IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

COOPERATIVE REGIONS OF ORGANIC PRODUCER POOLS,

Plaintiff,

v.

THOMAS BOWMAN, TOM BOWMAN TRUCKING, INC., JOHN DOE and ABC COMPANY,

Defendants.

OPINION AND ORDER

10-cv-697-slc

In this diversity action, plaintiff Cooperative Regions of Organic Producer Pools (CROPP) alleges that defendants Thomas Bowman and Tom Bowman Trucking, Inc., overbilled CROPP to the tune of $800,000 by systematically padding invoices submitted for hauling services. Plaintiff contends in its eight-count complaint that defendants' acts amount to (I) breach of contract; (II) common law fraud; (III) common law fraudulent concealment; (IV) theft by fraud under Wis. Stat. § 943.20; (V) racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; (VI) racketeering in violation of the Wisconsin Organized Crime Control Act (WOCCA), Wis. Stat. § 946.83; and (VII) conspiracy to commit the fraudulent acts alleged in counts II through VI. Count VIII is plaintiff's claim for punitive damages.

Defendants have moved to dismiss counts 2 through 7 of the complaint for failure to meet the pleading requirements of Federal Rules of Civil Procedure 8(a) and 9(b). Alternatively, they argue that counts 5 through 8 of the complaint must be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). As discussed below, I conclude that plaintiff has alleged its fraud claims with sufficient particularity.

As for the racketeering claims, I conclude that plaintiff has stated a facially plausible claim of racketeering under 18 U.S.C. § 1962(c) and its WOCCA analogue, although this is a wobbler. Plaintiff has not stated a facially plausible racketeering claim under 18 U.S.C. §§ 1962(a) or (b) of RICO or under WOCCA's analogues, Wis. Stat. §§ 946.83(1) and (2), respectively. Plaintiff also has failed to allege facts sufficient to prove conspiracy under either RICO or the common law. Therefore, I am granting in part the motion to dismiss Counts V and VI and granting the motion to dismiss Count VII.

For the purpose of deciding a motion to dismiss, the court accepts as true all of the well-pleaded allegations of the complaint, in which I find the following facts to be fairly alleged:[1]

ALLEGATIONS OF FACT

Plaintiff Cooperative Regions of Organic Producer Pools (CROPP) is engaged in the business of producing and distributing organic dairy products and has its principal place of business located in La Farge, Wisconsin. Defendant Thomas Bowman is a citizen of the state of Pennsylvania. Defendant Tom Bowman Trucking, Inc. is a Pennsylvania corporation with its principal place of business located in Orangeville, Pennsylvania. Thomas Bowman is the founder, owner and President of Bowman Trucking.

Sometime before January 2006, CROPP and defendant Bowman Trucking entered into a contract under which Bowman Trucking agreed to haul organic bulk milk for plaintiff at a rate

[1] In response to the motion to dismiss, plaintiff submitted an affidavit from its lawyer attaching what he asserts to be true and correct copies of invoices received by CROPP from Bowman Trucking for services rendered from 2006-2010, along with a spreadsheet that purports to analyze the invoice for the period July 16-July 31, 2010. Dkt. 9. I have not considered the affidavit or the attached exhibits because they are outside the scope of the complaint and defendants have not conceded the authenticity of the exhibits. *See, e.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 582-583 (7th Cir. 2009).

of $1.40 per mile. Bowman Trucking began performing hauling services under the contract in January 2006, and thereafter regularly sent itemized invoices for its services to CROPP in La Farge, Wisconsin. On its invoices, Bowman Trucking represented that it had hauled organic dairy products for CROPP on certain specified routes and for certain specified miles. Plaintiff paid the amounts claimed on the invoices.

In the summer of 2010, CROPP discovered that Bowman Trucking and Thomas Bowman "had been systematically overcharging CROPP Cooperative for hauling services under the Hauler Contract" by secretly adding significant extra miles to the invoices. When confronted by CROPP's representatives, Thomas Bowman admitted that he was adding extra miles to the invoices because he believed CROPP should have been paying him a standard fee equal to $1.75 per mile and he was deliberately adding extra miles to Bowman Trucking's invoices to make up the difference. On August 31, 2010, CROPP terminated its business relationship with Bowman Trucking and Thomas Bowman. CROPP estimates that it lost over $800,000 to this fraud scheme between January 2005 and August 2010.

John Doe and ABC Company are unidentified persons and business entities who conspired with, aided and abetted or otherwise assisted Bowman and Bowman Trucking in perpetrating the alleged misconduct.

OPINION

Motions to dismiss are construed in the light most favorable to the plaintiff. *McCready v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006). The court must accept as true "all well-pleaded factual allegations and making all possible inferences from those allegations in" the plaintiff's favor. *Id*. (citation omitted). In order to state a claim, CROPP must allege facts that plausibly

suggest it is entitled to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To allege plausible grounds for relief, the complaint must allow a "reasonable expectation" that discovery will reveal evidence of illegality. *Id*. at 556.

