

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
: :
RC SOONER HOLDINGS, LLC, *et al.*, : Case No. 10-10528 (BLS)
: :
Debtors. : (Jointly Administered)
: :

: :
RC SOONER HOLDINGS, LLC, *et al.* :
and OLD SOUTH APARTMENTS, LLC, :
: :
Plaintiffs, :
: :
v. : Adv. Pro. No. 10-50723
: (BLS)
: :
REMYCO., INC.; *et al.*, :
: :
Defendants. :

MEMORANDUM OF LAW IN SUPPORT OF THE REMY DEFENDANTS
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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I. INTRODUCTION

A. Procedural Status

The Debtors¹ each filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code on February 22, 2010. The cases are being jointly administered. The Debtors are continuing to operate at debtors-in-possession. An Unsecured Creditors' Committee has not been appointed.

Two days later, on February 24, 2010, the Debtors filed a Complaint commencing this Adversary Proceeding. On March 13, 2010, the Debtors filed an Amended Complaint.

By Order entered April 14, 2010, the time for the Remy Entities² to answer, move or otherwise plead to the Amended Complaint was extended to and including April 15, 2010. The

¹ The Debtors are RC Sooner Holdings, LLC; RC Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC; RC Southern Hills Owner, LLC; Brixton Square Apartments, LLC; CC Apartments, LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC; and Southern Hills Villa Apartments, LLC. In addition to the debtors, Plaintiffs also include Old South Apartments, LLC, despite the fact that this entity though transferred at the same time, is not in bankruptcy.

² The "Remy Entities" are RemyCo., Inc., The Remy Companies, Inc., Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., Diamond Pointe, LLC, Bluechip Holdings, LP, Tim L. Remy, Tim J. Remy, Sherry E. Remy, L. Leon Remy, Robin E. Remy, Sherry E. Remy Revocable Trust DTD July 14, 1997, and L. Leon Remy Revocable Trust DTD July 14, 1997 and Mona Remy Berke.

Remy Entities now file this Motion to Dismiss in response to the Amended Complaint.

B. Summary of Argument

In an effort to shift blame from their own mismanagement and malfeasance, Debtors have instituted this adversary proceeding alleging that the Remy Entities breached certain written express representations and warranties (Count I), defrauded them (Count II), engaged in racketeering and a racketeering conspiracy (Counts III and IV) and were the recipients of a fraudulent conveyance (Count V), in connection with the sale of certain membership units in single purpose LLC's which in turn owned eight (8) apartment complexes in Tulsa, Oklahoma.

In furtherance of this effort at obfuscation, Debtors baldly allege criminal and fraudulent conduct on the part of numerous parties without supplying even the most basic factual basis as required by the Federal Rules and seek to recover additional damages in tort despite the existence of express agreements between the parties. Accordingly Count II must be dismissed. Plaintiffs' RICO claims are similarly pled in bald conclusory fashion. Moreover, Plaintiffs' alleged pattern of racketeering activity, which is based on a single closing involving the same alleged victim, and which occurred over a period of only three months, is no pattern at all. It surely

fails to meet the continuity requirements long established to state such claims. Lastly, Plaintiffs' constructive fraudulent conveyance claim must be dismissed because they fail to set forth any facts to show that fair value was not given.

Accordingly, the Remy Entities request that the Court dismiss Counts II through V of Plaintiffs Amended Complaint.

C. Parties

Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., and Bluechip Holdings, LP ("Selling Defendants") owned various Apartment LLCs in Tulsa, Oklahoma. The individual defendants named in the Amended Complaint, Tim L. Remy, Tim J. "(TJ)" Remy, Sherry Remy, L. Leon ("Leon") Remy, Robin Remy, and Mona Remy Berke, owned varying interests in some or all of the Selling Defendants. *Id.* at ¶¶ 21-30. In addition to their interests in the Selling Defendants, the individual defendants also own interests in the various other named corporate defendants, including RemyCo. Inc. ("RemyCo"), The Remy Companies, Inc. ("Remy Cos."), and Diamond Pointe, LLC ("Diamond Pointe"). Plaintiffs have also named the Sherry E. Remy Revocable Trust, formed by Sherry Remy, and the L. Leon Remy Revocable Trust, formed by Leon Remy as Defendants. The Amended Complaint

collectively refers to this group, excluding Diamond Pointe, as "the Remys." *Id.* at ¶ 19.

