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 DEFENDANTS HEARTLAND FINANCIAL GROUP, INC., CHRISTOPHER MCDANIEL, AND STUART FOSTER'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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INTRODUCTION

Plaintiff Samuel K. Lipari ("Lipari"), on behalf of his now dissolved company, Medical Supply Chain ("MSC"), has attempted to turn a comparatively straightforward breach of contract case into a convoluted, far-reaching and nearly incomprehensible federal conspiracy case. Plaintiff recently amended his breach of contract lawsuit to allege claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), and to add several individuals and corporate entities as defendants in the case. Specifically, Heartland Financial Group, Inc. ("Heartland"), Christopher McDaniel[1] and Stuart Foster are three of the newly added defendants, and Plaintiff alleges that each one of them violated the federal RICO statute. However, Plaintiff's "exceptionally verbose and cryptic"[2] Amended Complaint has failed to allege a single viable RICO cause of action against any one of these three defendants, and all purported claims against these defendants should therefore be dismissed with prejudice.

I. Procedural History of This Lawsuit.

A. The Original Complaint and Subsequent Dismissal of Heartland.

On March 22, 2006, Lipari, purportedly as the "Statutory Trustee of Dissolved Medical Supply Chain, Inc.," filed suit in the Circuit Court of Jackson County, Missouri against General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC (collectively the "GE Defendants"), Carpet n' More, Stuart Foster, and Heartland Financial. This lawsuit alleged that the GE Defendants refused to sublease a building and provide necessary

[1] McDaniel is the Chief Executive Officer of Heartland Financial Group, Inc.

[2] This phrase was used by Judge Murguia to describe a similarly convoluted and deficient Complaint filed by Plaintiff in another case, *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316, 1331 (D. Kan. 2006). Not surprisingly, Plaintiff's Complaint in the *Neoforma* case was ultimately dismissed by Judge Murguia for pleading deficiencies. *Id*.

financing to Plaintiff so as to prevent Plaintiff from entering the healthcare supply market, thereby ensuring that defendants' "cartel" would continue to dominate the market. 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 the buy-out of the lease.

In the original state court action, Plaintiff never obtained service of process on Foster or Carpet n' More, but he did obtain service on Heartland Financial. On May 4, 2006, Heartland filed a motion to dismiss Plaintiff's petition. Heartland's primary argument in its motion to dismiss was that Plaintiff failed to state a claim against Heartland upon which relief could be granted, in that Plaintiff failed to make any factual allegations against Heartland whatsoever. On May 25, 2006, the trial court issued its Order granting Heartland's motion to dismiss. *See* Exhibit 1, Order Granting Heartland's Motion to Dismiss. Because of Plaintiff's failure to serve Foster and Carpet n' More, and as a result of the May 25, 2006 Order, Plaintiff was left to proceed only against the GE Defendants.

B. Plaintiff's Amended Complaint.

The case was subsequently removed to this Court, and Plaintiff filed his Amended Complaint on December 7, 2007. (Doc. 6) This amended pleading attempts to assert claims under RICO, and it added multiple new parties (including Heartland, McDaniel and Foster) as defendants. Plaintiff brought Heartland back into the case as a defendant despite the fact that Plaintiff's claims against Heartland had previously been dismissed by the state court.

In attempting to allege RICO claims against all of the defendants, Plaintiff's Amended Complaint purports to assert fourteen separate predicate acts which he claims serve as evidence of the defendants' pattern of racketeering activity which is prohibited by RICO. Notably, not a single one of these fourteen predicate acts alleges that Heartland, McDaniel or Foster engaged in criminal activity or wrongdoing of any sort.[3] Additionally, none of these three defendants are implicated in either of the two purported state law claims brought by Plaintiff. Thus, Plaintiff has wholly failed to properly allege any cause of action against Heartland, McDaniel or Foster.

ARGUMENT

I. Plaintiff's Claims Should Be Dismissed Under Rule 12(b)(6) For Failure to State a Claim Upon Which Relief May Be Granted.

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, Plaintiff appears to be attempting to assert federal RICO claims against defendants Heartland, McDaniel and Foster under 18 U.S.C. § 1962. Ultimately, none of these claims can survive a Rule 12(b)(6) analysis, and therefore should be dismissed by this Court.

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.*

[3] In fact, the allegations in Plaintiff's Amended Complaint that pertain to Foster primarily focus on the fact that he attempted to assist in the sale of a building that Plaintiff wanted to sublease. *See* Doc. 6, ¶¶ 125, 162. It goes without saying that this certainly does not constitute criminal behavior that would subject Foster to RICO liability.

