

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO**

**JENNIFER MILLER**  
4579 Angeline Lane  
Mason, Ohio 45060

**-and-**

**KIMBERLY GRANT**  
3927 Timberwoods Court  
Loveland, Ohio 45140

**Plaintiffs,**

**-VS-**

**ASSOCIATION OF COMMUNITY  
ORGANIZATIONS FOR REFORM  
NOW, a.k.a. "ACORN"**  
*Serve: National Registered Agents, Inc.*  
*145 Baker Street*  
*Marion, Ohio 43302*

**-and-**

**PROJECT VOTE-VOTING FOR  
AMERICA, INC.**  
*Serve: National Registered Agents, Inc.*  
*145 Baker Street*  
*Marion, Ohio 43302*

**Defendants.**

)  
) **Case No. 1:08-CV-797**  
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) **Hon. Herman Weber**  
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) **BRIEF IN RESPONSE TO**  
) **DEFENDANTS' MOTION TO DISMISS**  
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Now come Plaintiffs Jennifer Miller and Kim Grant, by and through counsel, and respectfully offer this Brief in Response to Defendants' November 20, 2008 Motion to Dismiss.

## I. ISSUES

The Defendants allege that the Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted. In attempting to avoid the consequences of the culpable bed they have made, Defendants offer a myriad of reasons for why this Court should avoid deciding the merits of Plaintiffs' claims. Though some are more compelling than others, each of these arguments ultimately amounts to subterfuge.

First, Defendants urge the Court to find that Mrs. Miller and Mrs. Grant lack standing under the curious premises that (1) impairment of citizens' voting rights only injures the state of Ohio; (2) injuries to constitutional rights are not "injuries;" and (3) flooding boards of elections with unlawfully registered voters could not cause a dilution in the value of Plaintiff's votes.

Next, despite allegations of several alternate enterprises, Defendants argue that the Plaintiffs' First Amended Complaint does not allege the existence of the requisite "enterprise" because (1) ACORN may not be both a "person" and an "enterprise;" (2) "the Complaint does not allege that ACORN, Project Vote, and Citizens Services, Inc., is an enterprise;" and (3) "the Complaint does not allege that ACORN and its canvassers are an enterprise."

Defendants also propagate the mistake notion that Plaintiffs Complaint does not *allege* sufficient predicate acts because (1) Defendants "could not have been charged with forgery or tampering with records," and (2) the Plaintiffs have not pled the predicate acts with sufficient specificity (more specifically, Defendants contend that Plaintiffs' Complaint does not allege facts that would amount to forgery or tampering with records).

Finally, Defendants intransigently, but wrongly, declare that they are immune from theories of vicarious liability, and therefore not liable, under *respondeat superior* or otherwise, for the widespread and repeated criminal conduct of their canvassers.

## II. DISMISSAL STANDARD

A case should be dismissed when the plaintiff fails to state a claim upon which relief can be granted.<sup>1</sup> In analyzing whether the plaintiff has done so, a court should confine itself to the averments made in the complaint.<sup>2</sup> With regard to these averments, all that the civil rules require is short, plain statement of claim that will give defendant fair notice of plaintiff's claim and grounds upon which it is based.<sup>3</sup> In other words, the Ohio civil rules require "notice pleading" rather than fact pleading, and notice pleading merely requires that claim concisely set forth only those operative facts sufficient to give fair notice of the nature of the action, and, except in very narrow circumstances, the plaintiff is not required to plead operative facts of his or her case with particularity.<sup>4</sup>

Meanwhile, courts have noted that plaintiff is not required to prove his or her case at pleading stage and need only give reasonable notice of claim.<sup>5</sup> Since the only purpose of rule establishing general pleading requirements is to give parties notice of the allegations, one who

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<sup>1</sup> Civ. R. 12(B)(6).

<sup>2</sup> *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, at 94, 644 N.E.2d 686, at 688.

<sup>3</sup> *Patrick v. Wertman*, 113 Ohio App.3d 713, 681 N.E.2d 1385.

<sup>4</sup> *Columbia Gas of Ohio, Inc. v. Robinson*, 81 Ohio Misc.2d 15, 673 N.E.2d 701.

<sup>5</sup> *State ex rel. Harris v. Toledo* (1995), 74 Ohio St.3d 36, 656 N.E.2d 334.

moves for dismissal bears an enormous burden in order to be entitled to dismiss of complaint at pleading stage of litigation.<sup>6</sup>

The federal rules permit a court to dismiss a complaint before trial for failure to state a claim upon which relief can be granted.<sup>7</sup> In reviewing a Rule 12(b)(6) motion to dismiss, a court must take all of the plaintiff's allegations as true and must resolve all doubts in the plaintiff's favor.<sup>8</sup> The complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>9</sup>

On a motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."<sup>10</sup> The Court in *Scheuer* continued: "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, the allegations of the complaint should be construed favorably to the pleader."<sup>11</sup>

### III. LAW AND ANALYSIS

#### A. Standing

The Defendants first set of arguments for dismissal relate to standing, and opine that (1) impairment of the voting rights of Mrs. Miller and Mrs. Grant is only "an injury to the

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<sup>6</sup> *Kensington Land Co. v. Zelnick*, 94 Ohio Misc.2d 180, 704 N.E.2d 1285.

<sup>7</sup> Fed.R.Civ.P. 12(b)(6).

<sup>8</sup> *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489 (6th Cir.1990).

<sup>9</sup> *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

<sup>10</sup> *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

<sup>11</sup> *Id.*

State of Ohio;” (2) impairment of “civil right” is not an “injury” under R.C. 2923.34; and (3) proximate causation is not alleged. Well-established constitutional law, in conjunction with the citizen standing provision articulated in R.C. 2923.34(B) and basic principles of causation, dictate that each of these arguments is grossly mistaken.

As a preliminary matter, the expansive nature of the Ohio Corrupt Activities Act should not be taken for granted. In *Iron Workers Local Union No. 17 Insurance Fund et al. v. Philip Morris et al*, the defendants argued that the injury allegedly suffered by the plaintiffs in a civil RICO action was “too remote”, thereby warranting dismissal under Fed. Civ. R. 12(B)(6).<sup>12</sup> The court resolutely disagreed, concluding that the injury (and standing) provisions of the OCAA are significantly more liberal than those found in the federal RICO statute:

While somewhat similar to federal RICO, the Ohio Pattern of Corrupt Activity Act has significantly different and more liberal standing provisions.

2923.34(F) provides that “in a civil proceeding under division (B) of this section, any person *directly or indirectly* injured by conduct in violation of section 2923.32 of the Revised Code or a conspiracy to violate that section \* \* \* shall have a cause of action for triple the actual damages sustained. By affording a cause of action to any person directly or indirectly injured, the Ohio General Assembly departed from the language used by Congress in drafting a federal cause of action under the federal RICO law.<sup>13</sup>

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<sup>12</sup> *Iron Workers Local Union No. 17 Insurance Fund et al. v. Philip Morris et al.* (N.D. Ohio E.D., 1998), 29 F.Supp. 825

<sup>13</sup> Title 18 U.S.C. section 1964 provides in pertinent part: (c) Any person injured in his *business or property* by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney’s fees. Emphasis added.

