IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PHOENIX BOND & INDEMNITY CO., *et al.*,	)	
	)	
Plaintiffs,	)	No. 07 C 1367
	)	
v.	)	Hon. James F. Holderman
	)	
HEARTWOOD 88, LLC, *et al.*,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT HEARTWOOD 88, LLC'S
MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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INTRODUCTION

Heartwood's initial Memorandum ("Memo.") demonstrated that Plaintiffs' claims are not legally viable and therefore must be dismissed for each of several reasons. Plaintiffs' Opposition ("Opp.") does not undermine any of those reasons.

First, in the Seventh Circuit, a RICO plaintiff must plead an enterprise with a structure and goals separate from the predicate acts themselves. Plaintiffs' concession that they have failed to do so is fatal to their RICO claims against Heartwood.

Second, a RICO plaintiff who claims an injury caused by the predicate act of mail fraud must plead at least one instance of a completed mail fraud – including an actual mailing – before the claimed injury occurs. Plaintiffs' concession that they also have failed to do this is likewise fatal to their RICO claims against Heartwood.

Third, because Plaintiffs' RICO claims against Heartwood must be dismissed, this Court also should dismiss their state-law tortious interference claim against Heartwood for lack of supplemental jurisdiction. But even if this Court exercises supplemental jurisdiction over that claim, it still should dismiss the claim because the facts alleged by Plaintiffs do not establish the required element of a specific purpose of interfering with their claimed business expectation.

ARGUMENT

I. PLAINTIFFS HAVE NOT PLEADED A VIABLE RICO CLAIM AGAINST HEARTWOOD

A. Plaintiffs Are Required But Have Failed To Plead A RICO Enterprise With "A Structure And Goals Separate From The Predicate Acts Themselves"

Plaintiffs do not dispute that, for more than 20 years, the Seventh Circuit, this Court, and other District Courts in the Seventh Circuit have stated that a RICO plaintiff must allege an enterprise with "a structure and goals separate from the predicate acts themselves." Stachon v. United Consumers Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000). Opp. at 4-8; Memo. at 7-8.[1]

[1] In addition to the cases cited in Heartwood's Memo. at 7-8, see, e.g., United States v. Torres, 191 F.3d 799, 805 (7th Cir. 1999) (RICO enterprise "must be an organization with a structure and goals separate from the predicate acts themselves"); Bachman v. Bear, Stearns & Co., Inc., 178 F.3d 930, 931-32 (7th Cir. 1999) ("concerted activity" of multiple defendants "is not an

They also do not dispute that they have failed to plead such an enterprise. However, they argue that this failure does not bar their RICO claims for two reasons. *First*, they argue that, with rare exceptions, courts have "simply quote[d] or reference[d] language" requiring that an alleged RICO enterprise have "a structure and goals separate from the predicate acts themselves," without actually enforcing that requirement. Opp. at 7.[2] *Second*, they argue that the Seventh Circuit's decision in United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996), allows their RICO claims to proceed even though there is no alleged enterprise with a "structure" or "goals separate from the predicate acts themselves." Opp. at 4-6. Both arguments are incorrect.

1. The Seventh Circuit, This Court, And Other District Courts In The Seventh Circuit Have Regularly Enforced The Requirement Of "A Structure And Goals Separate From The Predicate Acts Themselves"

The Seventh Circuit, this Court, and other District Courts within the Seventh Circuit have regularly dismissed RICO claims for failure to allege an enterprise with "a structure and goals separate from the predicate acts themselves." Stachon, 229 F.3d at 675. See, e.g., Bachman, 178 F.3d at 931-92 (RICO claim "fails at the 'enterprise' stage" and therefore was properly dismissed

