



SO ORDERED.

SIGNED this 11 day of March, 2005.

Janice Miller Karlin
JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
REDIE B. LEWIS)	Case No. 03-41515
)	Chapter 13
Debtor.)	
_____)	
REDIE B. LEWIS)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7068
)	
BNC MORTGAGE, INC.,)	
OPTION ONE MORTGAGE CORP.,)	
FIRST UNION NATIONAL BANK,)	
KOZENY & MCCUBBIN, L.C.,)	
MILLER ENTERPRISES, INC.,)	
JEFFREY MILLER, Individually,)	
ADAMSON & ASSOCIATES, INC.,)	
MAPLEWOOD MORTGAGE, INC.,)	
and DOES 1-100 Inclusive.)	
)	
Defendants.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on Motions to Dismiss Plaintiff's Second Amended Complaint filed by the following Defendants: (1) Miller Enterprises, Inc. and Jeffrey Miller; (2) First Union National Bank; (3) Kozeny & McCubbin, L.C.; (4) Option One; (5) BNC Mortgage, Inc.; and (6) Adamson and Associates, Inc.¹ The Court has jurisdiction to hear this case as it is related to the bankruptcy case that arises under Title 11 of the United States Code, and the parties have all consented to the Court hearing and determining the issues involved in this case and entering all appropriate orders and judgments.²

As a preliminary matter, the only Defendants who have not filed a Motion to Dismiss are Maplewood Mortgage, Inc. and "Does 1-100."³ These Defendants have never been served with process, and on July 8, 2004, after this case had been pending almost a year, this Court gave Plaintiff ten days to show cause why each of these Defendants should not be dismissed as a result of her failure to serve them

¹Docs. 131, 132, 144, 145, 146 and 149.

²28 U.S.C. § 1334 and 28 U.S.C. § 157(c)(2). *See also* Doc. No. 117, an order entered June 16, 2004, confirming that all parties have provided written consent to allow this Court to hear and determine this case and enter all appropriate orders and judgments pursuant to 28 U.S.C. § 157(c)(2), subject to review under 28 U.S.C. § 158.

³The Court assumes Plaintiff is trying to name entities or persons, the identities of whom are unknown to her, which many plaintiffs commonly call "John Doe." In addition, in paragraphs 2-9 of Plaintiff's Second Amended Complaint, which section she entitled "PARTIES," she outlines who each of the defendants are. "Does 1-100" are never mentioned, and at no other point are they mentioned in the Complaint (including in the prayer for relief), except in the caption.

within the time allowed by Fed. R. Bankr. P. 7004(a), which incorporates Fed. R. Civ. P. 4(m).⁴ Plaintiff filed nothing in response, and so the Court did dismiss each of these parties on July 28, 2004.⁵

When Plaintiff filed her Second Amended Complaint on September 9, 2004, she once again named these once-dismissed parties as Defendants. Yet another 120 days have expired, and she still has not served any of these Defendants with this Second Amended Complaint. For the same reason these Defendants were originally dismissed, the Court will again dismiss Defendants Maplewood Mortgage, Inc. and “Does 1-100.” “Does 1-100” are also dismissed because Plaintiff’s Second Amended Complaint never mentions them except in the caption, and thus by definition, Plaintiff has failed to state a claim against them upon which relief can be granted under Fed. R. Bankr. P. 7012(b)(6).

I. FINDINGS OF FACT

Plaintiff initially filed this adversary proceeding on August 4, 2003, pro se. Several Defendants filed Motions to Dismiss her original Complaint. Thereafter, she hired counsel and he filed, on her behalf, a First Amended Complaint on November 25, 2003. On July 8, 2004, this Court granted motions to dismiss filed by all Defendants (except for those who had never been served) on all counts contained in Plaintiff’s First Amended Complaint, except for one count. The only count not dismissed was one brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”).⁶ Out of an abundance of caution, the

⁴*Lewis v. BNC Mortgage, Inc. (In re Lewis)*, 2004 WL 2191602, *11 (Bankr. D. Kan. July 8, 2004), which is Doc. No. 120, herein.

⁵Doc. No. 121.

⁶18 U.S.C. § 1961, *et seq.*

Court granted Plaintiff one last opportunity to amend her complaint to properly allege a RICO cause of action.

The Court's July 8, 2004 order provided Plaintiff a road map with the requirements for properly pleading a RICO action, since her first two Complaints had been blatantly deficient in pleading a RICO claim. The Court also allowed Plaintiff two months after the date of the Court's opinion to file the Second Amended Complaint so that if she needed to conduct additional discovery in order to plead her RICO complaint with the requisite detail, she would have adequate time to do that discovery.

