UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

INDIAN LAND CAPITAL COMPANY, LLC

Plaintiff,

v. **Civil Action No. 5:21-cv-5015**

INFRASTRUCTURE DEVELOPMENT COOPERATIVE, LCA; HIGHLAND PARK MANAGEMENT, LLC; L. STEVEN HAYNES; And RAYCEN RAINES,

Defendants.

DEFENDANT RAYCEN RAINES'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant Raycen Raines ("Raines" or "Defendant"), by counsel, and pursuant to Fed. R. Civ. P. 12(b)(6) files this Memorandum in Support of his Motion to Dismiss Counts Four and Five of Plaintiff's Amended Complaint. In support of his Motion, Raines states as follows:

I. INTRODUCTION

Plaintiff's Amended Complaint fails to cure the flaws of its original Complaint as to the claims against Raines. None of the allegations that Plaintiff has added change the fact that this case is based on a contract to which Raines is not a party. Plaintiff's Amended Complaint refers to the "Galanis Fraudulent Bond Scheme" to try to prop up its RICO claim, but those new allegations still fail to adequately state a RICO claim against Raines. Plaintiff has now failed twice to allege facts sufficient to state a claim against Raines and, therefore, this case should be dismissed against Raines with prejudice.

At its heart, this case remains a contract dispute between two entities: Plaintiff Indian Land Capital Company, LLC ("ILCC") and Defendant Infrastructure Development Cooperative, LCA ("IDC"). As alleged in the Amended Complaint, ILCC and IDC entered into a Loan Agreement in February 2016 wherein ILCC advanced a $1,500,000 loan to IDC in connection with a project through which IDC would provide propane to tribal entities. (*See* Am. Compl. ¶¶ 79, 80.) IDC defaulted on the Loan Agreement, and IDC and ILCC negotiated multiple extensions of the payment term. Now ILCC seeks damages from IDC based on IDC's alleged failure to make payments due under the contract.

Instead of simply filing a breach of contract action against IDC, ILCC has also named Highland Park Management, LLC, L. Steven Haynes and Raines as Defendants. With respect to Raines, the Amended Complaint asserts a fraud and deceit claim (Count Four) and a civil RICO claim (Count Five) that arise out of IDC's alleged breach of the Loan Agreement. Yet, Raines is not a party to the Loan Agreement or either of the extensions of that Agreement. Put simply, there is no legitimate reason for Raines to be named in this case.

Plaintiff's Amended Complaint still fails to plead either claim against Raines with the particularity required under Fed. R. Civ. P. 9(b). Plaintiff fails to allege specifics regarding the particular misrepresentations that Raines made. In addition, the Amended Complaint fails to sufficiently allege ILCC's reasonable reliance on Raines' alleged statements in deciding to contract with another party, IDC.

With respect to the RICO claim, Plaintiff's Amended Complaint fails wholesale. It fails to adequately plead an enterprise separate and apart from the persons involved in the alleged enterprise, fails to plead a sufficient pattern of racketeering conduct, and fails to plead with particularity the predicate acts of either mail or wire fraud against Raines. Because there are no

facts under which Plaintiff can assert a plausible fraud or RICO claim against Raines, Counts Four and Five of the Amended Complaint should be dismissed with prejudice.

