

**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
SWANSON MIDGLEY LLC’S MOTION AND AMENDED MOTIONS TO
DISMISS UNDER RULE 55.27(g)(2) FOR FAILURE TO STATE A CLAIM**

COMES NOW Plaintiff Samuel K. Lipari appearing *pro se* and makes the following suggestion in opposition to the defendant SWANSON MIDGLEY LLC’S Motion And Amended Motions To Dismiss.

I. STATEMENT OF FACTS

1. The plaintiff amended his petition and served it on the defendant SWANSON MIDGLEY LLC before Morrow, Willnauer & Klosterman, LLC’s motion and amended motions to dismiss.
2. The plaintiff’s amended petition makes the same factual allegations in the body of the petition, the accompanying affidavit and attached evidentiary documents that were contained in the original petition.
3. To clarify the averments of mail and wire fraud violations in a manner that was consistent for each of the RICO defendants, the amended complaint restarts the numbering of counts in the SWANSON MIDGLEY LLC section and breaks down the frauds committed by the defendant SWANSON MIDGLEY LLC attorneys CHRISTOPHER BARHORST and HOLLY L. FISHER in the name of the defendant CHAPEL RIDGE MULTIFAMILY LLC. See amended petition ¶¶156-158, 182-184 on pgs. 22, 26; ¶¶ 179-200¹, on pgs. 28-31; ¶¶ 253-268 on pgs. 38-40; ¶¶ 271-272 on pgs. 40-41.

¹ The plaintiff inadvertently duplicated paragraph numbers 169 to 186 in the amended complaint. All references to paragraph numbers will include page numbers to avoid confusion.

A. Motions to Dismiss Abandons Affirmative Defenses

4. Morrow, Willnauer & Klosterman, LLC in its first responsive pleading raises no affirmative defenses under penalty of forfeiture² on behalf of the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER except the assertion of the affirmative defense that the plaintiff has “failed to state a claim.”

B. Motions To Dismiss Do Not Seek To Dismiss All Rico Counts Against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, And HOLLY L. FISHER

5. Morrow, Willnauer & Klosterman, LLC do not argue that the petition or amended petition fail to state RICO claims against the RICO co-conspirator defendants other than SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER, nor do the Motions to dismiss argue that the plaintiff’s state law causes of action against the co-conspirator General Electric defendants GE, GE Capital, GE Transportation or Jeffery Immelt fail to state a claim.

6. Morrow, Willnauer & Klosterman, LLC does not argue that the plaintiff’s petitions have failed to state a claim against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER’s client CHAPEL RIDGE MULTIFAMILY LLC even though the petition describes misconduct of CHAPEL RIDGE MULTIFAMILY LLC outside of the representation of SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER.

7. Morrow, Willnauer & Klosterman, LLC was twice served notice that defendants are liable under RICO Conspiracy 18 U. S. C. § 1962 (d) according to the controlling case for the acts of co-conspirators according to the controlling US Supreme Court case *Salinas v. United States*, 522 U.S. 22, 63-64 (1997).

“282. 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 in this action formed an agreement to participate in an 18 U. S. C. § 1962(d) criminal **conspiracy meeting the requirements of *Salinas v. United States*, 522 U.S. 22, 63-64 (1997)** with agents of the following existing RICO conspiracy members 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, Bradley J. Schlozman, Novation LLC, US Bancorp and The Piper Jaffray Companies whose overarching purpose is to artificially inflate hospital supply costs in an

² 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 responsively 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).

ongoing hospital skimming scheme to loot Medicaid, Medicare and private insurance funds.”
[Emphasis added]

Paragraph 282, on page 42 of Amended petition.