D. Alleged Facts

In early October of 2009, Daniel Gordon, on behalf of RC Sooner Holdings, and real estate broker Defendant Sperry Van Ness/William T. Strange Associations, Inc ("SVN")³, on behalf of Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., and Bluechip Holdings, LP ("Selling Defendants") began negotiations for the purchase of the membership interests in eight separate special purpose entities, each of which owned an Apartment LLC, which in turn owned various multi-family residential apartment complexes in and around Tulsa, Oklahoma (the "Apartment LLCs"). Each apartment complex was in turn encumbered by a mortgage. *Id.* (¶¶ 11, 31, 35).

Negotiations between SVN and Gordon continued through October of 2009, and the parties agreed that RC Sooner Holdings would form a group of entities (referred to in the Amended Complaint as RC LLCs), and through those entities, acquire the membership interests in the various Apartment LLCs. *Id.* at ¶ 32. The RC LLCs (and non-Debtor Purchaser Old South Apartments, LLC) agreed to purchase 100% of the

³ Undersigned counsel does not represent SVN.

membership interests of the Apartment LLCs for a total aggregate cash payout of \$1,196,000.000. The agreement was memorialized in five separate written agreements, each of which was titled "Limited Liability Company (sic) Purchase Agreement" (the "Purchase Agreements"). Though the Purchase Agreements recite both an effective date and a closing date of October 29, 2009, the Amended Complaint acknowledges that the closing did not actually occur until the following month. *Id.* at ¶37.

Plaintiffs allege that the mortgages on the various Apartment LLCs were in default as of the time of closing. Plaintiffs further allege that this was directly contrary to the written representations and warranties set forth in the Purchase Agreements. *Id.* at ¶¶ 11, 13, 43-44; see also ¶¶ 33, 40, 54.

Additionally, Plaintiffs allege that on November 19, 2009, "the Remys" negotiated forbearance agreements with Fannie Mae at Fannie Mae's request. *Id.* at ¶¶ 19, 45-46. According to Plaintiffs, Leon and Tim Remy executed the various forbearance agreement letters, while Tim, TJ, Robin, Leon, and Sherry Remy, along with the Leon Remy Trust and the Sherry Remy Trust signed the "various Forbearance Agreements." *Id.* at ¶¶ 45, 46. The Amended Complaint is silent as to any

specific acts alleged to have been committed by any individual Remy Defendant.

II. ARGUMENT

A. Standard Of Review

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although a court is required to accept as true the factual allegations in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* Accordingly, plaintiff must plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).

Moreover, factual allegations "must be enough to raise a right to relief above the speculative level"; mere suspicion that the plaintiff might establish an undisclosed set of facts to support a cause of action is not sufficient. *Twombly*, 550 U.S. at 555, 561-562. The Court need not credit a complaint's

"'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)). "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 129 S. Ct. at 1950. Vague and conclusory allegations are not facts. They "do not provide fair notice to the defendant", as Rule 8 requires, and the Court should disregard them. *Williams v. Potter*, 384 F.Supp. 2d 730, 733 (D. Del. 2005) (citing *United States v. City of Philadelphia*, 644 F.2d 187, 204 (3d Cir. 1980)).

Further, Rule 9(b) of the Federal Rules of Civil Procedure applies to claims based upon fraud, specifically, Counts Two and Three of the Amended Complaint. Rule 9(b) requires that the circumstances constituting any alleged fraud be pleaded "with particularity." Fed. R. Civ. P. 9(b). Failure to comply with Rule 9(b) mandates dismissal of those claims. See, e.g., *Miller v. McCown De Leeuw & Co., Inc. (In re Brown Schools)*, 368 B.R. 394, 403-404 (Bankr. D. Del. 2007); *Burtch v. Dent (In re Circle Y of Yoakum Texas)*, 354 B.R. 349, 356 (Bankr. D. Del. 2006) (both dismissing fraudulent transfer claims under Rule 9(b)).

