

**IN THE STATE OF MISSOURI
JACKSON COUNTY SIXTEENTH CIRCUIT COURT
AT INDEPENDENCE**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 0916-CV38273
)	Division 15
CHAPEL RIDGE MULTIFAMILY LLC, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFF’S RESPONSE TO
DEFENDANT TONY R. MILLER’S MOTION TO DISMISS UNDER
RULE 55.27(g)(2) FOR FAILURE TO STATE A CLAIM and NOTICE OF IMPLICIT
CONVERSION INTO A MOTION FOR SUMMARY JUDGMENT UNDER RULE 74.04**

COMES NOW Plaintiff Samuel K. Lipari appearing *pro se* and makes the following suggestion in opposition to the defendant TONY R. MILLER’S Motion To Dismiss. The plaintiff respectfully requests the court strike the motion to dismiss in response to the plaintiff’s accompanying motion showing the defendant is in default or in the alternative that the court deny the Motion to Dismiss for the following reasons:

I. STATEMENT OF FACTS

1. The defendant TONY R. MILLER’S Motion to Dismiss and Suggestion in Support does not seek to dismiss all claims against the defendant TONY R. MILLER in the amended petition.
2. The defendant TONY R. MILLER’S Suggestion in Support converts his Motion to Dismiss into a Summary Judgment and enters into the record evidence proving the plaintiff’s claims against TONY R. MILLER and the other latecomer defendants.
3. The defendant merely references the arguments of the defendant law firm TROPPITO & MILLER LLC which itself incorporated the arguments of the defendant SWANSON MIDGLEY LLC.
4. The plaintiff incorporates his statement of facts in his Suggestion in Opposition to the defendant SWANSON MIDGLEY LLC’S Motion And Amended Motions To Dismiss at ¶¶ 1-25 on pages 1-7.
5. Nether the defendant TONY R. MILLER’S Motion To Dismiss or Suggestion in Support of Dismissal include arguments for the non-appearing and unrepresented defendants CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and WELLS FARGO COMPANY.

6. The defendant TONY R. MILLER'S Motion To Dismiss does not challenge the plaintiff's claims against the named defendants CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, CHAPEL RIDGE MULTIFAMILY LLC, REGUS PLC, REGUS MANGEMENT GROUP LLC, LIANNE ZELLMER, or TROPBITO & MILLER LLC's clients WACHOVIA DEALER SERVICES INC., and WELLS FARGO COMPANY.

4. Neither the defendant TONY R. MILLER'S Motion To Dismiss or Suggestion in Support of Dismissal plead an affirmative defense for failure to state a claim of RICO Conspiracy under 18 U. S. C. § 1962 (d) which the plaintiff's petition and amended petitions allege includes TROPBITO & MILLER LLC.

5. The defendant TONY R. MILLER'S Motion To Dismiss does not answer the plaintiff's Amended Petition which makes an affirmative claim for judgment of liability against TONY R. MILLER'S.

6. The defendant CHAPEL RIDGE MULTIFAMILY LLC has now answered the plaintiff's Amended Petition, ensuring there will be discovery and a trial on the merits.

7. The defendants CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and WELLS FARGO COMPANY have defaulted by not answering the plaintiff's petition after being duly served by the Jackson County Sheriff, ensuring there will be discovery and a hearing to support the plaintiff's damages demand against the latecomer's RICO conspiracy and individual RICO predicate acts.

8. The defendants TONY R. MILLER and TROPBITO & MILLER LLC failure to answer the charge of 18 USC 1962(d) RICO Conspiracy and CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and WELLS FARGO COMPANY's defaults determine liability as admissions under RMSO Rule 55.09 that the Novation LLC Cartel 18 USC 1962(d) RICO Conspiracy exists and that TROPBITO & MILLER LLC, CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER joined the conspiracy.

9. The defendant TROPBITO & MILLER LLC failure to answer the specific facts asserted in the plaintiff's response to the Motion to Dismiss after it had been converted into a motion for summary judgment subjects TROPBITO & MILLER LLC to damages for 18 USC 1962(d) RICO Conspiracy and 18 USC 1962(e) RICO Mail and Wire Fraud predicate acts committed by TONY R. MILLER.

II. SUGGESTION IN OPPOSITION TO DISMISSAL

The defendant TONY R. MILLER represented by Spencer J. Brown of Deacy & Deacy, LLP has incorporated by reference the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER's remaining continuity argument. However, the plaintiff is required to establish RICO pattern, duration, frequency and substance of the purported racketeering activity individually for each defendant. See *Jones v. National Communication and Surveillance Networks*, 409 F. Supp. 2d 561 (S.D.N.Y. 2006). The plaintiff will show the Amended Petition sufficiently states RICO 18 U. S. C. § 1962 (c) and § 1962 (d) claims against TONY R. MILLER.

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER argued that the Amended Petition fails to allege a "pattern of racketeering" because "Plaintiff alleges Defendant were engaged in a close-ended scheme to deprive him of his phone service, mail service, and apartment" violating in the minds of at least Morrow, Willnauer & Klosterman, LLC attorneys James C. Morrow, Mo. Lic. #32658 and Abigail L. Pierpoint, Mo. Lic #59997. the Eight Circuit's requirements for a Close-ended continuity which involves "a series of related predicates extending over a substantial period of time." *Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999).

James C. Morrow and Abigail L. Pierpoint were able to create this misrepresentation of the plaintiff's petition and Amended Petition by materially misrepresenting to the court the substantial allegations and averments of supporting facts meeting the pleading standard for stating a RICO Conspiracy under 18 U. S. C. § 1962 (d) that includes General Electric and Novation LLC and allegations and averments of supporting facts meeting the pleading standard for stating the Novation LLC RICO enterprise the latecomer coconspirators are alleged to have committed RICO predicate acts in furtherance of.

The petition and Amended Petition clearly allege open ended continuity through both RICO conspiracy and association in fact with a RICO enterprise, the Novation LLC Cartel whose sole existence is as the petitions repeatedly show is for the purpose of restraining trade in the market for hospital supplies (felony violations of the Sherman Act) for an ongoing over arching criminal scheme to defraud Medicare and Medicaid through hospital skimming (artificially inflating hospital supply costs on exclusive long term contracts while paying illegal kickbacks to hospital administrators in violation of the Medicare Anti-kickback Safe Harbor).

Because the petition and Amended Petition overwhelmingly plead facts showing Open-ended continuity by every standard, the Willnauer & Klosterman, LLC attorneys James C. Morrow and Abigail L. Pierpoint substitute “Close-ended continuity” editing the petition’s averments to just the time period SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISCHER join the conspiracy and association in fact so that James C. Morrow and Abigail L. Pierpoint could utilize the “Straw Man Fraud” technique of the defendant conspirators that procured outcomes in Kansas District court through extrinsic fraud. “Having erected this straw man, the appellants then shred it...”*Limone v. Condon*, 372 F.3d 39 at 46 (1st Cir., 2004) “Courts must be equally careful, however, not to permit a defendant to hijack the plaintiff’s complaint and recharacterize its allegations so as to minimize his or her liability” *id.*

The Willnauer & Klosterman, LLC attorneys James C. Morrow and Abigail L. Pierpoint also misrepresented to this court the pleading standard and also the clearly established case law prescribing the elements to be averred for sufficiently stating a claim for RICO Conspiracy under 18 U. S. C. § 1962 (d) and RICO enterprise at the pleading stage.

