IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 07-0849-CV-W-FJG
	)	
GENERAL ELECTRIC COMPANY, *et al*.,	)	
	)	
Defendants.	)	

MOTION OF SEPARATE DEFENDANT BRADLEY J. SCHLOZMAN TO DISMISS

(*With Supporting Suggestions Incorporated*)

Pursuant to FED. R. CIV. P. 8(a)(2), 9(b), 12(b)(1), 12(b)(6), separate defendant Bradley J. Schlozman ("Schlozman") hereby moves the Court to dismiss the claims asserted against him in the COMPLAINT filed herein by the *pro se* plaintiff Samuel K. Lipari ("Lipari"). As set out in more detail, *infra*, Lipari's COMPLAINT does not adequately or sufficiently plead a civil RICO claim as to Schlozman in that, among other deficiencies, the COMPLAINT, as a matter of law, fails to establish an "enterprise" involving Schlozman, fails to establish a "pattern of racketeering" by Schlozman, fails to establish the commission of qualifying predicate acts by Schlozman, and fails to establish that Lipari has standing to assert a civil RICO claim against Schlozman. Moreover, even if Lipari's COMPLAINT can be read, in some respect, to state the requisites for a civil RICO claim against Schlozman, the Court lacks subject matter jurisdiction to consider the claim inasmuch as Schlozman is entitled to absolute immunity.

I. Overview

Lipari has filed the present litigation against a myriad of defendants, both individuals and corporate entities. In his COMPLAINT [Doc. 6],[1] Lipari alleges that (through his dissolved company Medical Supply Chain, Inc.) he entered into a written contract with defendant General Electric Co. ("GE") and some of GE's corporate subsidiaries. Lipari and his company were seeking to utilize this transaction to obtain funding so as to gain an entry into the hospital supply market. Thereafter, according to Lipari, on June 15, 2003, the GE defendants breached this contract causing monetary harm to Lipari and his business.

Subsequently, Lipari instituted a federal action in the District of Kansas seeking damages against the GE defendants for state law breach of contract and for violation of federal antitrust laws. The district court ultimately dismissed the lawsuit. *Medical Supply Chain, Inc. v. General Electric Co.*, 2004 WL 956100, op. at *4 (D. Kan. Jan. 29, 2004), *aff'd, in part*, 114 Fed. Appx. 708, 2005 WL 1745590 (10th Cir. Jul. 26, 2005).[2]

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[1] In actuality, the COMPLAINT [Doc. 6] is an amended pleading, but, in keeping with Lipari's nomenclature, it will be merely referenced as the "COMPLAINT" herein.

[2] The only ruling reversed by the Tenth Circuit was the district court's decision to disallow Rule 11 sanctions.

> Defendants are correct that Rule 11 sanctions can be imposed even when some claims are not frivolous. It is clear that at least MSC's claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew MSC existed. Therefore, it was abuse of discretion not to find that portion of the amended complaint frivolous.

Id. at *7. *See also Medical Supply Chain, Inc. v, General Electric Co.*, 2007 WL 101783, op. at *1 (D. Kan. Jan. 9, 2007) (imposing sanctions after remand). Lipari and/or his company have also been sanctioned by other courts in other litigation. *See*, *e.g.*, *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316, 1332-35 (D. Kan. 2006); *Medical Supply Chain, Inc. v. US Bancorp, NA*, 112 Fed. Appx. 730, 732 (10th Cir. 2004).