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enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies"); United States v. Korando, 29 F.3d 1114, 1118 (7th Cir. 1994) (RICO "enterprise must have a structure and goals separate from the commission of the predicate acts themselves"); United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991) (RICO enterprise cannot be "just a name for the crimes the defendants committed," but must "exist[] as an organization with a structure and goals separate from the predicate acts themselves"); United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) (RICO "enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity'"); Katris v. Doherty, 2001 WL 1636914, at *5 (N.D. Ill. Dec. 19, 2001) (Holderman, J.) (same); United States v. Rosenthal, 1998 WL 312118, at *11 (N.D. Ill. June 6, 1998) (Holderman, J.) ("[t]he enterprise must have a structure and goals separate from the predicate acts"); Paolino v. Hussain Egan Bendersky & Franczyk, L.L.C., 2006 WL 1980200, at *5-6 (N.D. Ill. July 11, 2006) (same); Ellis v. Allstate Ins. Co., 479 F. Supp. 2d. 782, 791-92 (N.D. Ill. 2006) (same); United States v. Segal, 248 F. Supp. 2d 786, 790-91 (N.D. Ill. 2003) ("the enterprise must have a structure and goals separate from the predicate acts themselves"); Singleton v. Montgomery Ward Credit Corp., 2000 U.S. Dist. LEXIS 11237, at *8 (N.D. Ill. June 14, 2000) (RICO enterprise must have "a structure and goals separate from the predicate acts themselves"); Blue Cross & Blue Shield v. Caremark, Inc., 1999 U.S. Dist. LEXIS 16230, at *25-26 (N.D. Ill. Sept. 30, 1999) (same).

[2] Plaintiffs acknowledge, however, that Okaya (U.S.A.), Inc. v. Denne Indus. Inc., 2000 WL 1727785 (N.D. Ill. Nov. 21, 2000), and Starfish Inv. Corp. v. Hansen, 370 F. Supp. 2d 759 (N.D. Ill. 2005) (cited in Memo. at 7-8) dismissed RICO claims for failure to satisfy the requirement. Opp. at 7 n.4.

under Rule 12(b)(6) because alleged "concerted action" between multiple defendants may be "a conspiracy, but it is not an enterprise unless every conspiracy is also an enterprise for RICO purposes, which the case law denies"); Stachon, 229 F.3d at 675-77 (RICO claim properly dismissed because plaintiffs failed to allege "something more than" a "string of participants" who committed "a pattern of racketeering activity through the purported scheme to defraud"); Timm, Inc. v. Bank One Corp., N.A., 2005 U.S. Dist. LEXIS 21039, at *10-11 (N.D. Ill. Sept. 22, 2005) (Holderman, J.) (dismissing RICO claim that "fails to allege a RICO enterprise" in that "[t]here [are] no goals or organization independent of the alleged scheme");[3] Paolino, 2006 WL 1980200, at *6 (dismissing RICO claim because "description of the alleged enterprise identifies no goals or structure separate from the alleged predicate acts themselves"); Ellis, 479 F. Supp. 2d at 792 (dismissing RICO claim because "Plaintiffs fail to identify any organizational structure or hierarchy among [alleged enterprise members], or any of their goals aside from the alleged predicate acts themselves"); LaFlamboy v. Landek, 2006 U.S. Dist. LEXIS 11595, at *14-15 (N.D. Ill. Mar. 21, 2006) (dismissing RICO claim because "Plaintiff has not alleged that the purported enterprise has a purpose apart from the alleged scheme"); id. ("[n]umerous courts in this district have dismissed § 1962(c) claims where the purported enterprise had no goals beyond the alleged conspiracy to defraud"); ABN AMRO Mortgage Group, Inc. v. Maximum Mortgage, Inc., 2005 U.S. Dist. LEXIS 17612, at *33 (N.D. Ind. May 16, 2005) (dismissing RICO claim because plaintiffs did not "make any allegations regarding the role of the players in the enterprise, beyond their roles in the specific transactions by which [plaintiff] claims to have been injured"); Sears Roebuck & Co. v. Emerson Elec. Co., 2003 U.S. Dist. LEXIS 332, at *16 (N.D. Ill. Jan. 7, 2003) (dismissing RICO claim because "[t]he only 'affairs of the enterprise'