B. Count II Of The Amended Complaint Must Be Dismissed

1. Plaintiffs Have Failed To Allege Facts To State A Claim For Relief Against The Individual Remy Defendants For Fraud

Count II of Plaintiffs' Amended Complaint fails to allege sufficient facts to support a cause of action against the Remy Entities for their claim of common law fraud and/or misrepresentation. Instead, Plaintiffs have merely reiterated the required legal elements buttressed of conclusory allegations and alleged wrongdoing by all the Remy Entities. Such allegations fall short of the heightened pleading standard of Rule 9(b) required to allege fraud and/or misrepresentation.

In Oklahoma⁴, the elements of actionable fraud are: (1) that defendant made a material representation; (2) that it was false; (3) that he made it when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *Occidental Hoteles Mgmt., S.L. v. Hargrave Arts, LLC*, No. 09-CV-526, 2010 U.S. Dist. LEXIS 34012 (N.D. Okla. Apr. 6, 2010) (citations omitted).

⁴ ¶11.4 of the Purchase Agreements provides that Oklahoma substantive law applies to Plaintiffs' claims.

Similarly, the Third Circuit applies the stringent pleading standards of Rule 9(b) to all averments of fraud or mistake, requiring that "the circumstances constituting fraud or mistake []be stated with particularity." A "plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the "precise misconduct with which [it is] charged." *Frederico v. Home Depot*, 507 F.3d 188, 200 (quoting *Lum v. Bank of America*, 361 F.3d 217, 223-224 (3d Cir.2004)). Thus "the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Id.*; see also *Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1252 (10th Cir. 1997) ("Simply stated, a complaint must set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof..") (internal citations and quotations omitted).

Finally, "where fraud is alleged against multiple defendants, blanket allegations of fraud couched in language such as 'by the defendants' are insufficient. Instead, the specifics of the alleged fraudulent activity of each defendant must be set forth." *Lillard v. Stockton*, 267 F. Supp. 2d

1081, 1094 (N.D. Okla. 2003) (internal citation and quotation omitted).

Here, Plaintiffs' allegations against the Remy Entities are so unspecific as to require dismissal of the entire claim. Plaintiffs have failed to plead their fraud-related claims with particularity because they: (1) fail to allege any facts establishing the Individual Defendants' role in the alleged fraud and (2) impermissibly lump all defendants together when making their allegations.

For example, Plaintiffs generally allege that the "Selling Defendants" (Home Realty, Bradford Creek, Landrum Design, and Bluechip Holdings) and "the Remys" made express representations in the Warranties and Agreements of Sale knowing they were untrue or materially deficient. Amended Complaint ¶¶ 11, 40. Although "the Remys" purports to include Mona Remy Berke, RemyCo, Remy Cos. Tim Remy, TJ Remy, Sherry Remy, Leon Remy, Robin Remy, the Sherry Remy Trust and the Leon Remy Trust, *id.* at ¶ 13, the Amended Complaint is devoid of any specific allegations of any specific acts of fraud by most of these Defendants. Similarly, Plaintiffs continually lump "the Remys" together with SVN and/or "Selling Defendants", despite alleging no facts to support such grouping see *id.* at ¶¶ 33, 54, 55, 56.

Further, Plaintiffs fail to set forth the identity of the party making the fraudulent statements, as well as the time, place and contents of the alleged fraudulent statements. Again, Plaintiffs' rely instead upon vague and conclusory allegations about representations made by SVN and/or the "Remys" or, both. For example, Plaintiffs fail to set forth even the vaguest of allegations as to the involvement of Mona Remy Berke.⁵ In addition, neither Tim Remy, Robin Remy, Leon Remy, the Leon Remy Trust nor the Sherry Remy Trust are alleged to have been involved in the underlying transaction in any way except for the Amended Complaint's vague and non-specific allegations that they "signed the various Forbearance Agreements in both individual and personal capacities and as "Key Principals" - which, upon information and belief, was at Fannie Mae's request. Amended Complaint at ¶ 46.