Having failed in the District of Kansas to obtain any satisfactory legal redress, Lipari filed the instant federal case in the Western District of Missouri broadly alleging that GE and the other defendants conspired to ensure the continuation of an "unlawful hospital supply cartel." With regard to this supposed conspiracy, Schlozman has been sued in his individual capacity for actions that he allegedly took while he was the Interim United States Attorney for the Western District of Missouri. Lipari asserts that Schlozman is liable under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq*. ("RICO").[3]

RICO makes it illegal "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." 18 U.S.C. § 1962(c). Furthermore, "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions is entitled to "recover threefold the damages he sustains" plus attorney fees. 18 U.S.C. § 1964(c). To prevail, a RICO plaintiff must show:

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[3] In this lawsuit, in addition to civil RICO claims against all of the named defendants, Lipari also asserts a state law claim of breach of contract against GE and some of its related corporate entities [COMPLAINT ¶¶ 348-69, at 60-63] and a state law claim for interference with business expectancies against those same "General Electric defendants" [COMPLAINT ¶¶ 370-91, at 64-67]. Inasmuch as these state law causes of action do not assert claims against Schlozman, they will not be addressed in this motion to dismiss.

Moreover, although it is not entirely clear, it appears that Lipari may be seeking to assert a direct claim for alleged violations of the federal extortion statute, 18 U.S.C. § 1951 ("the Hobbs Act") [COMPLAINT ¶ 181, at 31]. To the extent that Lipari is so attempting, it is well settled that there is no implied private right of action under the Hobbs Act. *See*, *e.g.*, *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408-09 (8th Cir. 1999).

> (1) that the defendant violated 18 U.S.C. § 1962; (2) that the plaintiff suffered injury to business or property; and (3) that the plaintiff's injury was proximately caused by the defendant's RICO violation.

Fogie v. THORN Americas, Inc., 190 F.3d 889, 894 (8th Cir. 1999). Moreover, as to the first requirement, section 1962 designates four "prohibited activities." Specifically, it is unlawful:

> (1) to invest income derived from a "pattern of racketeering activity" into an "enterprise" engaged in interstate commerce;
>
> (2) to maintain or control an enterprise through a pattern of racketeering activity;
>
> (3) to conduct or participate in the conduct of an enterprise's affairs through a pattern of racketeering; and/or
>
> (4) to conspire to violate any of the three substantive provisions.

18 U.S.C. §§ 1962(a)-(d). Thus, a violation of section 1962 is established only by proof of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985). In the present case, with regard to Schlozman, Lipari's COMPLAINT fails on each and every ground and must be dismissed.[4] As noted recently by the Eighth Circuit:

> The requirements of [18 U.S.C. § 1962] must be established as to each individual defendant. . . . Failure to present sufficient evidence on any one element of a RICO claim means the entire claim fails.

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., — F.3d —, 2008 WL 2262350, op. at *19 (8th Cir. Jun. 4, 2008).

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[4] In an effort to avoid undue repetition of arguments, Schlozman will limit the discussion of some of the legal deficiencies of Lipari's COMPLAINT that have been satisfactorily and thoroughly addressed by other motions to dismiss filed by other defendants in this action. Suffice it to say that Schlozman agrees with those defendants that Lipari's COMPLAINT fails to state a cognizable civil RICO claim against any defendant and should be dismissed

II. Lipari's COMPLAINT does not establish an "enterprise" involving Schlozman for purposes of civil RICO.

In *Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955 (2007), the Supreme Court considered the pleading requirements under FED. R. CIV. P. 8(a)(2) for pleading a "conspiracy" under the Sherman Act. In affirming the district court's dismissal of the complaint under ed. FED. R. CIV. P. 12(b)(6), the Court rejected the old pleading rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. at —, 127 S.Ct at 1959. [5] Instead, the Court adopted a stricter "plausibility" pleading rule:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Id. at —, 127 S.Ct at 1964 (*citations omitted*).

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[5] On such a focused and literal reading of . . . the "no set of facts [test]," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. . . . The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

Id. at —, 127 S.Ct. at 1959-60.

In applying the "plausibility" standards to a Sherman Act conspiracy claim, the *Twombly* court noted that:

> It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a [Sherman Act] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at —, 127 S.Ct at 1966 ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a . . . complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief."). *See also Assoc. Gen. Contractors, Inc. v. Carpenters*, 459 U.S. 519, 528, n.17, 103 S.Ct. 897, 903 n.17 (1983) ("[a] court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed").

