



issues to be tried and to expedite the trial of a cause on the merits." *Ford Motor Credit Co, v, Updegraff*, 218 S.W.3d 617, 621 (Mo.App. W.D. 2007). Instead, Plaintiffs Amended Petition is sixty-six pages long and consists largely of vague, rambling accusations. Although Plaintiff included additional facts in his Amended Petition, he still fails to sufficiently allege a pattern of racketeering, an essential element of the RICO statutes and does not establish a cause of action under the Missouri Rules of Professional Conduct. Thus, his claims against Swanson Midgley must be dismissed.

#### MOTION TO DISMISS STANDARD

A motion to dismiss for failure to state a cause of action is "solely a test of the adequacy of the plaintiff's petition" accepting the allegations as true and giving the Plaintiff all reasonable inferences therefrom. *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. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Gill Construction, Inc. v. 18<sup>th</sup> & Vine Authority*, 157 S.W.3d 699, 707 (Mo.App. W.D. 2005), quoting *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 909 (Mo. bane 2002). Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id.* If 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. bane 1993).

Here, Plaintiff has failed to state a claim as he has failed to plead a pattern of racketeering activity as required under the RICO statutes. Also, his claims regarding violations of the Missouri Rules of Professional Conduct must be dismissed as these rules do not give rise to a private cause of action.

### ARGUMENTS AND AUTHORITIES

I. Plaintiff fails to establish a pattern of racketeering activity, an essential element of a RICO claim.

The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits any person from conducting the affairs of an enterprise through a pattern of racketeering activity. *Bennett v. Berg*, 685 F.2d 1053, 1062 (8<sup>th</sup> Cir. 1982). Plaintiff fails to plead the essential elements of a RICO claim because he fails to plead a pattern of racketeering activities.

Plaintiff's RICO claims against Defendant must be dismissed because he has failed to plead a pattern of racketeering activity, an essential element of a RICO claim. See *I.I. 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 (8<sup>th</sup> Cir. 2008) (citing *HJ Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). 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 *HJ 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 of Poplar Bluff*, 167 F.3d 402, 406 (8<sup>th</sup> Cir. 1999) (citing *HJ Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241-242 (1989)). Open-ended continuity involves "acts, which by their very nature, threaten repetition into the future." *Id.* (citing

*H.J. Inc.*, 492 U.S. at 241-242). Although the Eighth Circuit has declined to set a minimum amount of time for "continuity" under the RICO statutes, it 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 (8<sup>th</sup> Cir. 1992).

Although the allegations in the Petition are somewhat difficult to follow, a summary of Plaintiff's allegations against Defendant is found in paragraph three of the Amended Petition, where Plaintiff states:

This petition arises from the legally separate defendants' decisions through their Missouri chartered law firm agents to deprive the plaintiff of his virtual office phone and mail service, his apartment home office and his business automobile on the same day through bad faith proceedings in violation of the plaintiffs contracts, Missouri landlord tenant law and consumer protection act notice requirements via fraudulent filings in the 16<sup>th</sup> Circuit State of Missouri Court.

It appears from this paragraph and the rest of the Petition that Plaintiff alleges Defendant was engaged in a close-ended scheme to deprive him of his phone service, mail service, and apartment. Although there are vague allegations that Defendant is part of a larger conspiracy, these allegations are never fleshed out and there are no specific facts pleaded connecting Defendant to a larger conspiracy. Thus, the length of time of this alleged close-ended scheme to fraudulently deprive Plaintiff of his apartment/home office is crucial in determining whether Plaintiff has met the continuity requirement of a RICO claim. Plaintiff does not include a clear timeline of events in his Petition. It appears that the sequence of events involving Defendant began on either July 24, 2009 when Christopher Barhorst filed an eviction action against Plaintiff or on July 27, 2009 when Christopher Barhorst sent Plaintiff a letter informing him that his rent was past due. See Petition, ~ 130, 184.

The Plaintiff does not make clear when the action to evict him from his apartment terminated when he states that Defendant deceived the 16<sup>th</sup> Circuit Court to evict Plaintiff and obtain a garnishment on his bank accounts. See Petition, 1255-256. Plaintiff does state, however, that on October 29, 2009, he emailed the Missouri Board of Bar Governors regarding "the continued fraudulent outcomes procured through extrinsic fraud on the court and the cases affected by the fraud." See Petition, ¶ 184. In the immediately preceding paragraph, Plaintiff alleges that Judge Charles Stitt proceeded with the garnishment action filed by Defendant despite his knowledge that the garnishment was procured by fraud committed on the court by Defendant. See Petition, ¶ 183. We can therefore safely assume that Plaintiff was referencing the completed eviction/garnishment action in his letter of October 29, 2009.