Plaintiff's Second Amended Complaint, just like the former two, involves the construction, purchase, financing, and subsequent foreclosure of her home. Plaintiff purchased a home that was constructed by Defendant Miller Enterprises, Inc. ("Miller Enterprises"), whose president is Defendant Jeffrey Miller ("Miller"). Miller Enterprises also carried a second mortgage on the property. Defendant Adamson & Associates ("Adamson") provided an appraisal of the property. Defendant Maplewood Mortgage, Inc. ("Maplewood") apparently served as the closing agent on the property. Defendant BNC Mortgage, Inc. ("BNC") was the underwriter for the first mortgage on the house, with Defendant Option One Mortgage Corp. ("Option One") acting as a servicing agent for BNC. The mortgage and deed rights were eventually assigned to Defendant First Union National Bank ("First Union"), who was represented by Defendant Kozeny & McCubbin, L.C. ("McCubbin"), a law firm, in a state court foreclosure action against Plaintiff, seeking foreclosure of her home.

Although the specific factual allegations contained in Plaintiff's Second Amended Complaint will be discussed in more detail below as they relate to each element of her claim, the Court finds a brief overview of the Plaintiff's claim will be helpful. Plaintiff claims that each of the Defendants jointly engaged

in an illegal enterprise wherein they sought out high risk buyers, required high down payments because those buyers were, by definition, unable to meet the requirements for a smaller down payment provided to more credit-worthy borrowers, doctored loan amounts so that a high rate of interest could be justified, reduced the amount of carry-backs so that the buyers could close on the property, inflated the value of poorly constructed homes and then pursued foreclosure on the mortgage and note, at which time they would bid in the property for an amount less than the house was worth, and resell it at an inflated value. Plaintiff contends that in perpetuating this scheme, Defendants' conduct violated RICO and mail fraud statutes.⁷

II. STANDARDS FOR EVALUATING MOTIONS TO DISMISS

Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into all adversary proceedings. To prevail on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate beyond a doubt that there is no set of facts in support of plaintiff's theory of recovery that would entitle plaintiff to relief.⁸ All well-pleaded allegations will be accepted as true and will be construed in the light most favorable to plaintiff.⁹

⁷Although Plaintiff cited to 18 U.S.C. § 1343 (relating to wire fraud), the Court assumes she intended to cite 18 U.S.C. § 1341, which relates to mail fraud, since there is no allegation that Defendants used wire, radio or television transactions to conduct the alleged scheme.

⁸*Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas*, 927 F.2d 1111, 1115 (10th Cir. 1991).

⁹*In re American Freight System, Inc.*, 179 B.R. 952, 956 (Bankr. D. Kan. 1995).

III. ANALYSIS

Plaintiff's Second Amended Complaint alleges that all Defendants have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") resulting in damages to Plaintiff. Each of the Defendants who has received service of process has moved to dismiss this Complaint pursuant to Fed. R. Civ. P. 12(b)(6),¹⁰ on the basis that it fails to plead the elements of a RICO claim with the particularity required by Fed. R. Civ. P. 9(b).¹¹

As this Court previously set out in great detail in its July 8, 2004 order, in order to survive a Rule 12(b)(6) motion, a RICO claim must allege (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.¹² Plaintiff is required to allege with particularity each element of a RICO violation and its predicate acts of racketeering.¹³ In requiring the specificity of pleading in a RICO case, the Tenth Circuit recognized the policy of notice pleadings under the Federal Rules of Civil Procedure "requires a court to read Rule 9(b)'s requirements in harmony with Rule 8's call for a 'short and plain statement of the claim' which presents 'simple, concise, and direct' allegations."¹⁴ However, the Tenth Circuit found "that the threat of treble damages and injury to reputation which attend RICO actions justify requiring plaintiff

¹⁰Fed. R. Civ. P. 12(b)(6) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7012(b).

¹¹Fed. R. Civ. P. 9(b) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7009.

¹²*Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

¹³*Hall v. Doering*, 997 F. Supp. 1445, 1453 (D. Kan. 1998) (citing *Farlow v. Peat, Marwick Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992)).