8. James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC had notice of the gravamen of the plaintiff’s charges against their clients SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER that they knowingly joined an already existing multi year RICO conspiracy making them liable under the controlling US Supreme Court case *Sedima SPRL v. Imrex Co. Inc*, 473 U. S. 479 at page 496:

“18. As co-conspirators, the latecomers charged in this petition had knowledge of acts of the ongoing criminal RICO conspiracy and intentionally participated in furthering the objectives of the racketeering enterprise and the RICO conspiracy to restrain trade in hospital supplies and overcharge Medicare by the latecomer conspirators violating Missouri statutes, and committing frauds on the 16th Circuit State of Missouri Court in an agreement **to join the ongoing conspiracy through predicate acts of mail and wire fraud designed to injure the plaintiff’s business and take his property in the manner the US Supreme Court has determined in *Sedima SPRL v. Imrex Co. Inc*, 473 U. S. 479 at page 496** gives the plaintiff standing under 18 U. S. C. § 1962. See **Exhibit 2.2** Web Site Index.”

Plaintiff’s original petition at ¶ 18 on pg. 5. See also amended petition at ¶ 19 on pg. 5

9. James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC had notice of the gravamen of the plaintiff’s charges against their clients SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER that Morrow, Willnauer & Klosterman, LLC’s clients are liable to the plaintiff even for the mail and wire fraud acts of the co-conspirators:

“24. The plaintiff’s petition alleges RICO predicate acts of mail fraud and wire fraud were committed by the defendants directly **or through conspiracy in specific identified communications** made through the US Mail and electronically that injured the plaintiff in his business under the standing requirement of the unanimous court in *Bridge et al v. Phoenix Bond & Indemnity Co. et al*, 128 S.Ct. 2131 (2008).” [Emphasis added]

Plaintiff’s amended petition at ¶ 24 on pg. 6. See also original petition at ¶ 19 on pg. 5

10. James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC had notice of the gravamen of the plaintiff’s charges against their clients SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER that Morrow, Willnauer & Klosterman, LLC’s clients are liable to the plaintiff for the acts of the co-conspirators under the current US circuit appellate law case of *United States v. Yannotti*, 06-5571-cr, 2008 WL 4071691 (2d Cir. September 4, 2008):

“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)."[Emphasis added]

Plaintiff's amended petition at ¶ 26 on pg. 6. See also original petition at ¶ 25 on pg. 6.

C. Motions to Dismiss Misrepresent Length of Conspiracy to Fraudulently Support Arguments the Plaintiff Failed to Adequately allege a Pattern or Continuity

11. At pages 8-10 of their suggestions in support of their motions to dismiss, James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC materially misrepresent the numerous clear averments of fact that SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER knowingly joined an already existing multi year RICO conspiracy by stating instead that the petition alleges a scheme of less than one year.

12. The plaintiff's petitions allege that SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER are "Latecomer Conspirators" to an ongoing conspiracy with the overarching scheme of defrauding Medicare, Medicaid and private insurers in conduct as early on the face of both the original petition and amended petitions and conduct originating as early as in the documents referenced by the original and amended petitions.

13. The original petition and amended petitions allege that SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER are "Latecomer Conspirators" to an ongoing conspiracy that is continuing at the time the plaintiff filed his petitions.

14. The petitions allege the RICO conspiracy began and an association in fact enterprise was participating in the RICO conspiracy by May 2005:

"18. The latecomer RICO co-conspirator defendants are now participants in a RICO Conspiracy that includes the federal district court judges Hon. Judge Carlos Murguia, Hon. Judge Fernando J. Gaitan, Jr. and, 16th Circuit Hon. Michael M. Manners to deprive the plaintiff of his business property. See third proposed amended complaint, exhibit I of the Motion to Amend at pgs. 123-125 <http://www.medicalsupplychain.com/pdf/Lipari%20Third%20Motion%20For%20Leave%20to%20Amend%2004217.pdf> and plaintiff's response to show cause <http://www.medicalsupplychain.com/pdf/Answer%20to%20show%20cause.pdf> and its supporting affidavit <http://www.medicalsupplychain.com/pdf/Lipari%20Affidavit.pdf>

19. As co-conspirators, the latecomers charged in this petition had knowledge of acts of the ongoing criminal RICO conspiracy and intentionally participated in furthering the objectives of the racketeering enterprise and the RICO conspiracy to restrain trade in hospital supplies and overcharge Medicare by the latecomer conspirators violating Missouri statutes, and committing frauds on the 16th Circuit State of Missouri Court in an agreement to join the ongoing conspiracy through predicate acts of mail and wire fraud designed to injure the plaintiff's business and take his property in the manner the US Supreme Court has determined in *Sedima SPRL v. Imrex Co. Inc*, 473 U. S. 479 at page 496 gives the plaintiff standing under 18 U. S. C. § 1962. See **Exhibit 2.2** Web Site Index."

