

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Heaven & Earth, Inc.,
Plaintiff,

Civil No. 03-3327 (DWF/SRN)

v.

**MEMORANDUM
OPINION AND ORDER**

Wyman Properties Limited Partnership
and United Properties, L.L.C.,

Defendants.

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Andrew L. Marshall, Esq., Bassford Remele, 33 South 6th Street, Suite 3800,
Minneapolis, Minnesota 55402, on behalf of Plaintiff.

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5th Street South, Suite 2300, Minneapolis, Minnesota 55402; Jeffrey E. Grell, Esq.,
Ricoact.com L.L.C., 7201 York Avenue South, Suite 906, Edina, Minnesota 55435, on
behalf of Defendants.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on October 1, 2003, pursuant to a Motion to Dismiss brought by Defendants Wyman Properties Limited Partnership ("Wyman") and United Properties, L.L.C. ("United"). By its complaint, Plaintiff Heaven & Earth, Inc. ("HEI" or "Plaintiff") alleges a civil violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c); a civil RICO conspiracy, 18 U.S.C. § 1962(d); fraud; breach of contract; consumer fraud; and conversion. Wyman and United (collectively, "Defendants") bring the current motion seeking to dismiss the complaint against them, contending that Plaintiff failed to plead a claim for breach of contract. Defendants assert that Plaintiff has not pled an actionable fraud claim because any

allegedly fraudulent statements made were immaterial and did not cause Plaintiff any injury. Defendants also assert that the consumer fraud claim fails because it has not been brought to benefit the public. Defendants' final argument is that the civil RICO claims should be dismissed as barred by RICO's four-year statute of limitations, or, in the alternative, that Plaintiff was not injured "by reason of" a pattern of racketeering activity. For the reasons stated below, the Court denies Defendants' Motion to Dismiss except with regard to the consumer fraud count of the complaint.

Background

On May 21, 1990, HEI and Wyman entered into a lease ("the 1990 Lease") for the first and second floors of the Wyman Building ("the Leased Property"). (*See* Compl. at ¶ 6.) The Leased Property is located at 110 5th Street North, Minneapolis, Minnesota. (*See id.*)

The Leased Property was managed by Eberhardt Property Management Company ("Eberhardt") until 1994. (*See id.*) In 1994, Eberhardt was purchased by United. (*See id.*) Brian Burg was employed as property manager for the Leased Property in 1992 and continued in that position for United once it completed its purchase of Eberhardt. (*See* Compl. at ¶ 7.)

The 1990 Lease contained the following provision:

7. UTILITY EXPENSE. Tenant shall timely pay when due for all utilities, including water, gas, electricity, telephone and other utility services used by it, whether or not separately metered; and in the event Tenant shall not pay the same when due, Landlord may, but shall not be obligated, to pay the same on behalf of the Tenant, and Tenant shall reimburse Landlord therefor, promptly upon demand. Utility payments hereunder shall be deemed to be additional rent,

(Compl., Ex. A, ¶ 7).

The same day the parties entered into the 1990 Lease, they also executed an addendum to the 1990 Lease ("the 1990 Addendum"). (*See* Compl., Ex. A.) Paragraph 4 of the 1990 Addendum states:

4. Rent during the initial Term and any renewal Term shall be considered "gross rent" with the exception that Tenant shall pay, in addition to Rent: (i) Tenant's separately Metered electrical costs, (ii) all costs attributable to Tenant's maintenance obligations hereunder, (iii) all costs attributable to Tenant's insurance costs hereunder and (iv) if water to the Premises is submetered, Tenant's water usage as submetered to the Premises.

(Compl., Ex. A, ¶ 4).

On November 26, 1996, the parties entered into a second lease ("the 1996 Lease"). (*See* Compl. at ¶ 11). The 1996 Lease provided that with regard to the utility payments:

8. SERVICES AND UTILITIES.
 - a. *Utility Expense*, Tenant shall timely pay when due for all utilities, including water, gas, electricity, telephone and other utility services used by it, whether or not separately metered; and in the event Tenant shall not pay the same when due, Landlord may, but shall not be obligated, to pay the same on behalf of Tenant, and Tenant shall reimburse Landlord therefore, promptly upon demand. Utility payments hereunder shall be deemed to be additional rent.

(Compl., Ex. B, ¶ 8).