The Missouri licensed attorney defendant TONY R. MILLER has now joined in this unethical conduct of making these same misrepresentations to the court even after the plaintiff answered SWANSON MIDGLEY LLC’s fraudulent motion to dismiss pointing out the intentional misrepresentations to the court. Bizarrely, TONY R. MILLER has committed these further ethical violations while simultaneously furnishing the court evidence of his false statements to attempt to obtain property from the plaintiff in violation of Missouri’s criminal code (acts to mislead a public official and are State of Missouri Class A Misdemeanors see <http://www.16thcircuit.org/Forms/CVL/Landlord.pdf>) making falsehoods to the court a misdemeanor and proving his violation of the US Criminal Code making Wire and Mail Fraud a felony.

The defendant TONY R. MILLER’s untimely motion to dismiss filed after defaulting when initially served by the sheriff at his last Missouri Supreme Court registered address as a licensed attorney is itself an additional predicate act of RICO Mail and Wire Fraud because it adopts SWANSON MIDGLEY LLC’s fraudulent misrepresentations and was transmitted to the court, the plaintiff and other parties through the US Mail and by wire with the posting on Missouri Case Net.

Plaintiff Sufficiently Pled Open Ended Continuity Establishing Pattern of Racketeering

It is an error of law that the defendants repeatedly attempt to foster on this court regarding the sufficiency of the Amended Petition's allegation of an enterprise for failure to occur over a year long period. The petition in fact clearly alleges a multi year enterprise which is fraudulently misrepresented as less than one year by the defendants. However, the defendants also misrepresent or mistake the clearly established case law that resolves this issue by the effect of alleging that the latecomer RICO co-conspirators including the defendant TONY R. MILLER have joined an ongoing RICO conspiracy with the non-defendant coconspirators General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, Jeffrey R. Immelt, Seyfarth Shaw LLP, Stuart Foster, Heartland Financial Group, Inc., Christopher M. McDaniel, Husch Blackwell Sanders LLP, Bradley J. Schlozman, Novation LLC, US Bancorp and The Piper Jaffray Companies. See Am. Pet. At ¶62 on pgs. 10-11.

There can be no reasonable doubt that the petition alleges an ongoing multi year criminal conspiracy that includes RICO predicate acts of fraud and extortion against the plaintiff:

“59. On February 9 2008 the plaintiff, Samuel K. Lipari served the defendants and the Honorable Judge David J. Waxse and Carlos Murguia with a, “Settlement Brief Notice” and three volumes of evidentiary exhibits indexed by volume, exhibit number and the description of the document.

60. The settlement brief “*Lipari v US Bank Settlement Brief*”, “Settlement Brief Evidence Exhibits Vol. I”, “Settlement Brief Evidence Exhibits Vol. II”, and “Settlement Brief Evidence Exhibits Vol. III” were created by the plaintiff in an effort to accelerate settlement and to stop the damage against citizens of the United States and residence of the State of Missouri.

61. What the plaintiff instead encountered was **the same criminal misconduct, fraud, extortion and retaliation the plaintiff had already suffered for the past decade**. See Lipari Affidavit **Exhibit 7**

62. On information and belief, the defendants in this action formed an agreement on July 24th, 2009 to participate in a criminal conspiracy with agents of the following RICO Conspiracy members...”[emphasis added].

Plaintiff's Am. Pet. At ¶¶ 59-62 on pg. 10.

There can be no reasonable doubt that the named defendants including TONY R. MILLER were alleged to have joined as latecomers an already existing RICO criminal enterprise committing ongoing acts of fraud including hospital skimming and defrauding Medicare:

“33. The **plaintiff's petition alleges the latecomer defendants joined a RICO enterprise and RICO conspiracy created by General Electric and called the Novation LLC cartel which has the over arching goal of artificially inflating hospital supply costs to skim Medicaid, Medicare and private insurance funds from hospitals** and is described fully in the litigation documents at <http://www.medicalsupplychain.com/Lipari%20v%20GE%2007-0849.htm>” [emphasis added].

Plaintiff's Am. Pet. at ¶33 on pg. 7

There can be no reasonable doubt that the named defendants including TONY R. MILLER were on notice that the gravamen of the claims against them included participating in a conspiracy to carry out the over arching goals of a specific RICO association in fact RICO enterprise:

“69. The plaintiff supports the following statements with a sworn affidavit and evidentiary exhibits that describe and document the public official corruption the plaintiff found running rampant in our Federal and State agencies, courts and public offices which was used by the defendants CHAPEL RIDGE MULTIFAMILY LLC, SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, HOLLY L. FISHER, REGUS PLC, REGUS MANGEMENT GROUP LLC, LIANNE ZELLMER, WELLS FARGO, WACHOVIA DEALER SERVICES INC., TROPPITO & MILLER LLC, CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER and their co-conspirators to injure the plaintiff and to **carry out the over arching goals of the RICO conspiracy as set by the RICO enterprise controlling hospital supplies in Missouri and the nation**” [emphasis added].

Plaintiff's Am. Pet. at ¶69 on pg. 10.

This court lacks the discretion to interpret the plaintiff's Amended Petition as the defendants' materially fraudulent misrepresentations of fact and law in their motions to dismiss require. Even if the petition was less clear, this court must accept the allegations as true and give the plaintiff all reasonable inferences there from. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. 2009). In order to survive a motion to dismiss, “the petition must invoke substantive principles of law entitling plaintiff to relief and ... ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.” *Id.* at 329-330.

TONY R. MILLER seeks to mislead this court into granting the Defendants' motion to dismiss on a basis prohibited under controlling US Supreme Court law as explained in *Abraham v. Singh et al.*, 480 F.3d 351 at ¶¶ 15-20 (5th Cir. 2007):

“In light of the liberal pleading standard with which the Plaintiffs' allegations must be viewed, *see Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 919, 166 L.Ed.2d 798 (2007), the district court erred in turning the Supreme Court's explanation of the continuity prong into a stringent pleading requirement. *See Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 231 (5th Cir.2003); *see also H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. at 2902 (“**[Showing continuity] may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity.** We can, however, begin to delineate the requirement.”). For pleading purposes, we must determine whether a pattern of racketeering has been alleged that is sufficiently similar to what the Supreme Court contemplated in its *H.J., Inc.* discussion and what this Court has held to constitute a pattern of racketeering activity. **At this early stage, a plaintiff's burden is not tied to the precise language that the Supreme Court used but to the Court's general explanation of the statute. Thus, the Court itself provided examples of how the continuity element may be satisfied and cautioned that the analysis "depends on the specific facts of each case . . . [and] cannot be fixed in advance with such clarity that it will always be apparent."** *Id.* at 242-43, 109 S.Ct. at 2902.”

SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, HOLLY L. FISHER; TROPBITO & MILLER LLC and now TONY R. MILLER have misrepresented to this court that Missouri State law fact pleading imposes a heightened pleading standard on federal RICO claims. As the plaintiff stated in his answer to SWANSON MIDGLEY LLC's motions to dismiss it has long been established that "a state statute is void to the extent that it actually conflicts with a valid federal statute" and that a conflict will be found either where compliance with both federal and state law is impossible or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982). The U.S. Supreme Court less recently stated in a case over FRCP Rule 4 (not FRCP Rule 8 on Notice Pleading): "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Hanna v. Plumer*, 380 U.S. 460 at 474 (1965).

