IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 07-CV-00849-FJG**
	)	
GENERAL ELECTRIC COMPANY, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF GE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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INTRODUCTION

This case represents another in a long series of frivolous lawsuits brought by Medical Supply Chain and/or Samuel K. Lipari regarding Medical Supply Chain's purported attempt to enter into the health care supplier/distribution market. On December 7, 2007, Plaintiff filed his Amended Complaint[1] in this case. The Amended Complaint represents nothing more than Plaintiff's most recent attempt to harass General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital") and GE Transportation Systems Global Signaling, LLC ("GE Transportation") (collectively, the "GE Defendants").

Although Plaintiff's spurious and outlandishly expansive Amended Complaint defies easy summary, the gist of Plaintiff's claims is that the GE Defendants, along with numerous other parties and non-parties have conspired to prevent Plaintiff's entry into the health care supply market by obstructing Plaintiff's efforts to obtain financing and office space in a particular building in Missouri. Plaintiff seeks over $2 billion in damages and has attempted to assert claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Hobbs Act and various common law theories.

Plaintiff's Amended Complaint, full of irrelevant and unsupported allegations, lacks the factual allegations necessary to plead a right to recovery under any of Plaintiff's theories of liability, but most notably RICO and the Hobbs Act. Plaintiff's federal law claims simply fail to state a claim upon which relief may be granted, and, as such, the Amended Complaint should be dismissed with prejudice and without an opportunity for

[1] Although Plaintiff has titled his latest pleading as the "Complaint," this is actually Plaintiff's Amended Complaint, and will be referred to as such in this brief.

re-pleading because of the patent frivolousness of Plaintiff's claims and the corresponding abuse of process by Plaintiff.

I. History of Similar Frivolous Lawsuits by Plaintiff.

Unfortunately, this is not the first time that a substantial amount of time, expense and judicial resources have been spent on addressing Plaintiff's lengthy, and wholly unsupported, allegations. Judges in both the U.S. District Court for the District of Kansas and the Western District of Missouri have been forced to wade through many of these same prolix and incomprehensible claims asserted by the Plaintiff over the last five years. These claims are summarized below.

A. US Bancorp I Lawsuit.

On November 12, 2002, Medical Supply Chain, Inc.[2] ("MSC"), filed suit against US Bancorp (and a host of others) in federal court in Kansas. *See Medical Supply Chain, Inc. v. US Bancorp, NA, et al*., Civil Action No. 02-2539-CM (Judge Carlos Murguia) ("*US Bancorp I*"). In that suit, MSC claimed that in March of 2002 it sought to establish a banking relationship with US Bancorp. US Bancorp, however, refused to establish the escrow accounts requested by MSC because of the "know your customer" requirements of the USA Patriot Act. In addition to asserting various state law claims in its Complaint, MSC alleged antitrust claims under the Sherman Act and Clayton Act, as well as violations of the Hobbs Act. Essentially, MSC was alleging that the defendants refused to provide financing to MSC in order to prevent MSC from entering the healthcare supply market, thereby perpetuating their monopoly over this market. MSC alleged damages in excess of $943 million and sought declaratory relief.

[2] Medical Supply Chain, Inc. is the dissolved corporation of which Mr. Lipari was the chief executive officer. Lipari now purports to bring the current lawsuit as "the sole assignee of the dissolved corporation Medical Supply Chain, Inc." (Doc. 6, p. 1)

On June 16, 2003, the United States District Court for the District of Kansas dismissed MSC's Complaint in *US Bancorp I*. The Court stated in the dismissal Order that some of MSC's allegations were "completely divorced from rational thought." *Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2003 WL 21479192, at *8. The Court further admonished MSC's counsel "to take greater care in ensuring that the claims he brings on his client's behalf are supported by the law and the facts." *Id*. at *6. Following the dismissal by the district court, MSC appealed to the Tenth Circuit. Not only did the Tenth Circuit affirm the dismissal of MSC's Complaint, it remanded the case to the district court to impose sanctions against Plaintiff and Plaintiff's counsel for the prosecution of a frivolous appeal. *See Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2004 WL 2504653 (10th Cir. Nov. 8, 2004); *see also Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2005 WL 2122675 (D. Kan. May 13, 2005).[3]