From 1990 until the present, HEI has received monthly billing statements from Defendants for rent and associated charges. (*See* Compl. at ¶ 9.) The billing statements refer to charges for electrical usage as "electrical reimbursement." HEI alleges it contacted Burt Corwin ("Corwin"), Wyman's President, and Burg about the high cost of electricity on several occasions, and that Defendants represented to HEI that the electrical charges were exactly those being paid by Defendants to NSP/Excel. (*See id.* at ¶ 16.)

In a letter dated November 7, 1997, Burg responded to HEI's request for additional information concerning the billing of electrical services ("the Burg letter"). The Burg letter states:

There is a consumption charge for electricity measured through the meter. This is a charge for electricity actually delivered to your suite. It is charged to the customer at seasonally adjusted rates; there is a different rate charge per kilowatt hour (kwh) between May and October than is used through November and April. NSP charges more for power in the summer than in the winter; the costs of power generation are greater then. We pass those charges through to you; we use the same rate as NSP does. Currently they are .073/kwh during the summer months and .063/KWH during the winter months.

(Compl. at ¶17 (emphasis omitted)).

In July 2000, HEI brought suit against Wyman over a lease option extending HEI's lease of the Leased Property. (*See id.* at ¶ 20.) During a deposition held on September 18, 2001, Burg stated that he did not believe that Defendants made any profit on the electrical charge. (*See id.*) The next day Burg sent a letter to HEI's counsel informing HEI's counsel that he had discussed the matter with Corwin and had learned that tenants of the Wyman Building were charged at a higher unit cost to the tenant than Wyman is itself charged by the utility. (*See id.* at ¶ 21.) In March 2002, HEI took Burg's deposition a second time. (See Compl. at ¶ 22.) HEI alleges that it was only then that it became fully aware of the extent of Defendants' mark-up of electrical charges, HE alleges that while it was being billed 7.3 cents per kilowatt hour, the actual cost to Defendants from NSP/Excel was 2.84 cents per kilowatt hour. (*See id.* at ¶ 18.) HM further alleges that as a result of the alleged overbilling of electrical charges HEI paid in excess of \$200,000 to Defendants that Defendants were not due under the leases. (*See id.* at ¶ 25.)

Analysis

1. Motion to Dismiss Standard

In deciding a motion to dismiss, the Court must assume, all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Id.* The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. William*, 490 U.S. 319, 326 (1989). The Court need not resolve all questions of law in a manner which favors the complainant; rather, the Court may dismiss a claim founded upon a legal theory which is "close but ultimately unavailing." *Id.* at 327.

2. Breach of Contract

The construction and effect of a contract is a question of law unless the contract is ambiguous. *See Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (*quoting Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 Minn. 1997)). The determination of whether a contract is ambiguous is a question of law, *See Goebel*, 567 N.W.2d at 5 15. If a contract is unambiguous, the contract must be given its plain and ordinary meaning. *See Denelsbeck*, 666 N.W.2d at 347 (citations omitted).

Defendants argue that the terms of the leases are clear and do not limit their ability to charge more for electricity than was charged to them by NSP/Excel. Defendants argue that the

“reimbursement” language contained in the leases was only applicable under a scenario whereby Plaintiff would be directly billed by NSP/Excel, but would fail to make its payments. Under such a scenario, Defendants claim that the language in the leases would allow Defendants to pay NSP/Excel for the electricity used by Plaintiff and to recover any such payments made from Plaintiff. Further, Defendants ask the Court to dispose of the conversion claim based on terms of the contract.

Like Defendants, Plaintiff contends that the terms of the leases are clear; however, Plaintiff asserts that the leases only allowed Defendants to bill Plaintiff for the actual cost of the electrical charge as paid by Defendants to NSP/Excel. Plaintiff argues that the language in the leases concerning “separately metered electrical costs” and reimbursements show that both parties intended the leases to act as a pass-through of electrical charges.

The Court finds that Plaintiff has made a colorable claim of breach of contract and thus declines to grant Defendant’s motion to dismiss with regards to Plaintiff’s breach of contract and conversion claims.

3. Fraud

A. Common Law Fraud

The elements of a common law fraud action are: (1) a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party’s own knowledge without knowing whether it was true or false; (3) with the intention to induce another act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) the party suffer a

pecuniary damage as a result of the reliance, *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986) (citations omitted).