Multi Year Enterprise Is Sufficiently Pled Under Controlling Case Law

The plaintiff's allegation of TONY R. MILLER like SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER joining the ongoing RICO conspiracy and RICO Enterprise sufficiently states a claim at law in the pleading phase of this trial. *Federal Ins. Co. v. Ayers*, 741 F. Supp. 1179, (E.D. Pa. 1990) holds that elements necessary to prove enterprise as required to state RICO claims are not necessary to plead causes of action under RICO statute; **plaintiff need only identify enterprise** so as to put defendants on notice of the claims against them.

In *LSC Associates v. Lomas & Nettleton Financial Corp.*, 629 F. Supp. 979, (E.D. Pa. 1990), the court determined that plaintiffs identifying entities which they believed were "enterprises" which had been marshaled against them, were sufficient to satisfy pleading requirement for RICO claims.

Open-ended continuity

The plaintiff has pled Open-ended continuity in multiple ways this court must recognize in following federal precedent:

Automatic Open ended Continuity at Law

Because the Amended Petition alleges TONY R. MILLER committed RICO predicate acts of Mail Fraud and Wire Fraud to deceive court officials that are criminal acts to mislead a public official and are State of Missouri Class A Misdemeanors (see <http://www.16thcircuit.org/Forms/CVL/Landlord.pdf>),

TONY R. MILLER's predicate acts are treated with Automatic Open ended Continuity at law. In *Leung v. Law*, 387 F. Supp. 2d 105 (E.D.N.Y. 2005) the court ruled that an inherently unlawful act performed on behalf of an enterprise whose business is racketeering activity would automatically give rise to the threat of continuity necessary to establish a pattern of racketeering activity under RICO. See also *U.S. v. Eppolito*, 436 F. Supp. 2d 532 (E.D.N.Y. 2006) an act performed on behalf of an enterprise whose business is racketeering activity would automatically give rise to the threat of continuity.

Novation LLC RICO Enterprise's Scheme to Defraud is Open-ended Continuity at Law

Because the Amended Petition alleges TONY R. MILLER is part of an association in fact enterprise, the Novation LLC RICO enterprise whose sole purpose is to restrain trade in hospital supplies for the purpose of defrauding Medicare and Medicaid, charges against TONY R. MILLER automatically give rise to the threat of continuity. In *Hughes v. Technology Licensing Consultants, Inc.*, 815 F. Supp. 2d 847 (W.D. Pa. 1992), the court even a three day old scheme to defraud consumers constituted open ended continuity because it was alleged to be continuing.

Professor G. Robert Blakey of Notre Dame Law School described how schemes to defraud constitute a pattern under RICO:

“The Pattern Of Racketeering Activity Unquestionably, the industry's conduct since the 1950s constitutes a “pattern.” *H.J. Inc.*, 492 U.S. at 238-43 (relationship and continuity).

That conduct also constitutes a “scheme to defraud” under 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

The focus of the concept of “scheme to defraud” is on “dishonest methods or schemes and [it] usually signif[ies] the deprivation of something of value by trick, deceit, chicanery or overreaching.” *Carpenter v. United States*, 484 U.S. 19, 27 (1987). The Fifth Circuit originated the Gregory standard, the broadest understanding of “scheme to defraud” in the circuits: *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (“moral uprightness, or fundamental honesty, fair play and right dealing in the general and business life of members of society”). It is properly followed in most circuits. Reflections at 1586.”

US Senate Judiciary Committee Testimony on RICO and Tobacco; *RICO and U.S. v. Philip Morris USA, Inc., et al.* Statement of Professor G. Robert Blakey, Notre Dame Law School, September 5, 2001.

In *Metropolitan Transportation Authority v. Contini*, No. 04 CV 0104 (EDNY, July 6, 2005) Judge Trager found that the MTA had adequately pleaded a pattern of racketeering activity, noting initially that even though there was only one project it was clear that “many acts of fraud were committed and that the fraud threatened to continue into the foreseeable future.” “City Check's money-laundering acts undertaken in pursuit of embezzling money from the MTA show a threat of future criminal conduct

sufficient to establish open-ended continuity even though those acts spanned less than one year." Slip op. 9.

The fact that TONY R. MILLER has not yet sold or returned the plaintiff's Audi business car taken through Class A Misdemeanor frauds on the court and consumer fraud violations makes the conduct of TONY R. MILLER automatically give rise to the threat of continuity. See *Hughes* 815 F. Supp. 2d 847 *Id.*

Mail fraud predicate acts in repossession of a used car by a finance and collection companies on behalf of an association in fact multi year enterprise supported a pattern of racketeering under RICO in *Chisolm v. Charlie Falk Auto Wholesalers, Inc.* 851 F. Supp. 739 (E.D.Va. 1994).

Conspiracy Establishes Open Ended Continuity Pattern of Racketeering

The plaintiff's allegation of TROPPITO & MILLER LLC like SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER joining the ongoing RICO conspiracy establishes Open-ended elements of continuity and relatedness to allege a pattern of racketeering required to state a claim under RICO:

Novation LLC RICO Conspiracy to Restrain Trade is Open-ended Continuity at Law

Because the Amended Petition alleges TONY R. MILLER was a latecomer coconspirator to the Novation LLC RICO conspiracy to restrain trade in hospital supply markets, charges against TONY R. MILLER automatically give rise to the threat of continuity. In *Commonwealth of Pennsylvania v. Derry Construction Co., Inc.* 617 F. Supp. 940 (W.D. Pa. 1985), the court ruled that alleging a company was in a conspiracy with another non-defendant company to unreasonably restrain trade in the construction industry like the plaintiff's allegation that hospital supply firms and their associates have entered into a criminal conspiracy to further a " RICO enterprise controlling hospital supplies in Missouri and the nation" (Am. Pet. at ¶69 on pg. 10) constituted open ended continuity. See also *Sadiighi v. Daghighfekr*, 36 F. Supp. 2d 279 (D.S.C. 1999).

Non-Defendant Co-Conspirator Conduct Meets The Pattern Requirement

The conduct averred against non-defendant co-conspirators is sufficient to state a claim against the named defendant co-conspirators including TONY R. MILLER, TROPPITO & MILLER LLC, SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER. In *Sadiighi*, 36 F.

Supp. 2d 279 the court ruled that non-defendants committing acts at the instruction of defendant coconspirators sufficiently established a “pattern of racketeering activity.” Notice of this clearly established principal was included in the petition by the plaintiff:

“26. The plaintiff’s petition alleges RICO predicate acts of mail fraud, wire fraud and Hobbs Act extortion committed by both a RICO enterprise and a RICO conspiracy joined by the defendants **making the defendants liable to the plaintiff even if they are found to have committed no RICO predicate act of their own and found to have lacked knowledge of the RICO enterprise and the RICO conspiracy’s predicate acts** against the plaintiff under *United States v. Yannotti*, 06-5571-cr, 2008 WL 4071691 (2d Cir. September 4, 2008).”

Plaintiff’s Am. Pet. at ¶26 on pg. 6.

Obstruction of Justice Open ended Continuity at Law

Because the Amended Petition alleges TONY R. MILLER committed RICO predicate acts of Mail Fraud and Wire Fraud to obstruct justice in the 16th Circuit State of Missouri Court, TONY R. MILLER’s predicate acts are treated with Automatic Open ended Continuity at law. In *U.S. v. Bellomo*, 263 F. Supp. 2d 561 (E.D.N.Y. 2003) the court found obstruction of justice by a RICO enterprise member to protect the enterprise’s purpose of making money from being interrupted was sufficiently related to sustain RICO.

