
No. 08-3115

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

SAMUEL K. LIPARI,

APPELLANT,

v.

GENERAL ELECTRIC COMPANY, *ET AL.*,

APPELLEES.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION**

BEFORE THE HONORABLE FERNANDO J. GAITAN, JR., CHIEF DISTRICT JUDGE

**BRIEF OF SEPARATE APPELLEE
BRADLEY J. SCHLOZMAN**

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I. Summary of the case

On March 22, 2006, Samuel K. Lipari (“Lipari”), the *pro se* appellant herein, brought a state court breach of contract action against several business entities. Later, Lipari amended this state court action to assert additional claims, including a federal civil RICO cause of action. Subsequently, the then-named defendants removed the case to federal district court. Thereafter, Lipari again amended his complaint to add additional claims and parties, including claims against Bradley J. Schlozman (“Schlozman), an appellee herein and the former Interim United States Attorney for the Western District of Missouri.

On July 30, 2008, following the filing of motions to dismiss by the various named defendants, the district court¹ entered an order that, among other matters, denied Lipari’s request to file another amended pleading, dismissed Lipari’s federal causes of action, and refused to retain jurisdiction over any remaining state law claims. Lipari then filed a notice of appeal and filed a Rule 59(e) motion with the district court, the latter motion suggesting that the district judge should have recused from hearing the case. On October 31, 2008, the district court entered an order denying Lipari’s Rule 59(e) motion and declining to recuse. Thereafter,

¹ The Honorable Fernando J. Gaitan, Jr., Chief District Judge, United States District Court for the Western District of Missouri.

Lipari filed an amended notice of appeal.

II. Appellee's waiver of oral argument

Schlozman believes that this appeal does not present unusual or remarkable issues of civil RICO law, case law construing either FED. R. CIV. P. 12 or 15, or judicial recusal jurisprudence. Nor does this appeal involve legal matters wherein there is a split of authority among the federal circuits. Moreover, Schlozman believes that the unique and narrow legal issues involved in this case may be adequately addressed by way of the parties' briefing with the Court. Accordingly, Schlozman is agreeable to a waiver of oral argument from the parties on this appeal, or, if the Court desires oral argument, a minimum allocation of time for such argument.

III. Corporate disclosure statement

As an individual, Schlozman is not required by the Federal Rules of Appellate Procedure to make a corporate disclosure statement. FED. R. APP. P. 26.1 (“Any nongovernment corporate party to a proceeding must file a statement identifying all of its parent corporations [*emphasis added*]”).

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VI. Jurisdictional statement

Lipari's original state court action was based on a claim of breach of contract, but was subsequently amended so as to assert causes of action for alleged violations of federal law. On November 9, 2007, the then-named defendants removed the action to federal court. Inasmuch as the civil action, in part, arose under the laws of the United States, on removal, subject-matter jurisdiction was vested properly with the federal district court. 28 U.S.C. § 1331. District and divisional venue likewise were proper with the district court inasmuch as the state court case was pending in Jackson County, Missouri, and, thus, the case was removed to the Western Division of the United States District Court for the Western District of Missouri. 28 U.S.C. §§ 105(b)(1), 1446(a).

Thereafter, Lipari amended his complaint to add new party-defendants, including Schlozman. Subsequently, following the filing of motions to dismiss, on July 30, 2008, the district court entered an order dismissing Lipari's federal claims, denying Lipari's motion to further amend his complaint, and refusing to exercise jurisdiction over the remaining state law claims. Add., Ex. 1.² On that same date, the district court entered a final judgment. S.A. [I], at 11.

² Citations are either to the three bound volumes of the SUPPLEMENTAL APPENDIX OF THE APPELLANT (cited herein as "S.A. [I]", "S.A. [II]" and "S.A. [III]") filed with the Court by Lipari on December 15, 2008 or to the Addendum to the Opening Brief of Appellant (cited herein as "Add.").

Thereafter, on August 4, 2008, Lipari filed a timely motion with the district court to alter or amend the judgment pursuant to FED. R. CIV. P. 59(e). S.A. [I], at 11. Then, on September 12, 2008, before the district court had ruled on the pending Rule 59(e) motion, Lipari filed a premature³ NOTICE OF APPEAL with the district court on January 24, 2008. S.A. [I], at 12. Ultimately, on October 31, 2008, the district court entered an order denying Lipari's Rule 59(e) motion. Add., Ex. 2. Three days later, on November 3, 2008, Lipari filed an AMENDED NOTICE OF APPEAL with the district court. Add., Ex. 3. Consequently, jurisdiction over the district court's final order of July 30, 2008, and the district court's order of October 31, 2008, is now proper with this Court.⁴ 28 U.S.C. § 1291.

³ See, e.g., *Parkus v. Davis*, 985 F.2d 425, 426 (8th Cir. 1993) (a timely Rule 59(e) motion tolls the time to file a notice of appeal and any appeal pursued during the pendency of the Rule 59(e) motion is "premature").