II. BACKGROUND

A. The Loan Agreement between ILCC and IDC.

IDC promoted a project wherein it would provide propane to tribal entities to improve access to propane, reduce energy costs for tribal citizens and generate revenue for tribes who were members of IDC. (Am. Compl. ¶¶ 79-80.) Defendant Haynes proposed that the project be funded from a bond "to be issued under an agreement with the Public Finance Authority, a unit of government of the State of Wisconsin based in Madison, Wisconsin." (*Id.* at ¶ 49.) In late 2015 and early 2016, Haynes contacted ILCC to obtain bridge financing to begin funding the project while the bonding was being finalized. (*Id.* at ¶ 53.) Negotiations ensued and ultimately ILCC and IDC executed a Loan Agreement on February 2, 2016. (*Id.* at ¶ 79.) The Loan Agreement was executed by Art Angle, a member of the Enterprise Rancheria, as President of IDC. (*Id.* at ¶ 84.) After the Loan Agreement was executed, no bonds were ultimately issued or purchased because the bonds were rated as a "high risk investment." (*Id.* at ¶¶ 85-86.) In addition, after the Loan Agreement was executed, Enterprise Rancheria terminated its membership in IDC purportedly because of certain conduct it allegedly discovered regarding use of the loan proceeds, the status of the project, and as a result of "IDC's, Highland Park's, and Haynes's misrepresentations and failure to provide adequate information." (*Id.* at ¶ 93.)[1]

On August 31, 2017, IDC defaulted on the Loan Agreement. (Am. Compl. ¶ 95.) Following the default, the Amended Complaint alleges that Haynes, on behalf of Highland Park

[1] Plaintiff also claims that IDC made representations regarding certain tribe's membership in IDC throughout the course of the parties' negotiations. (Am. Compl. ¶¶ 63-69.)

and IDC, negotiated a Loan Maturity Date Extension with ILCC. (*Id.* at ¶ 96.) When IDC defaulted again, IDC and ILCC negotiated a second extension agreement. (*Id.* at ¶ 107.) ILCC alleges IDC has breached the second extension agreement, and is seeking payment from IDC in this lawsuit.

B. The Galanis bond scheme.

Plaintiff's Amended Complaint adds a number of allegations regarding a bond scheme involving John "Yanni" Galanis. The majority of these allegations are pled "upon information and belief." (*See, e.g.*, ¶¶ 20-22; 27; 29-33.) Plaintiff alleges that under the scheme, *Galanis*, "through various entities controlled by him, represented to potential investors that a portion of bond proceeds [to be issued by WLCC] would be used to purchase an annuity, the proceeds of which would be sufficient to service the bond debt." (*Id.* at ¶ 23.) According to Plaintiff, *Galanis* sold more than $40 million in bonds to various groups and filtered the majority of the bond proceeds to *Galanis's* personal use and benefit. (*Id.* at ¶ 26.) Plaintiff further alleges that, upon information and belief, certain bond proceeds were deposited into a project fund "ostensibly for the benefit of [Wakpamni Lake Community Corporation ("WLCC")]" and that Haynes, working in conjunction with Raines, used Raines' association with WLCC to obtain disbursements of the funds for Haynes' 'fake consultation services.'" (*Id.* at ¶ 30.) Plaintiff claims, upon information and belief, Raines also received some of those proceeds. (*Id.* at ¶ 31.)

Plaintiff conveniently omits from his Amended Complaint that *Galanis* was prosecuted for this scheme and convicted.[2] At sentencing the District Court judge stated the following:

[2] Notably, Galanis is the subject of a Criminal Complaint filed in the Southern District of New York, Case No. 1:16-cr-00371 (Dkt. No. 1) wherein he was accused of engaging in a fraudulent scheme to misappropriate the proceeds of certain tribal bond issuances for personal use. WLCC cooperated in the investigation of Galanis, and Raines testified against Galanis at trial (*see* Dkt.

> There's no real dispute, in my view, about the seriousness of the crime and the harm caused to one of the poorest Native American tribes in the country, as well as the clients of Hughes and Atlantic, pension funds held for the benefit of transit workers, longshoremen, housing authority workers, and city employees, among others. Over the course of two years, Mr. Galanis helped steal more than $40 million from numerous pension fund clients and left the Wakpamni Lake Community Corporation without money for economic development and owing more than $60 million on the outstanding bonds. 2.35 million of the bond proceeds were sent to an entity controlled by Mr. Galanis, who then used that money for, among other things, jewelry, cars, hotels, and disbursements to family members.

