

NA 07-0031-C h/h Bentle v. Butler  
Judge David F. Hamilton

Signed on 01/04/08

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

STEPHEN G. BENTLE,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 4:07-cv-00031-DFH-WGH
	)	
RICHARD A. BUTLER,	)	
BARRY NANZ,	)	
CASEY NANZ,	)	
TRI-STATE CARBONIC, LLC,	)	
TRADE & INDUSTRIAL SUPPLY, INC.,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

STEPHEN G. BENTLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 4:07-cv-0031-DFH-WGH
	)	
RICHARD BUTLER, BARRY NANZ,	)	
CASEY NANZ, TRI-STATE CARBONIC,	)	
LLC, and TRADE & INDUSTRIAL	)	
SUPPLY, INC.,	)	
	)	
Defendants.	)	

ENTRY ON MOTION TO DISMISS

Plaintiff Stephen Bentle and defendants Richard Butler, Barry Nanz, and Casey Nanz each own an interest in Tri-State Carbonic, LLC. Bentle alleges that the other three individual defendants fired him from his management position in 2006 and caused other financial harm to him as part of a scheme to take advantage of his money and experience to start the business, and then to cut him out of the business. Bentle has sued Butler and both Nanzes, as well as Tri-State Carbonic, LLC, Trade & Industrial Supply, Inc., and the City of Lawrenceburg under state law for tortious interference with business relationships, common law fraud, slander, intentional infliction of emotional distress, and libel. All of the parties are citizens of Indiana, so the only basis for this court’s federal jurisdiction is that Bentle has also alleged that the defendants carried out “a pattern of

racketeering activity” in violation of the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962. See *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 523 (7th Cir. 1995) (“Our RICO jurisprudence is replete with examples of failed attempts to dress up state fraud claims as suave RICO cases using the expansive definitions of mail and wire fraud.”).

Defendants have moved to dismiss the claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. While the motions were pending, plaintiff voluntarily dismissed his claims against the City of Lawrenceburg, rendering the city’s motion moot. For the reasons set forth below, the other defendants’ motion to dismiss is granted. The court dismisses the federal RICO claims on the merits and relinquishes jurisdiction over the state law claims.

#### *Standard for Rule 12(b)(6) Motion*

In ruling on a motion to dismiss under Rule 12(b)(6), the court must assume as true all well-pleaded facts set forth in the complaint, construing the allegations liberally and drawing all inferences in the light most favorable to the plaintiff. *Brown v. Budz*, 398 F.3d 904, 908-09 (7th Cir. 2005). The Supreme Court recently summarized a plaintiff’s pleading obligations in the context of an antitrust claim: “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the

elements of the cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted). A plaintiff must “raise a right to relief above the speculative level,” *id.* at 1965, by pleading “enough facts to state a claim to relief that is plausible on its face,” *id.* at 1974. The Seventh Circuit has applied these pleading requirements outside the context of antitrust claims, including civil RICO claims. See *Jennings v. Auto Meter Products, Inc.*, 495 F.3d 466, 472 (7th Cir. 2007). After defendants filed their motion to dismiss, plaintiff filed a “RICO Statement” summarizing how he contends he satisfies the requirements of the statute. Docket No. 26. For purposes of the motion to dismiss, the court treats the RICO Statement as a supplement to the Complaint.

### *Factual Allegations*

Without vouching for the accuracy of the Complaint or RICO Statement, the court assumes for purposes of the motion to dismiss that the facts alleged in Bentle’s Complaint and his RICO Statement are true. In December 2004, defendants Butler, Barry Nanz, and Casey Nanz offered Bentle the opportunity to be involved in a new company they were launching, Tri-State Carbonic, LLC (“Tri-State”). Cmpl. ¶ 24. The company would supply businesses with carbon dioxide products. ¶¶ 25, 26. Bentle had previously installed two carbon dioxide refraction plants, which provided him with valuable experience in the field. ¶ 27. Butler, Barry Nanz, and Casey Nanz offered Bentle an ownership interest of 40% of the company and a salaried position as chief executive officer ¶¶ 4, 13. Bentle

paid \$250,000 to help finance the company's business plan. ¶ 14. He also established credit cards in the name of G. Bentle, his father, which he used to purchase supplies for Tri-State. ¶ 39. In addition, he provided his own computer, refrigerator, microwave, paper shredder, label maker, and other materials for use by the company. *Id.*