Amended Petition at ¶¶ 18, 19 pages 5-6. See also Original petition at ¶ 44 on page 8.

15. The petitions allege the RICO conspiracy continues beyond the filing of even the amended petition:

“47. The last predicate act on information and belief was procuring the scheduling of the plaintiff’s Western District of Missouri Court of Appeals hearing **to take place on December 15, 2009** in order to provide an overwhelming show of the defendant RICO conspiracy’s power over the State of Missouri legal system. See Exhibit 5 Appeal Case Docket WD70832.

48. Following a nationally distributed news article, the Western District of Missouri Court of Appeals rescheduled the hearing **to take place in January 2010**. See Exhibit 6 OpEd.”

Amended Petition at ¶¶ 47, 48 page 9. See also Original petition at ¶ 44 on page 8.

16. The link in paragraph 18 of the Amended complaint gives that the RICO conspiracy and an association in fact enterprise participating in the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER’s RICO conspiracy was already active March 20, 2005

“As the Internet Service Provider for Medical Supply Chain, Inc. and later for the plaintiff’s business under the trade names Medical Supply Chain and Medical Supply Line, Edward E. Whitacre Jr’s company engaged in warrantless wiretapping of the plaintiff’s associates and the plaintiff and unlawfully disclosed the plaintiff’s business records stored in the plaintiff’s home and computer **during the period of time from March 20, 2005 till April 8th, 2008** (the “subject period”). Under Edward E. Whitacre Jr’s direction, **AT&T is presently participating in a continuing racketeering enterprise with Sprint, Inc.; former and current officials of the executive branch; Jeffrey Immelt; and General Electric.**” [Emphasis added]

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17. Paragraph 28 of the Amended Petition gives Morrow, Willnauer & Klosterman, LLC notice of the gravamen of the charges that the RICO conspiracy joined placed SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER in jeopardy over the earlier acts of their co-conspirators predating July, 24, 2009 by over seven years:

“28. The plaintiff’s petition’s allegations of the RICO conspiracy that the defendants willingly joined as latecomer co-conspirators subject the latecomer defendants to liability for all acts during conspiracy’s existence. *Dextone Co. v. Building Trades Council of Westchester County*, 60 F.2d 47 (2d Cir. 1932).”

Amended Petition at ¶ 28 page 7. See also Original petition at ¶ 27 on page 6.

18. At page 10 of the Morrow, Willnauer & Klosterman, LLC Suggestion in Support of its Motion to Dismiss (“SISM”) sent via US Mail to the plaintiff and the other named defendants on January 20, 2010, James C. Morrow and Abigail L. Pierpoint make the materially false misrepresentation that: “the entire

fraudulent scheme allegedly perpetrated by Defendant lasted approximately three to four months, well short of the one-year guideline given by the Eighth Circuit.”

19. At page 5 of the Morrow, Willnauer & Klosterman, LLC Suggestion in Support of its Amended Motion to Dismiss (“SISAM”) mailed via US Mail to the plaintiff and the other named defendants on January 28, 2010, James C. Morrow and Abigail L. Pierpoint make the materially false misrepresentation that:

“Based on these pleadings, the entire fraudulent scheme allegedly perpetrated by Defendant lasted approximately three to four months, well short of the one-year guideline given by the Eighth Circuit. Plaintiff has therefore failed to allege sufficient continuity and has failed to establish a pattern of racketeering activity, an essential element of a RICO claim. Thus his RICO claim against Defendant (*sic*) must be dismissed.”