¹⁴*Cayman Exploration*, 873 F.2d at 1362.

to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis of the predicate acts.”¹⁵ To that end, courts have found that “the Rule of pleading with particularity requires assertions of time, place, and contents of false representations ... [and] the identity of the person making the representation and what was obtained or given up thereby.”¹⁶

Furthermore, as the requirements relate to corporate defendants, the rule requires that plaintiffs identify the specific individuals acting for the corporation who made the alleged misrepresentations.¹⁷ Courts have also noted that “while [the] plaintiff need only give fair notice in her complaint, the list of elements is deceptively simple . . . because each concept is a term of art which carries its own inherent requirements of particularity. For example, ‘conduct’ embodies the requirements of one or more of the four substantive violations set out in §§ 1962(a) through (d).”¹⁸

Although each Defendant has filed a separate motion to dismiss the Second Amended Complaint, each of the motions raise essentially the same arguments for dismissal. To the extent the motions raise the same legal and factual issues, the Court will jointly address them for simplicity.

¹⁵*Id.*

¹⁶*Hall v. Doering*, 997 F. Supp. at 1453 (quoting *Meyer v. Cloud County Bank & Trust*, 647 F. Supp. 974, 975-76 (D. Kan. 1986)).

¹⁷*Gottstein v. National Ass'n for Self Employed*, 53 F. Supp. 2d 1212, 1218 (D. Kan. 1999) (holding “the Rule of pleading with particularity requires assertions of time, place, and contents of false representations ... [and] the identity of the person making the representation and what was obtained or given up thereby,” and “[in] the context of corporate defendants, plaintiffs must identify the specific individuals who made the alleged misrepresentations).

¹⁸*Burdett v. Harrah's Kansas Casino Corp.*, 260 F. Supp. 2d 1109, 1120 (D. Kan. 2003) (internal quotations omitted).

A. Plaintiff's claims against First Union are barred by *res judicata* and issue preclusion.

First Union's Motion to Dismiss contains a defense not shared by the other Defendants, and therefore the Court will address its motion independently. Defendant First Union brought a state court foreclosure action against Plaintiff in September 22, 2000, seeking to foreclose its mortgage on the subject real estate. Plaintiff had the opportunity in that proceeding to raise, as a defense to the foreclosure, and by way of affirmative counterclaims, any claim or cause of action she had against First Union.

Plaintiff failed to plead a RICO claim against First Union in the state court proceeding. This Court has already held that the final state court judgment between First Union and Plaintiff precludes the parties from relitigating not only the adjudicated claim, but also any theories or issues that were actually decided, or could have been decided, in that action. Thus, to the extent Plaintiff's RICO claim against First Union existed before the completion of the foreclosure proceeding commenced, or at least by the last date for filing counterclaims, she was required to file a compulsory counterclaim against First Union in that proceeding. This she failed to do.

In the Court's July 8, 2004 Memorandum and Order, it noted that to the extent First Union had engaged in RICO acts after the conclusion of the state court proceeding that had damaged Plaintiff, she might be able to pursue an action against it. The court noted, as follows:

Although the Court finds that any RICO claim based upon actions that arose prior to the filing of the foreclosure action are barred, summary judgment is not appropriate at this time. Plaintiff alleges in her response to the summary judgment motion that First Union took actions in furtherance of the alleged illegal scheme by the defendants after the entry of the state court judgment. If the RICO claim is based, at least in part, on actions by First Union

that took place following the judgment in the state court proceeding, *res judicata* and issue preclusion would not operate to bar the RICO claim.¹⁹

The Court thus granted Plaintiff leave to amend her petition to specifically plead that First Union had committed RICO violations after the conclusion of the state court action.

In her Second Amended Complaint, Plaintiff alleges First Union committed one post-state court act in violation of RICO. That purported RICO violation was First Union's filing of a proof of claim in the underlying bankruptcy case; she contends this act was done in furtherance of the alleged RICO enterprise. Although the Court has serious doubts whether filing a proof of claim in a bankruptcy could be viewed as conduct that could support a RICO claim, the Court need not decide that issue because Plaintiff's allegation is simply untrue. Had Plaintiff reviewed the Claims Register in the Plaintiff's Chapter 13 bankruptcy case,²⁰ she would easily note that First Union never filed a proof of claim. Accordingly, the single post-state court action that Plaintiff contends First Union committed, which purportedly serves to keep that Defendant in the case, simply did not occur.

In her response to First Union's motion to dismiss, Plaintiff simply ignores First Union's argument that it did not commit the one and only post-foreclosure act Plaintiff has claimed it did---file a proof of claim. Plaintiff also ignores the findings contained in this Court's July 8, 2004 Order concerning the issues of *res judicata* and claim preclusion as they applied to First Union.