A cursory review of these two statutory provisions shows that the Ohio General Assembly patterned the Ohio Pattern of Corrupt Activity Act after the federal cause of action. While similar, the Ohio General Assembly made obvious and significant departures. Most pertinent to the issues here, the Ohio General Assembly stated that persons injured both directly and indirectly by violations of section 2923.32 had standing to bring an action under Ohio's RICO law.

Where a legislature makes a difference from patterned legislation, such change suggests the desire to alter previous understandings. The Ohio Supreme Court recognized this in *State v. Frost*, stating: "It is axiomatic that it will be assumed the General Assembly has knowledge of prior legislation when it enacts subsequent legislation."<sup>14</sup>

**i. Voting Rights are Individual Rights, not Government Rights.**

The Defendants first protest that Mrs. Miller and Mrs. Grant, even though they have alleged that Defendants have caused and/or threaten to cause impairment of their voting rights, have not alleged an injury because "the State of Ohio is the victim of Defendants' alleged conduct, and Plaintiffs may not usurp the sovereign's prerogative to assert or decline to assert any claims related to such conduct." This position ignores well-known, well-established, and undisputed constitutional law.

For over half of a century, the U.S. Supreme Court has maintained that voters have a right "to have their expressions of choice given full value and effects by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots \* \* \*."<sup>15</sup> Several years ago, the Supreme Court reaffirmed this right, holding in *Bush v. Gore* that "the right of

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<sup>14</sup> *State v. Frost* (1979), 57 Ohio St.2d 121, 387 N.E.2d 235.

<sup>15</sup> *U.S. v. Saylor* (1944), 322 U.S. 385, at 386.

suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>16</sup> It has also held that an injury to that right *confers standing* because there is a “plain, direct and adequate interest in maintaining the effectiveness of [one's] votes.”<sup>17</sup> Consequently, irrespective of whether “the sovereign” has an interest in the voting rights of Mrs. Miller and Mrs. Grant, the right to have one's vote undiluted when cast and counted is a clearly a constitutionally-recognized individual right, and one plainly declared to be sufficient to confer standing.

Here, Plaintiffs First Amended Complaint is replete with allegations, *inter alia*, that Defendants' criminal enterprise has diluted their votes in past elections, and threatens to dilute their votes in future elections.<sup>18</sup> Consequently, Mrs. Miller and Mrs. Grant have more than adequately alleged violations of their individual voting rights. So long as violation of those rights constitutes an “injury,” these rights are clearly a basis upon which relief may be granted under R.C. 2923.32.

**ii. Injuries to Constitutional Rights are “Injuries.”**

Injuries to a plaintiff's constitutional rights are clearly “injuries” under R.C. 2923.32. The Defendants' contend that Plaintiffs' Complaint is defective because it alleges neither “personal injuries nor any injury to their business or property.” This contention portrays an ignorance of the Ohio Corrupt Activities Act's plain language, legislative intent, and interpretive case law.

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<sup>16</sup> *Bush v. Gore* (2000) 531 U.S. 98, at 105, citing *Reynolds v. Sims* (1964), 377 U.S. 533, at 555.

<sup>17</sup> *Baker v. Carr* (1962), 369 U.S. 186, at 208.

<sup>18</sup> See Plaintiffs' First Amended Complaint, at Paragraphs 5, 20, 42, 51, 52, and 122-127.

Although patterned after Federal RICO law, the Ohio Corrupt Activities Act obviously diverges on the issue of injury. While Federal RICO law only confers standing on private plaintiffs who have sustained injury to their business or property,<sup>19</sup> R.C. 2923.34 conversely provides that “[a]ny person who is injured or threatened with injury by a violation of section 2923.32 of the Revised Code may institute a civil proceeding \* \* \* seeking relief from any person whose conduct violated or allegedly violated section 2923.32 of the Revised Code \* \* \*

\* \* \*<sup>20</sup>

Defendants attempt to ignore Ohio’s expanded conception of injury by arguing that the RICO statutes of three other states have arguably been interpreted so as to require “personal injuries.” This is extremely weak.

First, the cases that the Defendants cite only note that, under the applicable statutes, personal injuries are within their purview, not that injury to voting rights are excluded.<sup>21</sup> More importantly, these out-of-state statutes are of no relevance to this case. Meanwhile, as evidenced by their lack of citation, no Ohio court has ever placed such an arbitrary limitation on the conception of injury, such as the Defendants’ self-servingly ask this Court to do now. And there is no reason for this court to do so now.

Courts may not ignore the plain meaning of words used under the auspices of statutory interpretation.<sup>22</sup> Black’s Law Dictionary defines an injury as “the violation of another’s legal right,” “a wrong or injustice,” and the “violation of a legal right.”<sup>23</sup> Given that the United

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<sup>19</sup> 18 U.S.C. 1964(c).

<sup>20</sup> R.C. 2923.34(B).

<sup>21</sup> See, for example, *Reaugh v. Inner Harbor Hosp., Ltd.* (1994), 447 S.E.2d 617.

<sup>22</sup> See *Glouster Community Bank v. Winchell* (1995), 102 Ohio App.3d 256, 659 N.E.2d 330.

<sup>23</sup> Black’s Law Dictionary (8<sup>th</sup> Ed. 2004).

States Supreme Court has determined the dilution or debasement of one's vote to violate his or her constitutional right of suffrage, the harms alleged here plainly amount to an injury, as that term is contemplated in the Ohio Corrupt Activities Act.

Further, basic canons of statutory construction indicate that where the statute reads "injury," any injury should qualify, rather than any particular Defendants' chosen scope of injuries. R.C. 1.42 mandates that "words and phrases shall be \* \* \* construed according to the rules of \* \* \* common usage." These rules include an understanding that courts may not insert words into the statute.<sup>24</sup> The Ohio Revised Code is replete with statutes that narrows the scope of qualifying injuries with qualifying descriptors such as, *inter alia*, "physical," "serious physical," "irreparable," and "bodily." The Ohio General Assembly, when drafting the Ohio Corrupt Activities Act, could have simply added the qualifying term "personal" if it wished to restrict the scope of injuries within the act's purview. Despite having deliberately done so with other statutes, and despite modifying the scope of qualifying injuries from that of the Federal RICO statute, the Ohio General Assembly refrained from so doing. This abdication must be viewed as deliberate.

Finally, arguments like the one made by Defendants have been made before, and rejected by Ohio courts. In *State v. Grimm*, the defendants opined that, as a matter of policy, the Ohio Corrupt Activities Act was not intended to apply to a case like theirs.<sup>25</sup> The court responded by noting that "[w]hile we recognize that the statute may have been enacted to address activities more readily associated with 'organized crime,' our review must focus on whether the

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<sup>24</sup> See, *inter alia*, *State v. Patterson* (1998), 128 Ohio App.3d 174, 714 N.E.2d 409; *Ohio State Boxing Comm. V. Adore, Ltd* (1996), 110 Ohio App.3d 288, 673 N.E.2d 1016.

<sup>25</sup> *State v. Grimm* (1995), 102 Ohio App.3d 356, 657 N.E.2d 318.

elements of the statute have been satisfied by the evidence presented.”<sup>26</sup> Such is the case here. The defendants may not like the way that the statute applies to them, but due to its plain language, it applies. Only a change in the statute itself could alter this result. Consequently, Plaintiffs’ Complaint alleges an injury.