⁴ Pursuant to the Federal Rules of Appellate Procedure, if a party files a notice of appeal after a judgment has been entered, but before a Rule 59(e) motion has been ruled upon, then "the notice becomes effective to appeal a judgment or order . . . when the order disposing of [the Rule 59(e)] motion is entered." FED. R. APP. P. 4(a)(4)(B)(i). However, if a party intends to challenge the Rule 59(e) order (as Lipari does in this appeal), then the party must file an amended notice of appeal after the Rule 59(e) order is entered. FED. R. APP. P. 4(a)(4)(B)(ii).

VII. Statement of the issues

- A. The district court properly granted the motions to dismiss Lipari’s civil RICO claims in that Lipari does not have standing to sue under RICO because he has suffered no quantifiable injury to his business or property.**

Regions Bank v. J.R. Oil Co., LLC, 387 F.3d 721 (8th Cir. 2004)

World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc., 530 F.Supp.2d 486 (S.D.N.Y. 2007)

Roberts v. BJC Health System, 452 F.3d 737 (8th Cir. 2006)

- B. Alternatively, the district court’s dismissal of Lipari’s lawsuit is sustainable in that Lipari failed to state a cognizable civil RICO against Schlozman.**

- 1. Lipari failed to plausibly establish an “enterprise” involving Schlozman for purposes of civil RICO.**

Bell Atlantic Corp. v. Twombly, supra, 550 U.S. 544, 127 S.Ct. 1955 (2007)

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

Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008)

- 2. Lipari failed to plausibly establish a “pattern” of racketeering activity involving Schlozman for purposes of civil RICO.**

H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893 (1989)

3. Lipari failed to plausibly establish that Schlozman committed any “predicate acts” for purposes of civil RICO.

18 U.S.C. § 1961

DARREL C. MENTHE, *Avoiding the Pitfalls of Pleading Civil RICO*, 18 PRAC. LITIG. 55 (May 2007).

C. Alternatively, the district court’s dismissal of Lipari’s lawsuit is sustainable in that the alleged “predicate acts” attributed to Schlozman are protected by absolute immunity.

Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 986 (1976)

Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978)

D. The district court did not abuse its discretion in denying Lipari’s motion file a SECOND AMENDED COMPLAINT inasmuch as the proposed amendments were futile in that they would not have addressed or corrected the legal deficiencies in the FIRST AMENDED COMPLAINT.

Sanders v. Clemco Industries, 823 F.2d 214 (8th Cir. 1987)

U.S. ex rel. Lee v. Fairview Health System, 413 F.3d 748 (8th Cir. 2005)

E. The district court did not abuse its discretion in denying Lipari’s motion requesting the judge’s recusal.

Rabushka ex rel. United States v. Crane, 122 F.3d 559 (8th Cir. 1997)

Scenic Holding, LLC v. New Board of Trustees of Tabernacle, 506 F.3d 656 (8th Cir. 2007)

VIII. Statement of the case

Lipari's original state court action was based on a claim of breach of contract, but was subsequently amended so as to assert causes of action for alleged violations of federal law. On November 9, 2007, the then-named defendants removed the action to federal court. Subsequently, on December 7, 2007, Lipari amended his complaint to add additional claims and party-defendants. In the amended complaint, Lipari sought damages based on civil RICO, the Hobbs Act, breach of contract, and interference with a business expectancy. The named defendants were the appellees herein: General Electric Co., General Electric Capital Business Asset Funding Corp., GE Transportation Systems Global Signaling, LLC, Stewart Foster, Jeffrey R. Immelt, Heartland Financial Group, Inc., Christopher M. McDaniel, Seyfarth Shaw LLP, and Bradley J. Schlozman.

Thereafter, the various defendants filed motions to dismiss in lieu of answers. On July 30, 2008, the district court entered a ten-page ORDER dismissing Lipari's federal claims, denying Lipari leave to further amend his complaint, and refusing to exercise jurisdiction over any remaining state law claims.⁵ On that same date, the Court entered its final JUDGMENT IN A CIVIL CASE.

⁵ The district court's opinion is unreported, but may be found at *Lipari v. General Electric Co.*, 2008 WL 2977032, slip op. (W.D. Mo. Jul. 30, 2008), as well as the RICO BUS. DISP. GUIDE (CCH) ¶ 11,555.

Thereafter, on August 4, 2008, Lipari filed a timely motion with the district court to alter or amend the judgment pursuant to FED. R. CIV. P. 59(e). Then, on September 12, 2008, before the district court ruled on the pending Rule 59(e) motion, Lipari filed a premature NOTICE OF APPEAL with the district court on January 24, 2008. Ultimately, on October 31, 2008, the district court entered an order denying Lipari's Rule 59(e) motion. Three days later, on November 3, 2008, Lipari filed an AMENDED NOTICE OF APPEAL with the district court.

