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.	)	

MOVING DEFENDANTS' CONSOLIDATED REPLY TO PLAINTIFF'S CONSOLIDATED OPPOSITION TO MOVING DEFENDANTS' SEPARATE MOTIONS TO DISMISS (DOCS. 11, 19, 32)

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ATTORNEYS FOR DEFENDANTS GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION, GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, LLC, HEARTLAND FINANCIAL GROUP, INC., CHRISTOPHER MCDANIEL AND STUART FOSTER

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Defendants General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, Heartland Financial Group, Inc., Christopher McDaniel and Stuart Foster (collectively, the "Moving Defendants") submit this consolidated reply to Plaintiff's brief in opposition to the Moving Defendants' motions to dismiss (Docs. 11, 19, 22).

I. INTRODUCTION.

As one district court has noted, "'[c]ivil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device.'" World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 530 F.Supp.2d 486, 495 (S.D. N.Y. 2007) (quotation omitted). As such, and "'[b]ecause the mere assertion of a RICO claim … has an almost inevitable stigmatizing effect on those named as defendants, … courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.'" Id. at 495-96 (*quoting* Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 655 (S.D. N.Y. 1996)). The case at bar is a prime example of a frivolous RICO case that should be dismissed at this early stage of the litigation, and Plaintiff's consolidated opposition to the motions to dismiss filed by the Moving Defendants does nothing to change this conclusion.

II. LEGAL ARGUMENTS AND AUTHORITIES.

A. Legal Analysis and Arguments Applicable to Plaintiff's Claims Against Either All, or Nearly All, of the Moving Defendants.

1. Plaintiff Lacks Standing To Assert A RICO Claim Against the Moving Defendants In That He Has Failed to Allege A Cognizable RICO Injury.

If for no other reason, Plaintiff has failed to state a valid RICO claim because he has failed to allege a cognizable RICO injury. Plaintiff's brief in opposition to the Moving Defendants' motions to dismiss does nothing to refute the fact that Plaintiff has

failed to allege a concrete, financial loss to his business or property as required by the RICO statutes. Without such a loss, Plaintiff lacks standing to assert a RICO claim against the Moving Defendants.

A plaintiff in a RICO case cannot recover for speculative losses or where the amount of damages is unprovable. Trs. of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech. Inc., 886 F.Supp. 1134, 1146 (S.D. N.Y. 1995). In fact, a RICO plaintiff must allege and establish a concrete, financial loss to his business or property in order to have standing to assert a RICO claim. *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."); 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").

The case of World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 530 F.Supp.2d 486 (S.D. N.Y. 2007) is instructive. In Jakks Pacific, the plaintiff (licensor) brought a RICO claim against defendants (licensees) alleging, *inter alia*, that the defendants defrauded plaintiff and deprived it "of the intangible right of honest services from [plaintiff's] intellectual property licensing agent and its management supervisor of that licensing agent, … to obtain thereby valuable toy licensing rights and a lucrative videogame license at lower than competitive royalty rates." Id. at 495. In analyzing whether the plaintiff properly pled an injury redressable under RICO, the district court in Jakks Pacific noted the following with respect to RICO damages:

> The remedial purpose of RICO is to put the injured plaintiff in the same financial position it would have been in absent the misconduct. *See* Bankers Trust Co. v. Rhodes, 859 F.2d 1096, 1106 (2nd Cir. 1988). If the damages cannot be ascertained, then there is no lawful way to compensate the plaintiff. Thus, the courts regularly have held that a plaintiff who alleges injuries that are "indefinite and unprovable" does not have standing under, and cannot recover damages pursuant to, RICO. *See* First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2nd Cir. 1994); Allen v. Berenson Parimutuel of N.Y., 1998 WL 80168, at *3 (S.D. N.Y., Feb. 25, 1998).

Id. at 521.

In Jakks Pacific, the defendants argued that plaintiff's claims of injury, which were premised upon lost business opportunities (and lost profits resulting therefrom) that it would have earned on its licenses but for the defendant's fraudulent scheme, were deficient under RICO because they were speculative and unquantifiable. Id. at 521-22. The district court agreed with the defendants, and held that although the damages sought by plaintiff were of a nature recognized by state law, the great number of variables and factors that would affect the calculation of such damages rendered the claim too speculative to survive.[1] Id. at 521-24.

Plaintiff's damages claims in the present case are even more speculative and unprovable than those asserted in Jakks Pacific. Plaintiff's fanciful and conclusory allegation of $450 million in damages to his (start-up) business which allegedly resulted from the purported predicate acts of the Defendants does not even begin to approach the requisite "concrete loss" requirement of RICO claims. Numerous factors (e.g., poor

[1] To this point, the Court stated that:

> The problem with Plaintiff's claim of RICO injury is not that it cannot claim lost business opportunities as a result of Defendants' alleged misconduct. Instead, the legal infirmity derives from the fact that there is no plausible set of facts, consistent with Plaintiff's allegations, that makes the alleged injury sufficiently concrete to state a RICO claim.