**D. Motions to Dismiss Misrepresent Causes of
Action Alleged Against SWANSON MIDGLEY LLC,
CHRISTOPHER BARHORST, And HOLLY L. FISHER to be Based on State Law**

20. Morrow, Willnauer & Klosterman, LLC states in Issue V of its SISM at pg. 10 and Issue II of its SISAM at pgs. 5-6 and in the SISAM explanation of the standard for granting motions to dismiss at page 3 that the plaintiff has made claims against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER based on causes of action under the Missouri state law rules of professional conduct.

21. Neither petition states any counts or causes of action against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER for the numerous violations of the Missouri Rules of Professional Conduct described in the petitions.

22. The Original and Amended Petitions solely state claims for mail and wire fraud in violation of 18 U. S. C. § 1961 actionable under 18 U.S.C. § 1962 (c) and for conspiracy to commit mail fraud, wire fraud, theft of honest services and Hobbs Act extortion in violation of 18 U. S. C. § 1962 (d).

E. Amended Motion to Dismiss Drops Argument Mail and Wire Fraud Were Inadequately Pled

23. The first motion to dismiss has not been withdrawn by Morrow, Willnauer & Klosterman, LLC even though it was served after the plaintiff had filed his amended petition.

24. The plaintiff was therefore forced to answer both motions unnecessarily burdening the parties and the court.

25. The amended motion to dismiss drops argument that the petition fails to plead mail and wire fraud predicate acts against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER with adequate specificity.

II. SUGGESTION IN OPPOSITION TO DISMISSAL

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER have not filed an operative motion to dismiss. The two motions were in reality the first responsive pleadings by SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER to the petition and its averments of fact, later clarified in the Amended Petition by the plaintiff without material change.

In both pleadings, Morrow, Willnauer & Klosterman, LLC merely adopts the Novation LLC cartel conspirators' pattern of using violations of Missouri Rules of Professional Conduct Rule § 4.1 "Truthfulness in statements to others" and § Rule 3.3 "Candor toward the Tribunal" to provide cover for a non law and fact based court outcome, which has again for the second time been expressly condemned by Chief Justice William Ray Price Jr., of the Supreme Court of Missouri.³

A. NO DISMISSAL SOUGHT OF RICO CONSPIRACY CLAIMS

Neither motion to dismiss seeks to dismiss SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER from RICO conspiracy claims for the actions of their co-conspirators charged in the petition and amended petition against the named defendants in this case or from RICO conspiracy claims against SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and

³ "Our job is not that way. Though an equal branch of government, we have a more limited role. We resolve individual disputes. We have no power until litigants come to us with a real controversy, in which they have a real interest. When they do, we are not free to choose any resolution we want. We are first bound to honor our national and state constitutions. In fact, we are sworn to uphold the Bill of Rights that guarantees the rights of the individual, even against the will of the majority that you serve. We then follow the laws that you enact.

When the people of Missouri walk into our courtrooms, they expect and deserve to have their individual case heard on its facts and on the law, without fear that a rich man or a powerful interest has already bought the promise of the judge to rule the other way. Justice is rendering to each litigant what he or she is entitled to, not using his or her case as a stepping stone for fundraising or as a stepping stone for the advancement of a particular ideological or political goal, or as payback to a contributor.

Remember Avery v. State Farm, the case from Illinois in which an Illinois Supreme Court justice cast the deciding vote in a \$450 million case in favor of an insurance company ... after receiving more than \$1 million in campaign contributions from those connected to the company. Remember Caperton v. Massey, the case from West Virginia in which a new West Virginia Supreme Court justice cast the deciding vote in a \$50 million case after the CEO of that company spent approximately \$3 million to defeat the new judge's opponent.