As noted, *Twombly* involved a claim under the Sherman Act. However, in the time since *Twombly* was decided, federal courts have consistently applied the "plausibility" rule to civil RICO complaints alleging an enterprise. *See*, *e.g.*, *Dalton v. City of Las Vegas*, 2008 WL 2372695, op. at *2 (10th Cir. Jun. 12, 2008); *Pappa v. Unum Life Insurance Co. Of America*, 2008 WL 2048664, op. at *2 (M.D. Pa. May 12, 2008); *Dalton v. City of Las Vegas*, 2008 WL 2372695, op. at *2 (10th Cir. Jun. 12, 2008); *Challenger Powerboats, Inc. v. Evans*, 2007 WL 2885346, op. at *2 (E.D. Mo. Sep. 27, 2007). To that end, in applying the "plausibility" rule in a recent civil RICO case, the Seventh Circuit concluded that the plaintiff's complaint had failed to establish an enterprise for purposes of civil RICO.

> The same deficiency [lack of plausibility] attends another critical pleading – the RICO enterprise, about which all that the complaint says is that it "was an association of, between, and among [the defendants]." They are alleged to have conspired with each other, and with [another party] to drive out [the plaintiff]. But a conspiracy is not a RICO enterprise unless it has some enterprise-like structure, such as that of a cartel exempt from antitrust law. Nowhere in the complaint does one find anything to indicate a structure of any kind. There is no reference to a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differentiated functions, a budget, records, or any other indicator of a legal or illegal enterprise.

Limestone Development Corp. v. Village of Lemont, Illinois, 520 F.3d 797, 804 (7th Cir. 2008).

Any plain and fair reading of Lipari's COMPLAINT herein discloses an identical deficiency. While he alleges a massive conspiracy and points to parallel conduct by several of the defendants, he utterly fails to establish any "enterprise" within meaning of civil RICO. With regard to Schlozman in particular, Lipari's allegations are mere unsupported conclusions, merely alleging that Schlozman "took part in directing the enterprise's unlawful conduct" [COMPLAINT ¶¶ 130-32, at 22-23]. While the COMPLAINT make many scurrilous charges against Schlozman and the other defendants, it never establishes that the supposed actions of any of the defendants was a concerted enterprise to accomplish any particular goal or desired end.

> The existence of an enterprise at all times remains a separate element which must be proved by the plaintiff in order to establish a RICO violation. Proving the existence of an enterprise requires evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit. Although much about the RICO statute is not clear, it is very clear that those who are associates of a criminal enterprise must share a 'common purpose.'

Criag Outdoor Advertising, — F.3d at —, op. at *18 (*internal quotations and citations omitted*).

III. Lipari's COMPLAINT does not establish a "pattern" of racketeering activity involving Schlozman for purposes of civil RICO.

Congress passed RICO in an effort to combat organized, long-term criminal activity. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir.1992). Although § 1964(c) provides a private civil action to recover treble damages for violations of RICO's substantive provisions, *Sedima,*, 473 U.S. at 481, 105 S.Ct. at ----, the statute was never intended to allow plaintiffs to turn garden-variety state law fraud claims into federal RICO actions. *Jennings v. Meter Products, Inc.*, 495 F.3d 466, 472 (7th Cir. 2007). One mode for limiting the abuse of civil RICO is the requirement of establishing a pattern of racketeering activity. A pattern of racketeering activity consists, at the very least, of two "predicate acts" of racketeering committed within a ten-year period. 18 U.S.C. § 1961(5). To fulfill the pattern requirement, plaintiffs must satisfy the so-called 'continuity plus relationship' test: the predicate acts must be related to one another (the relationship prong) and pose a threat of continued criminal activity (the continuity prong). *H.J.*, *Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)).

Setting aside for the moment the issue of whether Lipari has plead any predicate acts against Schlozman, it is evident that his COMPLAINT utterly fails to establish any relationship between the variety of actions enumerated in the COMPLAINT. *See*, *e.g.*, DARREL C. MENTHE, *Avoiding the Pitfalls of Pleading Civil RICO*, 18 PRAC. LITIG. 55, 58 (May 2007) ("Nor can several diverse bad acts be stitched together to make a 'pattern' unless there is some relationship between them."). Again, a plain reading of the Complaint reveals that Lipari has not established any "pattern" of racketeering activity.

