

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

BRUCE AND WENDY ANDERSON,
(in propria persona)

Plaintiffs,

v.

AMWAY/QUIXTAR, INC., a corporation;
MICHAEL YOUNG McCORMICK,
DONALD E. CHRISTOPHER, HAL GOOCH,

Defendants.

Case No.: 3:07-cv-844-J-25JRK

**QUIXTAR INC.'S MOTION TO DISMISS AMENDED COMPLAINT
UNDER RULES 12(b)(1) AND 12(b)(6), FED. R. CIV. P.**

Defendant, Quixtar Inc. ("Quixtar") (erroneously denominated as Amway/Quixtar, Inc. in the Amended Complaint), by and through undersigned counsel, respectfully moves this Court for an order dismissing the Amended Complaint with prejudice on the grounds:

1. as set forth in the Motion to Dismiss Amended Complaint Under Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P. and Memorandum in support by Defendant Christopher (Dkt. Nos. 46 and 47) and for certain of the grounds set forth in the Motion to Dismiss and Brief in Support by Defendant Gooch (Dkt. Nos. 32 and 33); and
2. that the Andersons failed to properly plead a civil claim for violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

A memorandum in support of this motion accompanies this motion.

DATED: February 22, 2008.

Respectfully submitted,

/s/ Sarah G. Maroon

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**ATTORNEYS FOR DEFENDANT,
QUIXTAR INC.**

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**QUIXTAR INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS
AMENDED COMPLAINT UNDER RULES 12(b)(1) AND 12(b)(6), FED. R. CIV. P.**

I. INTRODUCTION

Quixtar agrees with and adopts the motion to dismiss filed by Defendant Christopher. (Dkt. Nos. 46 and 47.) Quixtar also agrees with and adopts the motion to dismiss filed by Defendant Gooch with respect to its positions on the RICO statute of limitations, that perjury in state court cannot constitute a predicate act under RICO, and the application of the Rooker-Feldman doctrine. (Dkt. Nos. 32 and 33.) In addition, Quixtar raises additional grounds supporting dismissal of the Amended Complaint.

II. THE AMENDED COMPLAINT FAILS TO STATE A CIVIL RICO CLAIM

To state a RICO claim under 18 U.S.C. § 1962(c), a plaintiff must allege (1) the existence of an enterprise; (2) that defendants (as “persons” defined in 18 U.S.C. § 1961(3)) are employed by or associated with the enterprise; (3) that defendants participated, either directly or indirectly, in the conduct of the enterprise’s affairs; (4) through a pattern of racketeering activity; causing (5) injury to the plaintiff. 18 U.S.C. § 1962(c) (2007); *see Spung v. Fairwinds Fin. Servs., LLC*,

Case No. 6:06-cv-756-Orl-19KRS, 2006 WL 2048291, at *4-5 (M.D. Fla. 2006).

The Andersons' First Amended Complaint (Dkt. No. 4.) alleges that Quixtar was a member of an association-in-fact enterprise consisting of Gooch and Quixtar, (Am. Compl. ¶ 43), and that Quixtar and unspecified others allegedly participated in the affairs of this enterprise through a pattern of racketeering activity "to acquire the Anderson's business and other property." (Am. Compl. ¶¶ 35, 40, 46, 49 and 50.) The predicate acts on which the Andersons rely for the pattern of racketeering activity are all based on an alleged fraud. (Am. Compl. ¶¶ 37-50.)

The Andersons have fallen far short of stating a RICO claim. They have failed to plead (1) the predicate acts with the necessary Rule 9(b) particularity for pleading fraud, and (2) a "pattern" of racketeering activity. Either of these defects, standing alone, warrants dismissal. In addition, the failure to adequately plead a substantive RICO claim requires dismissal of any RICO conspiracy claim as well.

A. The Andersons Have Failed to State a Claim Under 1962(c).

1. The Andersons Fail to Allege RICO Predicate Acts With Rule 9(b) Particularity.

The predicate acts of a RICO claim must be pled with the particularity set forth in Fed. R. Civ. P. 9(b). *Ambrosia Coal & Const. Co. v. Page Morales*, 482 F.3d 1309, 1317-18 (11th Cir. 2007) (affirming district court's dismissal of case for failure to plead predicate RICO acts with particularity). To satisfy Rule 9(b) in a civil RICO case, a plaintiff must allege the parties and participants to the alleged fraud, the representations made, the manner in which the representations are alleged to be misleading, the time, place, and content of the misrepresentations, the fraudulent scheme, the fraudulent intent of the defendants, reliance on the fraud and the injury resulting from the fraud. *Id.* (affirming dismissal of RICO claim for failure

to satisfy Rule 9(b)); *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1025 (S.D.N.Y. 1993) (“allegations of fraud that refer only to ‘defendants,’ without connecting particular misrepresentations to particular defendants, fail to satisfy the particularity requirements of Rule 9(b).”).