B. GE I Lawsuit.

On June 18, 2003 (just two days after the district court dismissed MSC's claims in the *US Bancorp I* lawsuit), MSC filed a lawsuit against the GE Defendants in federal court in Kansas. *See Medical Supply Chain, Inc. v. General Electric Company, et al*., Civil Action No. 03-2324-CM (Judge Carlos Murguia) ("*GE I Lawsuit*"). In that suit, MSC claimed that the GE Defendants prevented MSC's entry into the health care supplier/distribution market by refusing to sublease a building or provide financing to MSC. More specifically, MSC alleged that the GE Defendants (and GE's CEO Jeffrey Immelt) violated federal antitrust laws pursuant to the Sherman Act and the Robinson-

[3] On November 28, 2006, Samuel Lipari filed another lawsuit against US Bancorp NA and U.S. Bank NA in the Circuit Court of Jackson County, Missouri, alleging the same state law claims that were dismissed without prejudice in *U.S. Bancorp I*. This lawsuit was subsequently removed to the Western District of Missouri, and then transferred to the U.S. District Court for the District of Kansas, where it is currently pending as Case No. 07-2146-CM. ("*US Bancorp II*").

Patman Act. MSC also asserted state common law claims against the GE Defendants, including breach of contract. Boiled down to its essence, MSC was alleging that the GE Defendants refused to sublease a building and provide necessary financing to MSC so as to prevent MSC from entering the healthcare supply market, thereby ensuring that Defendants' "cartel" would continue to dominate the market. Among other remedies, MSC sought monetary damages in the amount of profits "that it would have made for the next four years of operations had it been allowed to enter the market," as well as the equity it would have gained from the purchase of the building, and the cash payment it would have received from GE for the buy-out of its lease.

On January 29, 2004, the district court dismissed all of MSC's antitrust claims with prejudice, and declined to retain jurisdiction over the state law claims. *See Medical Supply Chain, Inc. v. General Electric Company, et al*., 2004 WL 956100 (D. Kan. Jan. 29, 2004). MSC appealed the district court's ruling to the Tenth Circuit. On July 26, 2005, the Tenth Circuit affirmed the district court ruling and remanded the matter to the district court for a determination of the proper sanctions to impose against MSC for filing suit against Jeffrey Immelt in his individual capacity. *See Medical Supply Chain, Inc. v. General Electric Company, et al*., 2005 WL 1745590 (10th Cir. July 26, 2005).

C. Neoforma Lawsuit.

On March 9, 2005, MSC filed a lawsuit in the U.S. District Court for the Western District of Missouri against Neoforma, Inc., Novation, LLC, US Bancorp, and various other corporate entities and individuals. *See Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, No. 05-2010-CV-W-ODS. On June 15, 2005, Judge Ortrie D. Smith granted defendants' motion to transfer this case to the District of Kansas, and it was subsequently

transferred and assigned to Judge Carlos Murguia. *See Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, No. 05-2299-CM ("*Neoforma Lawsuit*"). In this lawsuit, MSC alleged that the defendants conspired to restrain trade in the hospital supply market. MSC asserted claims under the Sherman Act, Clayton Act, the Declaratory Judgment Act, RICO, the Hobbs Act and the USA PATRIOT Act, in addition to numerous common law claims. Similar to its previous lawsuits, MSC was alleging that the defendants improperly prevented MSC from obtaining the necessary financing (from US Bancorp and GE Capital) and office space (from GE) to enter the hospital supply market. Although not named as defendants in that action, MSC specifically alleged that GE, GE Capital and GE Transportation (i.e., the GE Defendants in the present lawsuit) were co-conspirators with the named defendants in the *Neoforma* case.

On March 7, 2006, the district dismissed all of MSC's federal claims against all defendants with prejudice, and declined to retain jurisdiction over the state law claims. *Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, 419 F.Supp.2d 1316, 1335-36 (D. Kan. 2006). Of particular note in the present case, the Court in *Neoforma* held that MSC's RICO and Hobbs Act claims failed to state claims for which relief may be granted. *Id*. at 1328-30. In addition, the Court determined that MSC's Complaint, as a whole, violated the pleading guidelines set forth in Federal Rule of Civil Procedure 8(a) and 8(e)(1). *Id*. at 1331. Specifically, the Court found that MSC's 115-page, 613 paragraph Complaint "falls miles from Rule 8's boundaries." *Id*.