¹⁹*Lewis v. BNC Mortgage, Inc. (In re Lewis)*, 2004 WL 2191602 at *11.

²⁰This Court takes judicial notice of the proofs of claim filed in Plaintiff's Chapter 13 case. *See In re Applin*, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989) (holding that the judicial notice of basic filings in the bankruptcy case is permissible to fill in gaps in the evidentiary record of a specific adversary proceeding or contested matter).

Plaintiff has not plead that First Union engaged in any conduct that forms a basis for the RICO claim following the entry of judgment in the state court foreclosure proceeding, notwithstanding being given months to do so. For the reasons set forth in the Court's Memorandum and Order dated July 8, 2004, the Court finds that the Plaintiff's RICO claim against First Union is barred by *res judicata* and issue preclusion.²¹ Therefore, First Union's Motion to Dismiss is granted, with prejudice.

B. Plaintiff's Second Amended Complaint is insufficient to state a claim for relief under RICO against the remaining movants.

Each Defendant has raised numerous issues concerning deficiencies in Plaintiff's Second Amended Complaint. Defendants contend, *inter alia*, that Plaintiff has failed to plead facts that could prove an enterprise existed, including the identity of corporate officers who were acting on behalf of the corporate defendants, that she has failed to establish a pattern of racketeering activity, and that she has failed to even identify what sections of the RICO statute Defendants have allegedly violated.

As noted above, in order to properly plead a claim under RICO, Plaintiff must allege (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.²² Plaintiff is required to allege with

²¹Although she did not bother to make this argument in opposition to First Union's Motion to Dismiss, Plaintiff has argued, in response to First Union's motion for sanctions, that the state court proceeding cannot be a basis for *res judicata* because the state court order is not a final judgment, as the appeal time had not run on that judgment when she filed this Chapter 13 proceeding. Plaintiff claims that the filing of her bankruptcy petition stayed the state court proceeding and that her deadline for filing an appeal was tolled by the automatic stay. This argument is completely without merit, as it is well established in the Tenth Circuit that the automatic stay provision of 11 U.S.C. § 362(a)(1) "does not prevent a debtor from commencing or continuing [her] own appeal." *Mason v. Oklahoma Turnpike Authority*, 115 F.3d 1442, 1450 (10th Cir. 1997) (citing *Chaussee v. Lyngholm (In re Lyngholm)*, 24 F.3d 89, 91-92 (10th Cir. 1994)).

²²*Cayman Exploration*, 873 F.2d at 1362 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

particularity each element of a RICO violation and its predicate acts of racketeering. “If plaintiff does not allege facts sufficient to establish any one of these elements, the complaint must be dismissed.”²³

1. Plaintiff has failed to properly plead an enterprise within the meaning of RICO.

The Court finds that Plaintiff’s Second Amended Complaint does not contain sufficient facts to allege an enterprise within the meaning of RICO. According to Congress, an “enterprise” “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”²⁴ To plead the existence of an enterprise, Plaintiff must allege facts sufficient to show “(1) ‘an ongoing organization with a decision-making framework or mechanism for controlling the group;’ (2) ‘various associates function as a continuing unit;’ and (3) ‘that the enterprise is separate from the pattern of racketeering activity.’”²⁵ “A RICO enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.”²⁶

Although Plaintiff added a substantial number of new paragraphs to the “facts” included in her Second Amended Complaint, in an attempt to establish that the various Defendants were somehow functioning as a continuing unit, the Court finds the Second Amended Complaint is devoid of factual allegations that could establish that Defendants had any sort of “decision-making framework or mechanism

²³ *Burdett v. Harrah's Kansas Casino Corp.*, 260 F. Supp. 2d at 1121.

²⁴ 18 U.S.C. § 1961(4).

²⁵ *Gottstein v. National Ass'n for Self Employed*, 53 F. Supp. 2d at 1219 (quoting *United States v. Sanders*, 928 F.2d 940, 943-44 (10th Cir. 1991)).

²⁶ *Id.* (quoting *States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996)).

for controlling the group.” There are no allegations that a singular organization existed “in a manner amenable to hierarchical or consensual decision-making.” In addition, it appears the entire enterprise alleged by Plaintiff consists of the parties’ alleged racketeering activity.²⁷ There is no allegation by the Plaintiff that “the enterprise is separate from the pattern of racketeering activity.”