IV. Lipari's COMPLAINT does not establish that Schlozman committed any predicate acts for purposes of civil RICO.

A RICO " pattern of racketeering activity," requires at least two acts of racketeering activity. Such are commonly called "predicate acts." A pattern of racketeering activity, then, is shown when a racketeer commits at least two distinct but related predicate acts. Those acts must be violations of criminal statutes listed in 18 U.S.C. § 1961. In this case, in the "Claims" portion of his COMPLAINT before the Court, Lipari sets out fourteen supposed "Racketeering Acts" committed by the defendants. However, the only "Racketeering Act" involving substantive[6] allegations against Schlozman is "Racketeering Act Number Eleven" [COMPLAINT ¶¶ 286-305, at 50-53]. In that portion of the COMPLAINT, Lipari charges Schlozman with:

> Improperly moving to dismiss a *qui tam* action filed in the Western District of Missouri*, United States ex rel. Michael W. Lynch v. Seyfarth Shaw, et al.*, Case No. 06–316-CV-W-SOW (W.D. Mo.) [COMPLAINT ¶¶ 286-296, at 50-52], and
>
> Withholding some testimony before the United States Senate regarding the decision to pursue fraud indictments against employees of an organization known as the association of Community Organizations for Reform Now ("ACORN").

For purposes of assessing the viability of Lipari's civil RICO claims against Schlozman, these two allegations will be addressed. *See*, *.e.g.*, *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 180 (2nd Cir. 2004) ("assuming arguendo that the alleged predicate acts constituting the pattern were adequately pled, we evaluate the RICO allegations with respect to each defendant individually").

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[6] The COMPLAINT is replete with examples of name dropping. On a few occasions, Schlozman's name is mentioned in passing by Lipari in other "Racketeering Acts" [COMPLAINT ¶¶ 233, 307, 333, at 41, 54, 58] but no civil RICO predicate acts are alleged against Schlozman.

As noted, to qualify as a predicate act for purposes of civil RICO, an alleged act must be a violation of one or more of the criminal statutes listed in 18 U.S.C. § 1961.

> The only acts of racketeering that can sustain a "pattern of racketeering" for civil RICO are spelled out in section 1961. These are known as "predicate acts." It is a rather limited list of specific federal crimes. RICO emphatically does not "borrow" from other statutes beyond the specific crimes listed in section 1961.

DARREL C. MENTHE, *Avoiding the Pitfalls of Pleading Civil RICO*, 18 PRAC. LITIG. 55, 57 (May 2007). In this case, Lipari has failed to plead (or explain) exactly how these supposed actions[7] of Schlozman violate any of the statutes enumerated in 18 U.S.C. § 1861(1).

V. Lipari's COMPLAINT does not establish that he has standing to assert a civil RICO as to any of the predicate acts allegedly committed by Schlozman.

In addition to establishing the elements for a violation of 18 U.S.C. § 1962, in order to demonstrate standing, plaintiffs who bring civil RICO claims must show damage to their business or property as a result of a defendant's conduct. *Sedima*, 473 U.S. at 496, 105 S.Ct. at 3285 (a civil RICO plaintiff only has standing if "he has been injured in his business or property by the conduct constituting the violation").

> To have standing to bring a civil RICO claim, a plaintiff must have suffered injury "by reason of" a RICO violation. The phrase "by reason of" as used in § 1964(c) means causation under the traditional tort "requirements of proximate or legal causation, as opposed to mere factual or 'but for' causation."

Regions Bank v. J.R. Oil Co., LLC, 387 F.3d 721 (8th Cir. 2004). In *Newton v. Tyson Foods, Inc.*, 207 F.3d 444 (8th Cir.2000), the Eighth Circuit further explained that:

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[7] To be clear, Schlozman adamantly denies any wrongdoing associated with the dismissal of the *Lynch* case, the prosecution of the ACORN employees, and his testimony before the United States Senate.