**iii. The Complaint alleges Proximate Causation.**

Defendants next argument is that there is no proximate cause between their criminal behavior or attempted criminal behavior and the Plaintiffs’ injury or threatened injury. Specifically, Defendants argue that their conduct is too attenuated from plaintiffs injuries because, plaintiffs are only injured if it (1) unlawful registrations are not discovered; (2) unlawful votes are cast; and (3) unlawful votes are counted.

In making this argument, Defendants cross-pollinate this argument with their major theme: that only the government is injured when voting rights are diluted, and that only the government should have a right to pursue attempt to remedy these injuries. To this end, Defendants heavily rely on *State v. Anza*, where federal RICO plaintiffs argued that a business competitor, through defrauding the New York tax authority, was able to gain a business advantage and offer lower prices than the plaintiffs.<sup>27</sup>

Use of *Anza* in the context of this case is clearly misguided. RICO plaintiffs in that case clearly had no constitutional right in its competitors maintaining market prices, rather than artificially low prices. Here, as has already been established, and as is alleged throughout the complaint, Defendants conduct ostensibly impairs the well-established constitutional rights of Mrs. Miller and Mrs. Grant to have the full value of their vote counted. Consequently, this muddled argument that protecting voting rights is the exclusively governmental rights must be

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<sup>26</sup> Id.

<sup>27</sup> *Anza v. Ideal Steel Supply Corp.* (2006), 547 U.S. 451.

set aside when engaging in causation analysis. Instead this Court must simply discern whether Plaintiffs' Complaint alleges that Defendants' acts have proximately caused their injuries.

In Ohio, the term "proximate cause" means the following:

[W]here an original act is wrongful or negligent and in natural and continuous sequence produces a result which would otherwise not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the initial offender from liability.<sup>28</sup>

Here, Plaintiffs' Complaint clearly alleges that Defendants have engaged in a widespread and wrongful series of acts that have inundated boards of elections with unlawful voter registrations, and that these act thus ultimately diluted, will dilute, and/or threaten to dilute Plaintiffs' votes.<sup>29</sup>

The Defendants argument that the boards of elections themselves are the only proximate cause of Plaintiffs' harm or threatened harm is remarkably disingenuous. It is akin to arguing that because local police are responsible for preventing assault, the police proximately cause the assault victim's injury by not preventing the assault in the first place. Such reasoning is clearly unsound.

Instead, an "eggshell plaintiff" theory, which provides that a defendant takes a plaintiff as he finds him, must apply.<sup>30</sup> The Plaintiffs' Complaint alludes to the inadequate election-fraud prevention capacities of the state of Ohio, that Defendants have been aware of these capacities, and that Defendants nevertheless have purposely engaged in conduct that

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<sup>28</sup> *Roth v. Ponderosa Steakhouse et al.* (Nov. 26, 2003), 2003-Ohio-6336, Cuyahoga App. No. 82817, citing *Clinger v. Duncan* (1957), 166 Ohio St. 216 at 223, 141 N.E.2d 156.

<sup>29</sup> Plaintiffs' First Amended Complaint, at Paragraphs 56-110, 5, 20, 21, 53.

<sup>30</sup> *McDevitt v. Wenger* (Nov. 10, 2003), 2003-Ohio-6096, at para. 31-35, Tuscarawas App. No. 2002AP090071; *Rybaczewski v. Kingsley* (Apr. 24, 1998), Lucas App. No. L-97-1048, at 9-11.

inundates these fragile gatekeepers with a significant number of unlawful registrations in a short period of time.<sup>31</sup>

Even if boards of elections' quality control could be deemed airtight, the Defendants have still attempted to cause a result that, if successful, would dilute the votes of Mrs. Miller and Mrs. Grant. R.C. 2923.31(I) provides that "corrupt activity" includes "attempting to engage in" one of the predicate acts. Revised Code 2923.02(B) expressly provides that "it is no defense to [an attempt charge] that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be." Plaintiffs' Complaint clearly alleges the attempt to engage in corrupt activity.<sup>32</sup>

Consequently, the Complaint alleges that the Defendants' conduct is the origin of the ultimate harm or threatened harm to Plaintiffs, and that Defendants, by and through their conduct, have attempted to cause harm to Plaintiffs, and all with full knowledge that they are inundating a system that cannot necessarily withstand their corrupt activity. These allegations more than adequately state a claim, despite protests of a lack of proximate causation, upon which relief can be granted.

In summation, on the issue of standing, Plaintiffs have clearly alleged a constitutionally cognizable injury. This injury is of the type covered by the Ohio Corrupt Activities Act. Finally, Plaintiffs have alleged that this injury is proximately caused by Defendants conduct. Thus, Plaintiffs have alleged, if not established, that they have standing to pursue the claims in their Complaint.

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<sup>31</sup> Plaintiffs First Amended Complaint, at Paragraphs 119-127.

<sup>32</sup> Id., at Paragraph 44.

## **B. The Enterprise**

Defendants next proclaim that Mrs. Miller and Mrs. Grant have failed to adequately allege the existence of an enterprise. Specifically, they argue that Plaintiffs' Complaint should be dismissed because (1) it alleges that ACORN is itself the enterprise; (2) it fails to adequately allege an enterprise consisting of ACORN, Project Vote, and Citizens Services, Inc.; and (3) it fails to adequately allege an enterprise between ACORN itself and its canvassers. Again, Defendants badly misfire.

First, Plaintiffs have clearly alleged the existence of an Enterprise consisting of ACORN, Project Vote, and Citizens Services, Inc. R.C. 2923.32(A)(1) provides: “[n]o person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity \* \* \*.” The element of “enterprise” is further defined in R.C. 2923.31: “(C) Enterprise includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. ‘Enterprise’ includes illicit as well as licit enterprises.”

Defendants only objection appears to be to the “association in fact” amongst ACORN, Project Vote, and Citizens Services, Inc. Although the term “association in fact” is not specifically delineated, Ohio courts have accentuated “*the legislature's broad definition of 'enterprise' in R.C. § 2923.31(C),*” and have held that it “encompasses informal, unstructured associations and even a single individual,” and is incompatible with a requirement that formal

structure, continuous existence, or existence separate from the criminal activity in which it engages be shown.<sup>33</sup>

Ohio courts of appeals have “resolved cases questioning the existence of an enterprise under the corrupt activity statute without reference to the federal requirements.”<sup>34</sup> Instead, Ohio courts simply apply the statutory definition of “enterprise” found in R.C. § 2923.31(C).

On this front, the Ohio Supreme Court has stated that in order to prove the level of association necessary to support an R.C. 2923.32(A)(1) conviction, a plaintiff must “prove that each defendant was *voluntarily connected* to the pattern [of corrupt activity comprising the enterprise], and performed two or more acts in furtherance of it.”<sup>35</sup> This test can be, and has been, easily distilled: in Ohio, to adequately allege an enterprise, an OCAA plaintiff must allege “that a group of persons associated together for a common purpose of engaging in a course of conduct.”<sup>36</sup>

When determining whether a plaintiff has made this allegation, it bears acknowledgement that Civ. R. 8(A) only requires a “short and plain statement of the claim.” Meanwhile, Civ. R. 8(E)(2) provides that a plaintiff may make alternative and inconsistent claims regarding both facts and theories of liability. Due to Defendants’ high level of

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<sup>33</sup> Owen, citing *State v. Habash* (Jan. 31, 1996), Summit App. No. 17073, unreported. Emphasis added.