Petition’s Inference of Regular Way of Doing business Meets Open Ended Continuity Requirement

The reasonable inference of the defendants including TONY R. MILLER’s regular way of doing business that includes predicate acts of Mail Fraud and Wire Fraud, Theft of Honest Public Services Wire Fraud, and Hobbs Act Extortion to commit frauds on the court and take property from the plaintiff fulfills the open ended continuity element of establishing a pattern of racketeering activity. In *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.* 187 F3d 229, (C.A. 2 (NY) 1999) the court ruled that the fact finder may infer from evidence that predicate acts were a regular of operating a legitimate business. Falsifying reports can be evidence that predicate acts were a regular of operating. See *Allwaste, Inc. v. Hecht*, 65 F. 3d 1523 (C.A. 9 1995).

The petition has described in detail the defendant TONY R. MILLER’s conduct as a member of the Novation LLC RICO association in fact enterprise in regular way of doing business and for the purpose of an overarching unlawful objective-the overcharging of Medicare and Medicaid funds. This establishes the requisite Open-ended continuity:

“In addition to closed-ended continuity, Plaintiffs contend that their complaint sufficiently alleges open-ended continuity. Courts evaluate open-ended continuity on a case by case basis. *Resolution Trust*, 998 F.2d at 1543. Open-ended continuity "may be established by showing that the predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit, or that the predicates are a regular way of conducting the defendant's ongoing legitimate business or the RICO enterprise." *Id.* Open-ended continuity requires a clear threat of future criminal conduct. *Erikson v. Farmers Group, Inc.*, 151 Fed.Appx. 672, 677 (10th Cir.2005) (citing *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273 [10th Cir.1989]). "A single scheme to accomplish one discrete goal, directed at a finite group of individuals, with no potential to extend to other persons or entities, rarely will suffice to establish a threat of continuing activity." *Id.* (citing *Boone*, 972 F.2d at 1556; *SIL-FLO*, 917 F.2d at 1515; *Phelps*, 886 F.2d at 1273-74).”

Gotfredson v. Larsen LP, 432 F.Supp.2d 1163 at 1176 (D. Colo., 2006).

Open-ended continuity is always present where it is averred that the defendants including TONY

R. MILLER regularly conduct their business as the petitioner described:

“Open-ended continuity is present where "the predicates are a regular way of conducting [an] ongoing legitimate business."4 H.J., 492 U.S. at 243, 109 S.Ct. at 2902; *Sion*, 893 F.2d at 447. In performing this analysis, the Court must look to whether the predicate acts themselves were a regular way of conducting the Defendants' business, not whether Defendants' conduct as a whole, including tortious conduct outside the purview of RICO section 1961(1) occurring in concert with the RICO predicates, were a regular way of conducting their ongoing legitimate business. See *Sion*, 893 F.2d at 448; *Johnston v. Wilbourn*, 760 F.Supp. 578, 588 & n. 13 (S.D.Miss.1991). Given the dearth of case law addressing this manner of establishing open-ended continuity, see *Vicom*, 20 F.3d at 783, the Court will be guided by the plain meaning of the test.”

Fac, Inc. v. Cooperativa De Seguros De Vida, 106 F.Supp.2d 244 at 259 (P.R., 2000).

III. CONVERSION OF THE MOTION TO DISMISS INTO MOTION FOR SUMMARY JUDGMENT

The defendant TONY R. MILLER has filed evidentiary exhibits with its motion to dismiss. The exhibits consisting of TROPBITO & MILLER LLC, CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER’s filings on behalf of the defendant WACHOVIA DEALER SERVICES INC. (a subsidiary of the defendant WELLS FARGO) have the effect of converting the motion to dismiss the plaintiff’s charges against the defendant TROPBITO & MILLER LLC into a motion for summary judgment. See *Donald Amick, v. Pattonville-Bridgeton Terrace Fire Protection District*, Case No: ED80382 at fn 2 (E. D. of Mo.05/07/2002) *infra*.

IV. STATEMENT OF FACTS

The court should award the plaintiff summary judgment under Rule 74.04 for the following reasons:

1. The defendant TONY R. MILLER's evidentiary exhibits eliminate any factual issues on whether the defendant TONY R. MILLER committed the conduct the Amended Petition alleged against TONY R. MILLER.

2. The plaintiff's business car taken unlawfully in violation of consumer protection laws through the specific predicate acts of Mail and Wire Fraud alleged in the Amended Petition resulted in fraud on the 16th Circuit Court.

3. The defendant TONY R. MILLER has yet to sell or give notice of a sale of the plaintiff's business car, indisputably meeting the open ended continuity requirement as explained *supra*.

4. The defendant TONY R. MILLER's agent employees CHRIS M. TROPBITO and NICHOLAS L. ACKERMAN who executed the conduct alleged against TONY R. MILLER and who were also named as defendant RICO persons in the Petition and Amended Petition have neither answered the complaint or raised any affirmative defenses or avoidances within 30 days of service of process.

5. The defendant TONY R. MILLER did not raise any affirmative defenses or avoidances and therefore waived them¹ in its motion to dismiss except failure to state a claim which has been shown at law to be frivolous.

6. The plaintiff's petitions are accompanied by a sworn affidavit and evidentiary documents which now are not in dispute given the evidentiary attachments of the defendant TONY R. MILLER and its admission on page one of the suggestion in support of dismissal that TONY R. MILLER performed the legal work alleged in the Petition and Amended Petition at ¶¶ 201-298 on pgs. 31-44.

7. CHRIS M. TROPBITO sought a judgment on behalf of TONY R. MILLER the attorney of record in the proceeding for TROPBITO & MILLER LLC and WACHOVIA DEALER SERVICES INC. against the plaintiff on December 16, 2009 but the trial judge who had been apprised of the fraud to unlawfully take the plaintiff's business vehicle shortly before entering the 16th Circuit Court room, continued the hearing until January 2010 after the plaintiff's Audi was to be sold by TROPBITO & MILLER LLC and WACHOVIA DEALER SERVICES INC.

¹ Missouri Rule 55.08 requires "In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances...". In *Detling v. Edelbrock*, 671 S.W.2d 265, the Missouri Supreme Court mandated that affirmative defenses not responsibly raised against the plaintiff's petition are waived:

"Respondent answered appellants' amended petition with a motion to dismiss in which the defense was neither raised nor intimated...Having failed to raise the defense in a timely fashion, the defense was waived." [Emphasis added] *Detling v. Edelbrock*, 671 S.W.2d 265 at 271 (Mo., 1984).

8. CHRIS M. TROPBITO came to the January 2010 hearing without having sold the car and without having sought a continuance the Wednesday before the as required by 16th Circuit Court local rules and instead applied with the Clerk for continuance of the hear until March only after seeing the plaintiff had come to the hearing and CHRIS M. TROPBITO came to the misguided realization he could not corruptly obtain a judgment through default for WACHOVIA DEALER SERVICES INC. and cover for TROPBITO & MILLER LLC, NICHOLAS L. ACKERMAN, TONY R. MILLER and his own RICO predicate acts.

9. TONY R. MILLER through his agents CHRIS M. TROPBITO and NICHOLAS L. ACKERMAN obtained tangible business property of the plaintiff in the form of the plaintiff's Audi sedan in RICO predicate acts of fraud described in the Petition and Amended Petition at ¶¶ 201-298 on pgs. 31-44.

