

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DEVON IT, INC., et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 10-cv-02899-JHS
	:	
IBM CORP., et al.,	:	
	:	
Defendants.	:	
	:	

PLAINTIFFS' RICO CASE STATEMENT

Plaintiffs, Devon IT, Inc. (“Devon IT”), Devon AD Tech, Inc. (“Devon AD”), and Devon IT (Europe), Ltd. (“Devon Europe”) (collectively, “Devon”), by and through their undersigned counsel, hereby respectfully submit the following RICO Case Statement pursuant to this Court’s order dated June 22, 2010:

- 1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. 1962(a), (b), (c), and/or (d).**

Response: The unlawful conduct is in violation of 18 U.S.C. 1962(c) and (d).

- 2. List the defendants and state the alleged misconduct and basis of liability of each defendant.**

Response: The defendants are Thomas M.S. Bradicich (“Bradicich”), Bernard S. Meyerson (“Meyerson”), James A. Gargan (“Gargan”), and Rodney C. Adkins (“Adkins”) (collectively, the “STG Defendants”) and IBM Corporation (“IBM”).

The STG Defendants intentionally misrepresented the market potential of the projects in which they sought investment from Devon and, in at least one instance, continued to demand funding from Devon in a project that already had been cancelled. The purpose of the conduct

was to enhance the apparent profitability of IBM's hardware group ("STG" or the "Systems and Technology Group").

IBM aided and abetted the activities of the STG Defendants by participating in several of the overt acts through which the STG Defendants effectuated their racketeering activity.

3. List alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

Response: In addition to the STG Defendants and IBM, plaintiffs are aware of Jan Janick ("Janick"), David Tjon ("Tjon") and Robert Moffat ("Moffat"). Janick was the IBM Vice President of Modular Development. He attended at least one meeting with Bradicich, at which he misrepresented the market potential of various products.

Tjon participated with Meyerson and Adkins in misrepresenting the benefits to Devon of alternative parts programs.

Moffat, at relevant times during 2008 and until February 2009, was a Senior Vice President of IBM and the Group Executive of STG. In that capacity, he formally directed and controlled the activities of the STG Defendants.

4. List the alleged victims and state how each victim was allegedly injured.

Response: The victims are Devon IT, Inc., Devon AD Tech, Inc. and Devon IT (Europe), Ltd. (collectively referred to, as indicated above, as Devon). The deceptions of the STG Defendants led them collectively to invest \$12,000,000 in the projects of the STG Defendants.

To fund those investments, Devon borrowed funds from Claret Capital, Inc. ("Claret"), the consideration for which included not only interest payments but also an equity share in the Devon entities. When the scheme of the STG Defendants led to Devon's inability to repay the

Claret loans, Claret obtained a judgment against Devon and one of its officers in the amount of \$3,449,000.

Devon also reorganized its entire business model to accommodate its various partnerships with the STG Defendants, losing more than \$50 million in the process.

5. Describe in detail the pattern of racketeering activities or collection of unlawful debts alleged for each RICO claim. The description of the racketeering pattern shall include the following information:

a. List the alleged predicate acts and specific statutes that were allegedly violated;

Response: The predicate acts were wire fraud, in violation of 18 U.S.C. 1343. The fraud consists of a wide-spread Ponzi scheme, extending over a period of nearly five years, involving the solicitation of \$12,000,000 in investments from Devon for two information technology projects (the Blade and iDataPlex projects) that Devon agreed to fund based on the STG Defendants' fraudulent representations and revenue projections. The STG Defendants intentionally misrepresented the market potential of the products they touted and continued to seek funding from Devon even after the cancellation of one of those projects. As part of the scheme, the STG Defendants repeatedly and intentionally misled Devon into believing that its failing relationship with IBM would continue to expand. Part of the scheme also involved the insinuation of Defendant Bradicich into a position of responsibility at Devon, which enhanced the ability of the STG Defendants to maintain Devon's participation in the investments. The funds that Devon provided to the STG Defendants in fact were not expended on the projects for which they were solicited, but rather for other purposes of the STG Defendants. The interstate wires and mails were used to transmit numerous fraudulent communications in furtherance of the scheme in general and the predicate acts in particular.

b. Provide the date of each predicate act, the participants in each predicate act, and a description of the facts constituting each predicate act;

Response: The enterprise operated through soliciting investments, and much of that activity occurred in a lengthy series of face-to-face meetings, facilitated by routine business communications and transmissions of funds. The summary of predicate acts below focuses not on the high-level goals and purposes of the enterprise, but rather on a series of specific acts involving the interstate transmission of funds or information for which documentary proof is most readily available.