Plaintiff also variously claims different entities constitute the leadership of the purported “enterprise.” First, she claims that First Union National Bank, Option One and/or BNC are “at the top of the hierarchy.”²⁸ Then she claims that “Miller Enterprises, Inc., Maplewood Real Estate, Inc. (not a party defendant), and Maplewood Mortgage, Inc. were at the core of the “enterprise....”²⁹ Although there are additional inconsistent factual allegations, this example serves to point out the stark deficiency in the Second Amended Complaint, and the unfairness such pleading poses to the named Defendants. A plaintiff alleging a RICO claim must know what her claim is when she files it. She cannot sue now and discover later what her claim is.³⁰

²⁷The Court further notes that when Plaintiff defines the “enterprise” in her Second Amended Complaint, conspicuously absent as members of the “enterprise” are Defendants Kozeny & McCubbin and Jeffrey Miller. *See* Plaintiff’s Second Amended Complaint, paragraph 12. Since Plaintiff thus tacitly admits they are not part of the “enterprise,” by definition Plaintiff has failed to state a claim against those two Defendants for a RICO violation. This failure continues in Plaintiff’s prayer for relief. Again, conspicuously absent is any request for damages against Kozeny & McCubbin, L.C.

²⁸*See* Plaintiff’s Second Amended Complaint. Doc. No. 130, ¶ 14.

²⁹*Id.* at ¶ 13.

³⁰*Cf. Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d at 989. Ironically, this Court has, out of an abundance of caution, tacitly allowed Plaintiff to violate this rule by allowing her two separate opportunities to amend her Complaint and do discovery before each amendment so she in fact was allowed to “discover” her claim after she filed the Complaint.

Plaintiff has also wholly failed, at least as to Defendants First Union National Bank, Option One, BNC Mortgage, Adamson & Adamson, Miller Enterprises, Inc. and Maplewood Mortgage, to plead which corporate employee or officer acted on their behalf in conducting or directing this “enterprise.”³¹ This is yet another example of a deficiency contained in Plaintiff’s First Amended Complaint, and which this Court specifically coached Plaintiff to correct in her Second Amended Complaint.³² She has chosen not to identify which individuals did which illegal acts on behalf of any of the Defendant corporations, and this is also fatal to her claim against the corporate Defendants.

The Court finds that Plaintiff has also failed to properly plead that the Defendants constituted an enterprise in the context of a RICO case. Plaintiff has certainly attempted to weave Defendants into a collective group that acted in a manner she contends harmed her, but that is insufficient to bring a claim under RICO. Instead, what Plaintiff has plead is that each Defendant acted individually (if at all), and not as a cog in the enterprise wheel. She doesn’t even indicate who had an ownership in the alleged enterprise. RICO has very specific statutory requirements and is aimed at a particular type of enterprise. Plaintiff has

³¹Plaintiff’s Second Amended Complaint indicates that Shirley Wheeler is one agent of Maplewood Mortgage (¶ 22), but never indicates that Shirley Wheeler was the Maplewood representative who engaged in the purportedly illegal RICO acts. Similarly, Plaintiff indicates that Jeffrey Miller “was employed by” Miller Enterprises but “also acted independently of Miller Enterprises.” (¶7) Plaintiff also indicated that Ronda Van Quaethem is an agent of Adamson & Associates, but never indicates she engaged in purportedly illegal acts. In fact, all she is alleged to have done on behalf of Adamson & Associates was to use two Miller Enterprise houses for “comparables” on an appraisal. (¶32). These paragraphs constitute the only attempts by Plaintiff to plead illegal acts by employees of the corporate members of the “enterprise.” These allegations are insufficient to meet the requirement that corporate fraud allegations be accompanied by the identity of the corporate officials who actually conducted the fraud.

³²*Lewis v. BNC Mortgage, Inc*, 2004 WL 2191602 at *16 (wherein this Court noted that “the rule requires that plaintiffs must identify the specific individuals who made the alleged misrepresentations,” and provided citation to additional authority).

wholly failed to plead facts that could show that these Defendants fit within the framework of a RICO enterprise.

2. Plaintiff has failed to plead, with the required specificity, that Defendants engaged in conduct sufficient to establish a RICO violation.

