

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 0916-CV38273
)	
CHAPEL RIDGE MULTIFAMILY LLC,)	Division 15
ET AL.,)	
)	
Defendants.)	
)	

**DEFENDANT WACHOVIA DEALER SERVICES, INC.'S
MOTION TO DISMISS PLAINTIFF'S PETITION**

COMES NOW Defendant Wachovia Dealer Services, Inc. (hereinafter, "Wachovia"), by and through counsel, and hereby moves the court to dismiss the Plaintiff's Petition as to Wachovia with prejudice, pursuant to Missouri Rule of Civil Procedure 55.27(a), on grounds that the Petition fails to state a claim upon which relief can be granted against Wachovia. Additionally, and in support of this Motion to Dismiss, Wachovia respectfully directs the Court's attention to its Memorandum in Support of Wachovia Dealer Services, Inc.'s Motion to Dismiss Plaintiffs Petition, which is incorporated by reference as though fully set forth herein.

WHEREFORE, for the foregoing reasons, Defendant Wachovia Dealer Services, Inc. requests that the Court issue an Order dismissing Plaintiffs Petition against Wachovia Dealer Services, Inc. and for such other and further relief as the Court deems proper and just under the circumstances of this case.

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SAMUEL K. LIPARI,)	
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Plaintiff,)	
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v.)	Case No. 0916-CV38273
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CHAPEL RIDGE MULTIFAMILY LLC,)	Division 15
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Defendants.)	
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MEMORANDUM IN SUPPORT OF DEFENDANT WACHOVIA DEALER SERVICES, INC.'S MOTION TO DISMISS PLAINTIFF'S PETITION

COMES NOW Defendant Wachovia Dealer Services, Inc. (hereinafter, "Wachovia"), by and through counsel, and hereby moves the court to dismiss the Plaintiff's Petition as to Wachovia with prejudice, pursuant to Missouri Rule of Civil Procedure 55.27(a) on grounds that the Petition fails to state a claim upon which relief can be granted against Wachovia. In support of its Motion to Dismiss Plaintiff's Petition, Wachovia provides the following information:

INTRODUCTION

In his Petition, Plaintiff appears to allege that Wachovia is part of a grand conspiracy to defraud Plaintiff and deprive him of his property in a concerted effort with many other named defendants, which Plaintiff believes is a violation of several federal and state laws, including, but not limited to The Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff's Petition contains nearly 300 paragraphs and a wide range of allegations against Wachovia and many others, including private individuals, companies, attorneys, law firms, judges, and high-ranking officials in the federal government. In his Petition, Plaintiff claims that this large group of completely unrelated parties has somehow managed to conspire against him, with the alleged intention of frustrating Plaintiff's business efforts and artificially inflating the price of medical supplies both locally and

across the nation. These claims, however, are entirely speculative and are not supported by facts, as required by Missouri law. Accordingly, Plaintiff's Petition, as directed toward Wachovia, should be dismissed with prejudice for its failure to state a claim upon which relief can be granted.

PLAINTIFF'S ALLEGATIONS AGAINST WACHOVIA

It is vitally important, especially in a Petition as lengthy and complex as the one in this case, to first outline Plaintiff's allegations of Wachovia's alleged wrongdoing in this matter. In his Petition, Plaintiff claims that Wachovia did a variety of different things, either alone or in concert with others, in an attempt to somehow harm Plaintiff, his business, the national healthcare industry, and/or the citizens of the United States who purchase medical supplies. Plaintiff claims that Wachovia committed the following acts in an effort to support his allegations of wrongdoing, fraud, and conspiracy in this case:

- Wachovia's last predicate RICO act allegedly occurred on December 15, 2009, when Wachovia reportedly refused to drop its lawsuit against Plaintiff for Plaintiff's failure to remit payment for the automobile financed by Wachovia (*see* Plaintiff's Petition at r 46);
- Wachovia, among others, allegedly conspired to encourage public and private corruption to injure Plaintiff's business and further the alleged RICO conspiracy of keeping prices of medical supplies high in Missouri and across the United States (*see id.* at ¶ 63, 84, 94, 172-73);
- Wachovia and others allegedly attempted to retaliate against Plaintiff for "exposing the threat from [an] FBI field officer participating in the public official corruption utilized by the RICO conspiracy on July 22, 2009" (*see id.* at ¶ 131);
- Wachovia and others have allegedly participated jointly as part of a "RICO enterprise in the 16th Circuit State of Missouri Court" (*see id.* at ¶ 175, 178);
- Wachovia, Wells Fargo, and their attorneys, allegedly engaged in mail fraud by purportedly manufacturing evidence that was sent through the U.S. Mail to further a fraudulent scheme, which included a plan to "deceive the plaintiff into voluntarily returning his business