IX. Statement of the facts

In his FIRST AMENDED COMPLAINT, Lipari alleged that (through his dissolved company Medical Supply Chain, Inc.) he entered into a written contract with appellee General Electric Co. (“GE”) and some of GE’s corporate subsidiaries (“the GE defendants”). S.A. [I], at 183-84. According to Lipari, he and his company were seeking to utilize this transaction to obtain funding so as to gain an entry into the hospital supply market. S.A. [I], at 184. However, according to Lipari, on June 15, 2003, the GE defendants breached this contract. S.A. [I], at 184. Lipari contends that this breach then caused monetary harm to Lipari and his business. S.A. [I], at 195-97. 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).⁶ S.A. [II], at 367-402.

⁶ The only ruling reversed by the Tenth Circuit was the district court’s decision to disallow Rule 11 sanctions. *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 case against a myriad of defendants in state court. S.A. [II], at 342-66. After Lipari added federal causes of action, the then-named defendants removed the case to federal district court. S.A. [I], at 4. Subsequently, Lipari amended his pleadings to add new claims and new defendants. S.A. [I], at 177-249. In his amended pleading, Lipari broadly alleged that GE and the other appellees herein conspired to ensure the continuation of an “unlawful hospital supply cartel.” S.A. [I], at 185.

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. S.A. [I], at 202-03, 230-33. Lipari asserts that Schlozman is liable under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (“RICO”).⁷

⁷ In his lawsuit, in addition to civil RICO claims against all of the appellees, Lipari also asserted a state law claim of breach of contract against GE and some of its related corporate entities and a state law claim for interference with business expectancies against those same “General Electric defendants.” S.A. [I], at 240-45. These claims do not implicate Schlozman. Moreover, it appeared that Lipari’s FIRST AMENDED COMPLAINT also sought to assert a direct claim for alleged violations of the federal extortion statute, 18 U.S.C. § 1951 (“the Hobbs Act”), against all of the appellees. S.A. [I], at 211. The district court dismissed any cause of action under the Hobbs Act. Add., Ex. 1. *See, e.g., Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408-09 (8th Cir. 1999) (there is no implied private right of action under the Hobbs Act). Lipari has not appealed that decision and it will not be further addressed herein.

With regard to the specific actions allegedly undertaken by Schlozman, in the “Claims” portion of his FIRST AMENDED COMPLAINT before the district court, Lipari set out fourteen supposed “Racketeering Acts.” S.A. [I], at 211-40. However, the only “Racketeering Act” involving substantive⁸ allegations against Schlozman was “Racketeering Act Number Eleven.” S.A. [I], at 230-33. In that portion of the FIRST AMENDED COMPLAINT, Lipari charged 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.),⁹ 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”).

S.A. [I], at 230-33.

⁸ The FIRST AMENDED 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.” [*see, e.g.*, S.A. [I], at 221, 234, 238] but no civil RICO predicate acts are alleged against Schlozman.

⁹ In addition, the FIRST AMENDED COMPLAINT contains some veiled references to Schlozman’s purported role in refusing to pursue criminal charges after a breaking and entering at Michael Lynch’s residence..

X. Summary of the argument

In this litigation, Lipari alleges a vast and far-ranging conspiracy between private individuals, corporations and government officers, all conspiring to create an unlawful hospital supply cartel and keep Lipari out of the hospital supply business. To that end, Lipari has alleged that some of the conspirators have violated federal law, in particular the civil provisions of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* However, as properly found by the district, Lipari lacks standing to pursue a civil RICO case. Standing under civil RICO requires that a plaintiff plead and plausibly establish a quantifiable injury to business or property. While Lipari alleges damages of \$450 million (which would be tripled under RICO to \$1.35 billion), he offers no plausible explanation for any measure of damages and resorts to speculation, guesswork, and hysterical hyperbole to justify a damages claim and explain the failure of his medical supply business. Under the facts before the district court, civil RICO jurisprudence required a dismissal of Lipari's civil RICO claims because he lacked standing.

Alternatively, even if Lipari has standing to bring a civil RICO action, he failed to plead a civil RICO claim upon which relief could be granted against Schlozman. Specifically, Lipari's pleadings fail to plausibly establish an

“enterprise” involving Schlozman, fail to plausibly establish a “pattern of racketeering activity” involving Schlozman, and fail to plausibly establish that Schlozman committed any “predicate acts.” Moreover, even assuming that Lipari could clear these legal hurdles, the acts allegedly undertaken by Schlozman were undertaken within the scope of his duties as the Interim United States Attorney for the Western District of Missouri, and are protected by immunity.

Lipari, on this appeal, also complains about the district court’s refusal to allow him to file a SECOND AMENDED COMPLAINT, adding three more corporate defendants. The district court properly refused to permit the amendment in that it would have been futile. The inclusion of the three companies would have done nothing to rectify the shortcomings in the FIRST AMENDED COMPLAINT that formed the basis for the district court’s dismissal of Lipari’s civil RICO claims.