> Proximate cause is a flexible common-law concept imported from tort law into RICO jurisprudence by way of the antitrust laws. Since but-for causation, or causation in fact, has no logical ending point, the concept of proximate cause cuts off liability for those damages only distantly caused by a defendant's bad acts. Using proximate cause as a standing requirement in civil RICO cases is justified on three grounds. First, the proximate cause requirement reduces the need for apportioning between damages caused by the defendant's actions and damages caused by independent factors. Second, it prevents two or more parties along the chain of causation from obtaining duplicative recovery. Third, the need for deterrence can be met with recoveries by more directly injured parties.

Id. at 446-47(*citing Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68, 112 S.Ct. 1311, 1317 (1992)). Turning then to the "predicate acts" alleged with regard to Schlozman, it is frankly impossible to discern any case for proximate causation (or, even, but-for causation).

In the *Lynch* suit, a *pro se* plaintiff, Michael Lynch, instituted a *qui tam* action against a host of law firms, business associations, and judges. *Lynch v. Seyfarth Shaw*, Case No. 06-00316-SOW [Doc. 1]. The complaint broadly alleged that ALCOA was engaged in a price-fixing scheme involving the other defendants. Inasmuch as the case was filed under the False Claims Act, the United States (while Schlozman was the Acting Interim United States Attorney for the Western District of Missouri) investigated Mr. Lynch's claims and ultimately moved to dismiss the case inasmuch as Mr. Lynch could not pursue an FCA claim against federal defendants and Mr. Lynch failed to link any of the defendants' actions to any claim for payment made to the United States (a necessary element in an FCA case). *Lynch v. Seyfarth Shaw*, Case No. 06-00316-SOW [Docs. 9, 10]. On October 12, 2006, the district court granted the motion to dismiss. *Lynch v. Seyfarth Shaw*, Case No. 06-00316-SOW [Doc. 11].[8]

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[8] In addition to complaining about the dismissal of Mr. Lynch's lawsuit, Lipari seemingly also suggests that the United States Attorney's office refused to pursue a prosecution connected with an alleged breaking and entering of Mr. Lynch's home.

With regard to Schlozman's testimony before the United States Senate, read broadly and generously, Lipari's COMPLAINT contends that Schlozman improperly testified as to whether he was "directed" to indict certain members of ACORN. However, even Lipari concedes that Schlozman ultimately sent a letter to the Senate Judiciary Committee so as to clarify any misunderstandings that might have arisen from his testimony regarding the ACORN prosecutions [COMPLAINT ¶ 302, at 52-53]. Setting aside the erroneous and opprobrious insinuations of Lipari, it defies all logic and common sense to tie these "predicate acts" to any injury to Lipari's business or property. The Court should not have to perform logical gymnastics to find proximate cause. The acts that Lipari attributes to Schlozman are too remote to afford him standing to pursue a civil RICO claim.

VI. The Court lacks jurisdiction over the predicate acts attributed to Schlozman because of absolute immunity.

Even if the Court determines that Lipari has successfully negotiated the minefield for pleading a viable civil RICO claim, any claim against Schlozman is not within the Court's subject matter jurisdiction because Schlozman was absolutely immune.[9] More than 60 years ago, the Supreme Court held that a federal prosecutor was absolutely immune from suit claiming malicious prosecution based on an indictment and prosecution of the plaintiff. *Yaselli v. Goff*, 275 U.S. 503, 48 S.Ct. 155 (1927), *aff'g,,*12 F.2d 396 (2nd Cir. 1926). The immunity was – and is – grounded on principles of public policy. *Id.*

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[9] For purposes of this discussion, Schlozman will focus on the alleged predicate act of his office's handling of the *Lynch qui tam* action, the prosecution of the ACORN employees, and the refusal to pursue criminal charges for the supposed breaking and entering of the Lynch residence. The "false testimony" claim is simply too removed from any potential damages claims asserted by Lipari to warrant any further discussion.