<sup>34</sup> *State v. McDade* (Nov. 20, 1991) Miami App. No. 90 CA 46, unreported; *State v. Kinsey* (Nov. 30, 1995), Holmes App. No. CA-515, unreported.

<sup>35</sup> *State v. Siferd*, 151 Ohio App.3d 103, 2002-Ohio-6801, 783 N.E.2d 591, at ¶ 43, citing *Schlosser*, 79 Ohio St.3d at 334, 681 N.E.2d 911 (emphasis added).

<sup>36</sup> See *State v. Humphrey*, Clark App. No.2002 CA 30, 2003-Ohio-3401, 2003 WL 21487780; *State v. Fritz* (2008), 178 Ohio App.3d 65, 896 N.E.2d 778:

obfuscation related to the structuring of their enterprise (which is chronicled in Plaintiffs' Complaint),<sup>37</sup> Mrs. Miller and Mrs. Grant have been forced to do just that.

Under this forgiving standard, enterprise allegations far less acute than those offered by Plaintiffs are often accepted, if not standard practice, in the RICO context. For instance, in *Shuttlesworth v. Housing Opportunities Made Equal*, the defendants urged the court to find that plaintiff had failed to identify any entity that qualified as an "enterprise" for purposes of the RICO statute.<sup>38</sup> On that subject, the plaintiff's complaint only alleged that "[t]he Defendants are collectively an enterprise engaged in activities which affect interstate commerce, to wit: individuals affiliated with corporations established under the law of the State of Ohio."<sup>39</sup> The court ultimately determined that even this allegation sufficiently identified the enterprise so as to satisfy notice pleading requirements.<sup>40</sup> Despite no less obfuscation by Defendants, Plaintiffs allegations are far more specific, and more than adequately allege the existence of an enterprise.

Plaintiffs' First Amended Complaint more than adequately alleges the existence of an enterprise between ACORN, Project Vote, and Citizens Services, Inc. Specifically, it notes that (1) Citizen Services, Inc. and ACORN share the same board of directors;<sup>41</sup> (2) Project Vote is ACORN's mobilization arm;<sup>42</sup> (3) ACORN, Project Vote, and Citizen Services, Inc. have

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<sup>37</sup> Plaintiffs' First Amended Complaint, at, *inter alia*, Paragraphs 9, 11, 13, 14, 15, 16, 36, 37, 38, 39, 40, 41.

<sup>38</sup> *Shuttlesworth v. Housing Opportunities Made Equal* (S.D. Ohio, 1994), 873 F.Supp. 1069.

<sup>39</sup> *Shuttlesworth v. Housing Opportunities Made Equal* (S.D. Ohio, 1994), 873 F.Supp. 1069.

<sup>40</sup> *Id.*, noting that "[t]he purpose behind this rule is to relieve the plaintiff of the duty of having to understand all of the inter-workings of a potentially-complex enterprise, information that would usually be adduced through discovery, prior to filing the complaint."

<sup>41</sup> Plaintiffs' First Amended Complaint, at Paragraph 11.

<sup>42</sup> *Id.*, at Paragraph 9.

juggled fund and blame between them after committing crimes;<sup>43</sup> (4) for all intents and purposes, Project Vote and Citizens Services, Inc. are wholly owned subsidiaries of ACORN;<sup>44</sup> (5) the enterprise exists separate and distinct ACORN and Project Vote, insofar as it includes Citizens Services, Inc., and other ACORN agents;<sup>45</sup> (6) there is an association in fact that featured a continuing unit, common hierarchy, common management, and common control;<sup>46</sup> (7) the enterprise is targeted towards inflating the number of registered voters, irrespective of whether such registrations are legal;<sup>47</sup> (8) ACORN's voter registration efforts are underwritten by Project Vote; (9) Project vote has entered into a written agreement with ACORN, authorizing ACORN to do voter registration work on its behalf;<sup>48</sup> (10) Project Vote conveys money to ACORN that is used for political activity;<sup>49</sup> (11) Project Vote's board was recently comprised entirely of ACORN members;<sup>50</sup> and (12) the enterprise conducts legitimate business separate from the incidents of corrupt activity.<sup>51</sup>

Going further, Ohio courts have even found that an enterprise may consist of an organization and its agents. In *Hicks*, the court held that “A sole proprietorship is a recognized legal entity, and, provided it has any employees, is in any event a “group of individuals

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<sup>43</sup> Id., at Paragraph 15.

<sup>44</sup> Id., at Paragraph 16.

<sup>45</sup> Id., at Paragraph 32.

<sup>46</sup> Id., at Paragraph 34.

<sup>47</sup> Id., at Paragraph 35.

<sup>48</sup> Id., at Paragraph 37.

<sup>49</sup> Id., at Paragraph 38.

<sup>50</sup> Id., at Paragraph 39.

<sup>51</sup> Id., at Paragraph 111.

associated in fact.”<sup>52</sup> The court reasoned further that “[the proprietor] had several people working for him; this made his company an enterprise, and not just a one-man band;” which amounted to “some separate and distinct existence for the person and the enterprise.”<sup>53</sup> Thus, here, Plaintiffs adequately allege an alternative enterprise relationship when they note that canvassers who collect unlawful voter registrations, particularly when and if they are independent contractors, and particularly when they are collecting unlawful voter registrations to further Defendants’ scheme, are part of an enterprise.<sup>54</sup>

Further yet, even if this Court were to ignore Ohio law on the matter (as Defendants would prefer), federal law favors the finding that Mrs. Miller and Mrs. Grant have adequately alleged an association in fact. The requirements for finding an enterprise, as they have developed under the federal RICO statute, are (1) an ongoing organization; (2) with associates that function as a continuing unit; (3) that has a structure separate and apart, or distinct, from the racketeering activity.<sup>55</sup>

In squarely addressing these elements, Plaintiffs’ Complaint alleges that (1) the enterprise exists separate and distinct ACORN and Project Vote, insofar as it includes Citizens Services, Inc., and other ACORN agents;<sup>56</sup> (2) there is an association in fact that featured a

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<sup>52</sup> *State v. Hicks* (December 31, 2003), Butler App. No. CA2002-08-198, unreported, citing *See State v. Post* (Sept. 20, 1996), *Lucas App. No. L-95-153*, citing *McCullough v. Suter* (C.A.7, 1985), 757 F.2d 142, and *United States v. Benny* (C.A.9, 1986), 786 F.2d 1410, certiorari denied, 479 U.S. 1017, 107 S.Ct. 668, 93 L.Ed.2d 720.

<sup>53</sup> *Id.*

<sup>54</sup> Plaintiffs’ First Amended Complaint, at Paragraphs 29-33, 35, 56-110.

<sup>55</sup> *United States v. Riccobene* (C.A.3, 1983), 709 F.2d 214, and *United States v. Bledsoe* (C.A.8, 1982), 674 F.2d 647. *Riccobene*, *supra* at 222-23. See also *Bledsoe*, *supra* at 664 (holding “enterprise” element requires proof of a structure separate from the racketeering activity).