10. The frauds included RICO predicate acts of Mail Fraud and Wire Fraud to deceive court officials that are criminal acts to mislead a public official State of Missouri Class A Misdemeanor See <http://www.16thcircuit.org/Forms/CVL/Landlord.pdf>

11. The pattern of racketeering engaged in by TONY R. MILLER is ongoing in that TONY R. MILLER is committing repeated criminal acts in furtherance of a conspiracy with the Novation LLC RICO Enterprise and is also committing RICO predicate acts of Fraud, Mail Fraud and Wire Fraud as a regular way of doing business.

V. SUGGESTION IN SUPPORT OF SUMMARY JUDGMENT

The defendant TONY R. MILLER through Spencer J. Brown of Deacy & Deacy, LLP's filing of evidentiary exhibits with TONY R. MILLER 's motion to dismiss has the effect of converting the motion to dismiss the plaintiff's charges against the defendant TONY R. MILLER into a motion for summary judgment under Rule 74.04:

"FN2. "In the interest of judicial economy, we review this matter as a summary judgment, deciding if the petition stated a claim for which relief can be granted..." *Sale v. Slitz*, 998 S.W.2d 159, 162 (Mo.App. S.D. 1999). "Review in such manner is consistent with holdings that state that [sic] a motion to dismiss is ordinarily confined to the pleadings and construed in the light favorable to plaintiff, **but when matters outside the pleadings are considered and not excluded by the court, the trial court shall treat the motion to dismiss as one for summary judgment.**" *Id.* See also *Howard v. Armontrout*, 729 S.W.2d 547, 548 (Mo.App. W.D. 1987). "Notice by the trial court is not required where a party or parties acquiesced in the trial court treating a motion to dismiss as a

motion for summary judgment." *Sale*, 998 S.W.2d at 162. **"Where the parties introduce evidence beyond that contained in the petition, ... a motion to dismiss the petition is converted to a motion for summary judgment and the parties are charged with knowledge that the motion was so converted." *Id.***

In the case at bar, an affidavit and documents were submitted into evidence. Therefore, the motion to dismiss was converted to a summary judgment and in the interest of judicial economy, we will review it as such.

Deeken, 27 S.W.3d at 870.”

Donald Amick, v. Pattonville-Bridgeton Terrace Fire Protection District, Case No: ED80382 at fn 2 (E. D. of Mo.05/07/2002).

A. Summary Judgment Standard

Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. banc 1993); *Claude v. Ceccarini*, 110 S.W.3d 843, 846 (Mo. App. E.D. 2003). The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *ITT*, 854 S.W.2d at 376; *Claude*, 110 S.W.3d at 846.

B. TONY R. MILLER Has Committed Violations of 18 U.S.C. § 1962(c)

The defendant TONY R. MILLER was sufficiently on notice that its conduct could be civilly actionable:

“Behavior prohibited by § 1962(c) will violate RICO regardless of the person to whom it may be attributed, and we will not shrink from finding an attorney liable when he crosses the line between traditional rendition of legal services and active participation in directing the enterprise. The polestar is the activity in question, not the defendant's status. *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F.Supp. 528, 560 (D.Md.1996)(“Th[e] cases reveal an underlying distinction between acting in an advisory professional capacity (even if in a knowingly fraudulent way) and acting as a direct participant in [an enterprise's] affairs.”)

Handeen v. Lemaire, 112 F.3d 1339 (C.A.8 (Minn.), 1997).

The defendant TONY R. MILLER cannot hide behind its role as just doing the “legal work” for the coconspirator defendant WACHOVIA DEALER SERVICES INC when TROPPITO & MILLER LLC, and its agents CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER had notice of the unlawfulness of that conduct which included making fraudulent representations to the plaintiff and the court through Mail Fraud and Wire Fraud predicate acts that were in furtherance of the Novation LLC Cartel RICO enterprise to criminally restrain trade in the hospital supplies market. As stated *supra* in the plaintiff’s suggestion in opposition to dismissal, acting in furtherance of the Novation LLC cartel, a RICO

enterprise organized around inherently illegal and criminal activities meets the open ended continuity and relatedness requirements through a threat of future criminal activity or in the alternative for the legitimate business defendant entities participating in the association in fact RICO enterprise including TONY R. MILLER TROPBITO, a regular way of doing of business is to be inferred from the plaintiff's petition establishing the continuity requirement. See Regular Way Of Doing Of Business *id.*

The Amended Petition sufficiently pleads the Similar Endeavors Test for relatedness that is the controlling law of the federal jurisdiction where TONY R. MILLER, and his agents CHRIS M. TROPBITO and NICHOLAS L. ACKERMAN committed their Mail Fraud and Wire Fraud predicate acts:

“The test formulated by the Eighth Circuit is whether defendants have engaged in similar endeavors in the past, whether they were engaged in similar activities elsewhere, or whether they have been engaged in other criminal activities. *Terre Du Lac Assoc. v. Terre Du Lac, Inc.*, 834 F.2d 148, 150 (8th Cir.1987), petition for cert. filed, (April 21, 1988); *Deviries v. Prudential-Bache Securities*, 805 F.2d 326, 329 (8th Cir.1986)”

Police Retirement System v. Midwest Inv. Ad. Serv., 706 F.Supp. 708 at 712 (E.D. Mo., 1989). The descriptions of the conduct of each conspirator including the charged defendants meets this test and sufficiently pleads continuity for purposes of establishing a pattern of racketeering activity:

“[T]he alleged conduct by defendants, comprising multiple mail, wire and securities frauds undertaken in furtherance of at least nine separate securities transactions, satisfies the "pattern" requirement under RICO even under its strict recent interpretations. See, e.g., *Holmberg v. Morrisette*, 800 F.2d 205 (8th Cir.1986); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir.1986). This is not a case in which multiple frauds are alleged in furtherance of a single unlawful transaction, *Albright Missouri, Inc. v. Billeter*, 631 F.Supp. 1328, 1330 (E.D.Mo.1986). This Court concludes that plaintiffs have pleaded "continuity plus relationship" adequately to render dismissal inappropriate.”

Welek v. Solomon, 650 F.Supp. 972 at 974 (E.D. Mo., 1987)

The controlling law of the federal jurisdiction where TONY R. MILLER and his agents CHRIS M. TROPBITO, and NICHOLAS L. ACKERMAN committed their Mail Fraud and Wire Fraud predicate acts specifically subjects TONY R. MILLER, to the Amended Petition's liability:

“If Handeen's evidence is up to this challenge, we are comfortable that he will have succeeded in proving that the attorneys conducted the bankruptcy estate. In that event, this would not be a case where a lawyer merely extended advice on possible ways to manage an enterprise's affairs. Cf. *Azrielli*, 21 F.3d at 521 (foreclosing liability where defendant only acted as attorney in illicit transactions). Nor would this be a situation where counsel issued an opinion based on facts provided by a client. See *Reves*, 507 U.S. at 185-86, 113 S.Ct. at 1173-74 (concluding that accounting firm did not violate RICO when it prepared audits in reliance upon a client's existing records); *Nolte*, 994 F.2d at 1316-17 (refusing to impose RICO liability where attorney had generated documents based on facts provided by client). Instead, **if the Firm truly did associate with the enterprise to the degree encompassed by the Complaint, we would not hesitate to hold that the attorneys "participated in the core activities that constituted the affairs of the**

[estate]," *Napoli v. United States*, 32 F.3d 31, 36 (2d. Cir.1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900, 130 L.Ed.2d 784, and reh'g granted, factual inaccuracies corrected, and original determination confirmed, 45 F.3d 680 (2d. Cir.), cert. denied, 514 U.S. 1084, 115 S.Ct. 1796, 131 L.Ed.2d 724, and cert. denied, 514 U.S. 1134 - ----, 115 S.Ct. 2015-16, 131 L.Ed.2d 1014 (1995), namely, the manipulation of the bankruptcy process to obtain a discharge for Lemaire. In that instance, **the Firm would have played some "role in the conception, creation, or execution,"** *Azrielli*, 21 F.3d at 521, of the illegal scheme, and we could safely say that the lawyers participated in the operation or management of the estate by assuming at least "some part in directing the enterprise's affairs." *Reves*, 507 U.S. at 179, 113 S.Ct. at 1170 (emphasis in original). Therefore, we conclude **that the Complaint could justify a finding that the Firm participated in the conduct of the alleged RICO enterprise"** [Emphasis added].