U.S. v. Galanis, No. 19-619, Dkt. No. 89-2, at A-2152-53 (2d Cir. March 4, 2020).[3] Galanis appealed his conviction and in the Second Circuit's Mandate, the Second Circuit confirmed that WLCC was a victim of Galanis' scheme. *U.S. v. Galanis*, No. 1:16-cv-00371, Dkt. No. 963 (S.D.N.Y. March 2, 2021).[4] Moreover, Galanis was ordered to pay $43,427,436 to WLCC. *Id.* Neither Raines nor WLCC participated in this scheme with Galanis. Rather, WLCC was a victim of the scheme, as Raines explained when he testified against Galanis in the criminal case.

The *Galanis* bond scheme has nothing to do with the facts alleged in the Amended Complaint, and the allegations are an inappropriate attempt to manufacture a non-existent connection between *Galanis's* criminal activity and Raines. In fact, the only allegation that attempts to link the Galanis bond scheme to this case is the allegation that "upon information and

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No. 505). Galanis was ultimately convicted of conspiracy to commit securities fraud and securities fraud.

[3] The Court can take judicial notice of the relevant documents in the *Galanis* criminal matter. *Keating v. Univ. of S.D.*, 386 F. Supp. 2d 1096, 1102 n.2 (D.S.D. 2005); *see also Deford v. Soo Line R. Co.*, 867 F.2d 1080, 1087 (8th Cir. 1989) (taking judicial notice of pleadings filed in a separate action in a federal court).

[4] In its opening brief, the United States summarized the case as follows: "The evidence at trial demonstrated that Galanis participated in a scheme to defraud two sets of victims: [WLCC], by inducing the WLCC to issue $60 million worth of tribal bonds; and ten pension funds, by investing their money in the WLCC bonds without disclosing material facts, resulting in over $40 million in losses." *See U.S. v. Galanis*, Dkt. No. 19-619, Dkt. 108, at 52 (2d Cir. June 2, 2020).

belief" during a trip to Las Vegas "believed to have been funded by the [bond scheme described above], Haynes pitched an economic development idea to representatives of the Enterprise Rancheria of Maidu Indians of California." (Am. Compl. at ¶ 34.) This allegation says nothing about Raines.

Plaintiff's Amended Complaint also adds allegations regarding the creation of IDC and the alleged scheme under which Haynes and Raines allegedly controlled IDC. However, the Amended Complaint does not allege that Raines provided services to IDC, acted as an agent of IDC, was a member of IDC, or controlled IDC. Instead, the Amended Complaint alleges that *Highland Park* acted as a manager and agent of IDC. (*Id.* at ¶ 44.) And neither Haynes nor Raines controlled the alleged other member of IDC – the Enterprise Rancheria. (*Id.* at ¶ 39.)

III. ARGUMENT

A. Plaintiff's Complaint fails to state a claim for fraud against Raines.

1. Fed. R. Civ. P. 9(b) requires fraud to be pled with particularity.

A complaint alleging fraud must be pled with particularity pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. "This particularity requirement demands a higher degree of notice than that required for other claims. The claim must identify who, what, where, when, and how." *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003). Thus, "a plaintiff must plead such matters as the time, place and contents of the allegedly false representations, as well as the identity of the person making the representations and what was obtained or given up." *Schaller Telephone Company v. Golden Sky Systems, Inc.*, 298 F.3d 736, 746 (8th Cir. 2002) (quoting *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). "Conclusory allegations that a defendant's conduct was fraudulent and deceptive are not

sufficient to satisfy the rule." *Id.* (quoting *Commercial Property v. Quality Inns*, 61 F.3d 639, 644 (8th Cir. 1995).