car to avoid negative information on the plaintiff's credit report when the defendants had no intention to avoid injuring the plaintiff's personal and business credit reputation as part of the overall [sic] scheme to deprive the plaintiff of any resource he could use to enter the hospital supply market." (*see id.* at ¶¶ 185-88, 194-200);

- Plaintiff alleges that Wachovia's petition - sent through the mail to the Court - against Plaintiff for repossession of his vehicle contained fraudulent information that "[gave] the appearance of a timely notice to cure" in Wachovia's efforts to either receive payment or the return of the vehicle (*see id.* at ~ 214);
- Wachovia and others engaged in alleged wire fraud by engaging in electronic communication regarding Plaintiff, assisting in closing down Plaintiff's email account, and causing electronic and fax communications to be sent to the Court to improperly influence the Court against Plaintiff and to harm Plaintiff's business interests (*see id.* at ¶¶ 243, 245-46);
- Wachovia and others allegedly entered into an agreement to participate in a criminal conspiracy, pursuant to 18 U.S.c. § 1962(d), to "artificially inflate hospital supply costs in an ongoing hospital skimming scheme to loot Medicaid, Medicare and private insurance funds" (*Id.* at ¶1256); and
- Finally, Wachovia allegedly committed fraud by refusing to accept Plaintiff's offer to have his personal debt paid by submitting his bill to the federal government for repayment, as Plaintiff believes the government is liable for his personal expenses due to purported harassment by the government and its agents (*see id.* at ¶267).

It is admittedly difficult to reconcile and fully understand the various allegations made by Plaintiff against Wachovia when they are viewed in this context. The real trouble with Plaintiff's Petition, however, is that these allegations are never placed in a context in which they make sense or, more importantly, form the basis for any claim for which Plaintiff could recover any relief from Wachovia. Even when taking Plaintiff's allegations as true on their face, Plaintiff has simply not created a coherent theory for which Wachovia could be found liable in this case.

STANDARD FOR GRANTING A MOTION TO DISMISS

"In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, we determine whether the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief. All of [plaintiffs] averments are taken as true and no attempt is made to weigh the facts alleged as to whether they are credible or persuasive." *Jones v. Kennedy*, 108 S.W.3d 203,206 (Mo. App. 2003) (citing *Preferred Physicians Mut. Mgmt. Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805, 810 (Mo. App.1996)). Accordingly, all of the factual allegations that Plaintiff has made in his Petition should be deemed true for purposes of ruling on Wachovia's motion to dismiss. If, however, a petition contains only conclusions and "does not contain the ultimate facts or any allegations from which to infer those facts, the petition may be dismissed for failure to state a claim." *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371,379 (Mo. App. 1993).

In his Petition, Plaintiff has failed to state a viable claim against Wachovia as he has failed to plead his allegations of mail and wire fraud with sufficient particularity and, moreover, has failed to plead a pattern of racketeering activity as required by RICO. Plaintiff's Petition should, therefore, be dismissed with prejudice.

LEGAL ARGUMENT

From a review of his Petition, it appears that Plaintiff attempts to state RICO claims against Wachovia, claiming that Wachovia participated in concert with others to destroy Plaintiff's business and harm consumers of health care products. Plaintiff also alleges that Wachovia engaged in various acts of mail and wire fraud to further its RICO goals. None of Plaintiff's claims, however, are supported by sufficient facts to survive a motion to dismiss.