Finally, Lipari argues that the district judge hearing the case should have recused. The district court properly refused this request. Lipari never formally moved for recusal and the suggestion he included in his Rule 59(e) motion was untimely. Moreover, based on Lipari’s substantive allegations, an average person would not reasonably question the district court’s impartiality.

XI. Argument

A. Standard of review

The Court reviews *de novo* a district court decision to dismiss a case pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction. *See, e.g., Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008). Similarly, the Court also reviews *de novo* a district court decision to dismiss a case pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted. *See, e.g., Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007). In both instances, the Court accepts as true all factual allegations in the complaint, viewing them in the light most favorable to the nonmoving party. *Hastings*, 516 F.3d at 1058. *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 568, 127 S.Ct. 1955, 1974 (2007) (to survive a motion to dismiss, the factual allegations of a complaint must “nudge[] claims across the line from conceivable to plausible”).

By contrast, a district court’s denial of a motion to amend a pleading and a district court’s denial of a motion to recuse are reviewed for abuses of discretion.¹⁰ *See, e.g., Knapp v. Hanson*, 183 F.3d 786, 790 (8th Cir. 1999) (motion to amend); *Hooker v. Story*, 159 F.3d 1139, 1140 (8th Cir. 1998) (motion for recusal).

¹⁰ However, if the denial of a motion to amend a pleading is based on futility, the Court reviews the district court’s ruling *de novo*. *In re K-tel International, Inc. Securities Litigation*, 300 F.3d 881, 899 (8th Cir. 2002).

B. Overview of civil RICO

The Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (“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:

- (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). Before the district court and in this appeal, Schlozman asserts that Lipari's allegations against Schlozman¹¹ fail, as a matter of law, on each and every ground. As noted recently by this Court:

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., 528 F.3d 1001, 1027-28 (8th Cir. 2008).

¹¹ In an effort to avoid undue repetition of arguments, Schlozman will only briefly address those legal issues that have been thoroughly dealt with in the briefs filed by other appellees in this appeal. Moreover, Schlozman will attempt to limit the discussion of the legal deficiencies of Lipari's FIRST AMENDED COMPLAINT to the specific allegations concerning Schlozman. Suffice it to say, however, that Schlozman agrees with the other appellees that Lipari's FIRST AMENDED COMPLAINT fails to state a cognizable civil RICO claim against any party and was properly dismissed by the district court as to all parties.

C. The district court properly granted the motions to dismiss Lipari’s civil RICO claims in that Lipari does not have standing to sue under RICO because he has suffered no quantifiable injury to his business or property.

In addition to establishing the elements for a violation of 18 U.S.C. § 1962, a civil RICO plaintiff must establish standing to sue. 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), this Court further explained that:

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)).

Acknowledging the standing requirement under civil RICO, the district court below dismissed Lipari's lawsuit, concluding that Lipari's allegations regarding the damages to his business and property were too vague and indeterminable to establish jurisdiction with the district court.¹² In making its ruling, the district court correctly noted that Lipari alleges that he has been injured by the loss of money from the sale of a lease to GE and some GE-affiliated companies. The district court further observed:

¹² The district court seemingly proceeded with dismissal for lack of standing under FED. R. CIV. P. 12(b)(6). *See* Add., Ex. 1. In fact, "if a plaintiff lacks standing, the district court has no subject matter jurisdiction." *Roberts v. BJC Health System*, 452 F.3d 737, 738-39 (8th Cir. 2006) (quoting *Faibisch v. University of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2006)). As such, the district court's dismissal was more accurately granted under the auspices of FED. R. CIV. P. 12(b)(1).

However, [Lipari] does not attempt to quantify or measure these damages in any way. He also offers no evidence or support for his claim that his RICO damages total \$450 million.

Add., Ex. 1.

The district court then compared Lipari's position with the civil RICO plaintiff in the case of *World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 530 F.Supp.2d 486 (S.D.N.Y. 2007). In that case, the plaintiff – a licensor of video games and toys – alleged that the defendant's racketeering acts deprived it "of the intangible right of honest services [of its licensing agents], and as a further result, it received lower royalty rates from its toy and videogame licenses." *Id.* at 518. More specifically, the plaintiff claimed that because of the alleged misconduct, the plaintiff "was denied the business opportunity of between 50-66% more in royalties from a non-corrupt licensing arrangement." *Id.*

In addressing a motion to dismiss for lack of standing, the *World Wrestling* court noted that:

[A civil RICO] plaintiff must show that its injury is to its property, and not, for example, physical, emotional or reputational harm, and that plaintiff's injury is proximately caused by the acts constituting the RICO violation. . . . In evaluating a RICO injury claim, it bears remembering that RICO should be liberally construed to effectuate its remedial purposes. However, a RICO plaintiff may not recover for speculative losses or where the amount of damages is unprovable.