2. Plaintiff has failed to plead the essential elements of fraud against Raines.

Plaintiff's Amended Complaint is devoid of allegations supporting the essential elements of a fraud claim against Raines. Under South Dakota law, the essential elements of fraud are: (1) a representation made as a statement of fact; (2) which was untrue and known to be untrue by the party making it, or else recklessly made; (3) which was made with intent to deceive and for the purpose of inducing the other party to act upon it; (4) which was actually relied upon by the other party; and (5) which thereby induced the other party to act to its injury or damage. *Stene v. State Farm Mut. Auto. Ins. Co.*, 1998 SD 95, 583 N.W.2d 399, 404 (S.D. 1998); *see also Brookings Mun. Utils., Inc. v. Amoco Chem. Co.*, 103 F. Supp. 2d 1169, 1177 n.10 (D.S.D. 2000) (same).

a. Plaintiff has failed to plead reliance with respect to any representation made by Raines.

Plaintiff has failed to plead actual reliance on any statement made by Raines with respect to ILCC executing the Loan Agreement with IDC. "The element of reliance forms the causal link between misrepresentation and detriment; the false statement must be a substantial cause of the damage suffered." *Cargill, Inc. v. Am. Pork Producers, Inc.*, 426 F. Supp. 499, 506 (D.S.D. 1977) (citing PROSSER, LAW OF TORTS, § 108 (4th Ed. 1971)).

Here, Plaintiff alleges it entered into the Bridge Loan *"in reasonable reliance on the representations made by Haynes on behalf of Highland Park and IDC."* (Am. Compl. at ¶ 79 (emphasis added).) Plaintiff's own allegations reflect ILCC did not rely on any misrepresentations made by Raines to enter into the Agreement. Unable to overcome the hurdle that Raines made no representations during the original negotiations, Plaintiff alleges that ILCC "relied on Haynes' and

Raines' misrepresentations and agreed to an *extension* of the Bridge Loan." (Am. Compl. ¶ 102 (emphasis added).) Plaintiff further alleges that Raines' "presence was intended to convince ILCC the Loan Proceeds were being used for their intended purposes." (*Id.* at ¶ 100.)

At the time Raines allegedly made any misrepresentations and at the time that Raines was allegedly present to "convince" ILCC about the use of the loan proceeds, the proceeds had already been paid *to IDC*, and IDC had already defaulted. Plaintiff fails to plead any facts as to why any statements regarding the use of the loan proceeds would have caused ILCC to extend the maturity date on the Loan. Arguably, the use of the loan proceeds was immaterial after the point of default and it was unreasonable for ILCC to have relied on any alleged representation made at that point in time regarding the use of the proceeds. Rather, IDC's ability to repay the loan or the potential to obtain financing to repay the loan would have likely impacted ILCC's decision to extend the maturity date and there are no allegations regarding any representations made by Raines as to these points. Therefore, the allegations of reasonable reliance with respect to any statement made by Raines must fail.

b. Plaintiff has failed to plead specific facts regarding the details of the alleged misrepresentation made by Raines.

Plaintiff's Amended Complaint also fails to include all of the necessary specifics regarding the alleged representations Raines made to ILCC. As discussed above, there are no allegations regarding any misrepresentation Raines made during the original negotiations of the Loan Agreement. Instead, the Amended Complaint alleges that "Raines participated in the *Extension* negotiations, during which he represented to [Rjay Brunkow] that he was participating on behalf of the Oglala Sioux Tribe." (*Id.* at ¶ 99 (emphasis added).) The Complaint then alleges in a conclusory fashion that "Haynes, Raines, and IDC continued to misrepresent WLCC's membership in IDC as membership by the Oglala Sioux Tribe." (Am. Compl. ¶ 73.) Notably,

paragraphs 53 through 69 which allegedly detail the negotiations for the bridge financing do not even mention Raines. (*Id.* at ¶¶ 53-69.) Then the Complaint alleges in a conclusory fashion that "Raines and Haynes made the above misrepresentations with the intent to cause ILCC to rely on the same to the detriment of ILCC's rights to take action to recover the bridge loan proceeds." (*Id.* at ¶ 101.)