[3] Plaintiffs incorrectly assert that this Court in Timm dismissed the RICO claim "because the alleged scheme was a limited one-time event and there were no allegations of structure or organization." Opp. at 8. But the complaint in Timm alleged numerous acts of racketeering. 2005 U.S. Dist. LEXIS 21039, at *3-4. Moreover, this Court could not have been clearer that the RICO claim was fatally deficient because "[P]laintiffs only allege that the defendants and non-defendant participants associated for the single purpose of" committing the alleged fraud. Id. at *11. "There were no goals or organization independent of the alleged scheme." Id.

described" in the complaint "are the very predicate acts that [plaintiff] alleges have caused its injuries" and members of alleged enterprise "were simply entities that [defendant] recruited to carry out its dirty work"); Singleton, 2000 U.S. Dist. LEXIS 11237, at *9 (dismissing RICO claim because "Plaintiff does not plead the existence of an enterprise with goals that are separate from the alleged predicate acts").

These cases above (and others) establish that courts in the Seventh Circuit have done more than "simply "quote[] or reference[] language" (Opp. at 7) requiring that an alleged RICO enterprise have "a structure and goals separate from the predicate acts themselves." Stachon, 229 F.3d at 675. Rather, courts have faithfully enforced this requirement by dismissing, at the pleading stage, RICO claims that fail to satisfy the requirement.

2. Rogers Does Not Authorize Plaintiffs' RICO Claim Based On An Alleged Enterprise With No "Structure" Or "Goals Separate From The Predicate Acts Themselves"

The Seventh Circuit's decision in Rogers, 89 F.3d 1326, does not allow Plaintiffs to pursue their RICO claims based on an alleged enterprise with no "structure" or "goals separate from the predicate acts themselves." This is true for two reasons. *First*, nothing in Rogers authorizes a RICO claim where, as here, the alleged enterprise has no structure beyond what is necessary to carry out the alleged predicate acts, and the affairs of the enterprise include only the commission of those alleged acts. *Second*, although this Court need not reach the issue in order to conclude that Plaintiffs here have failed to allege a cognizable RICO enterprise, Rogers is contrary to the more than 20 years of otherwise-unanimous authority discussed above, and therefore does not represent the law in the Seventh Circuit.

a. Rogers Does Not Authorize A RICO Claim Based On An Alleged Enterprise With No Structure That Is Separate From The Alleged Predicate Acts

As Plaintiffs acknowledge, Rogers addressed only whether a RICO enterprise must "have a *purpose* separate and apart from the pattern of racketeering activity." Opp. at 5-6 (quoting Rogers, 89 F.3d at 1336 (emphasis in original)). It did not address whether the enterprise must have a *structure* that is "separate and apart from the pattern of racketeering activity." Id.

Moreover, the enterprise in Rogers, unlike the enterprise alleged here, in fact had a structure that was separate from the predicate acts in that it had "an organizational pattern or system of authority beyond what [is] necessary to perpetrate the predicate [acts]." United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982). Specifically, the defendant in charge of the Rogers enterprise did not simply direct the drug dealing activities, but also "controlled the actions of other individuals" in the enterprise through a variety of methods, including: (a) "demanding a certain percentage of proceeds from drug sales;" (b) "pa[ying] individuals at various times for their services;" and (c) "using violence to generate a reputation as someone who would not tolerate dissent." 89 F.3d at 1335. Indeed, the structure of the enterprise was sufficiently elaborate to make it a "continuing criminal enterprise" within the specific statutory definition of 21 U.S.C. § 848. Id. at 1334 (§ 848's definition of "continuing criminal enterprise" includes, among other things, membership consisting of "defendant and at least five other individuals" "with respect to whom the defendant holds a supervisory, managerial, or organizational role" and "from which the defendant receives substantial income or resources").