Jakks Pacific, 530 F.Supp.2d at 521.

marketing, no vendor contracts, lack of efficiency, sub-par product offering, timing of entering into the market, lack of experience in the industry, etc.) could have caused Plaintiff's company to struggle getting off the ground. As a practical matter, it would be all but impossible to determine exactly what caused Plaintiff's company to fail to reach the success that Plaintiff (reasonably or unreasonably) envisioned for it.[2] This inherent uncertainty as to damages and causation dooms Plaintiff's RICO claims, just as was the case in Jakks Pacific.

There can be no doubt that Plaintiff's damages in this case are purely speculative and unquantifiable. Prior caselaw has recognized that the "concrete loss" requirement of a valid RICO claim is not easily met, and it certainly has not been met here. Inasmuch as Plaintiff has failed to demonstrate that he has suffered a quantifiable and cognizable injury under RICO, Plaintiff lacks standing to assert RICO claims against any of the Moving Defendants.[3] Thus, Plaintiff's RICO claims against the Moving Defendants should be dismissed by this Court.

2. Plaintiff's Claims Should be Dismissed With Prejudice for Failure to Comply With Fed. R. Civ. P. 8(a)(2) and 8(e)(1).

[2] This highlights the fact that, in addition to his failure to allege a cognizable RICO injury, Plaintiff also fails to satisfy the requirement that any claimed RICO injuries must be proximately caused by the defendant's conduct. *See* Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 266-68 (1992) (rejected "but for" causation standard to establish standing under RICO, and construed RICO to require proximate causation between the injuries asserted and the conduct alleged). The lack of proximate cause is further evidenced by the fact that the RICO damages alleged in this case (i.e., lost profits from allegedly being shut out of the market, revenue from the buy-out of the lease agreement, etc.) mirror the damages sought by Plaintiff in several prior (unsuccessful) lawsuits filed by the Plaintiff. *See* GE Defendants' Motion to Dismiss (Doc. 12, p. 2-5) for a decription of these other lawsuits. If these same damages were caused by the actions alleged by Plaintiff in those previous lawsuits, they could not have been proximately caused by the RICO predicate acts alleged in the present case.

[3] This deficiency undermines Plaintiff's substantive RICO claims under 18 U.S.C. § 1962(c), as well as his RICO conspiracy claims under 18 U.S.C. § 1962(d). *See* Jakks Pacific, 530 F.Supp.2d at 530 (stating that plaintiff's RICO conspiracy claim failed because, *inter alia*, plaintiff did not adequately allege a RICO injury).

The Moving Defendants' have argued that Plaintiff's claims should be dismissed for Plaintiff's wholesale disregard of Fed. R. Civ. P. 8's requirements that a Complaint consist of "a short and plain statement of the claim showing that the pleader is entitled to relief" and that "each averment of a pleading be simple, concise and direct." In response to this argument, Plaintiff simply proclaims that its "petition is a short and concise statement of each claim." Plaintiff's Opposition Brief (Doc. 42, p. 13). This Court obviously has the ability to determine whether the Plaintiff's 68-page/403 paragraph rambling Complaint contains "a short and concise statement of each claim." For reasons stated in their initial motions to dismiss, the Moving Defendants submit that it does not.

Although Plaintiff laments the complexity of the case, courts have uniformly held that RICO complaints, like all other civil complaints, must meet the requirements of Rule 8. *See* Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 776 (7th Cir. 1994) (stating 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)"). Plaintiff's on-going pattern[4] of Rule 8 violations should not be allowed to continue.

3. Plaintiff's Alleged Predicate Acts of Extortion Fail in That the "Obtaining of Property" Requirement Was Not Satisfied.

Plaintiff argues in his opposition brief that he has properly pled RICO predicate acts of extortion. This is incorrect. As the Moving Defendants argued in their respective

[4] *See* Medical Supply Chain, Inc. v. Neoforma, Inc., et al., 419 F.Supp.2d 1316, 1331 (D. Kan. 2006), in which Judge Murguia found that Plaintiff's complaint in that case fell "miles from Rule 8's boundaries," and was "so exceptionally verbose and cryptic that dismissal is appropriate."

Motions to Dismiss,[5] Plaintiff failed to properly plead that the Defendants obtained Plaintiff's property through the "wrongful use of actual or threatened force, violence or fear, or under color of official right." *See* 18 U.S.C. § 1951(b)(2). This "obtaining of property" requirement has not been satisfied by Plaintiff.