These allegations do not meet the heightened Rule 9(b) requirements. Plaintiff still fails to plead specifically *what exactly* Raines stated and *how* he stated it to ILCC. Plaintiff claims that Raines represented to Rjay Brunkow and ILCC that he was participating in the extension negotiations on behalf of the Oglala Sioux Tribe. (Am. Compl. ¶ 98.) Plaintiff also alleges in a conclusory fashion that "[n]egotiations again took place primarily via means of interstate wire communication, specifically, via telephone and email, with Haynes participating from Texas, Raines from South Dakota, and Brunkow in Minnesota." (*Id.* at ¶ 109.) However, Plaintiff never alleges the date or the time at which the alleged statements by Raines were made. There are no specific allegations about whether Raines' statements were made on the telephone or by email. Further, regardless of the alleged reasons for Raines' presence, Raines was not participating in any of the negotiations on behalf of a party to the Loan Agreement; therefore, any statements he could have possibly made were not on behalf of any party obligated under the Loan Agreement.

Raines made no representations regarding funding any project. Raines made no representations regarding any proposal to obtain bridge financing from ILCC. Raines made no representations regarding any bond issuance or any rating related to any bond. Based on this threshold pleading failure with respect to the specifics regarding the representations made by Raines, Count Four should be dismissed.

3. Plaintiff cannot allege fraudulent inducement against a stranger to the contract.

Furthermore, to the extent Plaintiff attempts to allege a fraudulent inducement claim against Raines, that claim must fail. Fraudulent inducement or fraud in general necessarily contemplates one party making a misrepresentation to another party which the defrauded party relies on and acts upon in entering the contract. Here, even accepting Plaintiff's allegations as true, the claim fails because Raines was not a party to the Loan Agreement between ILCC and IDC. Thus, from a commonsense perspective, Raines cannot be said to have fraudulently induced ILCC to enter into the contract with IDC. IDC was the entity that negotiated, and IDC made certain pre-formation representations that ultimately resulted in both the Loan being executed as well as the extensions thereto. Those representations were not made by Raines, nor could any statements allegedly made by Raines be material or relied upon by ILCC in deciding to contract with IDC. Therefore, the fraud claim must be dismissed.

B. <u>Plaintiff's Amended Complaint fails to sufficiently allege a RICO claim against Raines.</u>

1. Plaintiff's allegations fail under the heightened pleading standards applicable to RICO claims.

Similar to a fraud claim, a RICO claim must be plead with particularity under Rule 9(b). *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011); *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 428-29 (8th Cir. 2009). "Under Rule 9(b)'s heightened pleading standard, allegations of fraud . . . [must] be pleaded with particularity. In other words, Rule 9(b) requires plaintiffs to plead the who, what, when, where, and how: the first paragraph of any newspaper story." *Summerhill v. Terminix, Inc.*, 637 F.3d at 887, 880 (8th Cir. 2011) (alteration in original) (citations and internal quotation marks omitted).

To that end, in order to state a claim for a RICO violation, a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Nitro Distrib.,* 565 F.3d at 428 (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted)).

2. There is no enterprise as required by RICO.

To state a claim pursuant to 18 U.S.C. § 1962(c), a plaintiff must first allege the existence of an enterprise. An enterprise must possess three characteristics: "[a] common or shared purpose, some continuity of structure and personnel, and an ascertainable structure distinct from that inherent in a pattern of racketeering." *McDonough v. Nat'l Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997) (internal citations omitted). For the reasons discussed herein, Plaintiff has failed to plead the existence of an enterprise under RICO. There are no facts alleged that show a common or shared purpose. There are no facts alleged that show a continuity of structure and personnel. Finally, there are no facts alleged that establish an ascertainable structure distinct from the alleged racketeering committed.

a. Plaintiff's "associated in fact" enterprise theory fails.

The RICO statute defines a "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). It further defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Section 1961(4) recognizes that an enterprise may be a legal entity but also can take the form of "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Yet, "merely stringing together a list of defendants and labeling them an enterprise is insufficient to state a RICO claim." *See, e.g., Cedar Swamp Holdings, Inc. v. Zaman*, 487 F. Supp. 2d 444, 450 (S.D.N.Y. 2007).