> [W]e shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Malley v. Briggs, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097 (1986). The Court reaffirmed the holding of *Yaselli* in the leading modern decision on immunity for prosecutors, *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 986 (1976).

In *Imbler,* the Supreme Court held that "in initiating a prosecution and in presenting the [government's] case, the prosecutor is immune from a civil suit for damages . . . ." *Id*. at 431, 96 S.Ct. at 995. The immunity extended to any activities of the prosecutor that are "intimately associated with the judicial phase of the criminal process . . . ." *Id*. at 430, 96 S.Ct. at 995. Association with the judicial process results from the prosecutor functioning in his role as advocate for the government. *Id*. at 430-31, 96 S.Ct. at 995-96. The Court based its holding on two interrelated concerns: a prosecutor would be effectively disabled from discharging his public trust if called upon to account in a subsequent damages action for his conduct of a criminal trial; and less protection than absolute immunity would impede the criminal justice system's goal of accurately determining guilt or innocence by curtailing the discretion of the prosecution and defense in their conduct of the trial and presentation of evidence. *Id*. at 425-26, 96 S.Ct. at 992-93. Thus, the availability of absolute immunity came not from the Court's concern about the interference that civil litigation or the threat of litigation can pose for an official's duties, but rather from a concern with conduct closely related to the judicial process. The Court in *Imbler* also recognized that the duties of a prosecutor in his role as advocate involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.

Similarly, absolute immunity protects Executive Branch attorneys representing governmental interests in civil litigation and other civil proceedings. The basis for absolute immunity for government attorneys participating in civil proceedings was signaled by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978). There, in the context of a case concerning administrative enforcement proceedings in which penalties and sanctions could be imposed, the Court observed "that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit for damages." *Id*. at 512-13, 98 S.Ct. at 2913-14.

Although *Butz* concerned administrative proceedings in which penalties and sanctions could be imposed, nothing in its reasoning precludes its application to government attorneys functioning in proceedings where traditional civil remedies are the outcome. *Cf*. 438 U.S. at 516 n.40. The judicial process is what is protected by judicial and quasi-judicial immunity, and for immunity purposes there is no principled difference between civil and criminal proceedings. To that end, several courts of appeals have ruled that the principles outlined in *Butz* operate to afford absolute immunity to government attorneys who initiate or participate in civil proceedings. For instance, the Ninth Circuit has explained:

> [T]he principles outlined in *Butz* should *a fortiori* apply to the government attorney's initiation and handling of civil litigation in a state or federal court. Whether the government attorney is representing the plaintiff or the defendant, or is conducting a civil trial, criminal prosecution or an agency hearing, absolute immunity is "necessary to assure that . . . advocates . . . can perform their respective functions without harassment or intimidation." Given the similarity of functions of government attorneys in civil, criminal and agency proceedings, and the numerous checks on abuses of authority inherent in the judicial process, we reiterate . . . that "[t]he reasons supporting the doctrine of absolute immunity apply with equal force regardless of the nature of the underlying action."

Fry v. Melaragno, 939 F.2d 832, 837 (9th Cir. 1991). *See also Saunders v. Bush*, 15 F.3d 64, 67 (5th Cir. 1994); *Schrob v. Catterson*, 948 F.2d 1402, 1412 (3rd Cir. 1991).

In this case, with regard to the "predicate acts" attributed to Schlozman by Lipari, they involve decisions to prosecute claims, not prosecute claims, and litigation strategy in civil litigation. These are precisely the types of actions that absolute immunity was crafted to protect from outside lawsuits.[10] Moreover, it is well settled that absolute immunity applies to bar claims asserted under civil RICO. As noted by one district court:

> I find that in enacting RICO, Congress did not intend to limit a 'government attorney's] immunity from civil suit. Thus, the federal standard of prosecutorial immunity may apply to bar a civil RICO claim against a [government attorney]. . . . The same policy concerns [at issue in *Imbler*] apply with full force to a civil claim under RICO, and extending the immunity is entirely consistent with Congress' goal of fostering law enforcement. Accordingly, I find that a [government attorney] is absolutely immune from civil suit under RICO when he is acting within a protected function.