In addition to dismissing MSC's claims, the district court imposed sanctions on MSC's attorney, Bret Landrith,[4] as well as MSC's CEO and sole shareholder, Mr. Lipari. *Id*. at 1333-35. In setting forth the basis for its decision to sanction Mr. Lipari, the Court noted that Lipari "[took] responsibility for the decisions to knowingly bring the instant lawsuit after the result of plaintiff's previous attempts at litigation." *Id*. at 1334. The Court hoped that sanctioning Lipari, in addition to Landrith, would "serve[] to deter both from future frivolous filings." *Id*. at 1335.

II. The Present Lawsuit and Plaintiff's Amended Complaint.

On March 28, 2006, Samuel Lipari, purportedly as the "Statutory Trustee of Dissolved Medical Supply Chain, Inc.," filed suit against the GE Defendants (and others) in the Circuit Court of Jackson County, Missouri. This lawsuit asserted the same breach of contract claims that were asserted by MSC in the *GE I* lawsuit, namely, that the GE Defendants failed to sublease a building to MSC and to provide MSC with the financing necessary to purchase the building and capitalize its business. Just as in the *GE I* lawsuit, Plaintiff sought monetary damages in the amount of profits "that it would have made for the next four years of operations had it been allowed to enter the market," as well as the equity it would have gained from the purchase of the building, and the cash payment it would have received from GE for the buy-out of its lease. However, this time Plaintiff sought a specific monetary amount from the GE Defendants -- $450,000,000.

On October 10, 2007, Plaintiff filed a "Motion for Leave to Amend Under RMSO 55.33", which sought leave from the Circuit Court to file an Amended Petition to add new parties and new claims (including claims under RICO and the Hobbs Act) to this

[4] By the time that this decision was rendered by Judge Murguia, Mr. Landrith had already been disbarred by the Supreme Court of Kansas for, among other things, filing frivolous pleadings and motions. *See In re Landrith*, 124 P.3d 467 (Kan. 2005).

lawsuit. The Circuit Court granted Plaintiff's motion, and the GE Defendants removed the case to this Court on November 9, 2007 inasmuch as they were put on notice that Plaintiff intended to file an amended pleading asserting federal claims.

Pursuant to the order of this Court, Plaintiff filed his Amended Complaint on December 7, 2007. (Doc. 6) Although this amended pleading attempts to assert claims under RICO and the Hobbs Act, it certainly does not match the proposed amended pleading that Plaintiff had attached as an exhibit to his motion for leave to amend filed in Missouri state court. Specifically, the current Amended Complaint contains an additional 29 pages (and 140 paragraphs) of rambling, and often incoherent, accusations which were not included in the proposed amended pleading submitted in state court. In Plaintiff's Amended Complaint, he is seeking, as the alleged sole assignee of MSC, Inc., $700,000,000 on his breach of contract and tortious interference claims, in addition to his prayer for $1,350,000,000 (after trebling) for the alleged RICO violations.

Plaintiff's use of salacious, unsupported and unconnected allegations to turn a straightforward breach of contract case into a smear campaign through the assertion of baseless RICO and Hobbs Act claims should not be permitted by this Court. Plaintiff's latest attempt to abuse the legal process should meet the same fate that Plaintiff's previous lawsuits ultimately met – dismissal.

ARGUMENT

I. Plaintiff's Amended Complaint Should Be Dismissed With Prejudice for Failing to Comply With Fed. R. Civ. P. 8(a)(2) and 8(e)(1).

Plaintiff has filed an Amended Complaint with this Court which is interminable, utterly confusing and nearly indecipherable. By filing this 68-page/403 paragraph Amended Complaint, Plaintiff has completely disregarded the mandates set forth by

Federal Rules of Civil Procedure 8(a)(2) and 8(e)(1). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." For its part, Rule 8(e)(1) requires that "[e]ach averment of a pleading be simple, concise and direct." Plaintiff's Amended Complaint does neither.

The fact that this case involves RICO claims does not serve as a justification for Plaintiff's non-compliance with these rules. The Seventh Circuit has noted that "the caselaw is clear that, although RICO complaints often need to be somewhat longer than many complaints, RICO complaints must meet the requirements of Rule 8(a)(2) and Rule 8(e)(1)." *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 776 (7th Cir. 1994) (citations omitted). Further, the *Vicom* court noted that "the particularity demands of pleading fraud under Rule 9(b) in no way negate the commands of Rule 8." *Id.* (citations omitted). After noting that the plaintiff's amended complaint violated the letter and the spirit of Rule 8(a), the *Vicom* court stated that "the district court should have given more serious consideration to dismissing [plaintiff's] amended complaint with prejudice." *Id*.