The City of Lawrenceburg loaned Tri-State \$2,000,000 and provided an additional line of credit in the amount of \$300,000. ¶ 29. Bentle pledged his real estate holdings as a guarantee for the loan to Tri-State. ¶ 47. The loan was supposed to be used to support the purchase and construction of the new plant. ¶ 30. The line of credit was supposed to be used to pay for salaries, supplies, and other expenses. ¶ 32.

Tri-State designated Barry Nanz as manager, which meant that he had "full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business." ¶¶ 34, 35.

Bentle alleges that Butler, Barry Nanz, and Casey Nanz used \$300,000 of Tri-State's funds to purchase carbon dioxide trailers for Trade & Industrial Supply, Inc. ("TISI"), a different business owned and operated by Barry Nanz. ¶¶ 31, 36. Bentle also claims that Barry Nanz has generally co-mingled the funds

and assets of Tri-State with those of TISI. ¶ 37. Bentle alleges that Butler, Barry Nanz, and Casey Nanz did not properly account for Tri-State's funds and made it impossible for the business to succeed. ¶ 19.

On December 28, 2006, Butler, Barry Nanz, and Casey Nanz discharged Bentle by posting a notice at Tri-State's office forbidding Bentle from entering the property. ¶ 40. Bentle alleges that he has been informed by "the general public" that Butler, Barry Nanz, and Casey Nanz have accused him of misusing credit cards owned by Tri-State and that his discharge was the result of this alleged activity. ¶¶ 42, 43. Bentle has been unable to recover the personal property he had provided for Tri-State's use. ¶ 44. Additional allegations are addressed with respect to the relevant substantive claims for relief.

### *Discussion*

#### *I. Civil RICO Claims*

The only basis for this court's subject matter jurisdiction in this case is the federal civil RICO claims asserted pursuant to 18 U.S.C. § 1964(c), which creates a private civil remedy for violations of 18 U.S.C. § 1962. The Complaint attempts to allege violations of 18 U.S.C. § 1962(c), which provides: "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.” In response to the motion to dismiss and in his RICO Statement, Bentle contends that he has also alleged violations of section 1962(a), which addresses the investment of proceeds from a pattern of racketeering activity. See *Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 785 (7th Cir. 1999). The court does not see those allegations in the Complaint itself, but it makes no difference. Both section 1962(c) and section 1962(a) require first pleading and later proof of racketeering activity and a pattern of racketeering activity. As discussed below, plaintiff has failed to allege either the required racketeering activity or the required pattern of racketeering activity. The court does not reach the defendants’ other arguments under civil RICO.

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must allege that the defendants (1) conducted (2) an enterprise (3) through a pattern of (4) racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). It is insufficient for a plaintiff to allege these elements in boilerplate language; he must allege sufficient facts to support each element. *Goren v. New Vision International, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998); accord, *Jennings v. Auto Meter Products*, 495 F.3d at 472.

A. *Racketeering Activity*

Bentle alleges that the defendants violated 18 U.S.C. § 1962(c) when they devised and implemented a scheme to defraud him of money and property. The alleged indictable acts upon which Bentle's civil racketeering claims rest are mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. RICO defines "racketeering activity" to include acts of mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. 18 U.S.C. § 1961(1)(B).