A. Plaintiff's RICO Claims Must Be Dismissed As They Fail To Establish A Pattern of Racketeering Activity

Simply put, Plaintiff has failed to state a claim for which relief can be granted in his RICO allegations against Wachovia. Plaintiff clearly states in his Petition that he is "suing the defendants under a private right of action provided in 18 U.S.C. [§§ 1962(c) and Cd)] for acts of the RICO enterprise committed by the defendants that are enumerated in 18 U.S.c. § 1961." Plaintiff's Petition at ¶¶ 47-48. A plaintiff who brings suit under 18 U.S.c. § 1962(c) must prove that the defendant engaged in: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *see also United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir.1995) (describing the elements in an alternative, but essentially equivalent, manner), *cert. denied*, 518 U.S. 1026 (1996). To recover under 18 U.S.c. § 1962(d), the Plaintiff must demonstrate that a conspiracy was formed between the defendants to further the goals of the otherwise prohibited activities.

In his Petition, Plaintiff has simply failed to provide a basis upon which relief could be had from Wachovia for any alleged RICO violation by failing to set forth facts to support a RICO claim. Acts of "racketeering" are defined by 18 U.S.C. § 1961 and are referred to as "predicate acts." Plaintiff's Petition alleges that Wachovia committed the predicate acts of mail fraud and/or wire fraud, but fails to plead them with particularity, as discussed in more detail below. Moreover, the allegations in Plaintiff's Petition do not establish a pattern of racketeering activities undertaken by Wachovia.

Plaintiff outlines what he believes to be the "predicate acts" of Wachovia's purported mail and wire fraud in his Petition, stating that he first received a letter from Wachovia's attorney, Nicholas Ackerman, on August 27, 2009, which concerned Plaintiff's failure to make timely payments on the loan for his vehicle. *See* Plaintiff's Petition at ¶ 194. Plaintiff goes on to refer to

other pieces of correspondence between himself and Wachovia's counsel as other "predicate acts" that allegedly are part of Wachovia's fraudulent conduct and RICO activity, all of which were either sent or received between August 27, 2009 and December 15, 2009. *See id.* at ~46, 194-214, 245-46, 266-67. Finally, Plaintiff clearly states that Wachovia's last predicate RICO act allegedly occurred on December 15, 2009, when Wachovia reportedly refused to drop its lawsuit, which was filed on September 28, 2009, against Plaintiff for Plaintiff's failure to remit payment for his vehicle. *See id.* at ~46.

Even if Plaintiff had pled the aforementioned "predicate acts" of mail and wire fraud with particularity, which he did not, his RICO claims against Wachovia must be dismissed because he has failed to plead a pattern of racketeering activity, which is an essential element of any RICO claim. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). To prove a pattern of racketeering activity, a plaintiff must show "that the racketeering activities are related, and that they amount to or pose a threat of continued criminal activity." *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1028 F.3d Cir. 2008). Continuity in this context refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 1028 (citing *H.J., Inc.*, 492 U.S. at 241). "Close-ended continuity" involves "a series of related predicates extending over a substantial period of time." *Wisdom v. First Midwest Bank*, 167 F.3d 402, 406 (8th Cir. 1999). "Open-ended continuity" involves "acts, which by their very nature, threaten repetition into the future." *Id.*

In this case, Plaintiff himself has said that Wachovia's alleged predicate acts ended on December 15, 2009, so this must necessarily be a case of "close-ended continuity." The Eighth Circuit has consistently held that "the requirement of continuity over a closed period is not met when the predicate acts extend less than a year." *Primary Care Investors, Seven, Inc. v. PHP Healthcare*

Corp., 986 F.2d 1208, 1215 (8th Cir. 1992). Based on Plaintiffs own allegations, Wachovia's predicate acts in this case lasted only from August 27,2009 to December 15,2009, a period of less than four months. This is clearly much shorter than the one-year guideline provided by the Eighth Circuit in *Primary Care Investors* and other cases. Accordingly, Plaintiff has failed to allege sufficient continuity, thus failing to establish a pattern of racketeering activity, which is an essential element of any RICO claim. Plaintiffs RICO claims against Wachovia must, therefore, be dismissed.