<sup>56</sup> *Id.*, at Paragraph 32.

continuing unit, common hierarchy, common management, and common control;<sup>57</sup> (3) the enterprise is targeted towards inflating the number of registered voters, irrespective of whether such registrations are legal;<sup>58</sup> (4) ACORN's voter registration efforts are underwritten by Project Vote; (9) Project vote has entered into a written agreement with ACORN, authorizing ACORN to do voter registration work on its behalf;<sup>59</sup> (5) Project Vote conveys money to ACORN that is used for political activity;<sup>60</sup> (6) Project Vote's board was recently comprised entirely of ACORN members;<sup>61</sup> and (7) the enterprise conducts legitimate business separate from the incidents of corrupt activity.<sup>62</sup> Finally, the Complaint alleges a pattern of corrupt activity, perpetrated through use of the enterprise, that spans five years.<sup>63</sup>

In aggregate, and no matter which law is applied, Plaintiffs allegations more than adequately state, and in fact establish, that ACORN, Project Vote, and Citizens Services, Inc., and alternative associations, constitute "a group of persons associated together for a common purpose of engaging in a course of conduct." They clearly establish that the three are a group of individuals. They further establish continuing relations, such as entangling boards of directors, relations that effectively (though not legally) render Project Vote and Citizens Services, Inc. to be wholly owned subsidiaries, written agreements for voter registration and political activity, the exchange of funds, and joint criminal behavior and cover-ups. Finally, they allege the common purpose of seeking to inflate the number of registered voters, irrespective of whether those voters

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<sup>57</sup> Id., at Paragraph 34.

<sup>58</sup> Id., at Paragraph 35.

<sup>59</sup> Id., at Paragraph 37.

<sup>60</sup> Id., at Paragraph 38.

<sup>61</sup> Id., at Paragraph 39.

<sup>62</sup> Id., at Paragraph 111.

<sup>63</sup> Id., Paragraphs 56-110.

are legitimate, and then covering up these elections-related crimes. Consequently, Plaintiffs' First Amended Complaint adequately alleges the existence of an enterprise between ACORN, Project Vote, and Citizens Services, Inc., and/or between others, so that a Motion to Dismiss may not be granted on this issue.

### C. Preemption

The Defendants next opine that merely because their conduct *may* implicate other, elections-related criminal statutes, they could not be charged with Forgery and Tampering with Documents. These elections statutes simply do not have preemptive effect.

Defendants rely on R.C. 1.51 for their proposition that because R.C. 3599.11(A) and R.C. 3599.02(A) address elections-related crimes similar to those at issue in this case, they could not be indicted for the crimes alleged in Plaintiffs' Complaint. R.C. 1.51 states as follows:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Analysis under the Section typically requires two steps. First, the statutes at issue must conflict. If they do not conflict, either may apply. If they do conflict, they must be "irreconcilable" before a more general provision is preempted.

Unfortunately, Defendants skip an elementary threshold issue: whether the existence of a conflict, even if proven, is relevant in this case. It is not. As Defendants themselves acknowledge, "The conduct used to support a Civil RICO action must be *indictable*."<sup>64</sup> Even where two statutes conflict, a prosecutor may still indict a defendant under both statutes. More specifically, if the two offenses at issue are "allied offenses," then, according

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<sup>64</sup> *Cent. Distrib. of Beer, Inc. v. Conn* (6<sup>th</sup> Cir., 1993), 5 F.3d 181, at 183. Emphasis added.

to R.C. 2941.25(A), “the indictment or information may contain counts for all such offenses, but the defendant may be convicted of [that is, sentenced on] only one.”<sup>65</sup> Consequently, Forgery and Tampering with evidence are clearly not preempted by any elections law statute.

Although this simple analysis ends the matter, in the event that the court finds further analysis helpful, it is worth noting that Defendants hasty theory collapses on its own terms as well. As noted above, R.C. 1.51 requires (1) an inquiry into whether two statutes conflict; and if so (2) whether they are “irreconcilable.” If both are true, the more specific statute will preempt the more general statute. If either is not true, there is no preemption.

As to the first prong, there is no conflict between the two statutes. Where one of the statutes is general and one specific and they involve the same or similar offenses, we must then ask whether the offenses constitute allied offenses of similar import. To be allied offenses, “\* \* \* the elements of the offenses [must] correspond to such a degree that the commission of one crime will result in the commission of the other \* \* \*.”<sup>66</sup> Further, “when two statutory provisions are alleged to be in conflict, R.C. 1.51 requires us to construe them, where possible, to *give effect to both*.”<sup>67</sup>

Here, the elements of Forgery and Tampering with Records on the one hand, and False Registration on the other hand, do not correspond to such a degree that commission of one

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<sup>65</sup> See *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244, 74 O.O.2d 380, 344 N.E.2d 133 (“[a]n accused may be tried for both [allied offenses of similar import] but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense.”) See also Legislative Service Commission Summary of Am. Sub. H.B. 511, supra, at 69 (stating that pursuant to R.C. 2941.25 a defendant may be charged with multiple offenses of similar import committed with a single animus, but that he may be convicted of only one, and further stating that “the prosecution sooner or later must elect as to which offense it wishes to pursue).

<sup>66</sup> *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 549 N.E.2d 520, syllabus.

<sup>67</sup> *Board of Education of Gahanna-Jefferson Local School District v. Zaino* (2001), 93 Ohio St.3d 231, 234, 754 N.E.2d 789, 792; *Schindler Elevator Corp. v. Tracy* (1999), 84 Ohio St.3d 496, 499, 705 N.E.2d 672, 674.

crime will always result in commission of the other.<sup>68</sup> R.C. 2913.31 (Forgery) prohibits any person, with purpose to defraud, or knowing that the person is facilitating a fraud, from (1) forging the writing of another without that other's authority; (2) forging any writing so that it purports to be genuine when it is in fact spurious, or purports to be the act of another who did not authorize that act; or (3) uttering or possessing with the purpose to utter, any writing that the person knows to have been forged. Subsection (B) prohibits the forging or distribution of a forged identification card (the definition of "identification card" provided in the statute indisputably establishes that a voter registration card would be an identification card).

Meanwhile, R.C.2913.42 (Tampering with Records) prohibits any person, knowing he has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, from (1) falsifying or altering any writing or record; or (2) uttering any writing, knowing it to have been falsified.

Finally, R.C. 3599.11 provides as follows:

No person shall knowingly register or make application or attempt to register in a precinct in which the person is not a qualified voter; or knowingly aid or abet any person to so register; or attempt to register or knowingly induce or attempt to induce any person to so register; or knowingly impersonate another or write or assume the name of another, real or fictitious, in registering or attempting to register; or by false statement or other unlawful means procure, aid, or attempt to procure the erasure or striking out on the register or duplicate list of the name of a qualified elector therein; or knowingly induce or attempt to induce a registrar or other election authority to refuse registration in a precinct to an elector thereof; or knowingly swear or affirm falsely upon a lawful examination by or before any registering officer; or make, print, or issue any false or counterfeit certificate of registration or knowingly alter any certificate of registration. \* \* \* No person shall knowingly register under more than one name or knowingly induce any person to so register. \* \* \* No person shall knowingly make any false statement on any form for registration or change of registration or upon any application or return envelope for an absent voter's ballot.