Justice is a sacred but fragile concept. It depends upon the eye of the beholder, the trust and confidence of our people. It cannot be for sale to the richest bidder, the most powerful special interest group, or to the cleverest consultant. "

William Ray Price Jr., chief justice of the Supreme Court of Missouri, State of the Judiciary address Feb. 3, 2010
<http://www.courts.mo.gov/pressrel.nsf/bb9fda2a04f10ca8862565ec0067d206/da467a64748a6a84862576bf006d5157?OpenDocument>

HOLLY L. FISHER for the actions their identified but unnamed co-conspirators ranging back to 2005. It appears James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC silently hope that the court is misled into improperly substituting the Missouri state law civil conspiracy requirement that to be liable, a conspirator must commit an act in furtherance of the conspiracy: "(1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby injured." *Phelps v. Bross*, 73 S.W.3d 651, 657 (Mo.Ct.App.2002); *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo.1997) (en banc).

1. RICO Conspiracy Has Fewer Elements Than Civil Conspiracy

However elements 4 and 5 are unnecessary for proving a RICO § 1962(d) conspiracy:

"In order to obtain a conviction for RICO conspiracy, the government does not need to prove that the defendant committed or agreed to commit two predicate acts himself, or even that any overt acts have been committed. See *Salinas v. United States*, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) ("There is no requirement of some overt act or specific act in the statute before us.") In fact, the Supreme Court has held,

One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.

Id. at 65, 118 S.Ct. 469." [Emphasis added]

U.S. v. Saadey, 393 F.3d 669 at 676 (6th Cir., 2005). See also *In re Motel 6 Securities Litigation*, 161 F.Supp.2d 227 at 237 (S.D.N.Y., 2001). **RICO conspiracy does not require the government to prove that *any* predicate act was actually committed at all.**" [Emphasis added] . *Saadey Id.* At 677. 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. See *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.").

Liability for a RICO conspiracy under Section 1962(d) does not require the same proof of SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER'S 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 v. Berg*, 247 F.3d 532 at 537 (3d Cir. 2001).

2. No Affirmative Defense Pled to 18 U.S.C. § 1962(d)

The plaintiff has however not charged the defendants with civil conspiracy under state law, but instead with RICO Conspiracy under 18 U.S.C. § 1962(d). The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER have failed to plead an affirmative defense to 18 U.S.C. § 1962(d).

Missouri Rules of Civil Procedure Rule 55.08 Affirmative Defenses states:

“In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, . . . A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. . . .”

The defendants have cited no case or statutory authority, much less pled any facts to show that the RICO conspiracy claim has a defense or avoidance.

“These defenses were listed as conclusory statements and appellants pled no specific facts to serve as the basis for each defense. Rule 55.08 requires that a pleading setting forth an affirmative defense shall contain a plain statement of the facts showing that the pleader is entitled to the defense. The factual basis for an affirmative defense must be set out in the same manner as is required for the pleading of claims under the Missouri Rules of Civil Procedure. *Ashland Oil, Inc. v. Warmann*, 869 S.W.2d 910, 912 (Mo.App.1994). Because appellants have not sufficiently pled the alleged affirmative defenses, they fail as a matter of law. See *Id.*”

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 (Mo. App.W.D., 1995).

The defendants have not pled an affirmative defense to 18 U.S.C. § 1962(d):

“Having failed to allege sufficient facts to establish that it is entitled to the affirmative defense as a matter of law, Thornton cannot prevail on its motion for summary judgment upon that basis.”

Lumbermens Mut. Cas. Co. v. Thornton, 92 S.W.3d 259 at pg. 270 (Mo. App., 2002).

3. Defendants Waived an Affirmative Defense to 18 U.S.C. § 1962(d)

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER’S 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).

The defendants have put this court in a position where it cannot grant a defense or avoidance to 18 U.S.C. § 1962(d).

“...in admitting what are held to be affirmative defenses under a general denial, and in instructing the jury on affirmative defenses, none of which have been pleaded, we are compelled to reverse this case.”

People's Bank v. Stewart, 117 S.W. 99 at pg. 103, 136 Mo. App. 24 (Mo. App., 1909).