Defendants argue that Plaintiff's common law fraud claim should be dismissed because the allegedly false statements were immaterial, and Plaintiff suffered no pecuniary loss as a result of any reliance it placed on those statements. Defendants argue that any false statements regarding the rate it was billed for electrical charges were immaterial, because Defendants were under no contractual obligation to maintain prices at that level. Defendants also assert that even if the lease had obligated them to pass along the electrical charges directly to Plaintiff, the statements would not have caused any damage beyond that caused by the breach of contract.

Plaintiff, on the other hand, alleges that Defendants made material misrepresentations concerning the prices of electricity in oral representations made in the Defendants' monthly billing statements and in the Burg letter. Plaintiff alleges that Defendants were aware of the falsity of those statements when they were made and that its reliance on those statements resulted in it suffering pecuniary harm.

The Court finds that Plaintiff has properly alleged a common law fraud claim against Defendants. Plaintiff has asserted that Defendants made material misrepresentations regarding the calculation of electrical charges via oral representations, monthly billing statements, and the Burg letter. In addition, Plaintiff has asserted that it relied on the monthly billing statements to its detriment because the billing statements led Plaintiff to pay Defendants more than Defendants were due under the leases. Finally, Plaintiff has alleged that the oral representations and the Burg letter contained fraudulent statements and that those fraudulent statements concealed Defendants'

alleged overbilling of Plaintiff. Based on these allegations, the Court finds that the Plaintiff has alleged the requisite elements of a common law fraud claim.

B. Consumer Fraud Act ("CFA") Claim

The CFA provides, in relevant part, as follows:

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided therein.

Minn. Stat. § 325F.69, subd. 1.

An individual bringing a claim under the CFA must do so through the Private Attorney General Statute, Minn. Stat. § 8.31. *See Behrens v. United Vaccines, Inc., Div. of Harlan Sprague Dawley, Inc.*, 228 F. Supp. 2d 965, 968 (D. Minn. 2002). Individuals bringing a claim through the Private Attorney General Statute must "demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

Defendants contend that Plaintiff's claim for damages under the CFA should be dismissed because the alleged misstatements were not made to the public and resolution of the suit would not have any broader implications than between the parties to the suit. Defendants also assert that any damages suffered by Plaintiff occurred solely as the result of the alleged breach of contract and not as the result of any alleged misrepresentations.

Plaintiff asserts that the issue of whether the claim affects the public interest is one of fact that cannot be decided by the Court at this time. Plaintiff further argues that the suit is in the public's interest, because it is likely to force Defendants to cease their activities not only with regard to Plaintiff, but also as to the other tenants of the Wyman Building.

As a preliminary matter, the Court finds that the issue of whether the matter is in the public interest is a question of law, not a question of fact as Plaintiff contends. Plaintiff cites no cases to support its assertion, nor is the Court able to find such a case.¹ In considering whether the Plaintiff's suit is in the public's interest, the Court looks to recent cases for guidance. In *Ly v. Nicestrom*, 615 N.W.2d 302 (Minn. 2000), the Supreme Court of Minnesota held that the claimant's suit did not benefit the public, because the claimant was defrauded in a "single one-on-one transaction." *Id.* at 314. In *Flora*, the court went even farther in finding that the claimant's suit did not benefit the public where only "a finite group of shareholders and option holders" were involved in the alleged fraud. *Id.* at 788. In contrast, in *Collins v. Minn. Sch. of Business, Inc.*, 636 N.W.2d 816, 821 (Minn. Ct. App. 2001), the Minnesota Court of Appeals held that the claimants had shown a benefit to the public, because the fraud occurred in advertising that was presented to the public. *See id.* at 788.

The Court finds that the facts of *Ly* and *Flora* are more applicable to the claim at issue here. Like *Ly*, the Plaintiff in this case brought suit based on misrepresentations made to it in relation to a one-on-one transaction. Here, the misrepresentations alleged were made only to Plaintiff and possibly to a group of other tenants. In addition, like *Flora*, the benefits of a suit will extend only to Plaintiff and potentially to a finite group of tenants. Because the alleged misrepresentations were made in a one-on-one transaction and Plaintiff cannot prove that its

¹ In *Flora v. Firepond, Inc.*, 260 F. Supp. 2d 780 (D. Minn. 2003), the court dismissed a claim brought under the CFA on a motion for a judgment on the pleadings under Rule 12(c). *See id.* In that case, the court stated that a Rule 12(c) motion differs from a motion to dismiss for failure to state a claim under Rule 12(b)(6), but also noted that "the standards for dismissal under each are similar." *Id.* at 784 (citing *Allstate Fin. Corp. v. U.S. Postal Service*, 860 F. Supp. 653, 655 (D. Minn. 1994)).

action would benefit the public, the Court grants Defendants' motion to dismiss Plaintiff's CFA claim.