Rule 9(b) of the Federal Rules of Civil Procedure requires a party alleging fraud to state "with particularity the circumstances constituting fraud." This heightened pleading requirement applies to civil RICO claims that are predicated on mail and wire fraud claims. *Goren*, 156 F.3d at 729. This heightened pleading requirement is designed to protect the defendants' reputations from harm, to minimize litigation designed to harass defendants, and to provide defendants with notice of the claim. *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). To satisfy the pleading requirement, the plaintiff must state at minimum the time, place, and content of the alleged communications that constitute the fraud. *Graue Mill Development Corp. v. Colonial Bank & Trust Co. of Chicago*, 927 F.2d 988, 992 (7th Cir. 1991), citing *U.S. Textiles, Inc. v. Anheuser-Busch Companies, Inc.*, 911 F.2d 1261, 1268 n.6 (7th Cir. 1990). In other words, the plaintiff must supply "the who, what, when, where, and how: the first

paragraph of any newspaper story.” *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).

Here, the complaint alleges that the defendants created a scheme to defraud the plaintiff of money and property. The defendants allegedly made fraudulent statements about their financial situation, Cmpl. ¶ 12, their intentions to properly account for business funds, ¶ 19, and the relationship between Tri-State and TISI, ¶ 46. The complaint states: “At all times relevant, the Defendants used the United States Mail and communicated via telephone service provided and licensed by the United States government.” ¶ 11. The complaint also alleges that the defendants devised a scheme to defraud the plaintiff “in a manner prohibited by 18 U.S.C. §§ 1341 and 1343 . . . .” ¶ 50. When detailing each RICO cause of action, the complaint states: “Defendants utilized or caused to be utilized the United States Mail and facilities in interstate commerce on two or more occasions . . . .” ¶¶ 53, 56. These are the only instances in which the complaint refers to or discusses the use of mail or interstate wires. The reader waits in vain for specifics of the allegedly fraudulent uses of the mail or interstate wires. The plaintiff’s RICO Statement repeats the generalities but never identifies a single supposedly fraudulent use of the mail or interstate wires.

The complaint does not provided the time and place of any of the allegedly fraudulent statements. The broad allegations do not provide the degree of specificity required when a plaintiff alleges fraud. See *Graue Mill*, 927 F.2d at 993

(dismissing RICO claims when complaint did not allege the content, time, or place of any of the allegedly fraudulent statements). The complaint also does not specify which defendants were involved in any alleged misrepresentation. A plaintiff cannot “lump together” all defendants or treat all of the defendants as if they were one. See *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990).

Bentle argues that he is unable to name which defendant sent which piece of mail because that information is in the exclusive control of the defendants. Pl. Br. at 6-7. Specificity requirements can be relaxed if details about the alleged fraud are within the exclusive knowledge of the defendants. See *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994). This argument is not available to Bentle in this case. Bentle’s general allegations refer to supposedly fraudulent communications from the defendants directly to him. Yet he has not identified a single one of those communications. Even if he does not know who sent him each allegedly fraudulent mailing, he should be able to provide specific information about communications that the defendants had with him: dates when he received the mailings, dates of the telephone calls and the identities of the defendants who participated in each call, and the contents of the mailings and the telephone conversations. He has not provided any of this information. His complaint fails to allege any racketeering activity, which is an essential predicate of a viable claim under section 1962(c) or section 1962(a).

B. *Pattern of Racketeering Activity*

Even if Bentle could overcome the lack of particularity as to fraud, despite ample opportunity to do so, a civil RICO claim also requires the plaintiff to plead and ultimately to prove a “pattern of racketeering activity,” which RICO defines to require at least two acts of racketeering activity. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. at 500, the Supreme Court suggested that the surprisingly expansive private civil uses of RICO appeared to have been primarily the result of the broad predicate offenses in the statute (especially mail, wire, and securities fraud) and “the failure of Congress and the courts to develop a meaningful concept of ‘pattern.’” After lower courts provided a variety of answers in response to that invitation, the Supreme Court adopted the “continuity plus relationship” test for a pattern in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243 (1989). To satisfy that test, “the predicate acts must be related to one another (the relationship prong) and pose a threat of continued criminal activity (the continuity prong).” *Jennings*, 495 F.3d at 473, citing *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1022 (7th Cir. 1992).