The Andersons make no effort to identify, on a conspirator-by-conspirator basis, the time, place, and content of any alleged misrepresentations.¹ The Andersons also fail to allege that the persons who made these statements had the requisite fraudulent intent, nor do they allege any injury that was proximately caused by allegedly fraudulent statements. For example, the Amended Complaint lacks any allegations of how Quixtar or the alleged co-conspirators allegedly used the wires or mail as part of the alleged fraudulent scheme. With respect to other purported frauds, the Andersons do not allege any Quixtar involvement. (*See e.g.*, Am. Compl. ¶¶ 36, 37, 38, 43). Accordingly, the Court should dismiss the Andersons’ Amended Complaint. *See Ambrosia*, 482 F.3d at 1317-18; *Gelb*, 813 F. Supp. at 1025.

2. The Andersons Fail to Allege a “Pattern” of Racketeering Activity

To plead a pattern of racketeering activity, a plaintiff must allege facts establishing that the predicate acts are related and continuous. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The continuity requirement is a reflection of RICO’s concern with long-term criminal activity, as opposed to isolated or sporadic instances of criminal conduct. *Id.* at 242. Continuity may be “closed-ended” or “open-ended.” *Id.* at 241-42. Closed-ended continuity

¹ Notably, the Andersons do not allege that any alleged misrepresentations were made by Quixtar or even were known by Quixtar. Even if Quixtar knew, however, alleged knowledge of misrepresentations is insufficient to impart RICO liability on Quixtar under § 1962(c). *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997) (citing *Reves v. Ernst & Young*, 507 U.S. 1170, 1173 (1993)) (knowledge of an allegedly illegal scheme, coupled with inaction, cannot be the basis for RICO liability under § 1962(c)).

requires proof of a series of related predicate acts extending over a substantial period of time. *Id.* Open-ended continuity, on the other hand, requires a threat of continued racketeering activity. *Id.*

The Andersons allege no specific uses of the interstate wires and mails by Quixtar or any other specific fraudulent acts. Notwithstanding the lack of specificity, the Andersons conclusively allege that the alleged activities constitute “a pattern of racketeering” but they do not allege any continuity at all. (Am. Compl. ¶¶ 35, 43 and 50.) These alleged predicate acts suffer from a lack of continuity, and, therefore, cannot amount to a “pattern.” Under Eleventh Circuit law, to establish the necessary continuity, the predicate acts must themselves contain misrepresentations, and the plaintiff must have reasonably relied upon those misrepresentations. *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1306 (11th Cir. 2003). The Andersons, however, fail to allege any specific communications, much less that any contain fraudulent misrepresentations they relied upon. (*See e.g.*, Am. Compl. ¶¶ 47, 48.)

In addition, the Amended Complaint’s failure to plead with particularity also leads to a fatal defect in alleging a closed-ended pattern of racketeering activity because the allegations of fraud fail to disclose when they occurred. (Am. Compl. ¶¶ 47, 48.) *See Robinson v. Hawkins*, 942 F. Supp. 1234, 1238-39 (E.D. Mo. 1996) (racketeering acts occurring over a period of months were inadequate to allege a pattern). Because the Andersons fail to plead their RICO claim with particularity, this Court should dismiss their Amended Complaint. *See Green Leaf Nursery*, 341 F.3d at 1306-07; *Robinson*, 942 F. Supp. at 1238-39.

B. The Andersons Have No RICO Conspiracy Claim.

In order to state a claim for conspiracy, a plaintiff must allege that a defendant agreed to violate at least one of sections (a) through (c) of RICO. 18 U.S.C. § 1962(d); *Spung*, 2006 WL

2048291, at *4-5. A properly plead RICO claim must set forth specific factual allegations and not merely plead conclusions. *Id.* Yet the Andersons' allegations appear to have been inserted as an afterthought; they do not even attempt to plead an agreement to engage in conduct violating either § 1962 (a) or (b). As explained above, the Andersons have fallen far short of alleging a violation under 1962(c). As such, the RICO conspiracy claim must necessarily fail as well. *Id.* (dismissing *pro se* RICO claim for failure to allege a violation under subsections (a) through (c)).

III. CONCLUSION

The Andersons failed to properly plead the predicate acts with the necessary Rule 9(b) particularity for pleading fraud, failed to properly plead a pattern of racketeering activity, and failed to properly plead a conspiracy. Accordingly, the Court should dismiss the Amended Complaint.

DATED: February 22, 2008.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of February, 2008, I electronically filed the foregoing Motion to Dismiss and Memorandum of Law with the Clerk of Court by using the CM/ECF system which will send notification of such filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants on February 22, 2008:

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