In Scheidler v. National Organization for Women, Inc., 537 U.S. 393 (2003), the United States Supreme Court, in clarifying the "obtaining of property" requirement of an extortion claim under RICO, noted that:

> [Defendants] neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. 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 (citation omitted). Consequently, the Supreme Court held that because the defendants in Scheidler 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's scant response to Scheidler is a citation to specific language from a Second Circuit criminal case, U.S. v. Gotti, 459 F.3d 296 (2nd Cir. 2006). However, the quoted language from Gotti does nothing to help Plaintiff's argument in this case.[6] In Gotti, the Second Circuit concluded that nothing in Scheidler prohibited a defendant from being prosecuted for extorting intangible property rights from another, and the Court found that Scheidler simply clarified that it must be shown

[5] This argument was not mentioned in the Motion to Dismiss filed by Defendants Heartland Financial, McDaniel and Foster, because no extortion-related predicate act in Plaintiff's Complaint even mentioned these defendants.

[6] Notably, the Plaintiff merely quoted the introductory paragraph of the Court's decision which simply summarized the issues that the Second Circuit would be addressing in its decision, as well as its ultimate holdings on those issues.

that the defendant did not merely seek to deprive the victim of the property right in question, but also sought to obtain that right for himself. Gotti, 459 F.3d at 323.

The Second Circuit's decision in Gotti, even though not binding precedent for this Court, does nothing to defeat the Moving Defendants' argument that Plaintiff has failed to properly plead that the Defendants have obtained the property of Plaintiff. All of Plaintiff's allegations of damages in this case are ultimately founded upon his underlying claim that he was deprived of an alleged expectancy in a leasehold on certain real property. In other words, by failing to transfer such leasehold to Plaintiff, the GE Defendants allegedly deprived Plaintiff of using this specific building as a location for his start-up his company and thus Plaintiff's company was prevented from earning profits. The property (i.e., leasehold) at issue was the property of the GE Defendants, not Plaintiff. Thus, Plaintiff has not alleged (nor could he allege) that Defendants took certain property from him in order to obtain it for themselves. This deficiency is fatal to Plaintiff's extortion-related predicate acts alleged in his Complaint, and thus those claims cannot be used to allege a "pattern of racketeering activity" supporting a RICO claim.

In his opposition brief, Plaintiff claims the loss of his property rights in potential legal representation by various attorneys. The Moving Defendants do not believe that the mere prospect of legal representation constitutes any sort of property right recognized by law, and Plaintiff provides no authority supporting such a position. Further, even assuming, *arguendo*, that such a property right could be asserted, it certainly cannot be claimed that the Moving Defendants took such a property right from Plaintiff and retained it for themselves, as required by Sheidler.

In addition, Plaintiff claims the loss of his intangible property right of the honest services of various Kansas state government officials. However, even assuming Plaintiff's claims related to these state officials are true, Plaintiff's claims would still fail because these Kansas state officials have no cognizable duty to Plaintiff, a Missouri resident. *See* U.S. v. Sawyer, 239 F.3d 31, 39 (1st Cir. 2001) (stating that the theft of honest services of a government official occurs when the public official strays from his duty to the citizens and State for whom he serves). Thus, even though Plaintiff seeks to recover for the loss of certain intangible property rights, the basic deficiencies in these claims render them meritless.

B. Legal Analysis Applicable to Claims Against Individual Moving Defendants.

1. Arguments Specific to the GE Defendants.

a. Predicate Acts Related to Fraud – Alleged "Racketeering Act Number Ten".

Plaintiff's opposition brief fails to explain how his Tenth purported "Racketeering Act", in which he claims "fraud in [the GE Defendants'] removal [of this case] to federal court," states a viable predicate act of fraud. Specifically, Plaintiff fails to explain his failure to allege who was defrauded by the removal to federal court, whether there was any reliance on the alleged fraudulent statements, and whether any damages resulted from the alleged fraud. Thus, Plaintiff's fraud claim was not pled with the requisite particularity required by Fed. R. Civ. P. 9(b). Additionally, Plaintiff fails to cite to any caselaw or other legal authority which recognizes "fraudulent removal" of a lawsuit to federal court as a valid RICO predicate act. For these reasons, Plaintiff's Tenth

"Racketeering Act" fails to adequately plead a predicate act of fraud, and should be disregarded by this Court.

2. Arguments Specific to Defendant Jeffrey Immelt.

a. Alleged Extortion-related Predicate Acts.

In Defendant Immelt's Motion to Dismiss, he argued that the only two alleged extortion-related predicate acts in which he is mentioned, Acts 1 and 5, do not allege any specific criminal conduct by him and therefore do not constitute valid RICO predicate acts against him. Plaintiff, in his opposition brief, does not oppose, or even address, this argument. As such, there is no genuine dispute that Plaintiff has failed to allege an extortion-related predicate act against Defendant Immelt.[7]

b. Predicate Acts Related to Fraud – Alleged "Racketeering Act Number Fourteen".