To interpret the relationship requirement, the Supreme Court has adopted the statutory definition of pattern under federal criminal law, which defines a pattern as acts that have “the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” See *H.J. Inc.*, 492 U.S. at 240, quoting 18 U.S.C. § 3575(e); *Sedima*, 473 U.S. at 496 n.14. Bentle’s complaint

alleges that defendants Butler, Barry Nanz, and Casey Nanz schemed to induce him to participate in the formation of Tri-State so that they would be able to obtain funding from the City of Lawrenceburg to use for TISI. Bentle alleges that these defendants used the mail and telephone to make fraudulent misrepresentations to him and the city. The alleged fraudulent acts therefore had the singular purpose and result of obtaining funding from Lawrenceburg, which would be sufficient to satisfy the relationship requirement if the racketeering activity itself had been pled with the required particularity.

But Bentle's complaint cannot satisfy the continuity requirement for a pattern. The continuity requirement reflects Congress' desire to use RICO to target the special dangers posed by long-term criminal conduct as opposed to discrete acts of fraud. See *H.J. Inc.*, 492 U.S. at 242. A plaintiff can satisfy the continuity requirement by showing open-ended continuity or closed-ended continuity. *Id.* at 241-42; *Jennings*, 495 F.3d at 473.

Continuity is open-ended if the alleged scheme is of limited duration but threatens repetition and future harm. *Gamboa v. Velez*, 457 F.3d 703, 706 (7th Cir. 2006). A plaintiff can demonstrate open-ended continuity by showing one of three things: "(1) 'a specific threat of repetition' exists; (2) 'the predicates are a regular way of conducting an ongoing legitimate business', or (3) 'the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.'" *Vicom*, 20 F.3d at 782, quoting *H.J. Inc.*, 492 U.S.

at 242-43. In *Olive Can Co. v. Martin*, 906 F.2d 1147, 1151 (7th Cir. 1990), the Seventh Circuit held that because the purpose of the defendants' scheme was to repay a loan, the scheme had a natural ending point and did not pose a specific threat of repetition. Similarly, Bentle alleges that the purpose of the scheme was to turn Tri-State into a functioning business and to secure funding from Lawrenceburg that the defendants could use for other purposes. Pl. Br. at 11. According to the complaint, this scheme has already reached its natural ending point because Tri-State secured funding from Lawrenceburg and is a functioning business. This scheme does not pose a specific threat of repetition.

Bentle has not alleged that Tri-State committed acts of mail and wire fraud as a regular way of conducting business; he has failed to identify any acts of mail or wire fraud. In *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1296 (7th Cir. 1992), the Seventh Circuit found that the plaintiff had claimed properly that the predicate acts of racketeering were a regular way of conducting business when the plaintiff had presented evidence that the defendants resorted to extortion whenever anyone stood in the way of their business objectives. Here, Tri-State's business activities involve the construction of a carbonic processing plant and the sale of carbonic gas. Cmplt. ¶ 38. Bentle has not alleged that the defendants used mail or wire fraud as a regular part of conducting this business. Bentle has also not alleged that the defendants acted as part of a long-term association that existed for criminal purposes. Consequently, Bentle has not alleged open-ended continuity of the scheme.

Continuity is closed-ended if the related predicate acts have ceased but extended over such a substantial period of time that they pose an implicit risk of future harm. *Roger Whitmore's Auto. Services, Inc. v. Lake County*, 424 F.3d 659, 672-73 (7th Cir. 2005). The Seventh Circuit has analyzed closed-ended continuity by considering a number of factors: “the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.” *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). No one factor is decisive. *Id.* at 976. The court must examine the facts of each case and use these factors to make a common sense determination as to whether the alleged activity was long-term conduct. *Vicom*, 20 F.3d at 780.