Plaintiff now alleges Raines and Haynes were an "associated in fact" enterprise. To that end, Plaintiff alleges the following:

- "Learning from their experience and participation in the Galanis Bond Scheme, upon information and belief, Haynes and Raines began an enterprise through which they would obtain bond sale proceeds for their own use through fraud and artifice." (Am. Compl. ¶ 35.)[5]

- "Defendant Haynes and Defendant Raines were members of an association of persons formed for the common purpose of engaging in a course of conduct to obtain bond proceeds through fraudulent means." (*Id.* at ¶ 146.)

- "Haynes and Raines conspired to support the enterprise engaged in interstate commerce through repeated acts of wire and mail fraud." (*Id.* at ¶ 150.)

Yet, "an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 815 (8th Cir. 1992) (citing *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), cert. denied, 459 U.S. 1040 (1982)).

In *United States v. Turkette*, 452 U.S. 576 (1981), the United States Supreme Court stated:

> [T]he [Plaintiffs] must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . **The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.** The existence of an enterprise at all times remains a separate element which must be proved by the [Plaintiffs].

Id. at 583 (emphasis added). The enterprise element requires an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (internal quotations omitted). Without "the inclusion of the

[5] As discussed previously, Raines did not participate in the Galanis Bond scheme, and WLCC was a victim of Galanis' scheme.

enterprise element [which] requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, [RICO] simply punishes the commission of two of the specified crimes within a 10-year period." *Bledsoe*, 674 F.2d at 664. "Congress clearly did not intend such an application of [RICO]." *Id.*

Here, the Amended Complaint defines the relationship between Haynes and Raines solely by the alleged racketeering activity in which they allegedly engaged – which was purportedly to create IDC, then obtain financing for a project they purportedly never meant to complete. Even accepting those facts as true (they are not), the Amended Complaint alleges nothing more than a conspiracy among Defendants to commit mail and wire fraud, which does not qualify as an enterprise as a matter of law. *See Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) ("A conspiracy, however, is not an enterprise for the purposes of RICO.").

In addition, "[t]he hallmark concepts that identify RICO enterprises are 'continuity, unity, shared purpose and identifiable structure.'" *United States v. Fiel*, 35 F.3d 997, 1000 (4th Cir. 1994) (quoting *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981)). As previously discussed, the Amended Complaint includes new allegations regarding Raines' involvement in an alleged "fraudulent bond scheme" with Galanis. Nearly all these allegations are pled upon information and belief and focus on Galanis' conduct. The Amended Complaint alleges Galanis, "through *his controlled entities* sold more than $40 million in bonds to various groups, through three separate bond issuances" and that "*Galanis's controlled entities* filtered the majority of the bond proceeds to *Galanis's personal use and benefit*." (Am. Compl. ¶¶ 25, 26 (emphasis added).) That "fraudulent bond scheme" involved various other parties and is entirely separate from the facts alleged in the Amended Complaint. WLCC was a *victim* in that scheme, and Raines testified against Galanis at the trial where Galanis was convicted and ordered to pay over $40 million in

restitution to WLCC. Indeed, Plaintiff distinguished Galanis' bond scheme from "HAYNES' AND RAINES' OWN BOND SCHEME." Thus, there is no continuing unit. *Cedar Swamp Holdings, Inc.*, 487 F. Supp. 2d at 451 ("[A]n allegation that the perpetrator of a series of independent fraudulent transactions used a different accomplice to aid each transaction is insufficient to justify a conclusion that the perpetrator and the accomplices together constituted an ongoing organization or functioned as a continuing unit.").