Handeen v. Lemaire, 112 F.3d 1339 at 1350-1351 (C.A.8 (Minn.), 1997).

With the establishment of an association in fact enterprise made up of the defendants and their co-conspirators in an ongoing scheme to defraud Medicare and Medicaid, the petition establishes claims under § 1962(c) under the controlling law of this jurisdiction providing the petition states two or more predicate acts:

"To state a claim under § 1962(c), a plaintiff must establish: (1) the existence of an enterprise; (2) conduct by the defendants in association with the enterprise; (3) the defendants' participation in at least two predicate acts of racketeering; and (4) conduct that constitutes a pattern of racketeering activity."

In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 767 (8th Cir.2003).

No Court has held that a racketeering act must be "engaged in jointly by Defendants" to constitute a racketeering act that is actionable under RICO. Instead, it has long been the law under RICO that "it is irrelevant that each Defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as [the fact finder] may reasonably infer that each crime was intended to further or [was related to] the enterprise's affairs." *United States v. Elliot*, 571 F.2d 880, 902-03 (5th Cir. 1978).

The averred facts are related to the particular defendant TONY R. MILLER and his agents CHRIS M. TROPBITO and NICHOLAS L. ACKERMAN which committed their Mail Fraud and Wire Fraud predicate acts and informs each defendant of the specific act allegedly committed by the defendant justifying his inclusion in a particular count. As such the petitioner has adequately pled the circumstances of fraud: "Circumstances" include such matters as "the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Id. Lally v. Crawford County Trust & Sav. Bank*, 863 F.2d 612, 613 (8th Cir.1988) (per curiam).

The Amended Petition clearly states what the State of Missouri recognizes as extrinsic fraud:

“Fraud extrinsic to the judgment is shown when proof of facts is made which if known to the trial court would have caused the trial court to not enter the judgment; facts which would have caused the court to enter a different judgment do not constitute fraud extrinsic to the judgment. *Gehm v. Gehm*, 707 S.W.2d 491, 494[2, 3] (Mo.App.1986).”

Marriage of Harrison, In re, 734 S.W.2d 934 at 938-939 (Mo. App. S.D., 1987).

CHRIS M. TROPBITO sought a judgment on behalf of TONY R. MILLER the attorney of record, TROPBITO & MILLER LLC and WACHOVIA DEALER SERVICES INC. against the plaintiff on December 16, 2009 but the trial judge who had been apprised of the fraud to unlawfully take the plaintiff's business vehicle shortly before entering the 16th Circuit Court room, continued the hearing until January 2010 after the plaintiff's Audi was to be sold by TROPBITO & MILLER LLC and WACHOVIA DEALER SERVICES INC.

CHRIS M. TROPBITO came to the January 2010 hearing without having sold the car and without having sought a continuance the Wednesday before the as required by 16th Circuit Court local rules and instead applied with the Clerk for continuance of the hear until March only after seeing the plaintiff had come to the hearing and CHRIS M. TROPBITO came to the misguided realization he could not corruptly obtain a judgment through default for WACHOVIA DEALER SERVICES INC. and cover for TROPBITO & MILLER LLC, NICHOLAS L. ACKERMAN, TONY R. MILLER and his own RICO predicate acts. No state law *res judicata* argument would have been a valid defense to the plaintiff's RICO predicate act claims of federal Mail Fraud and Wire Fraud violations.

Mail Fraud under 18 U.S.C. § 1341

The Amended Petition states TROPBITO & MILLER LLC, and its agents CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER committed Mail Fraud under 18 U.S.C. § 1341. In *U.S. v. Parker*, 364 F.3d 934, 943 (8th Cir. 2004) (holding that misrepresentations or false promises is an element of mail fraud) with *Murr Plumbing v. Scherer Brothers Financial Services*, 48 F.3d 1066, 1070 (8th Cir. 1995) (holding that mail and wire fraud statutes encompass both frauds involving misrepresentations and frauds not involving misrepresentations). As *Parker* is more recent, it appears that the trend is to require misrepresentation to establish mail fraud. Under either version of the elements, however, Plaintiff has failed to state a claim for mail fraud.

In *Parker*, the court held that there are four essential elements of mail fraud:

1. a scheme to defraud by means of material false representations or promises,

2. intent to defraud
3. reasonable foreseeability that the mail would be used
4. the mail was used in furtherance of some essential step in the scheme

Parker, 364 F.3d at 943. In *Murr Plumbing*, the court held that in cases of mail or wire fraud not involving a misrepresentation, there are four elements of mail fraud under U.S.C. § 1341:

- 1) a scheme to defraud
- 2) intent to defraud;
- 3) reasonable foreseeability that the mails (or wires) would be used;
- 4) use of the mails (or wires) in furtherance of the scheme.

Murr Plumbing, 48 F.3d at 1069. Plaintiff alleges Defendants committed both fraud involving misrepresentation and frauds not involving misrepresentations. See Plaintiff's the Amended Petition at ¶¶ 201-298 on pgs. 31-44.

WIRE FRAUD UNDER 18 U.S.C. 1343

The Amended Petition states TROPBITO & MILLER LLC, and its agents CHRIS M. TROPBITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER engaged in wire fraud, another predicate act under the RICO statutes. Section 1343 regarding wire fraud provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The essential elements of wire fraud are: "a scheme to defraud, the use of interstate wires incident to the scheme, and an intent to cause harm." *United States v. Frost*, 321 F.3d 738, 741 (8th Cir.2003). Similar to mail fraud, here are two types of wire fraud—those which involve misrepresentations and those which do not. *Murr v. Plumbing*, 48 F.3d 1066, 1070 (8th Cir. 1995). Plaintiff is required to plead, regardless of whether misrepresentations are alleged, the "who, what, where, when, and how" of the alleged fraud." *BJC Health System v. Columbia Casualty Co.*, 478 F.3d 908, 917 (8th Cir. 2007). Essentially, a plaintiff must plead "the equivalent of the first paragraph of any newspaper story." *Drobnak v. Anderson Corp.*, 561 F.3d 778, 784 (8th Cir. 2009). See Plaintiff's the Amended Petition at ¶¶ 201-298 on pgs. 31-44.

The information in the Amended Petition states the plaintiff's direct resulting intangible business injuries and monetary damages from predicate acts in furtherance of the defendants' conspiracy. TROPPITO & MILLER LLC, and its agents CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER RICO predicate acts of fraud are shown to be the proximate cause of the plaintiff's injury to his business property:

“There is no real question that plaintiffs would not have incurred the expense of the adversary proceeding but for Sohrab's fraudulent transfers and acts of concealment. Thus, the Court addresses only the related concepts of causal link and proximate cause (which often are conflated into one standard) in the body of this opinion.”