There is compelling precedent for dismissing Plaintiff's Amended Complaint for violations of Rule 8. Judge Murguia, in the *Neoforma* lawsuit, found that Plaintiff's complaint in that case fell "miles from Rule 8's boundaries." *Neoforma, Inc.*, 419 F.Supp.2d at 1331. As such, the Court determined that "plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." *Id.* Notably, the Court also did not allow Plaintiff an opportunity to attempt to correct the deficiencies by filing an amended pleading. *Id.* at 1332.

In affirming a dismissal with prejudice for failure to comply with Rule 8 requirements, the Ninth Circuit provided the following reasoning in support of its decision:

> The appellees herein have had to spend a large amount of time and money defending against Cissna's poorly drafted proceedings in this and related actions. The right of these defendants to be free from this costly and harassing litigation and the rights of litigants awaiting their turns to have other matters resolved must be considered and the judgment of dismissal with prejudice affirmed.

Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 675 (9th Cir. 1981). The same considerations are present in the case at bar. The resources of both the Court and the GE Defendants should not be consumed with attempting to wade through Plaintiff's morass of indecipherable "facts" and argument simply in an attempt to ascertain whether a valid claim is somewhere buried within. The GE Defendants request that Plaintiff's Amended Complaint be dismissed with prejudice, and that Plaintiff not be allowed to file another amended pleading.

II. Plaintiff's Claims Under RICO and The Hobbs Act Should Be Dismissed Under Rule 12(b)(6) For Failure to State a Claim For Which Relief May Be Granted.

As discussed above, Plaintiff's rambling and largely incoherent Amended Complaint have made it nearly impossible to decipher exactly what federal claims the Plaintiff has attempted to allege. In addition, Plaintiff has often failed to delineate the specific parties against whom he is making various allegations. However, as best as can be determined by the GE Defendants, Plaintiff appears to be attempting to assert federal claims under both RICO (18 U.S.C. § 1962) and The Hobbs Act (18 U.S.C. § 1951). Ultimately, neither of these claims can survive a Rule 12(b)(6) analysis, and therefore should be dismissed.

A. Standard of Review.

When ruling on a motion to dismiss under Rule 12(b)(6), "a district court must accept the allegations contained in the complaint as true, and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party." *Breedlove v. Earthgrains Baking Cos.*, 140 F.3d 797, 198-99 (8th Cir. 1998) (citations omitted). In ruling on a motion to dismiss, the court "may consider some materials that are part of the public record . . . as well as materials that are necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (quotations omitted). The Court must grant the dismissal "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." *Riley v. St. Louis County*, 153 F.3d 627, 630 (8th Cir. 1998) (citations omitted).

B. No Private Right Cause of Action Exists Under The Hobbs Act.

Plaintiff generally alleges in his Amended Complaint that "[t]he defendants committed violations of The Hobbs Act, 18 U.S.C. § 1951." (Doc. 6, ¶ 181) Despite Plaintiff's failure to clarify whether he is alleging that some, or all, of the defendants violated the Hobbs Act, Plaintiff's claim must fail for a much more basic reason. The Eighth Circuit has determined that no private right cause of action exists under the Hobbs Act.

In *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402 (8th Cir. 1999), the Eighth Circuit addressed, as a matter of first impression, whether private rights of action are allowed under 18 U.S.C. § 1951 (Hobbs Act). After noting that other courts have found the Hobbs Act to be a bare criminal statute with no support for a private cause of action, the Court held as follows:

> We agree that neither the statutory language of 18 U.S.C. § 1951 nor its legislative history reflect an intent by Congress to create a private right of action. We hold, therefore, that the district court correctly dismissed the Wisdoms' claims based on a private right of action under 18 U.S.C. §§ 1341, 1343, and 1951.

Id. at 409. Based upon the foregoing, Plaintiff has no standing to assert a private cause of action based solely on purported violations of the Hobbs Act (18 U.S.C. § 1951), and he has thus failed to state a claim for which relief may be granted. As such, Plaintiff's claim(s) related to the Hobbs Act must be dismissed with prejudice.[5]

C. Plaintiff Has Failed to State a Cognizable Claim Under the RICO Statute.

In order to recover under the Racketeering Influenced Corrupt Organizations Act (RICO), the Plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Wisdom*, 167 F.3d at 406 (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985)). Plaintiff has failed to establish the predicate acts of racketeering and the pattern elements of the statutory requirements and, consequently, fails to assert a viable RICO claim. Furthermore, Plaintiff fails to adequately allege an injury to business or property as a result of the alleged RICO violation. This Court should therefore dismiss Plaintiff's RICO claims in the Amended Complaint with prejudice.