Such conclusory language does not comport with the standard set forth by *Iqbal/Twonbly* or by Rule 9(b). Accordingly, Count II of the Amended Complaint must be dismissed.

2. Count II Must Be Dismissed Pursuant to the Economic Loss Doctrine

⁵ Indeed it appears that the only alleged involvement of Mona Remy Berke is that she acting as a *Notary* for the Agreements of Sale of the LLC's.

In the alternative, Count II of Plaintiffs' Amended Complaint, must be dismissed because it is barred by the Economic Loss Doctrine. Simply stated, the Economic Loss Doctrine is a judicially created doctrine that bars a plaintiff from seeking recovery in tort for purely economic losses where the parties' obligations are governed by contract. Such is the case here.

The Economic Loss Doctrine requires a purchaser to recover in contract for purely economic loss *unless he can demonstrate harm above and beyond a broken contractual promise.*" R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM.& MARY L. REV. 1789, 1795-96 (2000). Quite simply, the Economic Loss Doctrine "prevent[s] the law of contract and the law of tort from dissolving one into the other." *Id.* at 1796 (quoting *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 968 (E.D. Wis. 1999)).

Oklahoma courts recognize the Economic Loss Doctrine, and have precluded a full range of torts, where a contractual agreement addresses the duties between the parties and provides a remedy for plaintiff's economic injury. See *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 652-53 (Okla. 1990); see also *United Golf, LLC v. West-Lake Chemical Corp.*, 05-cv-495, 2006 U.S. Dist. LEXIS 57531, at *

(N.D. Okla. August 15, 2006) (dismissing plaintiffs' tort claims because facts presented a "classic breach of warranty case" and plaintiffs were adequately protected by available contract remedies). The doctrine has particular force where plaintiff alleges an economic injury arising from alleged deficiencies in the property conveyed. See, e.g. *Oklahoma Gas & Elec. Co. v. McGraw-Edison Co.*, 834 P.2d 980, 982 (Okla. 1992); *Jones v. Featherston*, 373 P.2d 16 (Okla. 1962) (remedy of an unfinished or deficient or product not conforming to the contract is non-performance and not one based on fraud).

Oklahoma courts do not appear to have expressly addressed the application of the Economic Loss Doctrine to claims of fraud arising from the sale of membership units, where the very transfer, including the express representations and warranties, are set forth in a written agreement between the parties. However the rationale underlying the doctrine (as explained by those courts), supports the extension of the doctrine to claims of fraudulent inducement relating to the transfer of a property interest.

For example, in *Burton v. Juzwik*, 524 P.2d 16, 17-20 (Okla. 1974), plaintiff sought to recover, *inter alia*, punitive damages in connection with the alleged fraudulent transfer of interests in oil and gas leases. The Supreme Court of Oklahoma struck Plaintiffs' punitive damages claim

because the "gravamen of plaintiff's action [wa]s for breach of an obligation arising from contract." Id. Indeed, federal and state courts in Oklahoma have consistently precluded tort claims and the issuance of punitive damages in situations where the gravamen of the claims are breach of contract. See, e.g., *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536, 1547 (N.D. Okla. 1997) (dismissing gross negligence claim "because there was no duty imposed on defendant outside the scope of the Licensing Agreement and the warranties contained therein").

Similarly, other states that have addressed this question have chosen to apply the Economic Loss Doctrine to allegations of fraud in the inducement or misrepresentation, concluding that the defrauded party's remedy is solely in contract, not tort. See, e.g., *Nigrelli Sys., Inc. v. E.I. Dupont de Nemours & Co.*, 31 F. Supp. 2d 1134, 1138-39 (E.D. Wis 1999) (concluding that the Economic Loss Doctrine equally to plaintiff's fraud claims).