4. Racketeer Influenced and Corrupt Organizations (“RICO”) Act Claims

The RICO Act, IS U.S.C. § 196 1, et seq., states:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "A violation of § 1962(c) ... requires: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

A. Statute of Limitations

Civil RICO claims are governed by a four-year statute of limitations. *See Association of Commonwealth Claims v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995). The four-year statute of limitations for civil RICO claims does not begin to run until plaintiff discovers or should have discovered its injury. *See Rotella v. Wood*, 528 U.S. 549 (2000). The statute of limitations can be tolled if the plaintiff is able to show that there was fraudulent concealment of the violation and that the plaintiff exercised due diligence to discover the claim. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997).

Defendants present several arguments to support their contention that Plaintiff's civil RICO claim is time-barred by the four-year statute of violations. Defendants begin by asserting that Plaintiff has not established either the fraudulent concealment or due diligence requirements, and therefore, that the claim is barred. Defendants argue that Plaintiff had constructive notice of

the facts constituting its claim no later than November 7, 1997. In support of this assertion, Defendants argue that once Plaintiff received the Burg letter, Plaintiff had sufficient facts upon which to conduct an investigation of the electrical charges. Defendants argue that Plaintiff failed to exercise due diligence in investigating these facts, and, as a result, the claim is barred by the statute of limitations.

The Court rejects Defendants' arguments and finds that Plaintiff has alleged sufficient facts to constitute fraudulent concealment of the violation. In addition, Plaintiff has established that it investigated the facts underlying the claim with due diligence. Plaintiff asserts that it contacted Defendants on a number of occasions about the electrical charges. In response to Plaintiff's requests for information, Defendants allegedly told Plaintiff that the electrical charges were a pass-through of the charges as billed by the utility company. Both the Burg letter and Burg's initial deposition testimony had the effect of concealing the actual billing amounts from Plaintiff. Plaintiff had concerns about what it perceived to be higher than expected electrical charges and acted reasonably in requesting information regarding those charges from Defendants. Once Plaintiff received Defendants' response to its inquiries, Plaintiff alleges that it relied on those responses to its detriment. Thus, the Court finds Plaintiff has alleged fraudulent concealment of the claim and Plaintiff exercised due diligence in investigating the claim.

Defendants also argue that any damages suffered by Plaintiff occurred as a result of one cognizable pattern of conduct as opposed to multiple independent injuries. Defendants cite to *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996), for support of their assertion that any injuries suffered by Plaintiff occurred once the pattern of conduct began. According to Defendants' theory, Plaintiff suffered an injury once Defendants allegedly violated their

contractual obligation to charge Plaintiff the same rate for electricity as Defendants paid for the electrical charges. Any alleged misrepresentations that followed the violation of the leases was pail of "one, single continuous injury." *Klehr*, 87 F.3d at 239 (8th, Cir. 1996),

Plaintiff, on the other hand, contends that it suffered multiple distinct injuries as a result of the allegedly fraudulent billing statements. Plaintiff differentiates *Klehr* from this case by pointing out that *Klehr* involved only a single transaction-the purchase of a silo from the defendant. All of the damages claimed by plaintiff in *Klehr* arose from the purchase of the silo and the silo's failure to operate as advertised. Plaintiff argues that while some of the alleged misrepresentations in *Klehr* took place after the transaction, they all related to the same transaction and injury.

In addition, Plaintiff contends that its position is further supported by the decision of the Court of Appeals for the Seventh Circuit in *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987). In *Liquid Air*, the Seventh Circuit had to determine whether a RICO violation could be based on a single scheme with multiple counts of mail and wire fraud. The Seventh Circuit held that defendants had committed a separate act of fraud each time it submitted a false invoice because each invoice deprived plaintiff of property. The Seventh Circuit distinguished between cases where several misrepresentations were necessary to inflict a single harm and those cases like *Liquid Air* where "[e]ach invoice represented a discreet attempt to defraud Liquid Air and had little to do with the previous or subsequent false invoices." *Uniroyal Goodrich Tire Co. V. Mutual Trading Corp.*, 63 F.3d 516, 524 (7th Cir. 1995).