First Capital Asset Management, *id.* 218 F.Supp.2d at fn 44. See also *In re Motel 6 Securities Litigation*, 161 F.Supp.2d 227 at 235 (S.D.N.Y., 2001). The petition demonstrate “the ‘concrete loss’ required of a RICO plaintiff. See *Isaak v. Trumbull S & L*, 169 F.3d 390, 396 (6th Cir. 1999) (finding that plaintiff's RICO injury was ascertainable and definable by the time bankruptcy was filed)” *In re Jamuna Real Estate LLC*, 365 B.R. 540 at 556 (Bankr. E.D. Pa., 2007).

The plaintiff has standing against the defendant TROPPITO & MILLER LLC, and its agents CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER having suffered injuries that were proximately caused by the conduct complained of under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (standing for RICO claims); *Blue Shield v. McCready*, 457 U.S. 465, 477 (1982) (standing for antitrust claims) and *McCready and Associated Gen. Contractors, Inc., v. California State Council of Carpenters*, 495 U.S. 519 (1983) (Herein “AGC” standing for RICO claims).

Standing to assert RICO claims requires that the alleged RICO violation proximately caused a plaintiff's injury -- *i.e.*, the violation is not too remote from the injury. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). The principles underlying proximate cause in RICO are analogous to those in antitrust, so cases discussing antitrust proximate cause apply here. See *Steamfitters*, 171 F.3d at 932.

As shown in the RICO Violation Counts against TONY R. MILLER in the Amended Petition at ¶¶ 201-298 on pgs. 31-44., the petitioner has concisely pled averments of resulting injuries that meet each of the formal RICO proximate cause factors under *Steamfitters*, 171 F.3d at 932 the proximate cause factors under *McCready* 457 U.S. at 467 and proximate cause factors under *AGC*, 459 U.S. at 537-38, 540, 542-44.

C. TONY R. MILLER Has Violated 18 U.S.C. § 1962(d) Conspiracy

The defendant TONY R. MILLER's motion to dismiss like the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER's motion seems unfamiliar with RICO conspiracy controlling case law. To establish a conspiracy claim under section 1962(d), the Plaintiff need not prove that the conspirator has committed or agreed to commit the two or more predicate acts. See *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Id.* at 63, 118 S.Ct. at 477 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54, 60 S.Ct. 811, 858-59, 84 L.Ed. 1129 (1940)). A conspiracy may call for some co-conspirators to carry out the predicate acts and for others merely to provide support to the overall conspiracy. In such a case, those providing support are as guilty as the perpetrators of the acts themselves. See *id.* at 63-64, 118 S.Ct. at 477.

As the Supreme Court explained, section 1962(d) contains no requirement of an overt act to effect the object of the conspiracy. See *id.* RICO's conspiracy provision therefore casts a wider net than the general conspiracy provision applicable to federal crimes, section 371. See *id.* Thus, under RICO, although "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65, 118 S.Ct. at 477. A conspirator need not agree to undertake all of the acts necessary for the crime's completion. See *id.*

TONY R. MILLER has RICO conspiracy liability for participating in the scheme to defraud the petitioner. A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants, *Lombardo v. United States*, 865 F.2d 155, 159-60 (7th Cir.1989); *United States v. Moede*, 48 F.3d 238, 242 (7th Cir.1995); *United States v. Blasini-Lluberas*, 169 F.3d 57, 65 (1st Cir.1999); *United States v. Oplinger*, 150 F.3d 1061, 1065 (9th Cir.1998), just as a conspirator doesn't have to benefit personally to be guilty of conspiracy — a point so obvious that the petitioner can't find a case that states it, although it is implicit in statements of the elements of conspiracy, of which personal benefit is not one. *E.g.*, *United States v. Duran*, 407 F.3d 828, 835-36 (7th Cir.2005); *United States v. Miller*, 405 F.3d 551, 555-56 (7th Cir.2005). For that matter, neither the scheme to defraud, *United States v. Tadros*, 310 F.3d 999, 1006 (7th Cir.2002); *United States v. Pimental*, 380 F.3d 575, 585 (1st Cir.2004), nor the

conspiracy, e.g., *United States v. Bond*, 231 F.3d 1075, 1079 (7th Cir.2000); *United States v. Martin*, 228 F.3d 1, 10-11 (1st Cir.2000), has to succeed in inflicting harm for the participants to be guilty.

1. Any failure to allege a predicate Act would not eliminate § 1962(d) claims

The defendants including TONY R. MILLER are mistaken over the need to state a claim relevant to a § 1962(c) predicate act:

“Erskine, Satchell, and Branch argue that the conspiracy claims against them should be dismissed because “where the Plaintiff fails to allege a substantive violation of RICO, no claim for civil conspiracy to violate RICO may exist.” (Doc. 41 at 6; see also Doc. 55 at 5; Doc. 56 at 1.) This argument is without merit. First of all, as concluded in the previous section of this discussion, Lockheed has stated a claim against these three Defendants under section 1962(c). Secondly, the Defendants do not cite any case that supports their proposition that section 1962(d) claims necessarily fall with section 1962(c) claims. They all cite *Beck v. Prupis*, but in that case, in which the Supreme Court affirmed the Eleventh Circuit Court of Appeals, the Supreme Court explicitly declined to either adopt or even address that proposition:

[W]e do not resolve whether a plaintiff suing ... for a RICO conspiracy must allege an actionable violation under §§ 1962(a)-(c), or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury.

Beck, 529 U.S. 494, 506 n. 10, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). The issue in *Beck* was actually “whether a plaintiff can bring a section 1962(d) claim for injury flowing from an overt act that is not an act of racketeering.” *Id.*”

Lockheed Martin Corp. v. Boeing Co., 314 F.Supp.2d 1198 at 1222-1223 (M.D. Fla., 2004).

Like Lockheed however, the petitioner has stated claims in the form of extortion and fraud predicate acts.

2. TONY R. MILLER’S “Legal Work” *Reves* Argument not applicable to § 1962(d) claims

TONY R. MILLER in his admission on page one of the suggestion in support of dismissal stated that TONY R. MILLER merely performed “legal work” as alleged in the Petition and Amended Petition at ¶¶ 201-298 on pgs. 31-44. The defendant TONY R. MILLER through Deacy & Deacy, LLP is actually arguing that *Reves v. Ernst & Young*, 507 U.S. 170 (1993) supported dismissal of claims against for 1962(c) RICO predicate acts of Mail Fraud, Wire Fraud, Hobbs Act Extortion and Theft of Honest Public Services (if only Spencer J. Brown had bothered to research any case law to support his motion for dismissal).

The defendant TONY R. MILLER in his “legal work” argument against RICO predicate acts liability under 1962(c) would be entirely mistaken over the applicability of *Reves v. Ernst & Young*, 507 U.S. 170 (1993) to 1962(d) RICO conspiracy: “See *Posada-Rios*, 158 F.3d at 857 (concluding “that the

better-reasoned rule" is one which does not import the *Reves* test into a RICO conspiracy claim, "especially in light of the Supreme Court's recent decision in [*Salinas*]" which held "that S 1962(d) is governed by traditional conspiracy law")” *Smith v. Berg*, 247 F.3d 532 at fn 12 (3rd Cir., 2001).