The effect of James C. Morrow and Abigail L. Pierpoint of Morrow, Willnauer & Klosterman, LLC's failure to raise an affirmative defense to RICO Conspiracy under 18 U.S.C. § 1962(d) is that SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER have admitted liability under Missouri Rule of Civil Procedure 55.09:

“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. Specific averments in a pleading to which no responsive pleading is required shall be taken as denied.”

B. DEFENDANTS' PATTERN OF RACKETEERING IS SUFFICIENTLY PLED

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER are in error over their argument that the plaintiff violated Missouri Rule of Civil Procedure 55.05 by providing more averments than a short plain statement of facts showing the plaintiff is entitled to relief. *Komm v. McFliker*, 662 F.Supp. 924 at 927 (W.D. Mo., 1987) establishes a heightened standard for stating the RICO enterprise requirements of continuity plus relationship by means of “related but distinct schemes” that requires the association in fact ongoing business relationships and unlawful goals to be delineated. This standard is consistent with *Bell Atlantic v. Twombly*, No. 05-1126, 2007 WL1461066 (May 21, 2007) and the determination that Sherman Act conspiracy on which RICO is based requires more than notice pleading.

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER mistakenly believe that because the plaintiff did not allege a garden-variety fraud scheme with a small number of closely related defendants and a closed end event scheme that he failed to state a RICO claim. In actuality the reverse is true. “Congress was concerned in RICO with long-term criminal conduct.” *Vanliner Ins. Co. v. All Risk Service, Ltd.*, 990 F.Supp. 1145 at 1148 (E.D. Mo., 1997). The plaintiff must allege “ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.” *Trans World Airlines, Inc. v. Berger*, 864 F.Supp. 106 at 108 (E.D. Mo., 1994). “Where there is only one purpose, one result, one set of participants, one victim and one method of commission, there is no

continuity and, therefore, no pattern of racketeering activity." *Allright Missouri, Inc. v. Billeter et al.*, 631 F.Supp. 1328 at 1329 (E.D. Mo., 1986).

The complexity of the petition is in actuality what successfully states continuity plus relationship by means "related but distinct schemes" required to successfully allege a pattern of racketeering involving SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER:

"The allegations regarding sales of UMC debentures can fairly be classified as a single scheme, including the "cover-up" in proxy solicitations and the various underlying allegations of mail, wire and securities fraud. Similarly, allegations regarding sales of ATMs, fees from UMC Canada, the public offering of UMC PLC, and market manipulation of UMC common stock point to four separate schemes. Cases which have found a single scheme typically involve either a single series of transactions which effect a number of people, e.g. *Madden*, 636 F.Supp. at 464-65 (single check kiting scheme resulted in 5,643 plaintiffs being defrauded), or multiple frauds effecting a single victim. E.g. *Deviries*, 805 F.2d at 329 (single investor alleged that brokerage house and individual broker made fraudulent misrepresentations to induce him to open an account and thereafter "churned" the account). The present plaintiff's allegations involve substantially different methods and potential victims. Any attempt to define all of this conduct as a single scheme would ignore the practicalities of the situation and would effectively make the relationship and continuity prongs of the pattern test mutually exclusive."

Komm v. McFliker, 662 F.Supp. 924 at 927 (W.D. Mo., 1987).

The information in the petition described as a violation of "simple plain statement" notice pleading alleged by the defendants is necessary to meet the similar endeavors test that is the controlling law of the Eighth Circuit:

"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 of SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER'S conspirators 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 defendants are mistaken over the need to state a claim relevant to SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER's participation in predicate acts of others in a multi year enterprise committing numerous § 1962(c) predicate acts:

"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).

There is no inadequate allegation of facts in either of the plaintiff's petitions to place SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER in the Novation LLC Cartel RICO enterprise which cements the continuity and relatedness of a multi year pattern of racketeering:

The requirement of association with the enterprise is not strict. The RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. The RICO statute seeks to encompass people who are merely associated with the enterprise. The defendant need only be aware of at least the general existence of the enterprise named in the indictment, and know about its related activities.

U.S. v. Cianci, 378 F.3d 71 at 95 (1st Cir., 2004).