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

In order to recover under RICO, the Plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985)). Plaintiff has failed to allege the necessary predicate acts of racketeering and has also failed to properly allege the pattern and enterprise elements of a valid 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 Has Failed to State A Claim Under 18 U.S.C. § 1962(a), (b) or (c) Against Defendants Heartland, McDaniel or Foster.

Although it is difficult, if not impossible, to decipher what claims Plaintiff is attempting to assert under RICO, one paragraph of his 403-paragraph Amended Complaint contains certain phrases which indicate that he may be attempting to assert claims under § 1962(a), (b) and (c). Specifically, Plaintiff alleges that "the defendants …

directly or indirectly invested in [§ 1962(a)], maintains an interest in [§ 1962(b)], and or [sic] participates in [§ 1962(c)]" an enterprise which has conducted a pattern of racketeering activity. (See Doc. 6, ¶ 116) However, generic references to certain buzzwords do not properly state a claim for relief under any of these three subsections of § 1962.

a. 18 U.S.C. § 1962(a).

In order to properly state a claim for relief under § 1962(a), the Plaintiff must allege that the defendants derived income from a pattern of racketeering activity and used or invested that income in an enterprise. *Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987). In addition, Plaintiff must allege and prove that he was injured as a result of the defendants' use or investment of the racketeering income, which must be separate from any injury arising from the alleged predicate acts. *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889, 894-96 (8th Cir. 1999).

Plaintiff's Amended Complaint wholly fails to allege that Heartland, McDaniel or Foster derived any income from a pattern of racketeering or used any ill-gotten funds to invest in an alleged enterprise. Also, Plaintiff fails to allege that he has suffered an injury resulting from the defendants' use or investment of racketeering income, separate from any injury arising from the predicate acts alleged in the Amended Complaint. Thus, no claim upon which relief may be granted has been asserted under 18 U.S.C. § 1962(a).

b. 18 U.S.C. § 1962(b).

Under § 1962(b), it is unlawful:

> for any person through a pattern of racketeering activity or through a collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

In order to assert a valid claim for relief under this subsection, Plaintiff must allege injury from the defendants' acquisition or control of an interest in a RICO enterprise, separate from any injury resulting from the predicate acts. *Lightning Lube, Inc. v. Witco Corp*., 4 F.3d 1153, 1190 (3rd Cir. 1993); *AllState Insurance Co. v. Siegel*, 312 F.Supp.2d 260, 272-73 (D. Conn. 2004). Additionally, the Plaintiff must allege and prove that the interest or control of the RICO enterprise by the defendants is the result of racketeering activities. *Lightning Lube, Inc.*, 4 F.3d at 1190 (citing *Banks v. Wolk*, 918 F.2d 418, 421 (3rd Cir. 1990)).

Plaintiff's Amended Complaint does not allege that Heartland, McDaniel or Foster (on any of the other defendants) acquired an interest in a RICO enterprise as a result of racketeering activity. Plaintiff also fails to allege that he suffered an injury from the acquisition of the enterprise that is separate and distinct from any injuries supposedly suffered as a result of the alleged predicate acts. Thus, Plaintiff has not properly stated a claim for relief under 18 U.S.C. § 1962(b).

c. 18 U.S.C. § 1962(c).

In order for Plaintiff to assert a claim for relief against defendants Heartland, McDaniel and Foster under § 1962(c), he must allege that these defendants participated in the operation or management of the enterprise through a pattern of racketeering activity, and played some part in directing the enterprise's affairs. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993); see also *Fogie v. Thorn Americas, Inc.*, 190 F.3d at 896 (citing § 1962(c)'s restriction on liability to those in management positions). In other words, participation in the activities of the enterprise is not enough, Plaintiff must allege that the

defendants participated in the operation or management of the enterprise. *Goren v. New Vision Inter., Inc.*, 156 F.3d 721, 727 (7th Cir. 1998) (citing *Reves*).

Plaintiff has not alleged that defendants Heartland, McDaniel and Foster participated in the operation or management of the alleged enterprise, nor has he even alleged that they engaged in a pattern of racketeering activity whatsoever. Notably, Plaintiff's Amended Complaint alleges fourteen (14) separate predicate acts,[4] however, not one of the alleged predicate acts includes **any** allegations against either Heartland, McDaniel or Foster. Thus, not only has Plaintiff failed to claim that any of these three defendants participated in the operation or management of the enterprise, there is not even an allegation that they participated in any racketeering activity conducted by the enterprise. Thus, no viable claim for relief has been asserted under 18 U.S.C. § 1962(c).