B. Plaintiff's Mail and Wire Fraud Claims Are Fatally Flawed And Must Be Dismissed

Plaintiffs allegations of mail and wire fraud against Wachovia, independent of his flawed RICO claims, similarly fail to state a claim for which relief can be granted. The law imposes a strict requirement on parties pleading allegations of fraud, which is embodied in Missouri Rule of Civil Procedure 55.15. Rule 55.15 requires that the circumstances constituting fraud be pleaded with particularity. *See, e.g., Bohac v. Walsh*, 223 S.W.3d 858 (Mo. Ct. App. 2007) (pleader in a fraud claim must state the circumstances of each element of fraud with particularity). "Circumstances" means the facts constituting the fraud or mistake. *See Heitman v. Brown Group, Inc.*, 638 S.W.2d 316 (Mo. Ct. App. 1982).

To state a proper cause of action, all elements of fraud must be pleaded. Failing to plead any one element renders a petition fatally defective. *See Schauer v. Gundaker Movits Real Estate Co.*, 813 S.W.2d 112 (Mo. Ct. App. 1991). Thus, a petition that does not allege facts showing that plaintiff had a right to rely on the representations or failing to show any causal connection with the alleged injury, fails to state a cause of action. Similarly, a petition does not state a cause of action for fraud where it fails to state that defendant either knew the statement was false or was ignorant of its truth or falsity. *See, e.g., Wieners v. Miller*, 683 S.W.2d 659 (Mo. Ct. App. 1984) (insurer's false

statement to purchaser that mobile home was insured). Importantly, allegations amounting to mere conclusions are to be disregarded by the Court. See *Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78 (Mo. Ct. App. 1993) (emphasis added).

In any claim for mail or wire fraud under RICO, a plaintiff must identify the "who, what, where, and how' of the alleged fraud." *BJC Health Sys. V. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007). Rather than identifying with particularity these essential elements of his fraud claims against Wachovia, Plaintiff has resorted to mere conclusory statements that do not sufficiently identify how Wachovia is supposed to have defrauded Plaintiff. It appears that Plaintiffs central allegation of fraud against Wachovia is that Wachovia engaged in mail and/or wire fraud by purportedly manufacturing evidence that would allow Wachovia to repossess Plaintiffs car and frustrate Plaintiffs business efforts. Plaintiffs "conclusions of fraud" do not, however, state with particularity who at Wachovia specifically defrauded Plaintiff, what Wachovia did that was allegedly fraudulent, when each and every fraudulent act or communication took place, the reasonableness of the reliance of the recipient of such allegedly fraudulent information, and many other critical aspects of Wachovia's purported misconduct that would otherwise give rise to any liability for either mail or wire fraud.

In a fraud claim, the plaintiff must "allege ultimate facts and cannot rely upon conclusions." *Black v. Rite Mortgage and Financial, Inc.*, 239 S.W.3d 165, 169 (Mo. App. 2007). Indeed, the claimed fraud "must appear clearly from the facts alleged and be independent of conclusions." *Id.* In his Petition, however, Plaintiff offers little else but conclusions of fraud that do not approach pleading fraud with particularity as required by Missouri law. If a plaintiff fails to plead any essential element of fraud properly, "the petition is defective and subject to dismissal." *Id.* In this case, Plaintiff has simply failed to plead his fraud claims, which are used to support his RICO claims,

against Wachovia with the required degree of particularity necessary to withstand a motion to dismiss.

More importantly, all of Plaintiffs allegations of Wachovia's "fraud" in this case are squarely focused on the lawful actions taken by Wachovia to recover collateral, Plaintiffs vehicle, following Plaintiffs failure to make payments according to the loan agreements he had previously made with Wachovia. This lawful exercise of a creditor's rights, through the appropriate use of the legal system, should not be viewed as anything but a natural and legitimate result of Plaintiff's own failure to pay his bills. Accordingly, Plaintiffs fraud claims fail to state a claim upon which relief can be granted and should be dismissed with prejudice.

CONCLUSION

WHEREFORE, Defendant Wachovia Dealer Services, Inc. moves the court to dismiss Plaintiffs Petition with prejudice as directed toward Wachovia Dealer Services, Inc., thus dismissing Wachovia Dealer Services, Inc. from this action, and for such further relief as the court deems just and appropriate under the circumstances of this case.

Respectfully submitted,

SOUTH & ASSOCIATES, P.c.



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CERTIFICATE OF SERVICE

I hereby certify that on this, the ~~U!~~¹¹ day of February, 2010, I placed a copy of the above and foregoing document in the United States Mail, postage prepaid, to the following recipients:

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