Each Defendant has noted that Plaintiff has failed to plead what section of the RICO statute they violated by their purported actions. This Court apprised Plaintiff in its July 8, 2004 order that this failure was one of the many deficiencies of her First Amended Complaint. In her response to the various Motions to Dismiss, Plaintiff summarily dismisses this deficiency. This Court, again, disagrees. Plaintiff's failure to identify which provision of RICO each Defendant is alleged to have violated is sufficient to sustain the Defendants' motions to dismiss. As noted by the Court, above, "conduct," which is a specific element of a RICO claim, "embodies the requirements of one or more of the four substantive violations set out in §§ 1962(a) through (d)."³³

Section 1962 contains four distinct subsections, each of which creates civil liability based upon different actions and different legal bases than the other subsections. For example, § 1962(a) makes it illegal for racketeers to use profits from illegal activities to invest in or purchase controlling interests in legitimate businesses that are engaged in, or whose activities affect, interstate commerce. Section 1962(b) prohibits the takeover of a legitimate business that is engaged in, or whose activities affect, interstate commerce through a pattern of racketeering activity. Section 1962(c) prohibits the operation of a legitimate business or association that is engaged in, or whose activities affect, interstate commerce through a pattern

³³*Burdett v. Harrah's Kansas Casino Corp.*, 260 F. Supp. 2d at 1120 (internal quotations omitted).

of racketeering activity. Section 1962(d) makes it illegal for anyone to conspire to violate subsections (a) through (c).

Because each of the potential violations of RICO require Defendants to have committed different acts, it is imperative that Plaintiff provide Defendants with notice of which provisions of 18 U.S.C. § 1962 each Defendant has allegedly violated. For example, if Plaintiff intended to rely on § 1962(b), she is required to plead that the purported enterprise affected interstate or foreign commerce. Neither these words—nor even the concept—ever appear in her Second Amended Complaint. This Court will not require Defendants to proceed with this case, defending against any and all of the provisions of § 1962, with its prejudicial title and its potential for treble damages, in hope that Plaintiff, some day, will decide (and inform Defendants) which provision she believes each has violated.

This Court pointed out this deficiency in its July 8, 2004 Memorandum and Order, believing Plaintiff would heed the Court's advice in properly drafting her Second Amended Complaint. For reasons unknown to the Court, Plaintiff has decided not to identify what provisions of § 1962 she contends each Defendant has allegedly violated. In so doing, Plaintiff has again clearly failed to allege what "conduct" forms a basis for her RICO claim. Defendants' motions to dismiss are also granted on that basis.

3. Plaintiff fails to identify, with sufficient particularity, the alleged racketeering activity of each Defendant.

The Court also finds that Plaintiff has failed to plead, with sufficient particularity, in what alleged racketeering activity each Defendant has purportedly engaged. "Racketeering activity," for purposes of RICO litigation, is defined in 18 U.S.C. § 1961(1). Among the extensive list of actions that can constitute

“racketeering activity” are any actions that are indictable under federal mail fraud statutes³⁴ and federal wire fraud statutes.³⁵ Although Plaintiff generically alleges that Defendants committed mail fraud,³⁶ Plaintiff neglected to provide sufficient facts to comply with the heightened pleading requirements of a RICO claim.

In the context of a RICO claim based upon mail or wire fraud, “[a] complaint must delineate the specifics of each purported use of the mail and wires, including the time, place, speaker, and content of the alleged fraudulent misrepresentations, as well as the manner in which the misrepresentations were fraudulent.”³⁷ “The elements of the offense of mail fraud are: ‘(1) the devising of a scheme or artifice to defraud or take money or property by false pretenses, representations or promises; (2) the specific intent

³⁴18 U.S.C. § 1341. This 21 page, 75 paragraph complaint mentions “mail fraud” twice. First, in paragraph 17, it states that “[t]hese entities consistently utilized the U.S. mails and wires to accomplish the goals of their schemes in violation of 18 U.S.C. § 1343 and the Racketeering (sic) Influenced and Corrupt organizations Act, 18 U.S.C. §§ 1961 et. seq. Second, in paragraph 75, it states that there was a “purpose of executing such scheme in violation of the RICO statutes 18 U.S.C. §§ 1961 et seq. and Mail Fraud Statutes 18 U.S.C. § 1343 (sic).”

³⁵18 U.S.C. § 1343.

³⁶Plaintiff alleges that Defendants committed mail fraud, but cites to the federal wire fraud statute in so doing. The Court will assume that the Plaintiff intended to rely on the mail fraud statutes for purposes of this motion, but notes that the result would be the same if Plaintiff in fact intended to cite and rely on the wire fraud statute to establish racketeering activity. That is because she has similarly failed to properly plead any concrete examples of wire fraud.