In addition, unlike here, the "affairs of the enterprise" in Rogers consisted of more than just the commission of the predicate acts of drug dealing. Sears, 2003 U.S. Dist. LEXIS 332, at *16. They also included: (a) "open[ing]" and "maintain[ing]" a "drug house" within the meaning of 21 U.S.C. § 856(a)(1), Rogers, 89 F.3d at 1339; (b) "beat[ing] up … enem[ies]," id. at 1335; and (c) arranging to "murder" people regarded as threats to the profitability of the enterprise. Id. at 1331.

In sum, nothing in Rogers authorizes a RICO claim where, as here, the alleged enterprise has *neither* a "purpose" nor a "structure" that is "separate from the predicate acts themselves." Stachon, 229 F.3d at 675. This Court therefore can and should dismiss Plaintiffs' RICO claims for failure to allege a cognizable enterprise without having to address whether Rogers represents the state of the law in the Seventh Circuit.

b. Rogers In Any Event Does Not Represent The Law In The Seventh Circuit

Although this Court need not address the issue in order to conclude that Plaintiffs here have failed to allege a cognizable RICO enterprise, Rogers is contrary to the otherwise-unbroken line of authority discussed above that spans more than 20 years and includes numerous decisions from the Seventh Circuit, this Court, and other District Courts within the Seventh Circuit. It therefore does not represent the law in the Seventh Circuit. This is especially true in view of the fact that many of the decisions discussed above are significantly more recent than Rogers. See, e.g., Tsiolis v. Interscope Records, Inc., 946 F. Supp. 1344, 1353 (N.D. Ill. 1996) ("th[is] court will follow" the "more recent Seventh Circuit decisions"); Carpenter v. Ford Motor Co., 1992 U.S. Dist. LEXIS 5501, at *5 n.3 (N.D. Ill. Apr. 9, 1992) ("the Seventh Circuit's most recent pronouncement" is "controlling in this circuit").

Nor have Plaintiffs even made a convincing argument that Rogers represents what the law in the Seventh Circuit *should* be. There is a simple and compelling reason for the requirement that a RICO enterprise have a structure and goals separate and apart from the predicate acts themselves. Without that requirement, "every conspiracy to commit fraud [would be] a RICO organization and consequently every fraud that requires more than one person to commit [would be] a RICO violation." Bachman, 178 F.3d at 932. Indeed, "no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless the inclusion of the enterprise element 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. Congress clearly did not intend such an application of [RICO]." Bledsoe, 674 F.2d at 664. In addition to producing results at odds with Congressional intent, such a broad application of RICO would disregard and conflict with the Seventh Circuit's repeated admonition that RICO "was never intended to allow plaintiffs to turn garden-variety state law fraud claims into federal RICO actions." Jennings v. Auto Meter Prods., Inc., 2007 U.S. App. LEXIS 17618, at *12 (7th Cir. July 25, 2007). See also Midwest Grinding

Co., Inc. v. Spitz, 976 F.2d 1016, 1022 (7th Cir. 1992) (RICO should not be used as "a surrogate for garden-variety fraud actions properly brought under state law"). Plaintiffs' Opposition does not even address, much less refute, this rationale.

B. Plaintiffs Are Required But Have Failed To Plead A Completed Predicate Act Of Mail Fraud That Could Have Caused Their Claimed Injury

Plaintiffs acknowledge that Beck v. Prupis, 529 U.S. 494 (2000), requires dismissal of a civil RICO claim where the plaintiff "ha[s] not alleged an injury caused by a predicate act." Opp. at 13. See also Memo. at 8-11. Plaintiffs also do not dispute that: (1) the only predicate act alleged here is mail fraud, which they concede is not completed until there is an actual mailing; and (2) the only actual mailing regarding each Certificate that Plaintiffs claim to have lost occurred *after* the conclusion of the Sale at which the Certificate was sold. Memo. at 9-10. These concessions alone establish that none of the predicate acts of mail fraud that Plaintiffs allege could have caused their claimed injury.