Here, the Court finds that Plaintiff's complaint alleges multiple distinct injuries. The Court agrees that the facts in *Klehr* differentiate that case from the case presently before this

Court. In *Klehr*, the court was considering a single transaction and a series of misrepresentations that were made both before and after the transaction took place. All of the misrepresentations present in that case were aimed at concealing the facts of the initial transaction. Here, Plaintiff has alleged a series of alleged misrepresentations, each of which resulted in a distinct injury to Plaintiff. On this issue, the Court finds persuasive the Seventh Circuit's ruling in *LiquidAir*, where the Court found that each false invoice was a separate attempt to defraud plaintiff of its property.

In summary, the Court finds that the statute of limitations for Plaintiff's civil RICO claim began running on September 19, 2001. Plaintiff has alleged sufficient information to support its claim that Defendants concealed the facts upon which the civil RICO claim is based and that Plaintiff exercised reasonable diligence in investigating the matter. Further, Plaintiff has alleged multiple distinct injuries resulting from Defendants' alleged acts of mail fraud.

B. Racketeering Activity

"Racketeering activity" is expressly defined by RICO to mean any act indictable under certain provisions of Title 18 of the United States Code. 18 U.S.C. § 1961(1)(B). In this case, RICO liability is predicated on alleged acts of mail fraud, 18 U.S.C. § 1341. Mail fraud consists of "the foreseeable use of the mails or wires for the purpose of carrying out a scheme to defraud." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 918 (S. Cir. 2001) (citing *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989)), The crime of mail fraud is broad in scope and "its fraudulent aspect is measured by a non-technical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair

play." *Atlas Pile Driving*, 886 F.2d at 991. "Even routine business communications may be sufficient to make a scheme of false dealing a federal offense." *Id.* at 992.

Defendants assert that the 1990 and 1996 Leases cannot serve as the basis for an alleged pattern of mail fraud, because breach of contract is not fraud. Defendants cite several cases in which courts have held that breach of contract claims are insufficient to support a finding of fraud that can form the basis for a RICO violation. In particular, Defendants rely on *Renaissance Center Venture v. Lozovoj*, 884 F. Supp. 1132 (E.D. Mich. 1995) ("*RCV*"), which they claim is "nearly identical" to the case before this Court.

Plaintiff rebuts much of the argument put forth by Defendants by restating its position that the basis for the RICO action is mail fraud and not the alleged breach of contracts Plaintiff has alleged Defendants were aware of the approximate energy usage of the leased property, and the cost of that usage, but that Defendants conspired to charge Plaintiff almost twice that amount. In carrying out their alleged scheme, Defendants used the U.S. Postal Service to deliver billing statements that stated that the charges to Plaintiff and other tenants of the Wyman Building were merely "reimbursements" for charges paid out by Defendants. Plaintiff also relies on language in the Burg letter that stated Defendants only pass through charges paid by them to NSP/Excel.

The Court finds that Defendants' reliance on the *RCV* case is misplaced. In *RCV*, the issue was whether defendants violated a lease agreement by failing to separately meter leased space. The *RCV* court held that defendants had not violated the lease because the lease itself did not call for such an arrangement. The court also held that plaintiffs had been unable to prove any damages as the energy costs had been divided amongst the lessees based on a formula created by an independent engineering firm that used objective factors to determine the lessees' energy

usage. Finally, the court held that the information as to how the electrical charges were calculated was clearly outlined in the monthly billing, statements sent out to plaintiffs. Here, no such formula or objective calculation was in place.

Here, the Court finds that Plaintiffs have pled a claim of mail fraud sufficient to support a claim for a RICO violation. Plaintiff clearly based its mail fraud claim on the Defendants' use of the U.S. Postal Service in the delivery of the allegedly fraudulent billing statements and the Burg letter. The cases cited by Defendants for their assertions that an inference of fraud cannot be supported solely by a breach of contract action do not address the claims actually presented by Plaintiff. Therefore, the Court finds that Plaintiff has alleged sufficient instances of mail fraud to serve as the basis for a civil RICO claim.

C. Pattern of Racketeering Activity

RICO's language specifically requires that a plaintiff establish a pattern of racketeering –activity. *See United Healthcare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 571 (8th Cir.1996). The language of RICO implies that while two acts are necessary, they may not be sufficient to constitute a pattern of racketeering activity. *See United Healthcare*, 88 F.3d at 571 (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989)).