³⁷*Scheiner v. Wallace*, 832 F. Supp. 687, 699-700 (D. S.D.N.Y. 1993) (citing *Luce v. Edelstein*, 802 F.2d 49, 54 (2nd Cir. 1986); *Di Vittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2nd Cir. 1987)).

to defraud; and (3) the use of the United States Mails for the purpose of executing the scheme.”³⁸ Plaintiff is also required to describe how the particular mailing or transaction furthered the fraudulent scheme.³⁹

Plaintiff’s bare, conclusory allegations that Defendants have violated federal mail fraud statutes, without sufficiently detailing the facts to support the alleged violations, are insufficient to satisfy the pleading requirements of a RICO claim. Simply stating, generically, that Defendants violated 18 U.S.C. § 1343, without providing detailed factual allegations as to which of them used the mails for what purpose at what time, is no more proper in pleading a RICO claim than if Plaintiff had simply plead that Defendants violated RICO without the conclusory “mail” allegation. Plaintiff has failed to plead, with sufficient particularity, that Defendants engaged in “racketeering activity” as defined by Congress in 18 U.S.C. § 1961.

4. Plaintiff has failed to properly plead that Defendants engaged in a pattern of racketeering activity.

Congress has defined a “pattern of racketeering activity” as “at least two acts of racketeering activity”⁴⁰ Because Plaintiff has failed to properly plead that Defendants engaged in any alleged racketeering activity, the Court must, by definition, find that Plaintiff has failed to plead a pattern of such activity. Although Plaintiff has developed fairly lengthy and detailed facts showing various actions by the Defendants as they relate to Plaintiff, the Court finds those facts do not establish a pattern of racketeering activity for purposes of a RICO claim.

³⁸*Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1206 (D. Colo. 1998) (quoting *United States v. Kennedy*, 64 F.3d 1465, 1475 (10th Cir. 1995)).

³⁹*Id.* See also *Gottstein v. National Ass’n for Self Employed*, 53 F. Supp. 2d at 1218-19 (dismissing RICO claim, holding that bare allegation that a defendant “used mails to defraud customers,” without specific references to time and content of such representations, is insufficient).

⁴⁰18 U.S.C. § 1961(5).

C. Plaintiff's RICO complaint should be dismissed with prejudice.

Certain factors must be considered before dismissing a complaint with prejudice, including (1) the degree of actual prejudice to the defendants, (2) the amount of interference with the judicial process; (3) the culpability of the litigant, (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) the efficacy of lesser sanctions.⁴¹ A court must provide its reasoning for dismissing an action.⁴²

This adversary proceeding has been pending for over 19 months, and its pendency has delayed confirmation of Debtor/Plaintiff's Chapter 13 Plan. All her creditors have been stayed from pursuing collection against her—while they received no disbursement⁴³ from the Chapter 13 Trustee—for over 19 months while she failed to plead with specificity. This is prejudicial to the system, and to those creditors who have been stayed while she pursues this action.

In addition, and probably most importantly, Plaintiff was specifically warned by the Court in its July 2004 order dismissing her first amended complaint that her seconded amended complaint had to conform to certain pleading requirements for RICO claims. The Court gave her considerable additional time to discover, then plead, her RICO claims. In addition, this Court carefully outlined what she had to do to successfully plead a RICO claim, yet she knowingly filed a Second Amended Complaint that failed to

⁴¹*Krueger v. I.R.S.*, 2001 WL 1572322, *1 (D.N.M. 2001) (citing *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)).

⁴²*Id.* (citing *Dimond v. Allsup's Convenience Stores, Inc.*, 182 F.3d 931 (10th Cir. 1999)).

⁴³The Court did condition Plaintiff's continued occupancy of the subject real estate, and continued existence of the Chapter 13 proceeding, on making a payment to the Trustee in an amount equal to her mortgage payment. No other creditor is receiving anything while this bankruptcy pend, awaiting the resolution of these claims.

conform. Most of the defendants in this case have expended extensive litigation resources, because most have had to file three separate motions to dismiss, one after each successive complaint filed. They have had to appear numerous times for hearings in Topeka, where Plaintiff chose to file, notwithstanding that she resides in Kansas City, the real estate that is the subject of the adversary is in the Kansas City area, and most counsel are from the Kansas City area.