Id. at 518-19 (*internal citations and quotations omitted*). After examining the speculative and tenuous nature of plaintiff's claims of lost "services of honest agents" and lost "business opportunities," the court found that there was "no plausible set of facts, consistent with the allegations in the [plaintiff's complaint], that would demonstrate that the plaintiff had suffered a quantifiable and cognizable injury under RICO." *Id.* at 524.

After analyzing the facts in the *World Wrestling* case, the district court below found that Lipari's "allegations regarding his injuries are even less specific, particularly since [Lipari] had not even begun operating his business at the time he alleges that the actions occurred." Add., Ex. 1. The district court noted that innumerable other facts – wholly unrelated to any civil RICO acts – could have contributed to the lack of success of Lipari's business, including "poor marketing, lack of vendor contracts, inefficiencies, sub-par product offerings, timing of entry into the marketplace and lack of experience in the industry." Add., Ex. 1. As a result, the district court properly dismissed Lipari's civil RICO claims, holding that Lipari's "alleged injuries are 'indefinite and unprovable' and [thus] he has no standing to assert a claim under the RICO statute." Add., Ex. 1.

The district court's ruling was correct as a general proposition for all the defendants named in Lipari's lawsuit, but was particularly apt with regard to allegations against Schlozman. In this case, in the "Claims" portion of his FIRST AMENDED COMPLAINT before the district court, Lipari set out fourteen supposed "Racketeering Acts." However, the only "Racketeering Act" involving substantive allegations against Schlozman was "Racketeering Act Number Eleven." In that portion of the FIRST AMENDED COMPLAINT, Lipari charged 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.), 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").

S.A. [I], at 230-33. Reviewing these "predicate acts" alleged with regard to Schlozman, it is frankly impossible to discern any case for proximate causation (or, even, but-for causation) as to even Lipari's admittedly speculative business damages.

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. The complaint broadly alleged that one particular company, ALCOA, was engaged in a price-fixing scheme involving the other defendants. Inasmuch as the case was filed under the False Claims Act (“FCA”), the United States (while Schlozman was the 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). The district court granted the motion to dismiss. With regard to Schlozman’s testimony before the United States Senate, read broadly and generously, Lipari’s FIRST AMENDED COMPLAINT contended that Schlozman improperly testified as to whether he was “directed” to indict certain members of ACORN.¹³

¹³ However, even Lipari conceded 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 S.A. [I], at 233. In any event, affording Lipari’s allegations their worst connotation, they do not state a predicate act. *See, e.g., Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1021 (7th Cir. 1992) (“[W]e know that telling a lie or committing perjury is not *per se* a RICO predicate act for one simple reason: it is not included among the list of predicate acts in 18 U.S.C. § 1961(1).”); *Rand v. Anaconda, Inc.*, 623 F.Supp. 176, 182 (E.D.N.Y. 1985) (“Perjury . . . is not a RICO predicate act.”), *aff’d*, 794 F.2d 843 (2nd Cir. 1986).

Setting aside the erroneous and opprobrious insinuations of Lipari, it would have defied all logic and common sense for the district court to tie these “predicate acts” to any injury to Lipari’s business or property. The district court should not have to perform contorted logical gymnastics to find proximate cause. The acts that Lipari attributed to Schlozman were too remote to afford him standing to pursue a civil RICO claim.

D. Alternatively, the district court’s dismissal of Lipari’s lawsuit is sustainable in that Lipari failed to state a cognizable civil RICO claim against Schlozman.

As noted *supra*, the district court dismissed Lipari’s civil RICO claims based on lack of standing. In reaching that decision, the district court noted that other grounds for dismissal had been raised, but “because the standing issue is dispositive of all of plaintiff’s claims, the Court finds no reason to address these other arguments.” Add., Ex. 1. The other grounds raised before the district court also support a dismissal.¹⁴

¹⁴ It is well settled that this Court may affirm a district court’s ruling on any basis supported by the record, even if that legal basis was not addressed by the district court. *See, e.g., Skare v. Extendicare Health Services, Inc.*, 515 F.3d 836, 840 (8th Cir. 2008); *Richmond v. Higgins*, 435 F.3d 825, 828 (8th Cir. 2006).

In order to succeed on his RICO claim, Lipari was required to adequately plead and prove four elements: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, *supra*, 528 F.3d 1001, 1027 (8th Cir. 2008) (*internal citation omitted*). Lipari failed on each element.

1. Lipari failed to plausibly establish an “enterprise” involving Schlozman for purposes of civil RICO.

In *Bell Atlantic Corp. v. Twombly*, *supra*, 550 U.S. 544, 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 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 a plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 547, 127 S.Ct at 1959.¹⁵ Instead, the Court adopted a stricter “plausibility” standard:

¹⁵ 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

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 570, 127 S.Ct at 1964 (*citations omitted*).

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.

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 560, 127 S.Ct. at 1959-60.