Plaintiffs attempt to avoid this conclusion by arguing that, where the specific predicate act is mail fraud, only the first element of that offense – the formation of the scheme – has to occur before the injury. Opp. at 10-15. But it is logically impossible for a claimed injury to be caused by a predicate act that has not yet been committed. Thus, Plaintiffs in effect are asking this Court to rule that civil RICO cases based on the alleged predicate act of mail fraud are exempt from Beck's requirement that the claimed injury be "caused by a predicate act." Not surprisingly, Plaintiffs do not point to anything in Beck that permits such an exception.

Moreover, none of the three arguments offered by Plaintiffs remotely justifies such an exception. First, Plaintiffs argue that "[n]o court has ever held" that "the mailing must occur … before an injury" in order to satisfy the causation element of a civil RICO claim for injury based on the alleged mail fraud scheme. Opp. at 10. Second, they argue that their proposed exception is authorized by the Seventh Circuit's decision in Phoenix Bond & Indem. Co. v. Bridge, 477 F.3d 928 (7th Cir. 2007), and the District Court's pre-Beck decision in City of Chicago v. Wolf, 1992 U.S. Dist. LEXIS 6035 (N.D. Ill. Apr. 30, 1992). Opp. at 11-12. Third, they argue that

enforcing the requirement of an injury "caused by" a completed act of mail fraud would be inconsistent with the rule that "mailings in furtherance of a scheme to defraud do not themselves have to be fraudulent" to satisfy the elements of the criminal mail fraud statute. Opp. at 12-13. Each of these arguments is incorrect.

1. Courts Have Held Specifically That Alleged Mail Fraud Cannot Cause A Claimed RICO Injury That Occurs Before Any Actual Mailing

Plaintiffs' assertion that "none of the cases cited by Heartwood hold that a mailing must be completed before an injury" (Opp. at 13) in order to satisfy the causation requirement is simply wrong. The following cases (among others) held specifically that the alleged predicate act of mail fraud cannot be the cause of a claimed RICO injury that occurs before the alleged mail fraud has been completed by an actual mailing.

(a) Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 366 F. Supp. 2d 792 (W.D. Wis. 2005) (cited in Memo. at 10). The plaintiff alleged that it was injured by entering into a contract in reliance on the defendants' "materially false" representations about (among other things) the "truth[]" and "accura[cy]" of information contained in a document that the defendants had prepared for later submission to government agencies. Id. at 798, 807. The District Court held that the "claims flounder on the issue of causation" because the document "had not been mailed" to "the federal and state agencies" until after formation of the contract, and "nothing in plaintiff's … complaint suggests that it would not have entered the … contract had defendants not actually transmitted the [document] to the relevant governmental agencies." Id. at 806-07. Thus, even though the alleged fraudulent scheme began before the injury-producing contract was formed, the element of causation still could not be satisfied because no mailing occurred until after the contract was formed.

(b) Vicon Fiber Optics Corp. v. Scrivo, 201 F. Supp. 2d 216 (S.D.N.Y. 2002) (cited in Memo. at 10). The plaintiff company alleged that it was injured by the defendants'/employees' "submission of and reimbursement for false and fraudulent travel and

entertainment expenses." Id. at 219. The District Court held that the defendants' later mailing of "proxy solicitations" to the company's shareholders that "failed to disclose" the "false, fraudulent, and fictitious travel and entertainment expenses" did not establish the predicate act of mail fraud that could have caused the alleged injury because the injury "happened, or could have happened, even if no proxy solicitations were ever mailed." Id. at 218-29.