Liability for the “passive conspirator” exists notwithstanding *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Some defendants claim that the law requires a showing of "operation or management of the enterprise" to demonstrate a RICO conspiracy under Section 1962(d). Even though the Supreme Court did hold in *Reves* that, to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs, one must participate in the operation or management of the enterprise itself," the passive conspirator immunity argument fails for the following reasons.

First, *Reves* involved a Section 1962(c) substantive RICO offense not a Section 1962(d) RICO conspiracy offense. In *Reves*, the Supreme Court held that an accounting firm could not be liable under Section 1962(c) for incorrectly valuing a farm cooperative's assets listed on its financial statements. *Reves*, 507 U.S. at 179. The Court reasoned that the firm had not "conduct[ed] or participated ... in the conduct" of the enterprise's affairs because it did not participate in the "operation or management of the enterprise itself." *Id.*

All circuits but the Ninth have concluded that *Reves* addressed only the extent of conduct or participation necessary to violate Section 1962(c), and did not address the principles of conspiracy law under Section 1962(d).² See *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998); *Napoli v. United States*, 45 F.3d 680, 683-84 (2d Cir. 1995); *MCM Partners, Inc. v. Andrews-Bartlett & Assoc.*, 62 F.3d 967, 979 (7th Cir. 1995); *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993) ("to hold that under section 1962(d) the government must show that an alleged coconspirator ... participated to the extent required in *Reves* would add an element to RICO conspiracy that Congress did not direct"). The Tenth Circuit stated:

"[T]he word 'participate' makes clear that RICO liability is not limited to those with primary

² As noted, only the Ninth Circuit has ruled that *Reves*' "on or management" test applies to RICO conspiracy charges. See *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128-29 (9th Cir. 1997). However, *Neibel* was decided before *Salinas*, and the Ninth Circuit has not yet revisited its ruling. Moreover, *Neibel* relied upon *United States v. Antar*, 53 F.3d 568, 581 (3d Cir. 1995), another pre-*Salinas* decision, which the Third Circuit subsequently ruled was no longer good *Smith v. Berg*, 247 F.3d at 534.

responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required." *Reves II*, 507 U.S. at 179, 113 S.Ct. at 1170 (footnote omitted). *Id.* (footnote omitted). Outsiders, such as the Title Companies, who are associated with a RICO enterprise and participate in the operation or management of the enterprise may also be liable under 1962(c). *Reves II*, 507 U.S. at 185, 113 S. Ct. at 1173."

BancOklahoma Mortgage Corp. v. Capital Title Co. Inc., 194 F.3d 1089, 1100 (10th Cir. 1999).

Thus, *Reves*' "operation or management" standard applies only to substantive RICO offenses under Section 1962(c) and not to a conspiracy to violate RICO under Section 1962(d).

Second, after *Reves*, the Supreme Court specifically set forth in *Salinas* the standard for liability under Section 1962(d). See *Salinas*, 522 U.S. at 65. Such conspiracy liability requires a showing that: (1) two or more people agreed to commit a substantive RICO offense, and (2) the defendant knew of and agreed to the overall objective of the violation. *Id.*; See *Posada-Rios*, 158 F.3d at 857 (citing *Salinas*); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000) (same). There can be no question that the Supreme Court was aware of its decision in *Reves* when it decided *Salinas*, and there is nothing inconsistent between the two decisions.

Thus, reading *Reves* and *Salinas* together, it is clear that a defendant may be held liable for conspiracy to violate Section 1962(c) if it knowingly agrees to violate the elements of Section 1962(c), one of which is the "operation or management" of a RICO enterprise.³ However, liability for a RICO conspiracy under Section 1962(d) does not require the same proof of participation in the "operation or management" of the alleged RICO enterprise, just as it does not require proof of commission of all the other elements of the Section 1962(c) substantive offense. *Salinas*, 522 U.S. at 65; see also *Smith*, 247 F.3d at 537.

3. TONY R. MILLER Conceded RICO Conspiracy Liability Under RMSO Rule 55.09

³ Relying upon *Beck v. Prupis*, 529 U.S. 494 (2000), Defendants could assert that *Salinas* is irrelevant for the purpose of civil RICO claims. *Beck* involved a chief executive officer whose employment was terminated when he discovered that certain of his company's officers were engaged in racketeering. The Court ruled that the termination, allegedly in furtherance of a RICO conspiracy, was not independently wrongful under any substantive RICO provision and did not give rise to a cause of action under Section 1962(c). In *Beck*, the only mention of *Salinas* appears in a footnote: "[w]e have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation." *Beck*, 529 U.S. at 501 n.6. However, this sentence does not in any way repudiate or undercut the *Salinas* holding. The *Beck* decision turns rather on the injury requirement of Section 1964(c). *Id.* Thus, violations of Section 1962(d) continue to be defined under and governed by *Salinas*.

TROPPITO & MILLER LLC, CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER all became liable for the conspiracy's preceding acts when they joined the ongoing Novation LLC Cartel RICO conspiracy. "Acts taken in furtherance of the Enterprise, even before an individual Defendant joined the conspiracy are actionable under Section 1962(d) if they further the objectives of the Enterprise. *Salinas v. United States*, 522 U.S. 52, 63-64 (1997).

TROPPITO & MILLER LLC, CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER are liable now that WELLS FARGO COMPANY, CHRIS M. TROPPITO and NICHOLAS L. ACKERMAN have defaulted by failing to plead any defense, avoidance or answer to the plaintiff's petition for affirmative relief under RMSO Rule 55.09.

Missouri RMSO Rule 55.09 states:

"RULE 55.09 FAILURE TO DENY, EFFECT
Specific averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleadings."

TONY R. MILLER has also not answered or raised affirmative defenses or avoidances to the Amended Petition charge of 18 USC 1962(d) RICO Conspiracy in his first responsive pleadings, the Motion to Dismiss for Failure to State a Claim and the Suggestion in Support, both authored by Deacy & Deacy, LLP. Failure to plead an affirmative defense to 18 U.S.C. § 1962(d) has resulted in a waiver of the defense: "Generally, failure to plead an affirmative defense results in waiver of that defense." *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984); *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991).

TONY R. MILLER'S failure to answer the charge of 18 USC 1962(d) RICO Conspiracy and CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and WELLS FARGO COMPANY's defaults determine liability as admissions under RMSO Rule 55.09 that the Novation LLC Cartel 18 USC 1962(d) RICO Conspiracy exists and that TROPPITO & MILLER LLC, CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER joined the conspiracy.

For purposes of the Petition and Amended petition TROPPITO & MILLER LLC, CHRIS M. TROPPITO, NICHOLAS L. ACKERMAN, and TONY R. MILLER are now liable for the petitioner's RICO conspiracy claims: "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Diaz*, 176 F.3d 52, 97 (2d Cir.1999) (quoting

United States v. Amato, 15 F.3d 230, 235 (2d Cir.1994)). "[o]nce a RICO enterprise is established, a defendant may be found liable even if he does not have specific knowledge of every member and component of the enterprise." *Mason Tenders District Council Pension Fund v. Messera*, 1996 WL 351250 at *6 (S.D.N.Y.1996).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests the court deny the defendant TONY R. MILLER'S Motion To Dismiss the plaintiff's petitions for failure to state a claim. The plaintiff respectfully requests the court grant summary judgment against the defendant TONY R. MILLER on all counts.

Respectfully submitted,

S/ Samuel K. Lipari

SAMUEL K. LIPARI
PLAINTIFF *PRO SE*.

CERTIFICATE OF SERVICE

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