Plaintiffs often allege mail and wire fraud claims “to dress up state fraud claims as suave RICO cases. . . .” See *Uniroyal Goodrich Tire*, 63 F.3d at 523. For this reason, the Seventh Circuit has taught that mail and wire fraud claims are not “favored means of establishing a RICO pattern. . . .” *Roger Whitmore's*, 424 F.3d at 673, citing *Vicom*, 20 F.3d at 781. When a plaintiff's RICO claims rely heavily on allegations of mail and wire fraud, they often lack the type of variety necessary to show continuity. See *Jennings*, 495 F.3d at 475. Here, Bentle's RICO claims rely solely on allegations of mail and wire fraud. The complaint does not specify the number of acts of mail or wire fraud or identify any particular such acts.

There is no bright line rule for what constitutes a substantial period of time in the context of a civil RICO claim, but this complaint falls on the short side. The Supreme Court has observed that a few weeks or months is an insubstantial period of time where there is no threat of future criminal conduct. *H.J. Inc.*, 492 U.S. at 242. The Seventh Circuit has found that closed periods of several months to two years were not substantial. See, e.g., *Roger Whitmore's*, 424 F.3d at 673 (two years not substantial period); *Hartz v. Friedman*, 919 F.2d 469, 474 (eighteen months not substantial period); *J.D. Marshall International, Inc. v. Redstart, Inc.*, 935 F.2d 815, 820 (7th Cir. 1991) (thirteen month period not substantial); *Miller v. Gain Financial, Inc.*, 995 F.2d 706, 708-09 (7th Cir. 1993) (period of a few months not substantial). Here, Bentle alleges that the defendants made fraudulent misrepresentations to him between December 2004 and December 2006. This two year period is at the outer edge of the time periods the Seventh Circuit has found insubstantial. This factor therefore does not weigh strongly in favor or against a finding of closed-ended continuity.

A plaintiff is not required to show the presence of more than one scheme to demonstrate a pattern of racketeering activity. See *H.J. Inc.*, 492 U.S. at 240-41. However, the allegation of only one scheme weighs against a finding of closed-ended continuity. See *Roger Whitmore's*, 424 F.3d at 674. In *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), the Seventh Circuit held that allegations of twelve separate acts of mail fraud were insufficient to demonstrate a pattern of racketeering activity because together they constituted only one scheme with a

single victim. In contrast, in *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304 (7th Cir. 1987), the Seventh Circuit held that a defendant who generated nineteen fraudulent invoices had committed a pattern of racketeering activity because each instance of false billing inflicted a separate injury on the victim, even though there was only one scheme with one victim. Thus, “the repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO. *Id.* at 1305.

Bentle has alleged one overarching scheme by Butler, Barry Nanz, and Casey Nanz: to obtain a substantial loan from Lawrenceburg. One component of this scheme required them to recruit Bentle as part owner and CEO of Tri-State so that they could utilize his financial contribution, benefit from his experience in the field, and present Tri-State as an attractive loan applicant. Once the loan was secured and the company established, they would terminate Bentle. The alleged victims of this scheme were Bentle and Lawrenceburg. The City of Lawrenceburg, which Bentle initially named as a defendant to his claims, has not alleged any injury based on alleged misrepresentations by the other defendants.

The scheme Bentle alleges is similar to the scheme discussed in *Lipin*, in which the Seventh Circuit affirmed dismissal of the allegations of mail fraud as insufficient to demonstrate a pattern of racketeering activity. In both situations the combination of fraudulent statements constituted a single scheme that injured a single victim. Bentle has alleged that the misrepresentations led him to invest \$250,000 in Tri-State and ultimately led to the termination of his employment. He

also asserts that he used his own office supplies to advance Tri-State's business plan, and that the defendants have since confiscated these supplies. It is a stretch to imagine that part of the defendants' alleged scheme was to deprive Bentle of a refrigerator, microwave, paper shredder and other office supplies he provided to the new company. Rather, the alleged confiscation of Bentle's office supplies appears to have been a side effect of the termination of his employment. Even so, Bentle has alleged that he suffered several injuries as a result of the scheme. Unlike the plaintiff in *Liquid Air*, however, he has not demonstrated that each instance of mail or wire fraud led to a separate injury. Therefore, he has not demonstrated the type of repeated economic injury that would weigh in favor of closed-ended continuity.<sup>1</sup>

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<sup>1</sup>Bentle has also alleged that the defendants made additional false statements related to Bentle's use of company credit cards that damaged his reputation. The defendants posted the allegedly libelous statement in a notice on the door of the Tri-State office. Cmplt. ¶ 40. The complaint provides no specific information about where or how the alleged slanderous statements were made. Because the complaint does not allege that the defendants made these statements using the mail or wire systems, the court has not considered these statements in relation to allegations of racketeering activity.