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<sup>68</sup> See *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699 (holding that "comparison of the statutory elements in the abstract [rather than with respect to the facts of a particular case] is the more functional test.")

Cursory examination of these statutes reveals pertinent divergences between Forgery and Tampering with Records, and False Registration. The statutes here are not allied offenses of similar import.

First, Forgery addresses the validity and authenticity of documents. False Registration addresses the contents of a document that are false. Forgery prohibits potentially true statements in documents that are illegally signed, while False Registration only prohibits false statements in documents that may or may not be legally signed.

In *State v. Sufronko*, similarly to here, Defendant was indicted under forgery but claimed a right to be indicted under a different statute. The court distinguished Forgery from Falsification, stating that “[a] significant difference is that a false statement does not have to be in writing, while the forgery does.”<sup>69</sup> Further, a forgery does not have to contain false information, while a falsification does.<sup>70</sup> Similarly here, False Registration requires the conveyance of false information, while Forgery does not.

Tampering with Records also diverges from False Registration. Tampering with Records may occur where a defendant falsifies, alters, or utters *any* record, while False Registration significantly limits the scope of records to which it applies. Consequently, neither Tampering nor Forgery is allied with False Registration.

Even if the statutes did conflict in such a manner that they were allied offenses of similar import, Forgery and Tampering with Records are reconcilable with False Registration. “Only where the conflict is deemed *irreconcilable* does R.C. 1.51 mandate that one provision

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<sup>69</sup> *State v. Sufronko* (1995), 105 Ohio App.3d 504, 664 N.E.2d 596.

<sup>70</sup> *Id.*

shall prevail over the other.” (Emphasis added.)<sup>71</sup> “We have judicially recognized similar rules of statutory construction: ‘First, all statutes which relate to the same general subject matter must be read *in pari materia*.’<sup>72</sup> And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes.’<sup>73</sup> In other words, all provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously.<sup>74</sup> With this in mind, statutes are deemed “irreconcilable” only where they are in “hopeless conflict,”<sup>75</sup> and prohibit the exact same conduct.<sup>76</sup> This lofty standard exists for good reason—if Forgery and Tampering with Records were the exact same as False Registration, then there would have been no reason for the Ohio General Assembly to draft the False Registration statute. Here, Forgery and Tampering with Records are not in “hopeless conflict” with False Registration for the same reasons noted several paragraphs above.

Finally, the Ohio Corrupt Activities Act alters the analysis of this matter, because it makes it a crime to attempt or conspire to violate Forgery and Tampering with Records statutes. R.C. 2923.31(I) then defines “corrupt activity” as “engaging in, attempting to engage in, conspiring to engage in \* \* \* any of the following: \* \* \* conduct constituting a violation of

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<sup>71</sup> *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131.”

<sup>72</sup> *United Telephone Company of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131; *Maxfield v. Brooks* (1924), 110 Ohio St. 566, 144 N.E. 725; *State, ex rel. Bigelow, v. Butterfield* (1936) 132 Ohio St. 5, 6 O.O. 490, 4 N.E.2d 142.

<sup>73</sup> *Id.*

<sup>74</sup> *State v. Glass* (1971), 27 Ohio App.2d 214, 56 O.O.2d 391, 273 N.E.2d 893; *State v. Hollenbacher* (1920), 101 Ohio St. 478, 129 N.E. 702.

<sup>75</sup> *Couts v. Rose* (1950), 152 Ohio St. 458, 40 O.O. 482, 90 N.E.2d 139.’ *Johnson's Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35, 567 N.E.2d 1018, 1025.”

<sup>76</sup> *State v. Sufronko* (1995), 105 Ohio App.3d 504, 664 N.E.2d 596

section [inter alia] 2913.42 [and] 2913.31.” This differs inexorably from the crime of False Registration.

#### **D. Specificity of Predicate Acts**

The Defendants next declare that Plaintiffs must plead any Ohio Corrupt Activities Act case with specificity, and have not done so. Again, both assertions misguide the court. To be clear, Defendants’ “specificity” argument should not be confused with the Civil Rules’ particularity requirement.

All that the civil rules require is short, plain statement of claim that will give defendant fair notice of plaintiff’s claim and grounds upon which it is based.<sup>77</sup> In other words, the Ohio civil rules require “notice pleading” rather than fact pleading, and notice pleading merely requires that claim concisely set forth only those operative facts sufficient to give fair notice of the nature of the action, and, except in very narrow circumstances, the plaintiff is not required to plead operative facts of his or her case with particularity.<sup>78</sup> Meanwhile, courts have noted that plaintiff is not required to prove his or her case at pleading stage and need only give reasonable notice of claim.<sup>79</sup> The only purpose of rule establishing general pleading requirements is to give parties notice of the allegations.<sup>80</sup>

The particularity requirement set forth in Civ. R. 9(B) pertains only to fraud, and thus does not apply in this case. Further, neither the Ohio Corrupt Activities Act nor any Ohio case law demonstrates that anything beyond notice pleading is intended to apply to an R.C.

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<sup>77</sup> *Patrick v. Wertman*, 113 Ohio App.3d 713, 681 N.E.2d 1385.

<sup>78</sup> *Columbia Gas of Ohio, Inc. v. Robinson*, 81 Ohio Misc.2d 15, 673 N.E.2d 701.

<sup>79</sup> *State ex rel. Harris v. Toledo* (1995), 74 Ohio St.3d 36, 656 N.E.2d 334.

<sup>80</sup> *Kensington Land Co. v. Zelnick*, 94 Ohio Misc.2d 180, 704 N.E.2d 1285.

2923.34 case. While Plaintiffs' Complaint must articulate facts that could amount to a Forgery or Tampering with Records charge, their Complaint need only provide a "short and plain" statement of these facts, rather than the type of particularity required in a fraud claim.

**i. Elements**

Of course, Plaintiffs must allege facts that would be sufficient to amount to predicate acts, and they have more than done so here. R.C. 2913.31 (Forgery) prohibits any person, with purpose to defraud, or knowing that the person is facilitating a fraud, from (1) forging the writing of another without that other's authority; (2) forging any writing so that it purports to be genuine when it is in fact spurious, or purports to be the act of another who did not authorize that act; or (3) uttering or possessing with the purpose to utter, any writing that the person knows to have been forged. Subsection (B) prohibits the forging or distribution of a forged identification card (the definition of "identification card" provided in the statute indisputably establishes that a voter registration card would be an identification card).

Meanwhile, R.C.2913.42 (Tampering with Records) prohibits any person, knowingly he has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, from (1) falsifying or altering any writing or record; or (2) uttering any writing, knowing it to have been falsified.