Moreover, there are no allegations regarding (1) the identity of the alleged victims[6] in the other fraudulent bond scheme; (2) when, specifically, the other alleged acts of racketeering were committed; or (3) which Defendant(s) committed the alleged acts of racketeering. Such information is necessary to satisfy the pleading requirements of Rule 9(b). *See Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (1989) (dismissing RICO claim because "[p]laintiffs' conclusory allegations fail to satisfy Fed. R. Civ. P. 9(b)'s requirement that averments of fraud be stated with particularity.").

Finally, to establish a distinct structure, a plaintiff must show "that the common activities of the enterprise extend beyond the minimal association necessary to sustain the pattern of racketeering." *Waldner v. Boade*, No. 10-4056, 2013 U.S. Dist. LEXIS 96381, at *8 (D.S.D. July 10, 2013) (internal citation omitted). "'The distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.'" *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 770 (8th Cir. 1992) (quoting *Bledsoe*, 674 F.2d at 665 (8th Cir. 1982)); *see also Handeen v. Lemaire*, 112 F.3d 1339, 1352 (8th Cir. 1997) ("In assessing whether an alleged

[6] Those victims are sealed on the public docket. There is no basis to believe that ILCC was a victim in this fraudulent bond scheme involving Galanis.

enterprise has an ascertainable structure distinct from that inherent in a pattern of racketeering, it is our normal practice to determine if the enterprise would still exist were the predicate acts removed from the equation."). Here, no enterprise would exist absent the alleged predicate acts of mail and wire fraud because there is no distinct structure. Instead, there are two individual defendants who are alleged to have committed mail or wire fraud. This is not enough to create a RICO enterprise.

3. There is no alleged pattern of racketeering.

To state a claim under RICO, plaintiff must also establish a pattern of racketeering activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989). While the language of RICO implies that two acts are necessary, two acts may not be sufficient to constitute a pattern of racketeering activity. *Id.* Moreover, "[a] pattern of racketeering activity is present only when predicate acts are linked by continuity *plus* relationship." *See Handeen*, 112 F.3d at 1353 (1997) (emphasis added). The Supreme Court has referred to continuity as both a closed and open-ended concept that is principally temporal in nature. *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241). A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. *Id.* (quoting *H.J., Inc.*, 492 U.S. at 242). In the alternative, the predicates may satisfy the definition of open ended continuity to the extent they involve a distinct threat of long-term racketeering activity. *Id*.

Here, Plaintiff attempts to allege continuity over a closed period by alleging a series of related predicates that extend over a substantial period of time. Yet, Plaintiff has wholly failed to establish a sufficient series of related predicates. Instead, Plaintiff only alleges that Haynes and Raines "pursued the fraudulent bond scheme through, and by engaging in, a pattern of racketeering activity, including repeated acts of wire fraud to obtain access to loan proceeds advanced by ILCC

under the Loan Agreement and additional extensions thereto." (Am. Compl. ¶ 147). The Complaint further alleges Haynes and Raines "pattern of racketeering activity and the fraudulent bond scheme were conducted through means of interstate commerce, including interstate wire communication . . . ." (*Id.* at ¶ 148.) These allegations are insufficient to establish a pattern of racketeering activity. *Crest Constr. II, Inc. v. Doe,* 660 F.3d 346, 356 (8th Cir. 2011) ("While the complaint is awash in phrases such as 'ongoing scheme,' 'pattern of racketeering,' and 'participation in a fraudulent scheme,' without more, such phrases are insufficient to form the basis of a RICO claim."); *see, e.g., Gallagher v. Magner,* 619 F.3d 823, 842 (8th Cir. 2010) (concluding that general allegation of cooperation amongst the defendants and the use of phrases such as "buy in" were insufficient to formulate a RICO claim). And as discussed above, the allegations regarding the Galanis bond scheme are too far attenuated from any specific conduct related to the breach of contract claim at issue here. That bond scheme that resulted in Galanis' conviction cannot serve the purposes of "continuity" for a RICO claim against Raines, especially where WLCC was a victim int hat scheme.