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER are shown by the averments in the complaint to have committed predicate acts of mail and wire fraud in furtherance of the enterprise to defraud Medicare and Medicaid even though the frauds on the court were a diverse form of the conspiracy's ongoing prevention of the plaintiff's entry into the market for hospital supplies:

"Congress's purpose in enacting RICO was to eradicate organized crime by "**bring[ing] the often highly diversified acts of a single organized crime enterprise under RICO's umbrella.**" *Eufrazio*, 935 F.2d at 566. Accordingly, "**separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern** [of racketeering] under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise." *Id.* Moreover, **a RICO enterprise may engage in a pattern of**

racketeering activity that consists of separate and distinct conspiracies. *United States v. Pungitore*, 910 F.2d 1084, 1099-1101, 1134-35 (3d Cir. 1990).” [Emphasis added]

United States v. Irizarry at fn 7 (3rd Cir., 2003). Since the criminal activity is ongoing and under *H.J. Inc. v. Northwestern Bell Telephone Co.* 492 U.S. 229, 239 (1989) in which it was ruled that proving a pattern requires showing that the racketeering acts "are related" and "amount to or pose the threat of continued criminal activity" it is sufficient that the petitions allege SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER agreed that some member of the enterprise would commit the predicate acts. See e.g. *United States v. Kragness*, 830 F.2d 842, 860 (8th Cir. 1987); *United States v. Joseph*, 835 F.2d 1149 (6th Cir. 1986); *United States v. Neapolitan*, 791F.2d 489, 494-98 (7th Cir. 1986); *United States v. Adams*, 759 F.2d 1099 (3d Cir. 1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984); *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984). *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990).

C. MISSOURI’S RULES OF PROFESSIONAL CONDUCT ARE NOT A DEFENSE

The defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER’S argument that the plaintiff’s claims are a prohibited cause of action based on the Missouri Rules of Professional Conduct is fatally flawed. The authority used by the defendants is misapplied. The state law based prohibition of a cause of action based on professional conduct violations cannot be used to invalidate mail fraud, wire fraud and RICO conspiracy claims under 18 U.S.C. 1961 – 1968. 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 averments are to support the plausibility of the allegation that the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER expressly entered into a specific agreement on July 24, 2009 to participate in the ongoing RICO conspiracy and enterprise. A plausibility also reinforced by the temporal relationship of the defendants’ conduct and that of the other Latecomer Conspirators extensively described in the petitions. A jury could conclude from the serious Missouri Professional Conduct Violations of SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and

HOLLY L. FISHER in the face of the plaintiff's repeated notices of the frauds and the 16th Circuit's own sample unlawful detainer form cautions a false affidavit to mislead a public official to obtain an eviction is a Class A Misdemeanor (see <http://www.16thcircuit.org/Forms/CVL/Landlord.pdf>) that the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER'S role in the conspiracy was so substantial CHRISTOPHER BARHORST, and HOLLY L. FISHER were willing to sacrifice the existence of their law firm SWANSON MIDGLEY LLC and in fact prevented their client CHAPEL RIDGE MULTIFAMILY LLC from mitigating its liability for the racketeering to further the criminal goals of the RICO conspiracy.

It is clearly established that the petitioner has a right to bring new claims based on conduct in a preceding litigation. "[A]n adverse party may, by bringing a new proceeding, invoke the power of the courts to scrutinize the conduct of the parties in the previous action. *Marshall v. Holmes*, 141 U.S. at 599, 12 S.Ct. at 65, quoting *Johnson v. Waters*, 111 U.S. 640, 667, 4 S.Ct. 619, 633, 28 L.Ed. 547 (1884)" [emphasis added] *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests the court deny the defendants SWANSON MIDGLEY LLC, CHRISTOPHER BARHORST, and HOLLY L. FISHER'S Motions to Dismiss the plaintiff's petitions for failure to state a claim.

Respectfully submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 8th day of February 2010 by hand delivery, by first class mail postage prepaid, or by email to:

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