1. Plaintiff's Allegations Regarding the Racketeering Activity are Frivolous and Defective.

Plaintiff attempts to establish a pattern of racketeering by alleging predicate acts that are deficient on their face. Although Plaintiff appears to be asserting fourteen

[5] Plaintiff should have been aware that no private right cause of action exists under the Hobbs Act inasmuch as Judge Murguia, in the *US Bancorp I* lawsuit, dismissed Plaintiff's Hobbs Act claim on this very ground. *See US Bancorp I*, 2003 WL 21479192 at *6 (citing *Wisdom*).

separate predicate acts in his Amended Complaint, each of these alleged acts can be placed into one of two categories: extortion or fraud.[6] Plaintiff appears to be alleging eleven separate acts of extortion (or attempted extortion), and three separate acts of fraud. However, the allegations supporting each of these acts are insufficient to establish a pattern of racketeering as required by RICO, and thus Plaintiff's RICO claim fails as a matter of law.

a. Predicate Acts Related to Extortion.

Plaintiff attempted to allege eleven separate predicate acts involving extortion or attempted extortion. Specifically, these are delineated in Plaintiff's Amended Complaint as "Racketeering Acts" 1, 2, 3, 4, 5, 6, 7, 8, 9, 12 and 13. None of these alleged acts, however, constitute extortion or attempted extortion.

Significantly, Plaintiff's allegations pertaining to the majority of these extortion-related predicate acts do not allege any improper conduct by the GE Defendants. Specifically, Plaintiff's allegations with respect to Acts 2, 4, 6, 8, 9, 12 and 13 fail to assert any unlawful act by any of the GE Defendants. In fact, one of Plaintiff's alleged

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[6] Plaintiff has attached the following labels to the fourteen predicate acts (or "Racketeering Acts") alleged in his Amended Complaint:

1. Attempted Extortion to Prevent the Petitioner from Bringing his Antitrust Claim;
2. Attempted Extortion of Petitioner's Kansas Legal Representation ;
3. Extortion of Petitioner's Legal Representation in the Western District of Missouri;
4. Extortion Against Independence Examiner Newspaper;
5. Attempted Extortion of Counsel Over Petitioner's Contract Claims;
6. Extortion over Petitioner's Replacement Counsel David Sperry;
7. Extortion over Petitioner's Replacement Counsel James C. Wirken;
8. Attempted Extortion over Judy Jewsome for Helping Petitioner's Witness David Price;
9. Attempted Extortion over Associate Donna Huffman a Potential Replacement Counsel;
10. GE, GE Transportation and GE Capital Defendants' Fraud in Removal to Federal Court;
11. June 5th Fraudulent Testimony of Defendant Bradley J. Schlozman;
12. Attempted Extortion Over Petitioner's Witness, Bret D. Landrith;
13. Attempted Extortion Over a Potential Replacement Counsel; and
14. Fraudulent Misrepresentations on Form 10-K's by Defendant Jeffrey R. Immelt.

(Emphasis added.)

extortion-related predicate acts, Act 6, is devoid of any allegations of wrongful conduct by anyone. (Doc. 6, ¶¶ 238-240) Some of the other alleged acts of extortion focus on the purported conduct of a diverse group of individuals and organizations (all of which are non-parties to this case), such as various Kansas State Bar officials (Acts 2, 8, 9, 12, 13), the law firm of Lathrop & Gage (Act 4), and Missouri Governor Matt Blunt (Act 4). Thus, most of the alleged acts of extortion do not implicate or even reference the GE Defendants.

The acts of "extortion" alleged by Plaintiff do not constitute extortion as pled. Under the Hobbs Act, extortion is defined as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. § 1951 (b)(2). Fatally, not one of the extortion-related predicate acts asserted by the Plaintiff has properly alleged that the GE Defendants obtained property from the Plaintiff.