(c) Line v. Astro Mfg. Co., Inc., 993 F. Supp. 1033 (E.D. Ky. 1998) (cited in Memo. at 11). The plaintiff alleged that he was injured by purchasing a home in reliance on defendants' safety-related misrepresentations in furtherance of a fraudulent scheme. Id. at 1035-36. He further alleged that the defendants committed predicate acts of mail and wire fraud by "transmitting or receiving sale orders, advertisements and warranties by telephone and U.S. mail." Id. at 1036. The District Court held that the plaintiff failed to allege "a [s]ufficient [c]ausal [c]onnection" between the alleged mail fraud and the claimed injury because "the alleged predicate acts" of mail fraud "occurred between 1990 and 1997" but the plaintiff "admittedly purchased his … home in 1985." Id. at 1037-38.

Plaintiffs ineffectively attempt to distinguish these cases on two grounds. First, they argue that the cases "simply held that where the *deceptive conduct* underlying the alleged mail fraud scheme occurred after the alleged injury, those misrepresentations could not have" caused the alleged injury. Opp. at 14 (emphasis in original). This is incorrect. The plaintiff in each case alleged that its injury was caused by "deceptive conduct" that was in furtherance of the alleged "scheme" but that did not include actual use of the mail. See Barry Aviation, 366 F. Supp. 2d at 798 (alleged "materially false" pre-injury representations); Vicon Fiber Optics, 201 F. Supp. at 219 (alleged "false" and "fraudulent" pre-injury reimbursement requests); Line, 993 F. Supp. at 1035-36 (alleged pre-injury misrepresentations).

Second, they argue that Barry Aviation and Line "require[d] the plaintiff to show its reliance on the misrepresentations" and are therefore in conflict with Phoenix Bond. Opp. at 14 n.6. This is a red herring. In both of those cases, it was the *plaintiffs* who alleged that their injuries were caused by their reliance on the defendants' misrepresentations. Barry Aviation,

366 F. Supp. 2d at 807 ("plaintiff's theory of causation is that it entered the … contract in reliance on" the allegedly false documents); Line, 993 F. Supp. at 1037 ("plaintiff alleges that the defendants' RICO violations … induced the plaintiff to purchase a manufactured home"). The court in each case simply recognized that the plaintiff's claim of injury caused by alleged mail fraud was untenable because there was no actual mailing, and therefore the alleged mail fraud was not complete, until after the claimed injury occurred.

2. Neither Phoenix Bond Nor Wolf Authorizes A Civil RICO Claim Based On Alleged Mail Fraud Where The Claimed Injury Pre-Dates Any Actual Mailing

Plaintiffs argue that the Seventh Circuit's decision in Phoenix Bond and the District Court's decision in Wolf authorize a civil RICO claim based on the alleged predicate act of mail fraud even where the claimed injury pre-dates any actual mailing. Neither decision provides any such authority.

Plaintiffs acknowledge that the causation issue here – whether there can be a viable civil RICO claim based on alleged mail fraud where, as here, the claimed injury pre-dates any actual mailing – "was not presented" to the Seventh Circuit in Phoenix Bond. Opp. at 12. They nevertheless suggest that the Seventh Circuit resolved the issue by implication because it "indicated that … the [RICO] proximate cause analysis is considers [*sic*] whether the scheme, as opposed to the mailings or any individual misrepresentation, caused the injury." Id. But nothing on the page of the Phoenix Bond opinion that Plaintiffs cite (p. 932) or anywhere else in the opinion provides any such "indicat[ion]." The Seventh Circuit's holding was simply that a "direct *victim* may recover through RICO" even if it is not "the direct *recipient* of the false statements." Phoenix Bond, 477 F.3d at 932 (emphases in original).[4]

[4] Heartwood believes and reserves the right to argue at the appropriate time and in the appropriate forum that this holding is incorrect. However, whether Plaintiffs' allegations satisfy the causation requirement described in Heartwood's Memorandum (at 8-11) and above does not turn on whether this holding is correct.