Based on these pleadings, the entire fraudulent scheme allegedly perpetrated by Defendant lasted, at most, 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 claims against Defendant must be dismissed.

II. Violations of the Missouri Rules of Professional Conduct do not create a private cause of action.

Plaintiff seems to allege in support of his claims against Defendant that Defendant's actions violated the Missouri Rules of Professional Conduct. See, e.g., Petition, ¶ 26. Missouri case law is clear that these rules do not create a private cause of action:

The Rules of Professional conduct do not form a basis for a civil cause of action. While they provide standards and violation of them result in disciplinary action, they do not augment an attorney's substantive legal duty or the extra-disciplinary consequences of violating such a duty.

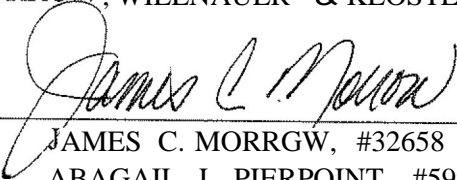
*Roth v. La Societe Anonyme Turbomeca*, 120 S.W.3d 764,777 (Mo. App. 2003). Thus, any claims against Defendant in Plaintiff's Petition based on its alleged violation of the Missouri Rules of Professional Conduct must be dismissed.

**CONCLUSION**

Therefore, based upon the above and foregoing, Plaintiff's RICO claims and claims based on the Missouri Rules of Professional Conduct against Defendant Swanson Midgley LLC must be dismissed for Plaintiff's failure to state a claim upon which relief can be granted.

WHEREFORE, for the foregoing reasons, Defendant Swanson Midgley LLC, requests that this Court issue its Order dismissing Plaintiff Samuel Lipari's Amended Petition against Swanson Midgley LLC, and for such other and further relief as the Court deems just and proper.

MORROW, WILLNAUER & KLOSTERMAN, L.L.C.

By 

JAMES C. MORROW, #32658

ABAGAIL L. PIERPOINT, #59997

Executive Hills East, Building A

10401 Holmes, Suite 300

Kansas City, Missouri 64131-3405

Telephone: (816) 382-1382

Fax: (816) 382-1383

Email: [jmorrow@mwklaw.com](mailto:jmorrow@mwklaw.com)

[apierpoint@mwklaw.com](mailto:apierpoint@mwklaw.com)

ATTORNEY FOR DEFENDANTS  
SWANSON MIDGLEY LLC, CHRISTOPHER  
BARHORST, AND HOLLY L. FISCHER

I hereby certify that a copy of the above and foregoing was mailed, via U.S. mail, first class, postage prepaid, this 28th day of January 2010, to:

Samuel K. Lipari  
803 S. Lake Drive  
Independence, Missouri 64053

PLAINTIFF PRO SE

Chapel Ridge Multifamily, LLC  
3460 NE Akin Boulevard  
Lee's Summit, Missouri 64064

DEFENDANT

Regus, PLC  
22 Grenville Street  
St. Helier, Jersey, LU 00000

DEFENDANT

Regus Management Group, LLC  
RA: CSC Lawyers Incorporating Service, Inc.  
150 S. Perry Street  
Montgomery, Alabama 36104

DEFENDANT

Lianne Zellmer  
2300 Main Street, Suite 900  
Kansas City, Missouri 64108

DEFENDANT

Wells Fargo  
420 Montgomery Street  
San Francisco, California 94163

DEFENDANT

Wachovia Dealer Services, Inc.  
8575 W. 110th Street, Suite 100  
Overland Park, Kansas 66210

DEFENDANT

Troppito & Miller, LLC  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

Chris M. Troppito  
508 Walnut Street  
Kansas City, Missouri 64106

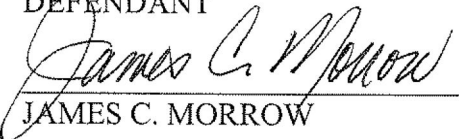
DEFENDANT

Nicholas L. Ackerman  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

Tony R. Miller  
508 Walnut Street  
Kansas City, Missouri 64106

DEFENDANT

  
\_\_\_\_\_  
JAMES C. MORROW