1. The STG Defendants solicited and received numerous payments from Devon on the Blade and iDataPlex projects. Specifically, payments were transmitted on January 5, 2006 (\$500,000), December 18, 2006 (\$1,500,000), June 11, 2007 (\$500,000), September 28, 2007 (\$2,000,000), October 24, 2007 (\$2,000,000), December 20, 2007 (\$2,500,000), and March 3, 2008 (\$3,000,000). The solicitation and receipt of those payments was integral to the racketeering activity. Each of those payments was transmitted by wire.

2. On September 20 and September 26, 2007, Adkins and Meyerson caused invoices to be sent to Devon for payments due under the Blade and iDataPlex agreements.

3. On June 25, 2007 and January 15, 2008, Bradicich sent emails seeking investments in GeeVee, Inc., a company controlled by Bradicich's son, in furtherance of the racketeering activity.

4. On October 3, 2007, Meyerson fraudulently advised Devon by email that Intel had committed to invest in the iDataPlex project.

5. In January 2008, without advising Devon, the STG Defendants cancelled the Blade project and used interstate communications to direct FoxConn to cease manufacturing efforts under that project.

6. On February 19, 2008, Gargan sent an email seeking payment from Devon under the investments with the STG Defendants.

- c. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the “circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). Identify the time, place and substance of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;**

Response: The RICO claim is based on wire fraud. The answers to item b. above specify for each of the alleged predicate acts the time, place, and substance of the alleged misrepresentations, and the identity of the persons to whom and by whom the alleged misrepresentations were made.

- d. State whether there has been a criminal conviction for violation of any predicate act;**

Response: No.

- e. State whether civil litigation has resulted in a judgment with regard to any predicate act;**

Response: No.

- f. Describe how the predicate act forms a “pattern of racketeering activity;” and**

Response: The fraudulent misrepresentations and solicitations of funds are part of a Ponzi scheme, the principal purpose of which is to use the lure of IBM’s reputation to lull Devon (and similarly situated potential business partners) into contributing funds to the STG Defendants. The STG Defendants, in turn, use those funds not for the purpose of advancing the purported investment projects, but rather to improve the apparent financial performance of STG and, on

information and belief, to palliate concerns of other previously solicited business partners. Each of the predicate acts discussed above contributed to this pattern by (a) helping to obtain investments from Devon; (b) persuading Devon that the investments would be profitable; or (c) mitigating Devon's concerns about problems with previous investments.

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe the alleged relationship and common plan in detail.

Response: The predicate acts relate to each other in that the acts were performed as part of a coherent common plan to use intentional misrepresentations about business opportunities to obtain funds from Devon and similarly situated potential business partners that would improve the apparent financial performance of STG.

6. Describe in detail the alleged "enterprise" for each RICO claim. A description of the enterprise shall include the following:

a. state the name of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

Response: The enterprise is STG, IBM's hardware division.

b. a description of the structure, purpose, functions and course of conduct of the enterprise;

Response: STG is a business component of IBM. Its purpose, functions, and course of conduct are to coordinate IBM's design, development, marketing and sale of tangible information technology products worldwide.

c. A statement of whether any defendants are employees, officers or directors of the alleged enterprise;

Response: All of the STG Defendants were employees of STG at the relevant time, and STG is a component of IBM.

d. A statement of whether any defendants are associated with the alleged enterprise;

Response: The STG Defendants at all relevant times were employed by the enterprise, and the enterprise was a component of IBM.

e. A statement of whether plaintiff is alleging that the defendants are individuals or entities separate from the alleged enterprise or that the defendants are the enterprise itself, or members of the enterprise;

Response: The enterprise and the defendants are not coextensive. STG has numerous lawful activities beyond the scope of the pattern or racketeering activity or the other activities of the STG Defendants.

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, an explanation of whether such defendants are perpetrators, passive instruments or victims of the alleged racketeering activity.

Response: The STG Defendants and IBM are themselves neither the enterprise nor members of the enterprise. They are perpetrators.