The Seventh Circuit's holding does not remotely imply that an alleged predicate act of mail fraud can cause a claimed RICO injury even though the act has not been completed (*i.e.*, there has not been an actual mailing) before the injury occurs. To the contrary, the Seventh Circuit stated that "[a] scheme that injures D *by making false statements through the mail* to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's." Id. (emphasis added). By emphasizing that the alleged scheme must injure the victim "by" the "making" of statements "through the mail," the Seventh Circuit confirmed that both the formation of the scheme and an actual mailing in furtherance of the scheme must precede the claimed injury.

Plaintiffs also are incorrect that the Seventh Circuit would have to "reverse" the Phoenix Bond decision in order to affirm the dismissal of Plaintiffs' claims here for failure to plead causation. This is because "[a] point of law merely assumed in an opinion, not discussed, is not authoritative." Matter of Stegall, 865 F.2d 140, 142 (7th Cir. 1989). See also United States v. Kucik, 844 F.2d 493, 498 (7th Cir. 1988) (cases "not authoritative on" issues they do not "address[]"). As Plaintiffs here have conceded, the Seventh Circuit in Phoenix Bond was not asked to and did not address the no-causation argument made by Heartwood in this motion.

Finally, Wolf, 1992 U.S. Dist. LEXIS 6035, also provides no authority for Plaintiffs' position. To the extent it suggested that there can be a civil RICO claim based on alleged mail fraud where the claimed injury pre-dates any actual mailing, it is contrary to Beck. It also is inconsistent with subsequent Seventh Circuit authority cited in Heartwood's Memorandum (at 9) for the undisputed proposition that a completed predicate act of mail fraud occurs for purposes of a civil RICO claim only when and if there is an actual mailing.

3. Whether The Criminal Mail Fraud Statute Requires A Fraudulent Mailing Is Irrelevant

Plaintiffs suggest that the civil RICO requirement of an actual mailing before the claimed injury does not "make sense" because "mailings in furtherance of a scheme to defraud do not themselves have to be fraudulent." Opp. at 12. This is a *non sequitur*. The criminal mail fraud

statute does not include the civil RICO standing requirement of an injury "by reason of" a RICO predicate act. 18 U.S.C. § 1964(c). Whether the mailing must be fraudulent in order to satisfy the elements of the criminal mail fraud statute thus has nothing to do with when the mailing must occur in order to satisfy the causation requirements of § 1964(c).

II. PLAINTIFFS' TORTIOUS INTERFERENCE CLAIM AGAINST HEARTWOOD ALSO SHOULD BE DISMISSED

Plaintiffs do not dispute that, if this Court dismisses their RICO claims, it should decline to exercise supplemental jurisdiction over their tortious interference claim. Memo. at 11-12. However, even if this Court exercises supplemental jurisdiction over Plaintiffs' tortious interference claim, it should dismiss the claim for failure to plead that Heartwood acted with the specific purpose of interfering with Plaintiffs' claimed business expectation.

Plaintiffs argue that this issue is "inappropriate" for disposition before trial. Opp. at 15. But they make no attempt to reconcile this argument with the cases cited in Heartwood's Memorandum (at 12-13) that dismissed tortious interference claims *on the pleadings* because the allegations failed to satisfy the specific purpose requirement.

Plaintiffs also argue that, "[g]iven that the purpose of the scheme was to acquire liens that would have gone to plaintiffs and other tax buyers and that plaintiffs and other tax parties are the only parties who could have been injured by defendants' conduct, defendants' participation in the scheme establishes their purpose and intent to injure plaintiffs' expectancies." Opp. at 16-17. This argument is directly contrary to the rule that merely alleging "intent[]" to engage in conduct that the defendant knows will have the effect of "making it impossible" for a plaintiff to realize its alleged "expectancies" is not sufficient to establish the required purpose of interfering specifically with those expectancies. Hoopla Sports & Entm't, Inc. v. Nike, Inc., 947 F. Supp. 347, 357 & n.6 (N.D. Ill. 1996); Hayes & Griffith, Inc. v. GE Capital Corp., 1989 U.S. Dist. LEXIS 12625, at *29-32 (N.D. Ill. Oct. 24, 1989) (allegations that defendant "was aware of" plaintiff's expectancies and "knowingly" made misrepresentations which "caused" the interference with those expectancies insufficient because no indication "that the defendants acted