Moreover, even in states that permit fraud claims where an agreement exists, the courts have recognized that a fraud claim is actionable *only if* it is extraneous to the subject matter and contractual obligations of the contract. See *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, at

¶ 42 (Wis. 2005); *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532, 542-43 (Fla. 2004).

Here, the alleged fraudulent representations cannot be seriously characterized as extraneous to the Purchase Agreements. They are not only central to, but identical to the claims of breach of the *express* representations and warranties set forth in Count I. (¶¶ 38, 50-51) Indeed, but for the fact that Count I relates to a duty imposed by contract and Count II relates to a duty imposed by law, the two claims are identical. (¶¶ 54, 59). Because the alleged misrepresentations are set forth in the contract itself, any economic losses sustained should be maintained in an action in contract, not in tort. *See Freedom Props., L.P. v. Landsdale Warehouse Co.*, No. 06-cv-5469, 2007 WL 2254422, at *6 (E.D. Pa. Aug. 2, 2007) ("promises made to induce a party to enter into a contract that eventually become part of the contract itself cannot be the basis for a fraud-in-the-inducement claim"). Therefore, Count II of the Amended Complaint must be dismissed.

C. Count III Must Be Dismissed Because Plaintiffs Have Failed To State A Claim For Relief For Conspiracy

In Count III, Plaintiffs purport to allege a state law civil conspiracy claim against "Selling Defendants", "the Remys" and SVN, claiming that they all "combined to do

unlawful acts by unlawful means" by selling the Apartment LLCs to Plaintiffs. Amended Complaint ¶¶ 63, 64.

Under Oklahoma law, a civil conspiracy is

a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. . . . As a general rule, an actionable conspiracy must consist of wrongs that could have been actionable against the individual conspirators.

Schovanec v. Archdiocese of Oklahoma City, 2008 OK 70, 188 P.3d 158, 175 (Okla. 2008) (internal quotation and citations omitted). "The evidence of the conspiracy must be 'clear and convincing' and must do more than raise suspicion." *Dill v. City of Edmond*, 155 F.3d 1193, 1208 (10th Cir. 1998) (citing *Dill v. Rader*, 1978 OK 78, 583 P.2d 496, 499 (Okla. 1978)); see also *Tribal Consortium, Inc. v. Pierson*, No. 06-238, 2009 U.S. Dist. LEXIS 120482, 46-48 (W.D. Okla. Dec. 28, 2009).

Here, Plaintiffs have failed to plead the elements of a viable conspiracy claim. As articulated in Plaintiffs' Amended Complaint, the conspiracy claim in this case is based solely upon general allegations that all Defendants "pursued an independently unlawful purpose in selling the Apartment LLCs to the RC LLCs by means of fraud, misrepresentation or

racketeering." Amended Complaint ¶ 64. Further, there is no alleged "object to be accomplished" or "meeting of the minds" on the object or course of action. In addition and as discussed above, the Amended Complaint fails to set forth with requisite specificity the involvement of any of the individual Remy Entities.

Plaintiffs fail to state a claim for conspiracy, and have failed to allege any conspiracy with the particularity required by Rule 9(b). General or conclusory allegations of conspiracy are insufficient, and Plaintiffs' conspiracy claim must be dismissed.

D. Plaintiffs' Substantive RICO Claim Of Racketeering Activity Fails To Allege A Pattern

The civil RICO statute provides for civil damages for "any person or entity injured in its business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). Under 18 U.S.C. § 1962(c), it is "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" 18 U.S.C. § 1962(c). To state a claim for relief under 18 U.S.C. § 1962(c), a plaintiff must allege facts showing "(1) conduct (2) of an

enterprise (3) through a pattern of (4) racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

To survive a motion to dismiss a claim under 18 USC §1962(c), a complaint must sufficiently allege a pattern of racketeering activity. In addition to alleging the required RICO predicates, the complaint must establish: (1) a sufficient relationship between the racketeering acts and (2) "a threat of continued criminal activity" (the continuity prong). *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Plaintiffs' RICO claim fails to satisfy the "continuity" prong and thus must be dismissed.