Although Plaintiff amended her complaint and added certain facts, the Second Amended Complaint is still plagued with the same generalities that the Court previously noted, and that would make defending against that complaint completely unfair to Defendants. Due to the substantially unimproved nature of plaintiff's Second Amended Complaint, the Court has no reason to believe that allowing Plaintiff an additional opportunity to amend the complaint would cure the numerous defects that permeate her pleading. Plaintiff has had months to conduct discovery so that she might have the necessary details to properly plead a RICO cause of action, including two months after the Court denied her First Amended Complaint. The Court can only conclude that the requisite detail does not exist, or Plaintiff would have plead it, since she was fairly warned she would likely not be given another opportunity.

The Court finds if Plaintiff was unable, even after the road map provided by the Court, and after well over a year of discovery, to properly plead a RICO claim in her third attempt in doing so, that it is not fair to Defendants to provide yet another opportunity under the circumstances of this case. In light of the additional resources that would have to be expended by Defendants, as well as by this Court, in any attempt to decipher the purported wrongs complained of, the Court is simply unwilling to afford Plaintiff a fourth chance to finally articulate a viable theory. Accordingly, after a full review of the *Ehrenhaus*⁴⁴

⁴⁴*Ehrenhaus v. Reynolds*, 965 F.2d at 921.

factors, the Court concludes that, at this juncture, granting Plaintiff leave to amend yet again would be futile and prejudicial to Defendants.⁴⁵

IV. CONCLUSION

The Court finds that Plaintiff's Second Amended Complaint fails to state a claim for relief under RICO, and should be dismissed. Although the failure to plead any one of the four elements of a RICO claim with the required specificity would have been fatal to Plaintiff's claim, the Court finds that Plaintiff failed to properly plead any of the four elements. In addition, Plaintiff's claim against First Union is also dismissed because it is barred by the principles of issue preclusion and *res judicata*.

Plaintiff has now had three opportunities to file a RICO claim with sufficient particularity to withstand a motion to dismiss. The last of those opportunities occurred after this Court directed her counsel to the pertinent case law and statutory law that governed RICO claims. Furthermore, the Court fairly warned Plaintiff that it was unlikely the Court would allow yet another attempt to amend, given the length of time that has passed since the original Complaint was filed, and given the information provided by the Court, itself, to educate Plaintiff's counsel on the required elements.

⁴⁵ Another example of the prejudice that continuing delay will cause specifically relates to Defendant First Union. It brought a foreclosure action as a result of Debtor's non-payment in 2000, and received a judgment of foreclosure. It has been prevented from conducting a judicial sale of the property, and realizing the value of the pledged collateral, because Debtor filed two successive bankruptcy cases (the first of which was previously rather summarily dismissed by another court), and thus the automatic stay has prevented the foreclosure sale. Plaintiff continues to live in the real property. The Court cannot reward Debtor for her failures to properly plead her RICO case by granting yet another opportunity for an amended complaint in light of the five years of delay, and likely thousands of dollars of attorney fees, that she has already caused to First Union. If she had a RICO complaint against First Union, she was compelled to bring it years ago, within the confines of the state court foreclosure proceeding.

Therefore, the Court hereby dismisses Plaintiff's Second Amended Complaint, without leave to amend, and thus with prejudice, rather than allowing an additional opportunity to amend her pleadings. Defendants have been required to defend against three deficient complaints over an extended length of time, and Plaintiff has shown an inability to properly plead.

IT IS, THEREFORE, BY THIS COURT ORDERED that Miller Enterprises, Inc. and Jeffrey Miller's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 131), First Union National Bank's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 132), Kozeny & McCubbin, L.C.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 144), Option One's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 145), BNC Mortgage, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 146), and Adamson and Associates, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 149) are all granted, with prejudice to Plaintiff filing yet another amended complaint. The Court once again dismisses Plaintiff's Second Amended Complaint against Defendant Maplewood Mortgage, Inc. and "Does 1-100" as a result of Plaintiff's failure to serve the Second Amended Complaint on them within the 120 day period allowed by Fed. R. Civ. P. 4(m), which is incorporated into this proceeding by Rule 7004(a), and by her total failure to allege any illegal acts by the "Does 1-100."

IT IS FURTHER ORDERED that this adversary proceeding is dismissed, with prejudice, in its entirety except for the pending motions for sanctions brought by each of the Defendants, which will be decided by later order.

IT IS FURTHER ORDERED the foregoing discussion shall constitute findings of fact and conclusions of law under Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52(a). A judgment reflecting this

ruling will be entered on a separate document in compliance with Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58 after the Court enters a ruling on the pending motions for sanctions against Plaintiff and her counsel.

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