Id. at 572, 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. California State Council of 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 generally applied the “plausibility” rule to civil RICO complaints alleging an enterprise. *See, e.g., Melton v. Blankenship*, 2009 WL 87472, op. at *2 (6th Cir. Jan. 13, 2009); *Dalton v. City of Las Vegas*, 282 Fed. Appx. 652, 654-55 (10th Cir. 2008); *Pappa v. Unum Life Insurance Co. Of America*, 2008 WL 2048664, op. at *2 (M.D. Pa. May 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 entity] 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 the FIRST AMENDED COMPLAINT that was pending before the district court discloses an identical deficiency. While Lipari alleges a massive conspiracy and points to parallel conduct by several of the defendants, he utterly fails to establish any “enterprise” within the meaning of civil RICO. With regard to Schlozman in particular, Lipari’s allegations are bare unsupported conclusions, merely alleging that Schlozman “took part in directing the enterprise’s unlawful conduct.” While the FIRST AMENDED COMPLAINT makes scurrilous charges against Schlozman and the other defendants, it never establishes that the supposed actions of any of these parties 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.’

Craig Outdoor Advertising, 528 F.3d at 1026 (*internal quotations and citations omitted*). The district court’s dismissal of Lipari’s civil RICO claims is sustainable by this Court for the alternative reason that Lipari failed to plausibly establish the existence of a criminal enterprise.

2. Lipari failed to plausibly 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, supra*, 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 3277, 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 jurisprudential method 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, 2900 (1989).

Even assuming *arguendo* that Lipari plead any legally sufficient “predicate acts” against Schlozman, it is evident that his FIRST AMENDED COMPLAINT utterly failed to establish any relationship between the variety of actions enumerated in the pleading. *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 FIRST AMENDED COMPLAINT reveals that Lipari did not plausibly establish any “pattern” of racketeering activity and the district court’s dismissal of Lipari’s civil RICO claims is sustainable on that ground.

3. Lipari failed to 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 acts 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. A noted *supra*, in this case, in the “Claims” portion of his FIRST AMENDED COMPLAINT pending before the district court, Lipari set out fourteen supposed “Racketeering Acts” committed by the defendants. However, the only “Racketeering Act” involving substantive allegations against Schlozman was “Racketeering Act Number Eleven.” In that portion of the FIRST AMENDED 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.), 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) (“[A]ssuming arguendo that the alleged predicate acts constituting the pattern were adequately pled, we evaluate the RICO allegations with respect to each defendant individually.”).

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 plausibly explain) exactly how these supposed actions¹⁶ of Schlozman violate any of the statutes enumerated in 18 U.S.C. § 1861(1).

¹⁶ 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.

E. Alternatively, the district court’s dismissal of Lipari’s lawsuit is sustainable in that the alleged “predicate acts” attributed to Schlozman are protected by 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.¹⁷ More than 80 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.*

[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).

¹⁷ 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.

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. 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).

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.¹⁸ Moreover, it is well settled that absolute immunity applies to bar claims asserted under civil RICO. As noted by one district court:

¹⁸ 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 (suppressing exculpatory evidence, knowing use of perjury, and manufacturing evidence); *White v. Murphy*, 789 F.2d 614 (8th Cir.1986) (conspiring to conceal exculpatory evidence).

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."). Again, the district court's dismissal of Lipari's civil RICO claims against Schlozman is sustainable on this alternate ground.¹⁹

¹⁹ The fact that Schlozman acts arose in a supervisory setting does not diminish his entitlement to absolute immunity. *See, e.g., Van de Kamp v. Goldstein*, 555 U.S. —, — S.Ct. —, 2009 WL 160582, slip op. at 7 (Jan. 26, 2009).

F. The district court did not abuse its discretion in denying Lipari’s motion to file a SECOND AMENDED COMPLAINT inasmuch as the proposed amendments were futile in that they would have not addressed or corrected the legal deficiencies in the FIRST AMENDED COMPLAINT.

On March 22, 2006, Lipari originally filed a PETITION in the Circuit Court of Jackson County, Missouri. After Lipari’s case was removed to federal court, Lipari filed a FIRST AMENDED COMPLAINT²⁰ on December 7, 2007. On May 1, 2008, Lipari sought leave of the district court to file a SECOND AMENDED COMPLAINT. In entering its dismissal order on July 30, 2008, the district court denied – without comment – Lipari’s motion to amend his FIRST AMENDED COMPLAINT. Add., Ex. 1. Lipari contends on appeal that the refusal to permit the amendment was error. OPENING BRIEF OF APPELLANT, at 35-39. Lipari’s argument is without support.