with the purpose of injuring plaintiff's expectancies") (quoting Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 880 (1st Dist. 1978)). Instead, there must be something "in the complaint [that] supports the inference that [defendants] were specifically targeting [those] expectancies." Hoopla, 947 F. Supp. at 357. Plaintiffs also have ignored that, for the reasons explained in Heartwood's Memorandum (at 13-14), there was no way even to predict before any of the Sales what effect Defendants' participation in the Sales might have on the number of Certificates that any other Sale participant might have had a chance to purchase under the alleged "rotational" allocation system.

Finally, in addressing most of the cases cited in Heartwood's Memorandum (at 12-13) and above, Plaintiffs merely recite the courts' alternative rationales for dismissing the interference claims, such as failure to plead conduct toward third parties or lack of a valid business expectancy. Opp. at 17-18. But, in the Seventh Circuit, the fact "[t]hat an opinion contains multiple grounds of decision does not justify disregarding any of them." Eustace v. C.I.R., 312 F.3d 905, 908 (7th Cir. 2002). The claims in the cases cited by Heartwood in its Memorandum were dismissed for failure to plead the required specific purpose. See Hoopla, 947 F. Supp. at 357 ("[t]he *clearest problem* is [plaintiff's] failure to adequately plead that [defendants]" acted "with the intention of interfering with" plaintiff's business expectancies and "[n]othing in the complaint supports the inference that [defendants] were specifically targeting [plaintiff's] expectancies") (emphasis added); Kemmerer v. John D. & Catherine T. MacArthur Found., 594 F. Supp. 121, 122 (N.D. Ill. 1984) ("Plaintiff also fails to plead adequately that defendants *intentionally* interfered with his" expectancy) (emphasis in original); Parkway Bank & Trust Co. v. City of Darien, 43 Ill. App. 3d 400, 403-04 (2d Dist. 1976) ("[t]here are no facts stated in the complaint to suggest that defendants had as their purpose the interference with" plaintiff's expectancy).[5] Regardless of whether there were additional, alternative rationales for

[5] Plaintiffs incorrectly assert that then-District Judge Rovner dismissed the interference claim in Hayes & Griffith because the plaintiff there "failed to allege that its injury was anything more than an incidental result of 'the pursuit of the defendant's own ends by proper means.'" Opp. at 17. In fact, Judge Rovner specifically assumed that the complaint "allege[d] that [defendant]

the dismissals, these cases provide ample authority for dismissing Plaintiffs' claim here based on the same fatal deficiency.

CONCLUSION

For the foregoing reasons, and the reasons explained in Heartwood's Memorandum, this Court should dismiss with prejudice all claims asserted in the Complaint against Heartwood (Counts I-II and VII).[6]

Respectfully submitted,

HEARTWOOD 88, LLC

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used *improper* means," and went on to make clear that the complaint nonetheless was deficient because it did not "allege … that [defendant's] intent was to interfere with [plaintiff's] business relations." Id., 1989 U.S. Dist. LEXIS 12625, at *31-32 (emphasis added).

[6] Heartwood joins and adopts all of the arguments made in HBZ, Inc., Lori Levinson and Judith Berger's Memorandum of Law in Support of their Motion to Dismiss (Doc. 104), all of the arguments in the Sass Muni Defendants' Reply in Support of Their Motion to Dismiss (Doc. 129), all of the arguments in the Reply in Support of Defendant Salta Group, Inc.'s Motion to Dismiss (Doc. 124), and the arguments on pages 7-8 of the Reply in Support of the Motion to Dismiss Filed by Defendants BG Investments, Inc. and Bonnie J. Gray (Doc. 132).

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification to the following:

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/s/ Christopher K. Meyer