A pattern of racketeering activity is present only when predicate acts are linked by continuity plus relationship. *See Handeen v. Lemaire*, 112 F.3d 1339, 1353 (1997) (quoting *H.J. Inc. v. Northwestern Bell Tel.*, 492 U.S. 229, 239 (1989)). The Supreme Court has referred to continuity as both a closed and open-ended concept that is principally Temporal in nature. *See Handeen*, 112 F.3d at 1353 (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. *See Handeen*, 112 F.3d at 1353 (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 that they involve a distinct threat of long-term racketeering activity. *Handeen*, 112 F.3d at 1353 (quoting *H.J. Inc.*, 492 U.S. at 242).

Defendants argue that the "acts relied upon by HEI are disjointed in time and sporadic in nature and posed 'no threat of continued criminal activity.'" Defendants also assert that Plaintiff must show that the acts of mail fraud were a regular way of conducting the Defendants' ongoing business. Plaintiff responds by restating its allegation that the fraudulent billing statements were sent out on a monthly basis for a period of over 10 years as a part of Defendants' regular business activities.

The Court finds that Plaintiff has adequately pled that Defendants' racketeering activities manifested both relatedness and continuity. Plaintiff alleged that these activities were undertaken to defraud tenants of the Wyman Building and that these activities were accomplished by a common method-the fraudulent billing statements. These activities took place as part of Defendants' regular business practice and therefore clearly demonstrate continuity. Accordingly, Plaintiff has properly alleged injury by reason of a pattern of racketeering activity,

D. Causation and Damages

Section 1964(c) of the RICO provides that any person "injured in his business or property by reason of a violation of section 1962" may sue for treble damages. 18 U.S.C. § 1964(c), "The Supreme Court has construed the 'by reason of' language to incorporate the traditional requirements of proximate or legal causation, as opposed to mere factual or 'but for' causation." *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993) (quoting *Holmes v. Securities*

Investor Protection Corp., 503 U.S. 258 (1992)). In the context of RICO, "proximate causation requires 'some direct relation between the injury asserted and the injurious conduct alleged,'" (*United Healthcare Corp. v. American Trade. Ins. Co., Ltd.*, 88 F.3d 563 (quoting *Holmes*, 503 U.S. at 268)).

Defendants contend that Plaintiff did not suffer any damages "by reason of" the acts of racketeering alleged in the Complaint. Defendants argue that any damages that were suffered by Plaintiff arose out of the alleged breach of contract as opposed to the alleged mail fraud. Defendants contend that the alleged mail fraud merely delayed the bringing of the breach of contract action. Defendants propose that the appropriate manner in which to deal with the delay is to allow Plaintiff to recoup its losses by way of an award of prejudgment interest. Finally, Defendants assert that if the Court dismisses the RICO action, the Court should likewise dismiss the conspiracy to violate the RICO claim, 18 U.S.C. § 1962(d), because Plaintiff has not alleged the elements of the RICO claim.

Plaintiff argues that the creation and mailing of the fraudulent billing statements and the false statements made by Defendants are the direct cause of Plaintiff's damages. Plaintiffs rely heavily on *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781 (E.D. La. 1986), for support of its assertion that a plaintiff can suffer injury "by reason of" mail fraud sufficient to maintain a RICO action where the facts alleged may also constitute a breach of contract claim.

The Court finds that the alleged mail fraud that forms the basis for the civil RICO claim was a factor in causing Plaintiff's injury. The damages allegedly suffered by Plaintiff occurred not only as the result of the breach of contract, but also as a result of Defendants'

misrepresentations. Based on the reasons previously stated, the Court denies Defendants' motion to dismiss the civil RICO claim. In addition, the Court denies Defendants' motion to dismiss the conspiracy to violate RICO claim, because the elements of this claim have been properly alleged.

Conclusion


Based on the foregoing, the submissions of the parties, and all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

I. Defendants' Motion to Dismiss (Doc. No. 2) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

a. Defendants' Motion to Dismiss Count Five (Consumer Fraud) of Plaintiff's Complaint is **GRANTED**. Count Five of the Complaint is **DISMISSED WITH PREJUDICE**.

b. Defendants' Motion to Dismiss Counts One through Four and Count Six of the Complaint is **DENIED**.

Dated: October 21, 2003


DONOVAN W. FRANK
Judge of United States District Court