The proposed SECOND AMENDED COMPLAINT is identical to Lipari’s FIRST AMENDED COMPLAINT except that it seeks to add as additional defendants Sprint, Inc., AT&T, and KPMG LLP. S.A. [I], at 258-341. The proposed SECOND AMENDED COMPLAINT also adds paragraphs making allegations against the three

²⁰ Although an amended pleading, Lipari simply titled the document as a “Complaint.” S.A. [I], at 177.

companies. S.A. [I], at 330-40. According to Lipari, his proposed amended pleading establishes that these putative party-defendants were “co-conspirators in the RICO conspiracy and members of the defendant RICO enterprise.” OPENING BRIEF OF APPELLANT, at 36, 37. However, the inclusion of the three companies would have done nothing to rectify the shortcomings in the FIRST AMENDED COMPLAINT that formed the basis for the district court’s dismissal of Lipari’s civil RICO claims.²¹

The Federal Rules of Civil Procedure provide that amendments to the pleadings are to be liberally permitted:

A party. . . may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely granted when justice so requires.

FED. R. CIV. P. 15(a). The courts that have analyzed the “justice” language in Rule 15 have concluded that:

²¹ Before this Court, Lipari makes a passing argument that the allegations against Sprint Inc. and AT&T describe “business injuries that are from services contracted and paid for by [Lipari] that were not the services expressly or impliedly provided telecommunications customers.” OPENING BRIEF OF THE APPELLANT, at 37. Thus, Lipari contends these allegations would have established standing under civil RICO. However, a review of the “new” allegations contained in the proposed SECOND AMENDED COMPLAINT, ¶¶ 404-77, discloses only the same vague references to “damage to the business” and loss of the “honest services” of public officials that doomed Lipari’s FIRST AMENDED COMPLAINT. S.A. [I], at 330-40.

Under this policy, only limited circumstances justify a district court's refusal to amend the pleadings: undue delay, bad faith on the part of the moving party, futility of the amendment or unfair prejudice to the opposing party.

Sanders v. Clemco Industries, 823 F.2d 214, 216 (8th Cir. 1987). The decision as to whether to permit a party to amend its pleadings is left to the sound discretion of the district court. *Humphreys v. Roche Biomedical Laboratories, Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993). In this case, Lipari's SECOND AMENDED COMPLAINT suffers from the same legal deficiencies as his FIRST AMENDED COMPLAINT. Permitting the amendment and dragging additional parties into the litigation would have served no just purpose. *See, e.g., U.S. ex rel. Lee v. Fairview Health System*, 413 F.3d 748, 749 (8th Cir. 2005) ("Futility is a valid basis for denying leave to amend."). The district court did not abuse its discretion in denying leave to amend to Lipari.

G. The district court did not abuse its discretion in denying Lipari's motion requesting the judge's recusal.

On August 4, 2008, five days after the district court entered an order dismissing Lipari's civil RICO claims, Lipari filed a motion to alter or amend the judgment pursuant to FED. R. CIV. P. 59(e). In that pleading, Lipari marginally raised several issues,²² including a suggestion²³ that the district court should have recused from overseeing the proceeding. Lipari reasoned that the district judge was a member of the Board of Directors of a Kansas City hospital [St. Luke's] and in paragraph 109 of his FIRST AMENDED COMPLAINT, Lipari alleged:

²² In the Rule 59(e) pleading, Lipari asserted that the district court's dismissal order was the result of "manifest error and injustice" because the district court allegedly ignored new precedent [*Bridge v. Phoenix Bond & Indemnity Co.*, — U.S. —, 128 S.Ct. 2131 (2008)] and applied an excessively narrow view of causation. In its order of October 31, 2008, the district court rejected these arguments. Add., Ex. 2. Lipari has not challenged the rulings on these issues. Consequently, Schlozman will not further address these rulings except to say that the district court was correct in refusing to alter or amend its earlier judgment. See, e.g., *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006) ("Rule 59(e) motions are not available to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to judgment.").

²³ At no time did Lipari actually file any motion for recusal, although he had filed a motion for recusal against the same district judge in an earlier 2006 case that was remanded to state court, *Lipari v. General Electric Co.*, Case No. 06-0573-CV-W-FJG (W.D. Mo.).

The Western District of Missouri US Attorney office under Todd P. Graves had been active in prosecuting Medicare fraud. Medical Supply Chain, Inc.'s civil antitrust suit against Texas based Novation LLC, Volunteer Hospital Association (VHA), University Health System Consortium (UHC) and Neoforma, Inc. alleges the companies formed a cartel and were involved in a scheme to monopolize hospital supplies with General Electric and Jeffrey R. Immelt's former corporation GE Medical and Jeffrey R. Immelt's GHX, LLC to defraud Medicare through payments to administrators and kickbacks. The scheme resulted in almost all of Kansas City, Missouri St. Luke['s] [H]ospital's one hundred million dollar supply budget being purchased through Novation LLC. St. Luke's merged with University of Kansas School of Medicine after Irene Cummings, CEO of the University of Kansas was given a job by University Health System Consortium (UHC) on March 19, 2007.

S.A. [I], at 281.