Given these elements, Plaintiffs' Complaint, by and through the Incidents of Corrupt Activity articulated in Paragraphs 56 through 110, more than adequately state a claims for Forgery and Tampering with Records upon which relief may be granted. To provide examples demeans the overall level of crime at issue in this case. Nevertheless, by way of example, the Complaint plainly alleges that ACORN circulator Prentice McNary forged the names of a 16 year old girl and a 10 year old boy on voter registration cards, and submitted them

to ACORN, who in turn submitted them to the Summit County Board of Elections.<sup>81</sup> The Complaint is replete with further examples of ACORN agents spuriously signing others names or non-existent names to voter registration cards, and then submitting them as though they were valid, and then ACORN passing them on to government officials as though they were valid.<sup>82</sup>

Meanwhile, numerous Incidents of Corrupt Activity have involved ACORN canvassers spuriously forging the signature of another on voter registration cards and submitting them to ACORN, who in turn submits them to the government as though they are valid.<sup>83</sup> In some of these incidents, the names forged were for people who did not exist, could not have signed the registration cards because they were either deceased, or infants who could not write, or actually indicated that they did not sign the cards.<sup>84</sup> All of these incidents clearly amount to forgery.

As to Tampering with Record, the Defendants falsified records every time that an ACORN canvasser signed a voter registration card on behalf of a living, deceased, infantile, or non-existent individual. Defendants also falsified records when they persuaded people who have already registered to register again, or urged them to register again with different identifying information, such as a different address. Defendant then uttered these falsified registration cards when they submitted the voter registration cards to the relevant boards of election. Defendants also attempted to alter voter registration rolls but submitting registration cards for deceased, underage, or non-existent individuals, and through submitting multiple voter registrations for the

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<sup>81</sup> Id., at Paragraph 79.

<sup>82</sup> Id., at Paragraphs 57, 58, 68, 80, 82, 85, 86, 90, 91, 92, 93, 97, 98, 100, 102, 103, 106.

<sup>83</sup> Id., at Paragraphs 80, 82, 84.

<sup>84</sup> Id., at Paragraphs 57, 58, 68, 80, 82, 85, 86, 90, 91, 92, 93, 97, 98, 100, 102, 103, 106.

same individual (even if they are already registered in a different county or state), whether with the same identifying information or otherwise.<sup>85</sup>

**ii. Attempt**

Importantly, because Plaintiffs' Complaint alleges intent, it need not show plead that acts actually amounted to completed acts of Forgery and Tampering with Records.

The express statutory language of R.C. 2923.31(I) provides that an incident of "corrupt activity" includes an attempt to engage in any of the enumerated acts. Revised Code 2923.01 (*Attempt*) provides in pertinent part:

- (A) No person, purposely or knowingly, and when purpose of knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.
- (B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

Taken in combination, R.C. 2923.01(A) and (B) require only that Plaintiffs' Amended Complaint allege facts sufficient to place any particular named Defendant on notice that that Defendant attempted to do something while harboring a particular intent, not that any particular Defendant actually consummated an "object offense."<sup>86</sup>

Thus, pleading attempt alleviates Plaintiffs of the burden of alleging facts concerning the actual commission of the object offenses. Instead, Plaintiffs are required only to allege that, for any particular incident of corrupt activity, a particular actor committed a

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<sup>85</sup> Id., at Paragraphs 56, 65, 68, 71, 75, 76, 78, 79, 80, 82, 85, 86, 90, 91, 92, 93, 97, 98, 100, 102, 103, 106.

<sup>86</sup> By "object offense", Plaintiffs mean the offense that was the object of the attempt. Because "corrupt activity" includes both the enumerated "object offense" as well as an attempt to commit an enumerated "object offense", Plaintiffs use of the term "object offense" is merely an effort to distinguish these two legal concepts.

substantial step indicative of the requisite intent.<sup>87</sup> Here, the claims specified above clearly allege the commission of a “substantial step.” Moreover, Plaintiffs’ Complaint specifically alleges that Defendants purposefully and knowingly engaged in conduct that, if successful, would have amounted to Forgery and Tampering with Records.<sup>88</sup>

### **iii. Requisite Mental State**

Finally, Defendants contend that they lacked the requisite mental intent to commit either Forgery or Tampering with Records. Each of those statutes require that a defendant harbor “a purpose to defraud” and a knowledge that person is either facilitating a fraud or is without privilege to tamper with the pertinent records.<sup>89</sup>

As to “knowingly,” Revised Code 2901.22(B) (Culpable mental states) provides that “[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” In *Port Authority of New York and New Jersey v. Allied Corp.*, a federal RICO case, the court held that the pleading requirements should be somewhat relaxed where the details of the alleged misconduct are matters peculiarly within the knowledge of the defendants and may be obtained only through discovery.<sup>90</sup> Ohio law should be no more stringent in the context of an OCAA claim when dealing with matters such as ACORN’s internal motivations and operations.

Here, the Complaint alleges the Defendants “purposely and/or knowingly engaged in, or used others to engage in, conduct that, if successful, would amount to [Forgery or

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<sup>87</sup> See *State v. Green* (1991), 58 Ohio St.3d 239, at 240-241.

<sup>88</sup> Plaintiffs Complaint, at Paragraph 49.

<sup>89</sup> R.C. 2913.31; R.C. 2913.42.

<sup>90</sup> *Port Authority of New York and New Jersey v. Allied Corp.* (S.D.N.Y. May 5, 1991), Slip Opinion, at 14.

Tampering].”<sup>91</sup> It further alleges that Defendants engaged in these violations of law “with indifference as to whether registrations they gather and submit were/are valid or invalid.”<sup>92</sup> It separately alleges that the incidents of corrupt activity were “committed within the scope of the common purpose of gathering and submitting voter registrations irrespective of their lawfulness.”<sup>93</sup>

Meanwhile, circumstantially, the Complaint alleges that ACORN’s pattern of unlawful voter registration spans over a decade.<sup>94</sup> It further notes that ACORN has conceded that there are errors in its process, has opined that it can’t be expected to catch these errors, has conceded that it does not have the resources to check for unlawful voter registration cards, and has refrained from firing ACORN canvassers who committed bribery.<sup>95</sup> Moreover, it alleges over 50 separate incidents of unlawful voter registration perpetrated by the Defendants and/or the Enterprise.

Finally, it alleges that Defendants themselves, and not just Defendants’ employees and agents, exhibited the requisite mental intent. As noted above, Plaintiffs’ Complaint notes Defendants concessions that (1) they lack the resources to check for unlawful voter registration cards; and (2) they refrain from firing canvassers who committed bribery.<sup>96</sup> The Complaint separately alleges top-down control; cover-ups of corruption; a scheme targeted towards inflating the number of unlawfully registered voters; Defendants solicited and/or procured ACORN

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<sup>91</sup> Id., at Paragraph 49.

<sup>92</sup> Id., at Paragraph 50.

<sup>93</sup> Id., at Paragraph 55.

<sup>94</sup> Id., at Paragraph 51.

<sup>95</sup> Id., at Paragraphs 62, 72-74, and 66, respectively.

<sup>96</sup> Id., at Paragraphs 72-74.

employees to commit the predicate acts, and aided or abetted them in doing so; Defendants' lawbreaking has occurred for over a decade, and is on the rise; the predicate acts were explicitly or implicitly authorized by Defendants; policies pursued by Defendants that encouraged unlawful voter registration; that the corrupt activity is Defendants regular way of conducting business; and that Defendants hiring and training practices encourages unlawful voter registration.<sup>97</sup>

This staggering level of indifference towards applicable law infers the requisite intent, insofar as the Defendants must have been aware that their conduct would probably cause a certain result or would probably be of a certain nature. Consequently, Plaintiffs' Complaint adequately alleges all of the requisite elements of Forgery and Tampering with records, including the requisite mental states, as well as facts sufficient to allege that Defendants attempted Forgery and Tampering with Records.