The United States Supreme Court has directly addressed the "obtaining of property" requirement that must be established in any case where extortion is pled under either the Hobbs Act or common law. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the plaintiffs (a women's rights organization and various abortion clinics) claimed that the defendants (individual and corporate organizers of an antiabortion protest network) violated RICO by engaging in a nationwide conspiracy to shut down clinics through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. The Supreme Court's analysis of the plaintiffs' claims focused upon the "obtaining of property" language set forth in the Hobbs Act. Specifically, the Supreme Court noted that:

> There is no dispute in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. … But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. United States v. Nardello, 393 U.S. 286, 290, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969). To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Id. at 405-06. Consequently, the Supreme Court held that because defendants never obtained the property of the plaintiffs, the predicate acts of extortion had not been established, and thus there was no support for the plaintiffs' RICO claim which was founded upon the alleged acts of extortion. *Id*. at 411.

In the present case, Plaintiff alleged predicate acts of extortion are equally deficient. There is no allegation, and cannot be any such allegation, that any of the defendants (including the GE Defendants) obtained or attempted to obtain the Plaintiff's property. As such, each of Plaintiff's extortion-related predicate acts (i.e., Acts 1, 2, 3, 4, 5, 6, 7, 8, 9, 12 and 13) are fatally flawed and do not establish predicate acts sufficient to assert a viable RICO claim.

b. Predicate Acts Related to Fraud.

Plaintiff has attempted to allege three separate predicate acts involving fraud or fraudulent misrepresentation. Specifically, these are delineated in Plaintiff's Amended Complaint as "Racketeering Acts" 10, 11 and 14. However, as discussed below, these fraud-based predicate act allegations asserted by the Plaintiff are just as deficient as

Plaintiff's allegations pled in support of the extortion-based predicate acts. As such, they should meet the same fate.

First, Plaintiff's Tenth purported "Racketeering Act" does not sufficiently allege a predicate act of fraud. Plaintiff appears to be claiming that the GE Defendants, through their attorneys, committed fraud by removing the present case to this Court in 2006. This bizarre allegation is as untenable as it is ridiculous. Plaintiff altogether fails to allege who was defrauded, whether there was any reliance on the alleged fraudulent statements, and whether any damages resulted from the alleged fraud. It is certainly ironic that Plaintiff, who has now asserted federal claims and has shown a desire to pursue these claims in this Court, is at the same time alleging that fraud was committed in a previous removal of the case to this Court. Plaintiff's Tenth "Racketeering Act" fails to adequately plead a predicate act of fraud, and should be disregarded.

Plaintiff's Eleventh alleged "Racketeering Act" contains no allegations regarding conduct by the GE Defendants. Instead, these allegations focus on the purportedly "fraudulent testimony" given to the Senate Judiciary Committee by another named defendant (and former United States Attorney) Bradley J. Schlozman. Plaintiff's allegations related to the Eleventh "Racketeering Act" fail to allege a viable predicate act against the GE Defendants.

Plaintiff's alleged Fourteenth "Racketeering Act", references the named (but as of yet unserved) defendant Jeffrey Immelt (CEO of GE). The allegations fail to make any allegations against the GE Defendants. These allegations relate solely to Immelt's purported "fraud by omission" in "failing to disclose GE's liability to [Plaintiff] for the

breach of its real estate contracts with the [Plaintiff] in a Form 10-K corporate disclosure." (Doc. 6, ¶ 332)

Even if the GE Defendants were somehow implicitly implicated by the allegations made by Plaintiff against Immelt in Plaintiff's purported Fourteenth "Racketeering Act", these allegations of fraud necessarily fail for not being pled with particularity under Fed. R. Civ. P. 9(b). Rule 9(b) requires that in all averments of fraud, the circumstances constituting fraud "shall be stated with particularity." It has been widely held that the requirements of Rule 9(b) apply to fraud-based allegations contained within RICO complaints. *See Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982) (fraud-based RICO claim was not pled with particularity as required by Rule 9(b)). Plaintiff has failed to plead his Fourteenth "Racketeering Act" with the requisite particularity. There is no mention as to who was defrauded, reliance, what was obtained through the "fraudulent omission," and how Plaintiff was supposedly harmed by this conduct. Thus, Plaintiff's allegations related to the Form 10-K filing do not sufficiently plead a predicate act of fraud.

c. Without Pleading Any Sufficient Predicate Acts, All of Plaintiff's RICO Claims, Including RICO Conspiracy Under 18 U.S.C. § 1962(d), Necessarily Fail.