Connor v. City of Philadelphia, 1991 WL 102989, op. at *5-6 (E.D. Pa. Jun. 11, 1991). *See also Blackburn v. Calhoun*, 2008 WL 850191, op. at *21-22 (N.D. Ala. Mar. 4, 2008) (civil RICO claims dismissed based on absolute judicial immunity); *Dobson v. Anderson*, 2008 WL 183080, op. at *5 (E.D. Okla. Jan. 17, 2007) (district attorneys are absolutely immune from civil RICO claims); *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007) (dismissing civil RICO claims because "absolute immunity bars suits for money damages for acts made in the exercise of prosecutorial discretion.")

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[10] Certainly the conduct at issue herein (initiating prosecutions and moving to dismiss defective civil complaints) pales in comparison to the types of conduct for which absolute immunity has been extended to government attorneys. *See*, *e.g.*, *Imbler* , at 416 (failing to disclose or suppressing exculpatory evidence, knowing use of perjury, and manufacturing of evidence); *White v. Murphy*, 789 F.2d 614 (8th Cir.1986) (conspiracy to conceal and suppress exculpatory evidence is immunized).

VII. Conclusion

Notwithstanding the allegations contained in Lipari's COMPLAINT, a "plaintiff has no constitutional, statutory, or common-law right to have a public official investigate or prosecute a crime." *Murphy v. Morrison*, 1993 WL 302128, op. at *2 (D. Kan. Jul. 9, 1993). As another court has noted, "[t]hese duties are discretionary public duties that are enforced by public opinion, policy and the ballot." *Doe v. Mayor and City Council of Pocomoke City*, 745 F.Supp. 1137, 1139 (D. Md. 1990) (*and cases cited therein*). Lipari may or may not have (or had at one time) a legitimate state breach of contract claim. He does not, however, a cognizable civil RICO. *Compare* DARREL C. MENTHE, *Avoiding the Pitfalls of Pleading Civil RICO*, 18 PRAC. LITIG. 55, 56 (May 2007). In particular, his "claims" against Schlozman are the mere product of an overactive imagination and a disgraceful attempt to drag as many people into Lipari's litiagtion cesspool as possible without any basis in law or fact. For the reasons set out herein, the Court should dismiss Lipari's COMPLAINT.[11]

[11] In addition, given Lipari's frivolous litigation history, it is suggested that the Court enter an order requiring lipari to obtain judicial preapproval before filing further actions in this district.

Respectfully submitted,

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United States Attorney

By /s/ *Jeffrey P. Ray*

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ATTORNEYS FOR DEFENDANT BRADLEY J. SCHLOZMAN

[12] Authorized by the Department of Justice, on March 24, 2008, to provide individual capacity representation to Bradley J. Schlozman, former Interim United States Attorney, Western District of Missouri, in the case of *Samuel Lipari v. General Electric Co., et al.*, 07-0849-CV-W-FJG (W.D. Mo.). 28 C.F.R. § 50.15(a)(2).

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that on this 8th day of July, 2008, a true and correct copy of the foregoing **MOTION OF SEPARATE DEFENDANT BRADLEY J. SCHLOZMAN TO DISMISS (*WITH SUPPORTING SUGGESTIONS INCORPORATED*)** was electronically filed with the Clerk of the Court using the CM/ECF system, which then sent electronic notification of such filing to:

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The undersigned Assistant United States Attorney further certifies that, a true and correct copy of the foregoing **MOTION OF SEPARATE DEFENDANT BRADLEY J. SCHLOZMAN TO DISMISS (*WITH SUPPORTING SUGGESTIONS INCORPORATED*)** was placed in the United States first class mail, postage prepaid, addressed to the following non-ECF participant:

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PRO SE PLAINTIFF

/s/ *Jeffrey P. Ray*
JEFFREY P. RAY
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