(Even if the court were to assume that the alleged scheme brought about distinct injuries, the other *Morgan* factors weigh against finding closed-ended continuity.)

In sum, the combination of allegations of mail and wire fraud claims over a two year period, a single scheme, and a small number of closely related injuries weigh against finding closed-ended continuity. Having alleged neither open-ended nor closed-ended continuity of the alleged racketeering activity, Bentle has not satisfied the pleading requirements for the pattern element of a civil RICO claim.

## II. *State Law Claims*

In addition to his RICO claims, Bentle has asserted claims under state law for tortious interference with business relationships, fraud, slander, libel, and intentional infliction of emotional distress. The only basis of federal jurisdiction over those claims is federal supplemental jurisdiction under 28 U.S.C. § 1367, which allows a federal court to decide state-law claims outside federal diversity jurisdiction if they are so closely related to the federal claims as to be considered part of the same case. A federal court may decline to exercise supplemental jurisdiction if “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3).

When all federal claims have been dismissed, the district court should ordinarily relinquish jurisdiction over the supplemental state-law claims rather

than resolve them on the merits. *Williams v. Rodriguez*, No. 06-4126, — F.3d —, —, 2007 WL 4258679, at \*9 (7th Cir. Dec. 6, 2007); *Miller Aviation v. Milwaukee County Bd. of Supervisors*, 273 F.3d 722, 731 (7th Cir. 2001); *Wright v. Associated Insurance Companies, Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). The factors that determine whether supplemental jurisdiction is appropriate – judicial economy, convenience, fairness, and comity – will usually weigh in favor of dismissal at this stage. *Wright*, 29 F.3d at 1251. The Seventh Circuit has identified three situations in which jurisdiction over supplemental claims should be retained even though the federal claims have been dismissed: (1) where the statute of limitations would bar the refiling of supplemental claims in state court; (2) where substantial judicial resources have already been expended on the supplemental claims; or (3) where the outcome of the claims is obvious. *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007), citing *Wright*, 29 F.3d at 1251-52.

None of these situations applies in this case. First, 28 U.S.C. § 1367(d) explicitly tolls the statute of limitations for 30 days after dismissal of a supplemental claim to allow the plaintiff to refile the claim in state court without being time barred. *Williams Electronics Games*, 479 F.3d at 907. Indiana Code § 34-11-8-1 also provides a plaintiff who commenced an action but failed for any cause other than negligence with at least three years from the date of the dismissal to refile in state court. See *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 266 (7th Cir. 1998). Substantial judicial resources have not yet been expended on the state law claims; the motion to dismiss provided this court the first occasion to consider

these claims. Finally, although defendants have raised a number of serious challenges to the state claims, it is less clear that the problems could not be repaired (in contrast to the civil RICO claims, which appear to be beyond repair after ample opportunity to provide specifics). Accordingly, the court exercises its discretion to decline to exercise supplemental jurisdiction in this case. Counts III-IX are dismissed without prejudice for lack of jurisdiction.

*Conclusion*

For the foregoing reasons, the court grants defendants' motion to dismiss Counts I and II on the merits. Because plaintiff has had ample opportunity but has failed to provide the required specifics for his allegations of racketeering activity and because the alleged fraudulent scheme could not satisfy the requirement for a pattern of racketeering activity, dismissal of RICO claims will be with prejudice. All other claims will be dismissed for lack of jurisdiction. Final judgment shall be entered accordingly.

So ordered.

Date: January 4, 2008

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DAVID F. HAMILTON, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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