The only fraud-based predicate act allegedly committed by Defendant Immelt which Plaintiff mentions in his opposition brief is "Racketeering Act" 14. With respect to this predicate act, Plaintiff alleged in his Complaint that Defendant Immelt committed "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) In his Motion to Dismiss, Defendant Immelt argued that Plaintiff failed to plead this predicate act of fraud with particularity under Fed. R. Civ. P. 9(b), in that there is no mention as to who was defrauded; whether there was any reliance; what was obtained through the "fraudulent omission"; and how Plaintiff was supposedly harmed by this conduct.

[7] As stated in Section II(A)(3) of this brief, Defendant Immelt (along with the other Moving Defendants) also contends that all of Plaintiff's extortion-related predicate acts are deficient for failing to properly allege the "obtaining of property" requirement for such predicate acts.

Plaintiff's opposition brief does not, and cannot, explain away the deficiencies pointed out above by Defendant Immelt. Plaintiff merely states that reliance is presumed under federal securities law "if the omissions were material and the defendant had a duty to disclose." Plaintiff's Opposition (Doc. 42, p. 32). First, even assuming that such a statement is accurate, Plaintiff's Complaint would still be deficient in that it fails to allege that any alleged omission by Defendant Immelt was material. Second, Plaintiff fails to state who, if anyone, was impacted or injured by the alleged securities fraud. Clearly, Plaintiff was not injured by the alleged fraudulent omission inasmuch as he is not alleged to have been a GE shareholder. Thus, Plaintiff lacks the standing necessary to assert a claim of securities fraud against Defendant Immelt.

In addition, Plaintiff does not dispute the fact that no lawsuit between the parties (in which he was a plaintiff and GE was a defendant) was pending at the time of the alleged fraudulent omission. Therefore, there could not have been a fraudulent omission of a pending lawsuit if there was no pending lawsuit to mention. Plaintiff appears to rely on the fact that the Kansas District Court dismissed his state law claims in the initial lawsuit against the GE Defendants without prejudice, thereby leaving the door open for him to assert those claims again if he so chose. *See* Plaintiff's Opposition (Doc. 42, p. 32). However, the mere possibility that Plaintiff may (or may not) attempt to assert a frivolous claim against the GE Defendants at some unspecified point in the future certainly does not give rise to a duty to disclose such a possibility in a securities filing such as a 10-K corporate disclosure.

3. Arguments Specific to Defendants Heartland Financial, McDaniel and Foster.

a. No Predicate Act Allegations and No Proper RICO Conspiracy Allegations Against These Defendants.

As addressed in the Motion to Dismiss filed by Defendants Heartland Financial, McDaniel and Foster, not one of Plaintiff's fourteen alleged predicate acts implicates any of these three defendants. Plaintiff's opposition brief does not contest this fact. Instead, Plaintiff argues that these defendants were alleged to have participated in a RICO conspiracy under 18 U.S.C. § 1962(d).

In order for Plaintiff to state a viable RICO conspiracy claim under § 1962(d), he must allege: (1) that each of the defendants agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity; and (2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals. Goren v. New Vision Inter., Inc., 156 F.3d 721, 732 (7th Cir. 1998); Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 784 (7th Cir. 1999). Plaintiff's Complaint fails to satisfy either of these two pleading requirements with respect to his claims against Defendants Heartland Financial, McDaniel and Foster.

In Paragraph 147 of Plaintiff's Complaint, under the heading "Defendants' RICO Conspiracy Under 18 U.S.C. § 1962(d)", Plaintiff makes the blanket conclusory statement that "[t]he defendants knowingly entered into an agreement to commit two or more predicate crimes." *See* Doc. 6, ¶ 147. This conclusory allegation of agreement is insufficient to meet the pleading requirements of a RICO conspiracy claim. *See* Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1137 (7th Cir. 1986) (stating that a complaint may be dismissed if it consists of only vague, conclusory and general allegations of conspiracy). Further, Plaintiff has failed to allege, in support of his

§1962(d) conspiracy claim, that Defendants Heartland Financial, McDaniel and Foster agreed that someone would commit two or more predicate acts to further the interests of the racketeering enterprise. For these reasons, Plaintiff has failed to allege a valid RICO conspiracy claim against Defendants Heartland Financial, McDaniel and Foster.

III. CONCLUSION.

For all of these reasons stated herein, Defendants General Electric Co., General Electric Capital Business Asset Funding Corp., GE Transportation Systems Global Signaling, LLC, Jeffrey Immelt, Heartland Financial Group, Inc., Christopher McDaniel and Stuart Foster request that the Court grant their respective motions to dismiss and dismiss with prejudice all claims asserted against them in Plaintiff's Complaint, and grant these defendants all other relief to which they are entitled.

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