To the extent Plaintiff attempts to plead open ended continuity, the allegations also fail because there are no facts to suggest there is *distinct threat* of long-term racketeering activity where the sole activity here is unrelated to any other predicate acts or pattern of activity that could qualify under RICO.

4. Plaintiff fails to sufficiently plead a predicate act.

Finally, Plaintiff's RICO claim also fails for the very simple reason that it has failed to sufficiently allege a predicate act. Rule 9(b) requires that a party alleging fraud or mistake "state with particularity the circumstances constituting a fraud or mistake." Fed. R. Civ. P. 9(b); *see Murr Plumbing, Inc. v. Scherer Bros. Fin. Srvcs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (citing

18 U.S.C. §§ 1341, 1343) (holding that Rule 9(b)'s heightened pleading requirement applies to allegations of mail and wire fraud used as predicate acts for a RICO claim); *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 358 (8th Cir. 2011) ("Finally, we note that Plaintiffs' failure to meet the heightened pleading requirements of Rule 9(b) in alleging mail and wire fraud also provided an independent basis for dismissal.").

The Eighth Circuit addressed this same issue in *Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 428-29 (8th Cir. 2009). In *Nitro Distrib., Inc.*, the district court dismissed a RICO claim where the plaintiff's amended complaint alleged "in very general terms that [the defendant] engaged in racketeering that 'involved the use of the interstate telephone and the U.S. mails on a number of occasions . . . .'"). The Eighth Circuit affirmed holding that the district court correctly dismissed the claim for lack of particularity. *Id.* Similarly, the district court in *Crest Constr. II, Inc.*, also dismissed a RICO claim for failure to plead mail and wire fraud allegations with particularity. 660 F.3d at 358. In affirming the district court in *Crest Constr. II, Inc.*, the Eighth Circuit adopted the district court's opinion that the Complaint failed to identify the who, what, when, where, and how "with respect to a single allegation of mail or wire fraud; in fact the Complaint fails to specify a single date with respect to any such allegation." *Id.*

The same is true here. There are no allegations specifically of how Raines committed mail or wire fraud. Instead, the Complaint only includes conclusory allegations that:

- "Negotiations took place almost entirely via interstate wire communications over the phone and email." (Am. Compl. ¶ 55)
- "Haynes, Raines and IDC utilized means of interstate communication, including the telephone, internet, and mail to make the above representations and to execute the contract documents." (*Id.* at ¶ 78.)[7]

[7] To the extent this allegation suggests that any party other than IDC executed any contract document, the allegation is non sensical. Raines never executed any contract nor is he alleged to have.

- "[T]he negotiations for the extension agreement took place by means of interstate wire communication, including telephone and email communication, with Haynes participating, upon information and belief, from Texas, and Rjay Brunkow negotiating on behalf of ILCC in Minnesota. (Compl. ¶ 97.)

- "Negotiations again took place primarily via means of interstate wire communications, specifically, via telephone and email, with Haynes participating from Texas, Raines from South Dakota, and Brunkow in Minnesota. (*Id.* at ¶ 109.)

Plaintiff fails to specifically allege when Raines made any representation and how it was made. While Plaintiff alleges the representations were made over the phone, internet and mail, there are no specifics as to who was present on any specific telephone call and what information was communicated via email. Presumably, if Plaintiff had any such email correspondence, he would have alleged more details about these communications, including their dates, times, and to whom they were made and specifically who made them.

Because Plaintiff has failed to sufficiently plead that Raines committed any predicate act of mail or wire fraud, the RICO claim against Raines must be dismissed.

IV. CONCLUSION

For the reasons above, Defendant Raycen Raines respectfully requests that the Court dismiss Counts Four and Five against Raines. Defendant also asks for all additional relief in his favor that is just and proper.

Dated: June 1, 2021

Respectfully submitted,

By: */s/ Shawn M. Nichols*

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a copy of the above and foregoing was filed with the United States District Court for the District of South Dakota using the CM/ECF system which sent notification to all counsel of record.

/s/Shawn M. Nichols