2. Plaintiff Has Failed to State A Claim Under 18 U.S.C. § 1962(d) Against Heartland, McDaniel or Foster.

18 U.S.C. § 1962(d) provides that it shall be unlawful for any person to conspire to violate the provisions of § 1962(a), (b) or (c). In order for Plaintiff to state a viable 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*, 156 F.3d at 732; *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 784 (7th Cir. 1999).

Plaintiff fails to allege that defendants Heartland, McDaniel or Foster agreed with each other or anyone else to control or participate in the affairs of an enterprise through a pattern of racketeering activity. Plaintiff also failed to allege that these three defendants

[4] *See* Doc. 6, pp. 31-60.

agreed with each other or anyone else that someone would commit at least two predicate acts to accomplish the goals of the alleged enterprise. These deficiencies are fatal to Plaintiff's purported claim under § 1962(d).

The insufficiency of Plaintiff's purported claims under § 1962(a), (b) and (c), which were explained above, also serve as the death knell for Plaintiff's claim under § 1962(d). 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. See *Howard v. America Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (holding that "Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO"); *Craighead v. E.F. Hutton & Co., Inc*., 899 F.2d 485, 495 (6th Cir. 1990) (holding that "Plaintiffs' conspiracy claim [under § 1962(d)] cannot stand in light of the dismissal of their other RICO counts"); *VSA v. Von Weise Gear Co*., 769 F.Supp. 1080, 1085 (E.D. Mo. 1991) ("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)"). In the present case, it has been established that Plaintiff has failed to assert a proper claim under § 1962(a), (b) or (c), and thus Plaintiff's § 1962(d) claim has no foundation upon which to stand and should therefore be dismissed.

3. Plaintiff Has Not Adequately Pleaded the "Pattern" or "Enterprise" Elements of a RICO Violation.

In addition to the pleading deficiencies set forth above, Plaintiff has also failed to allege the "pattern" and "enterprise" elements required for a RICO claim. With respect to the pattern element, 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, there is no allegation connecting defendants Heartland, McDaniel and Foster to each (or any) of the alleged predicate acts.

Further, even if the Plaintiff established a "pattern" of racketeering activity (which he did not), he failed to adequately allege the existence of a RICO "enterprise". In order to adequately plead a RICO enterprise, Plaintiff must allege facts establishing: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in a pattern of racketeering. *Handeen v. Lemaire*, 112 F.3d 1339, 1351 (8th Cir. 1997) (citing *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989). Plaintiff has failed to sufficiently allege any of these three elements of an enterprise. With respect to the first two elements,

Plaintiff has not adequately pled a common or shared purpose among all of the defendants, and he has failed to establish any ascertainable structure to the alleged "enterprise" through his pleadings. With regard to the third element, Plaintiff has failed to make any claim that the "enterprise" exists separate from the racketeering activity alleged in his Amended Complaint. For these reasons, Plaintiff's RICO claim necessarily fails.

4. 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."); *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 his brand new business (MSC) was never allowed into the hospital supply market and never had a single day of operations. 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.

II. 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).

By filing an utterly confusing and rambling 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). Undoubtedly, the Plaintiff will make the circular argument that the length of the filing necessarily proves that he met his pleading requirements. However, the mere length of a complaint is irrelevant when the content is a morass of incomprehensible allegations that do not bear any relationship with each other. 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 satisfies neither requirement.

There is compelling precedent for dismissing Plaintiff's Amended Complaint for violations of Rule 8. In a related lawsuit, *Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, 419 F.Supp.2d 1316 (D. Kan. 2006), Judge Murguia found that Plaintiff's complaint in that case fell "miles from Rule 8's boundaries." *Id.* at 1331. 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.

Based upon Plaintiff's blatant violations of Rule 8, Heartland, McDaniel and Foster request that Plaintiff's Amended Complaint be dismissed with prejudice, and that Plaintiff not be allowed to file another amended pleading.

PRAYER

WHEREFORE, for all of these reasons, Defendants Heartland Financial Group, Inc., Christopher McDaniel and Stuart Foster request that the Court dismiss with prejudice all claims asserted against them in Plaintiff's Amended Complaint, and grant these defendants all other relief to which they are entitled.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 27th day of February, 2008, by first class mail, postage prepaid to:

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And an electronic copy was filed via the CM/ECF system which will send a notice of electronic filing to the following:

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