In assessing the continuity prong, courts look to the following factors: "(1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity." *Tabas v. Tabas*, 47 F.3d 1280, at 1292, 1296 (3d Cir. 1995) (en banc). Additionally, a plaintiff must show that the predicate acts "either constitute or threaten long-term activity." *Royalty Indemnity Co. v. Pepper Hamilton LLP*, 479 F.Supp.2d 419, 428 (D. De. 2007).

Continuity may either be closed-end, i.e. "'a closed period of repeated conduct'", or open-ended, i.e. "'past

conduct that by its nature projects into the future with a threat of repetition.'" *Tabas*, 47 F.3d at 1292 (quoting *H.J. Inc.*, 492 U.S. at 241-42). Closed-ended continuity may be established by "proving a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242). "A short-term scheme threatening no future criminal activity will not suffice." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1412 (3d Cir. 1991). Thus, in the Third Circuit, conduct lasting less than twelve months is not "substantial" and does not "meet the standard for closed-ended continuity." *Tabas*, 47 F.3d at 1293.⁶

Alternatively, open-ended continuity may be established where the defendant specifically threatened to repeat or extend his behavior indefinitely or where the plaintiff demonstrates that the predicate acts "are a regular way of conducting defendant's ongoing legitimate business . . ."

Here all the alleged predicate acts relate to a single series of real estate closings. The closings followed a brief period of negotiation (less than 3 weeks) and were consummated following an equally brief due diligence period. Additionally

⁶ See, also, *Callahan v. A.E.V. Corp.*, 182 F.3d 237, 246 n. 7 (3d Cir. 1999) (affirming district court's dismissal of RICO claims where, *inter alia*, the fraud lasted only six months); *Preferred Tax Serv., Inc. v. Tax Auth., Inc.* No. Civ. 05-872 SLR, 2006 WL 940596, at *4 (D. De. April 11, 2006)(collecting cases) (granting motion to dismiss where alleged predicate acts occurred over a five month period).

the transactions involved the same parties, and were all closed at the same time. Even under the most generous reading of the above cases, these facts simply can not constitute a pattern of racketeering activity. Additionally, the alleged facts do not establish open-ended continuity because they do not allege a threat of ongoing harm, nor do the allegations even hint that the predicate acts are Defendants' regular way of conducting ongoing legitimate business. Because the allegations fail to establish a pattern of racketeering activity, the court should dismiss Plaintiffs' §1962(c) claim.

E. Plaintiffs' RICO Conspiracy Counts Must Be Dismissed Because Plaintiffs Fail to Aver a Plausible Conspiracy And Fail To Adequately Plead Any Substantive RICO Violation

1. Plaintiffs' Rico Conspiracy Claims Fail Because Plaintiffs Fail To Plausibly Aver A Conspiracy

In Count IV of their Amended Complaint, Plaintiffs claim that Defendants engaged in a conspiracy in violation of 18 U.S.C. § 1962(d). Amended Complaint ¶ 77. This Count must be dismissed because Plaintiffs' conclusory allegations contained in a single paragraph do not satisfy the pleading requirements for a RICO conspiracy.

To plead a valid claim for RICO conspiracy under § 1962(d), a plaintiff must aver a plausible conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity. *Shearin v. E.F. Hutton Group, Inc.*,

885 F.2d 1162, 1166 (3d Cir. 1989), *overruled on other grounds by Beck v. Prupis*, 529 U.S. 494 (2000). To plead a plausible conspiracy, "plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." *Id.* at 1166. The plaintiff must also plead an "agreement to commit predicate acts and knowledge that the acts were part of a pattern of racketeering activity." *Id.* at 1166-67. Consequently, to allege a RICO conspiracy, the complaint must allege sufficient facts to support each of the defendants' agreement and his or her knowledge.