Lipari's "request" for recusal was legally unsupported and entirely untimely. 28 U.S.C. §§ 144, 455(a), (b)(1).²⁴ Furthermore, the timing of Lipari's arguments about judicial recusal are certainly suspicious. As succinctly noted in another case by this Court:

²⁴ For instance, under section 455, a party must raise a recusal claim at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for the recusal. *Tri-State Financial, LLC v. Lovald*, 525 F.3d 649, 653 (8th Cir. 2008). In this case, based on his own Rule 59(e) motion, Lipari knew about the district judge's directorship in 2006 – before the present litigation was even instituted.

[I]n denying [the] Rule 59(e) motion, the district court also denied [the plaintiff's] separate motion for recusal. We conclude that the district court did not abuse its discretion in doing so. Moreover, because it was not filed until after the district court had granted summary judgment to [the defendant] on the merits of the case, the motion was untimely.

Rabushka ex rel. United States v. Crane, 122 F.3d 559, 566 (8th Cir. 1997). See also *In re Kansas Public Employees Retirement Systems*, 85 F.3d 1353, 1360 (8th Cir.1996) (recusal motion untimely and interposed for suspect tactical reasons, “can and should” be denied on that basis alone); *Neal v. Wilson*, 112 F.3d 351, 357 n.6 (8th Cir.1997) (disapproving of tactic of waiting until after district court issued unfavorable ruling before moving for recusal).

Moreover, as noted by the district court, even if Lipari had made an actual motion for recusal and even if the motion had been timely, there was no basis for recusal. This Court has previously found that:

Under 28 U.S.C. § 455(a), a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Because § 455(a) sets forth an objective standard, whether a judge actually is biased or actually knows of a ground requiring recusal is irrelevant. Rather, the issue is whether the judge’s impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. Because a judge is presumed to be impartial, a party seeking recusal bears the substantial burden of proving otherwise.

Scenic Holding, LLC v. New Board of Trustees of Tabernacle, 506 F.3d 656, 662 (8th Cir. 2007) (*internal citations and quotations omitted*). Utilizing this criteria, the district court, in its October 31, 2008 order, concluded that “an average person would not reasonably question the Court’s impartiality, especially since the Court has not served on the Board of Director’s for St. Luke’s in several years.” Add., Ex. 2. The district court’s decision to not recuse was not an abuse of discretion.

XII. Conclusion

For the foregoing reasons, separate appellee Bradley J. Schlozman respectfully requests that the Court affirm the final judgment of the district court.

Respectfully submitted,

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²⁵ 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.*, Case No. 07-0849-CV-W-FJG (W.D. Mo.), and on the appeal of that case, *Samuel Lipari v. General Electric Co., et al.*, Appeal No. 08-3115 (8th Cir.). 28 C.F.R. § 50.15(a)(2).

XIII. Certification of mailing

The undersigned Assistant U.S. Attorney hereby certifies that two true copies of the forgoing APPELLEE'S BRIEF were placed in the United States first class mail, postage prepaid, on this 26th day of January, 2009, addressed to:

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XIV. Certification of compliance

Pursuant to Rule 28A(c) of the 8TH CIR. RULES OF APPELLATE PROCEDURE and FED. R. APP. P. 28(a)(11), 32(a)(7)(C)(i), the undersigned Assistant U.S. Attorney hereby certifies that the forgoing APPELLEE’S BRIEF complies with the applicable type-volume limitation in that:

The APPELLEE’S BRIEF was prepared utilizing WordPerfect 9[®] software,

The APPELLEE’S BRIEF contains 9,429 words²⁶ (and 981 lines) as verified by a count on WordPerfect 9[®], and

The APPELLEE’S BRIEF was prepared utilizing 14-point or larger proportionally spaced “Times New Roman” typeface.

JEFFREY P. RAY
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²⁶ The word count excludes the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument and certifications of counsel. FED. R. APP. P. 32(a)(7)(B)(iii).

**XV. Certification of digital version of the
BRIEF OF SEPARATE APPELLEE
BRADLEY J. SCHLOZMAN**

Pursuant to Rule 28A(d)(1)-(4) of the 8TH CIR. RULES AND PROCEDURE, appellee Bradley j. Schlozman, encloses with the mailing of this BRIEF OF SEPARATE APPELLEE BRADLEY J. SCHLOZMAN a 3½-inch computer diskette, appropriately labeled, containing the entire text of the BRIEF OF SEPARATE APPELLEE BRADLEY J. SCHLOZMAN. The diskette has been scanned for viruses and it is virus-free. This digital version of the BRIEF OF SEPARATE APPELLEE BRADLEY J. SCHLOZMAN is in Portable Document Format or “.pdf” form.

An additional copy of the digital version of the BRIEF OF SEPARATE APPELLEE BRADLEY J. SCHLOZMAN, also in .pdf form on a labeled 3½-inch computer diskette, is being furnished to the appellant and other appellees herein with the mailing of the BRIEF OF SEPARATE APPELLEE BRADLEY J. SCHLOZMAN.

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