7. State and describe in detail whether plaintiff is alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

Response: Plaintiffs are alleging that the pattern and the enterprise are separate. The enterprise is STG, which engages in the legitimate functions of developing, marketing, and selling information technology products. The pattern of racketeering activity involves the fraudulent solicitation and misdirection of investments by the STG Defendants, aided and abetted by IBM.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual daily activities of the enterprise, if at all.

Response: The enterprise (STG) engages in the legitimate functions of design, development, marketing and sale of various information technology products worldwide, while the pattern of

racketeering activity involves a series of fraudulent misrepresentations and behavior by which the STG Defendants enticed Devon to invest in the Blade and iDataPlex projects.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

Response: The enterprise, STG, received over \$12,000,000 in investment funds from Devon, of which the STG Defendants used a substantial portion to inflate the earnings of STG, to fund other projects with other business partners, or for some purpose other than the Blade and iDataPlex projects in which Devon intended to invest.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

Response: STG is engaged in interstate and foreign commerce. Specifically, it designs, develops, markets and sells various information technology products worldwide.

11. If the complaint alleges a violation of 18 U.S.C. 1962(a), provide the following: (a) state who received the income derived from the pattern of racketeering activity or through the collection of unlawful debt; and (b) describe the use or investment of such income.

Response: Not applicable; plaintiffs are not charging a violation of 18 U.S.C. 1962(a).

12. If the complaint alleges a violation of 18 U.S.C. 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

Response: Not applicable; plaintiffs are not charging a violation of 18 U.S.C. 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. 1962(c), provide the following:

(a) state who is employed by or associated with the alleged enterprise.

Response: The STG Defendants are employed by the enterprise. IBM is associated with the enterprise in the sense that the enterprise is a component of IBM.

(b) state whether the same entity is both the liable “person” and the “enterprise” under 18 U.S.C. 1962(c).

Response: The same entity is not both the liable “person” and the “enterprise” under 18 U.S.C. 1962(c). The persons are the STG Defendants, aided and abetted by IBM, and the enterprise is the STG division of IBM.

14. If the complaint alleges a violation of 18 U.S.C. 1962(d), describe in detail the facts showing the existence of the alleged conspiracy.

Response: With respect to the STG Defendants, the pervasive participation in the overt acts of the pattern of racketeering activity shows a common plan and agreement to engage in the pattern of racketeering activity.

With respect to IBM, responsible officials of IBM outside of the enterprise had actual knowledge of much of the pattern of racketeering activity and acted repeatedly with the intention to facilitate the racketeering activities of the STG Defendants. Among other things, IBM’s general counsel participated in the fraudulent inducement of the agreements that restructured the obligations of Devon and STG under the Blade and iDataPlex investments. IBM’s general counsel also participated in the structuring of Bradicich’s role on the advisory boards of the various Devon entities.

15. Describe the alleged injury to business or property.

Response: The injury was the fraudulently induced investment of Devon in the Blade and iDataPlex projects, together with the losses from the related developmental expenses and general reorganization of the operations of Devon to support those investments.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

Response: Devon invested in the Blade and iDataPlex projects and reorganized its operations to support those investments. If the STG Defendants had not misled Devon, Devon would not have made those investments or incurred any of the related losses and expenditures.

17. List the damages sustained by reason of the violation of 18 U.S.C. 1962, indicating the amount for which each defendant is allegedly liable.

Response: Devon has incurred damages in excess of \$12,000,000 (before trebling) from its investments in the projects of the STG Defendants, and additional damages of \$50,000,000 (before trebling) from the redirection of its entire business operations in order to focus on those relationships.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

Response: The only federal cause of action is under RICO, as discussed above.

19. List all pendent state claims, if any.

Response: Plaintiffs assert pendent state law claims for breach of fiduciary duty, breach of contract, common law fraud and fraud in the inducement, prima facie tort—Restatement (Second) of Torts § 870, negligence and participation in a breach of fiduciary duty.

Respectfully submitted,

Dated: July 26, 2010

MITTS MILAVEC, LLC

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CERTIFICATE OF SERVICE

I, Maurice R. Mitts, Esquire, hereby certify that a true and correct copy of the foregoing RICO Case Statement was electronically served upon the following counsel of record via the Court's ECF system on this 26th day of July, 2010:

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