those discovery disputes; and so forth.

[3] Mr Yagman filed a response to the Court's suggestion at the hearing that he should have filed a motion for an order to show cause re: contempt on February 14, 2007 indicating that he had done so already and that the Court was "unfounded, incorrect, and inappropriate." As discussed above with respect to the first amended complaint, these statements are without merit.

***8** Because neither the initial complaint nor the first amended complaint address the fundamental flaws of suing an improper party-the Sheriff in his official capacity-and failing to allege a cognizable RICO injury to a business or property interest, the motion to dismiss for failure to state a claim is granted.

Furthermore, the first amended complaint is dismissed with prejudice. It is apparent from the record that amendment would be futile. *Cf. Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir.1990).

III. DEFENDANT'S MOTION FOR SANCTIONS

This Court is generally reluctant to impose sanctions. In this Court's experience, sanctions run the risk of turning a lawsuit into a spiraling game of "gotcha." Sanctions can also have a negative effect on both an attorney's professional aspirations and the cost of malpractice insurance. The initial complaint filed in this matter, however, requires sanctions. Sanctions are necessary in

order to punish the conduct of unnecessarily dragging a fellow attorney's reputation through the mud by filing a public document associating that attorney, even on "suspicion," with base criminal conduct. Justin Clark, one of the attorneys named by Mr. Yagman in his footnoted initial complaint, has been practicing law about four years. His career surely deserves a better start than what occurred here.

Mr. Yagman's conduct was not inadvertent. It appears to be part of a strategy to intimidate counsel and achieve an advantage in the discovery dispute in *Thomas I.* Mr. Yagman, in his opposition brief, further implies that he is aware of evidence of criminal misdeeds by counsel. Mr. Yagman writes:

> "In this regard, this court ordered defendant and his counsel in *Thomas I* to record and make known instances of floor-sleeping, yet both defendant and his counsel have both obstructed justice in that federal proceeding and engaged in conduct that supports a criminal charge of mail fraud by disobeying and stealthily getting around that order. What they have done is to conceal instances of floor-sleeping by backing up into the IRC detainees who are forced to sleep on the floors of the IRC, not counting them as floor-sleepers, on the pretext that the IRC is not part of the jail system, but merely an ante-room to the jail system, and then getting around the reporting requirement. Moreover, when called to answer to this, defense counsel wrote a letter and sent it through the United States mail setting forth that there were no floor sleepers to count, Exh.3 hereto, thus committing mail fraud and conspiracy to engage in mail fraud, and then refusing to put in a declaration that which he had declared to be true in his letter. Exh. 4 hereto.

(Opp. at 14-15.) Later in the same opposition, in disputing the applicability of Section 1927 sanctions, Mr. Yagman writes:

> "Defense counsel's colorful language and threat to the court of what will happen were the court not to impose baseless sanctions, especially given that plaintiffs took care in the wording of their language that is challenged and the apparent evidence that defense counsel engaged in defendant's misconduct, see Exhibs. 3-3 hereto, warrants no response."

***9** (*Id.* at 32.)

A. Legal Standard

Federal courts have inherent power by virtue of their nature as institutions of justice to impose sanctions to preserve "silence, respect, and decorum" as well as to manage their affairs and "achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Under the Court's inherent power, the willful abuse of judicial process is sanctionable both to penalize improper actions by counsel and serve as a reminder to all counsel to respect the dignity of legal process. *Mark Inds., Ltd. v. Sea Captain's Choice,* 50 F.3d 730, 733 (9th Cir.1994) (noting inherent power sanctions are designed to "vindicate judicial authority"). This means the Court has broad authority "to control admission to its bar and to discipline attorneys." *Chambers,* 501 U.S. at 43.

The breadth of this power and its inability to be checked democratically means that the Court must use great discretion in imposing sanctions. *Id.* at 50. Thus, in order to impose sanctions, the Court must find a lawyer "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 45-46; *see also Yagman v. Republic Ins.,* 987 F.2d 622, 628 (9th Cir.1993) (requiring specific findings of bad faith to impose inherent power sanctions). Sanctions would also be appropriate for reckless conduct where the recklessness is paired with an additional factor, such as frivolousness, harassment, or improper purpose. *Fink v. Gomez,* 239 F.3d 989, 994 (9th Cir.2001). Furthermore, reckless conduct with knowledge of the applicable law or standard of conduct is tantamount to "bad faith." *B.K.B. v. Maui Police Dep't.,* 276 F.3d 1091, 1108 (9th Cir.2002). The law so discourages bad faith that even the assertion of a colorable claim, if made under substantial motivation of vindictiveness or obduracy, may be grounds for inherent power sanctions. *Mark Ind.,* 50 F.3d at 732

The imposition of sanctions must also comport with the principles of due process, which means that an opportunity to be heard must be given. *Oregon RSA No. 6 v. Castle Rock Cellular, Ltd.,* 76 F.3d 1003, 1007-08 (9th Cir.1996). Where a lawyer has been given a full opportunity for briefing and is on notice of the sanctionable conduct, oral argument is not necessary to comply with due process. *Pac. Harbor Capital, Inc. v.*

Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir.2000).