#### **E. Vicarious Liability, Organizational Liability, and *Respondent Superior***

Defendants attempt to argue that they cannot be held vicariously liable for the acts of their agents and employees. Ohio law plainly dictates otherwise. The Defendants are strictly and vicariously liable for the conduct of one another, as well as each and every member of the Enterprise not otherwise named as a Defendant in this case.<sup>98</sup> The overriding concern for the good of the public welfare led the *Schlosser* Court to conclude that an OCAA violation requires

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<sup>97</sup> Id., at Paragraph 14, 17, 35, 48, 51, 55, 64-67, 111, 118.

<sup>98</sup> *State v. Schlosser* (1997), 79 Ohio St.3d 329, 335, 1998-Ohio-716 (“The [EPCA] statute was designed to impose cumulative liability for the criminal enterprise.”); *State v. Nasrallah* (2000), 139 Ohio App.3d 722, 728 (“[W]e believe that it is in conformity with the Act that a court should consider all the harm caused by the enterprise ...”).

the imposition of both strict and vicarious liability.<sup>99</sup> The *Schlosser* Court, while recognizing some historical legislative similarity between RICO and OCAA, nonetheless recognized that the OCAA statute is fundamentally different from the federal RICO statute because, unlike its federal counterpart, the OCAA statute imposes both *strict and vicarious liability* for the conduct of anyone employed by or associated with an enterprise through a pattern of corrupt activity.<sup>100</sup>

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The Ohio General Assembly appears to be in agreement with the conclusions reached by the *Schlosser* and *Nasrallah* Courts. Revised Code 2901.23

(Organizational criminal liability)<sup>101</sup> provides in pertinent part:

(A) Any organization may be convicted [held liable] of an offense under any of the following circumstances:

(2) A purpose to impose organizational liability plainly appears in the section defining the offense, and the offense is committed by an officer, agent, or employee of the organization acting in its behalf and within the scope of his office or employment \*\*\*.

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(4) If, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment.

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<sup>99</sup> Schlosser, *supra*.

<sup>100</sup> See also, *State v. Nasrallah* (2000), 139 Ohio App.3d 722, 728 (“Since one of the principal purposes of [the Ohio Corrupt Activities Act] is to emasculate the financial vitality of organized criminal activity, we believe that it is in conformity with the act that *a court should consider all the harm caused by an enterprise* no matter where such harm occurred, in considering appropriate financial sanctions.”); *State v. Grimm* (1995), 102 Ohio App.3d 356, 359 (“While we recognize that the Ohio Corrupt Activities Act may have been enacted to address activities more readily associated with ‘organized crime’, our review must focus on whether the elements of the statute have been satisfied by the evidence presented.”)

<sup>101</sup> Because R.C. 2923.34(B) provides a civil cause of action for what is otherwise a criminal offense (violation of R.C. 2923.32(A)(1)), the provisions set forth in R.C. 2901.23 apply with equal force and effect in a civil action. To conclude otherwise would require a court to similarly disregard the provisions of every other criminal statute which provide force and effect to the OCAA statute, such as criminal statutes that set forth the elements of enumerated incidents of corrupt activity.

(B) When strict liability is imposed for the commission of an offense, a purpose to impose organizational liability shall be presumed, unless the contrary plainly appears.

Here, the OCAA plainly seeks to impose organizational liability. Plaintiffs' Complaint clearly alleges that the offenses were committed by Defendants' agents within the scope of their employment (if not Defendants themselves), and that Defendants tolerated or authorized this behavior amongst their employees. Consequently, organizational liability is permitted under general criminal liability principles articulated in the Ohio Revised Code.

Further, in *Rowland v. Mutual Life Ins. Co. of New York*, the Court specifically considered whether a plaintiff's RICO count must be dismissed on the theory that *respondent superior* does not apply in RICO claims.<sup>102</sup> The court held as follows:

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We are of the opinion that the doctrine is applicable to RICO claims except where the application of the doctrine would transform the alleged RICO "enterprise" into a liable "person" through the acts of the enterprise's employees. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349 (3d Cir.1987). We have reviewed the reasoning of the Court in *Rush v. Oppenheimer & Co., Inc.*, 628 F.Supp. 1188 (S.D.N.Y.1985) and do not find it in material conflict with *Petro-Tech*.

Further, where RICO defendants have "ratified or authorized the alleged fraudulent scheme, they would be directly liable."<sup>103</sup>

Despite Defendants' contentions, Plaintiffs' Complaint obviously offers far more than "conclusory allegations" that Defendants actively perpetrated the criminal scheme alleged in the predicate acts. It further alleges that Defendants ratified or authorized the corrupt behavior. As noted above, Plaintiffs' Complaint notes Defendants concessions that (1) they lack

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<sup>102</sup> *Rowland v. Mutual Life Ins. Co. of New York* (S.D. Ohio, 1988), 689 F.Supp. 793.

<sup>103</sup> *Id.*

the resources to check for unlawful voter registration cards; and (2) they refrain from firing canvassers who committed bribery.<sup>104</sup> The Complaint separately alleges top-down control; cover-ups of corruption; a scheme targeted towards inflating the number of unlawfully registered voters; Defendants solicited and/or procured ACORN employees to commit the predicate acts, and aided or abetted them in doing so; Defendants' lawbreaking has occurred for over a decade, and is on the rise; the predicate acts were explicitly or implicitly authorized by Defendants; policies pursued by Defendants that encouraged unlawful voter registration; that the corrupt activity is Defendants regular way of conducting business; and that Defendants hiring and training practices encourages unlawful voter registration.<sup>105</sup>

These allegations alone, and particularly when aggregated with the massive and lengthy pattern of corrupt activity itself, clearly establish that Defendants are either directly liable or vicariously liable for the acts of ACORN canvassers.

#### **F. Proceeds**

Defendants correctly note that Plaintiffs' Complaint, in order to state a claim related to proceeds, must allege that Defendants have derived proceeds from the pattern of corrupt activity, and used the proceeds in a manner than injures, or threatens to injure Plaintiffs. Plaintiffs' Complaint does just that. Paragraph 13 of Plaintiffs' Complaint alleges the unlawful acquisition of proceeds in the form of unlawfully funneled government money, and Paragraph 46 alleges the receipt of proceeds. Meanwhile, the Complaint is replete with references to money unlawfully paid to ACORN by Project Vote for political purposes.

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<sup>104</sup> Id., at Paragraphs 72-74.

<sup>105</sup> Id., at Paragraph 14, 17, 35, 48, 51, 55, 64-67, 111, 118.

That this money is used to injure Plaintiffs is axiomatic. Plaintiffs allege that they have been injured through Defendants corrupt activity, which obviously involves the payment of employees, etc. Consequently, every incident of corrupt activity constitutes an unlawful use of proceeds to injure Plaintiffs.

### **CONCLUSION**

Given all of the aforementioned reasons, Defendants' Motion to Dismiss Plaintiffs First Amended Complaint must be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 8<sup>th</sup> day of January, 2008:

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