Instead of the required specific allegations as to each defendants' acts and knowledge, the Amended Complaint merely alleges in broad conclusory language that "one or more" of the "Remys" and "Selling Defendants" "conspired to violate RICO by their words and actions, manifesting an agreement to participate directly or indirectly in the affairs of their enterprise through a pattern of racketeering activity," *Id.* at ¶ 76. The allegations in the Amended Complaint are insufficient to allege a RICO conspiracy.

2. Plaintiffs' Claims For Damages From A RICO Conspiracy Under § 1962(d) Should Also Be Dismissed Because Plaintiffs Have Failed To Sufficiently Allege An Underlying RICO Violation

In order to properly plead a RICO conspiracy claim, a plaintiff must show that at least one of the co-conspirators committed a substantive RICO violation. *See Lum v. Bank of America*, 361 F.3d 217, 227 n. 5 (3d Cir. 2004) (upholding dismissal of § 1962(d) claim where plaintiff failed to adequately plead any substantive RICO violation). If all of the substantive RICO claims fail, then the RICO conspiracy claim also fails. *Lightning Lube*, 4 F.3d at 1192.

Here as discussed above, Plaintiffs' 1962(c) claims fails to establish a pattern of racketeering activity. Consequently, the § 1962(d) claim fails and must be dismissed.

F. Count V Of The Amended Complaint Must Be Dismissed Because It Fails To Adequately Allege Facts Necessary To State A Claim For Relief Against Any Of The Remy Entities

The Debtors are separate legal entities that are being jointly administered, but have not been substantively consolidated. Notwithstanding their separate legal form, the Plaintiffs allege generally that *in the aggregate* RC Sooner and the RC LLCs "transferred cash and incurred mortgage debt obligations in the amount of \$29,772,661.00 less amounts

attributable to the Old South Purchase (such aggregate amount, the "Transfers")". Amended Complaint ¶ 79.

The Plaintiffs fail to allege any facts concerning the capitalization or financial condition of any of the RC LLCs before or after such Debtor's purchase of the respective membership interest. The Plaintiffs also fail to allege any facts concerning the value of the membership interests acquired by the RC LLCs.

In addition, the Plaintiffs' allegation that, in the aggregate, RC Sooner and the RC LLCs "incurred mortgage debt obligations" as part of the purchase of the membership interests is inconsistent with the nature of the transaction as described in paragraph 35 of the Amended Complaint. In paragraph 35, the Plaintiffs allege that the RC LLCs "purchased 100% of the membership units" in the applicable seller for a cash payment, calculated by an agreed-upon purchase price less the debt on the subject LLC. Amended Complaint ¶ 35. The Plaintiffs do not allege that the debt obligations of the RC LLCs were assumed, guaranteed, or otherwise in any respect became the obligations of the RC LLCs.⁷

⁷ Even the Plaintiff Apartment LLCs did not "incur" debt as part of the membership purchases. Those entities held the mortgage debt before and after their ownership was transferred to the RC LLCs.

And, the Amended Complaint is entirely devoid of any allegations that RC Sooner/Sooner Holdings made any transfer, or incurred any obligation whatsoever, in connection with the purchase by the RC LLCs of the membership interests in the various Apartment LLCs.

In order to prevail on a claim of fraudulent conveyance, the RC LLCs each must prove the elements of § 548 as to itself. Among those is that the value of the asset received was not reasonably equivalent to the consideration provided by that Debtor. *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624 (3d Cir. 2007). Instead, the Plaintiffs have made only vague and conclusory allegations that they, in the aggregate, received less than reasonably equivalent value for the Transfers, based at least in part on implausible and inconsistent factual allegations.

Because the allegations of Count V are devoid of facts to support a claim of constructive fraudulent conveyance under § 548(1)(B), Count V of the Amended Complaint must be dismissed.

III. CONCLUSION

For all the foregoing reasons and pursuant to Rules 8, 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rules 7008, 7009, and 7012 of the Federal Rules of Bankruptcy Procedure, the Remy Entities respectfully request that this Honorable Court enter an Order dismissing Counts II, III, IV and V of Plaintiff's Amended Complaint.

Respectfully submitted,

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