B. Application

1. Mr. Yagman Acted in Bad Faith

The Court specifically finds with respect to the footnote on the complaint that Mr. Yagman acted in bad faith. His actions in associating opposing counsel with heinous crimes speaks for itself. At the hearing on the motion to dismiss, Mr. Yagman expressed his belief that it was not his intent to associate defense counsel with acts of murder, attempted murder, and the like, but rather that the language of the complaint is unclear. During the hearing, Mr. Yagman also stated that he drafted the language cautiously:

> ***10** Mr. Yagman: Just wanted to dispel the Court's belief there's retaliation here. If I'm culpable of anything, it's of being an aggressive New Yorker. It's got nothing to do with me having gotten angry about anything or wanting to retaliate against anybody. I believe in litigating aggressively.
>
> The Court: When you start threatening lawyers -
>
> Mr. Yagman: Pardon me?
>
> The Court: When you start threatening lawyers with naming them in lawsuits, what ends up happening is that they may have to be in a position of notifying their malpractice carriers. They certainly are going to lose some sleep over it, and they're going to wonder what the heck is going to happen to them over the next six months. It is a very, very drastic thing to do or to threaten to do to any counsel, Mr. Yagman.
>
> Mr. Yagman: Your Honor, if I wanted to have been nasty, I could have named them as defendants. I was careful not to do that and now it seems to be boomeranging at me that I was careful.
>
> The Court: Well, you've accused them of being part of-or potentially part of a big cover-up.
>
> Mr. Yagman: I think potentially that they are part, but I don't have anything to prove that now. And that is why I said it potentially. I thought I was being careful and I'm sorry the Court looks at it as saying that I wasn't careful.

(Tr. of 2/12/2007 Hearing at 21:8-25.)

There is nothing cautious or unclear about putting opposing counsel's names on the face of a RICO complaint containing allegations (even on information and belief or "suspicion") of obstruction of justice as well as murder, attempted murder, kidnapping, extortion, deceit, dealing in controlled substances, and fraud. Mr. Yagman may well not have subjectively intended to connect opposing counsel to those acts, but if so, he certainly acted recklessly without reasonable concern for the harm done personally to opposing counsel and to the bar as a whole.

2. Mr. Yagman Had Adequate Opportunity to Respond.

In his motion to dismiss, the Sheriff included a concurrent request for 28 U.S.C. § 1927 sanctions, subsequently withdrawn, and for inherent power sanctions based on bad faith. Specifically, the motion argues: "While Defendant's counsel has routinely been the target of baseless accusations from Plaintiffs' counsel herein, Plaintiffs' Complaint (*and the accusation that Defendants'* [sic] *counsel has in some way participated in the alleged wrongful conduct contained in Plaintiffs' Complaint*) is a new low." (Mot. at 12.) (emphasis added). This language put Mr. Yagman on notice that the footnote was considered for sanctions.

Yet in Mr. Yagman's opposition, he, as noted above, not only declined to recant or attempt to clarify his language, but he also stated allegations against defendants' counsel of mail fraud.[4] (Opp. at 15.) He also stated in the opposition that he "took care in the wording of their language that is challenged." (Opp. at 32.) Since the language challenged is the footnote, it stands to reason Mr. Yagman understood the motion's request for sanctions, the conduct at which that request was aimed, and the reason sanctions would be considered.

[4] As discussed above, Mr. Yagman's opposition states: "defense counsel wrote a letter and sent it through the United States mail setting forth that there were no floor-sleepers to count, Exh.3 hereto, thus committing mail fraud and conspiracy to engage in mail fraud." (Opp. at 15.)

***11** In his reply, the Sheriff again discusses the footnote, but also notes the language from the opposition. The reply states:

> While Defendant's counsel hoped that the request for sanctions contained in Defendant's Opposition [sic] would encourage Plaintiffs' counsel not to pursue the allegations made against Defendant's counsel, (and perhaps even to withdraw those allegations), instead, Plaintiffs' counsel has now actually taken the accusations to a new level by

> openly accusing Defendant's counsel of engaging in mail fraud.

(Reply at 11.) Mr. Yagman received notice of the request for sanctions and notice of the seriousness of his statements. Furthermore, at the hearing the Court questioned Mr. Yagman on the issue of the propriety of this suit, the inclusion of defendant's counsel in the footnote, and the imposition of sanctions.

In conclusion, Mr. Yagman's conduct in choosing to escalate a discovery dispute in *Thomas I* into a separate RICO lawsuit in which he associates named defense counsel and their firm with egregious criminal conduct cannot go unanswered. Courts have a supervisory responsibility to the bar. The conduct here appears to have been done in bad faith, vexatiously, and for oppressive reasons. If not done intentionally, it was clearly done recklessly, frivolously, and with the improper purpose of harassment. The court has weighed and considered an appropriate sanction. Plaintiffs' counsel Stephen Yagman is hereby sanctioned $1,000 for each attorney named on the complaint and an additional $1,000 for the firm, for a total sanction of $5,000. The sanction shall be payable to the Clerk of the Court within 30 days of this order.

IV. CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss for failure to state a claim and for sanctions is GRANTED. The first amended complaint is dismissed with prejudice. Plaintiffs' counsel Stephen Yagman is ordered to pay $5,000 to the Clerk of the Court within 30 days from the date of this order.

IT IS SO ORDERED.