Although Plaintiff's Amended Complaint fails to state whether he is making RICO claims under 18 U.S.C. § 1962(a), (b) or (c), it makes little difference. In order to assert a valid claim under any of these provisions, Plaintiff must allege facially sufficient predicate acts of racketeering activity. As explained above, Plaintiff has completely failed to satisfy this requirement. Thus, he has failed to state a claim for which relief may be granted under § 1962(a), (b) or (c).

Additionally, Plaintiff appears to be attempting to assert a RICO conspiracy claim under 18 U.S.C. § 1962(d), which states that "[i]t should be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." However, when a plaintiff has failed to allege sufficient predicate acts under § 1962(a), (b) or (c), a conspiracy claim under § 1962(d) will not survive. In *VSA v. Von Weise Gear Co.*, 769 F.Supp. 1080 (E.D. Mo. 1991), the Eastern District of Missouri determined that "'a conspiracy claim under § 1962(d) will not lie when the Court has determined that the plaintiff has failed to state a claim under § 1962(c).'" *Id*. at 1085 (quoting *Police Retirement System v. Midwest Invest. Advisory Services, Inc*., 706 F.Supp. 708, 713 (E.D. Mo. 1989)). Consequently, the *VSA* court held that the "[p]laintiffs' failure to establish the predicate offenses or a pattern of racketeering activity mandates the dismissal of the RICO claims under 18 U.S.C. §§ 1962(c) and1962(d)." The same result is mandated here. Plaintiff's § 1962(d) claim has no foundation upon which to stand, and should be dismissed.

2. Plaintiff Has Not Adequately Pleaded the Pattern Element of a RICO Violation.

Plaintiff has also failed to allege the pattern required for a RICO claim. The Supreme Court has held that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicate acts are related and that they amount to or pose a threat of continued criminal activity." *H. J., Inc. v. Northwestern Bell Co*., 492 U.S. 229, 239 (1989). "It is this factor of continuity plus relationship which combines to produce a pattern." *Id*. (citation omitted). Relatedness may be established if the acts have the "same or similar purposes, results, participants, victims, or methods of commission." *Id*. at 240. Continuity, in turn, requires either "a closed period of repeated

conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* Thus, a plaintiff in a RICO action must allege either an "open-ended" pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a "closed-ended" pattern of racketeering activity (i.e., past criminal conduct "extending over a substantial period of time"). Even if the Court were to accept Plaintiff's allegations of racketeering conduct, they are insufficient to establish either an open-ended or closed-ended pattern. Not only are the individual predicate acts pled by Plaintiff not related, but there is no allegation connecting the GE Defendants to each of the alleged predicate acts.

3. Plaintiff Has Not Pleaded an Injury that Can be Redressed by the RICO Statute.

Finally, Plaintiff does not adequately allege an injury redressable under RICO. Courts have construed the requirement that a plaintiff establish an injury to business or property to require a showing of a concrete, financial loss. *See e.g., Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (rejecting a RICO claim where "the facts alleged do not establish proof of 'concrete financial loss,' let alone show that money was paid out as a result of [defendant's] alleged racketeering activity."); *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3rd Cir. 2000) ("[T]he injury to business or property element of section 1964(c) can be satisfied by allegations and proof of actual monetary loss, *i.e.*, an out-of-pocket loss."); *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625, 629 (N.D. Cal. 1993) (noting that "the requirement of a concrete financial loss proximately caused by the wrongful conduct of RICO defendants is not easily met" and dismissing car dealers' allegations of reduced profits resulting from manufacturer's wrongful refusal to supply them with popular vehicle models); *Oscar v. University*

Students Co-operative Ass'n, 965 F.2d 783, 785 (9th Cir.1992) (en banc) (injuries to property are not actionable under RICO unless they result in "tangible financial loss" to plaintiff). Any damages claimed by Plaintiff would necessarily be speculative inasmuch as he claims that MSC was never allowed into the hospital supply market. Plaintiff's fanciful allegations about billions of dollars in alleged lost profits fall far short of satisfying the pleading requirement of "concrete financial loss." This is especially true given that Plaintiff has claimed billions in loss because of the conduct of U.S. Bancorp, Neoforma and a host of other entities named as defendants in other lawsuits filed by Plaintiff. Plaintiff's RICO claim should therefore be dismissed.

PRAYER

WHEREFORE, for all of these reasons, the GE Defendants request that the Court dismiss Plaintiff's Amended Complaint with prejudice and grant Defendants all other relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 18th day of January, 2008, by first class mail, postage prepaid to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

__/s/ Michael S. Hargens_____