I. Counts II through VII: Failure to Allege Fraud with Particularity

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, when alleging fraud, a plaintiff is required to provide "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992) (citations omitted); *see also Uni*Quality, Inc. v. Infotronx*, Inc., 974 F.2d 918, 923 (7th Cir. 1992). Put more colloquially, a plaintiff must plead the "who, what, when, and where" of the alleged fraud. *Reger Development, LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir. 2010). As the court has noted,

> Rule 9(b)'s particularity requirement serves an important purpose. Accusations of fraud can seriously harm a business. This is especially so in RICO cases where those accusations of fraud lead to the probably more damaging accusation that the business engaged in "racketeering." Rule 9(b) ensures that a plaintiff have some basis for his accusations of fraud before making those accusations and thus discourages people from including such accusations in complaints simply to gain leverage for settlement or for other ulterior purposes.

*Uni*Quality*, 974 F.2d at 924.

Here, CROPP has pled its fraud claims with sufficient particularity. In its complaint, CROPP accuses Bowman and Bowman Trucking over the life of the parties' contract of

systematically lying in its invoices about miles traveled in order to cheat CROPP out of $800,000. Although CROPP has not specifically identified by month and year every invoice that it contends was fraudulent, this is unnecessary because CROPP is alleging that *every* invoice from Bowman Trucking is fraudulent. *See* Complaint, dkt. 1, at ¶¶ 27-28. Further, the complaint alleges that Bowman and Bowman Trucking communicated the misrepresentation to CROPP by sending its invoices in the mail. *Id*. at ¶53. Finally, CROPP alleges that Thomas Bowman admitted that he had added extra miles to the invoices. Taken together, these allegations establish that CROPP has a basis for its accusations, which are specific enough to inform defendants of the who, what, when and where of the alleged fraud.[2]

II. Counts V and VI: Plaintiff's Federal and State RICO Claims

In Counts V and VI, plaintiff alleges violations of the federal RICO Statute, 18 U.S.C. § 1962(a)-(c), and Wisconsin's RICO analogue, the Wisconsin Organized Crime Control Act (WOCCA), Wis. Stat. § 946.83. Case law interpreting RICO, on which WOCCA is patterned, is persuasive authority when interpreting WOCCA. *State v. Mueller*, 201 Wis. 2d 121, 144, 549 N.W. 2d 455 (Ct. App. 1996). Thus, the analysis I am about to apply to plaintiff's federal RICO claims in Count VI applies equally to the WOCCA claims in Count V.

The elements of a RICO violation consist of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). A pattern of racketeering activity consists of at least two predicate acts of racketeering

[2] Because I am not dismissing plaintiff's fraud claims, it follows that I have no basis to dismiss its claim for punitive damages.

committed within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts are acts indictable under a specified list of criminal laws, 18 U.S.C. § 1961(1)(B), including mail fraud under 18 U.S.C. § 1341. A successful civil RICO plaintiff can recover treble damages, costs and attorney fees. *Sedima*, 473 U.S. at 491-193.

The specific allegations of the RICO claim in Count VI are:

> 60. Bowman Trucking is an enterprise engaged in interstate commerce and/or activities that affect interstate commerce within the meaning of 18 U.S.C. § 1861.
>
> 61. Bowman Trucking and Mr. Bowman used and caused to be used the mails of the United States to send their fraudulent invoices to CROPP Cooperative in violation of 18 U.S.C. § 1341.
>
> 62. The numerous violations of 18 U.S.C. § 1341 perpetrated by Bowman Trucking and Mr. Bowman over a period of over four and a half years constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961.
>
> 63. Mr. Bowman used income generated by the aforementioned pattern of racketeering activity to operate Bowman Trucking in violation of 18 U.S.C. § 1962(a).
>
> 64. Mr. Bowman maintained an interest in and controlled Bowman Trucking through the aforementioned pattern of racketeering activity in violation of 18 U.S.C. § 1962(b).
>
> 65. Mr. Bowman participated in the conduct of the affairs of Bowman Trucking through the aforementioned pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).
>
> 66. CROPP Cooperative has incurred damages as a direct and proximate cause of the violations of 18 U.S.C. §§ 1962(a), (b), and (c) perpetrated by Bowman Trucking and Mr. Bowman in excess of $800,000.00. CROPP Cooperative is entitled to recover three times of [*sic*] amount of its actual damages, plus all of its attorney fees, costs and disbursements, from Bowman Trucking and Mr. Bowman, jointly and severally, under 18 U.S.C. § 1964(c).

Plaintiff states its WOCCA claims in paragraphs 52-59 of the complaint. They are identical to the RICO claims except for the statutory citation.

Defendants contend that 1) the § 1962(c) claim must be dismissed because Bowman Trucking cannot simultaneously be the "person" and the "enterprise"; and 2) the § 1962(a) and § 1962(b) claims must be dismissed because they fail to set out facts necessary to show a violation of those subsections.[3]

A. § 1962(c)

18 U.S.C. § 1962(c) makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting 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." The term "racketeering activity" is defined to include a host of so-called predicate acts, including "any act which is indictable under . . . section 1341 (relating to mail fraud)." § 1961(1)(B).

Plaintiff acknowledges that under § 1962(c), the "person" and the "enterprise" must be separate, *see Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001), and that it therefore cannot proceed simultaneously against Bowman and Bowman Trucking with respect to this claim. Plaintiff asserts, however, that it has no intent to do so; its § 1962(c) claim, it says, is brought only against Bowman in his conduct of the enterprise, Bowman Trucking. According to plaintiff, this is clear from paragraph 65 of the complaint, which alleges that

[3] Defendants also argue that Count VI must be dismissed because it improperly combines multiple RICO violations in a single count. This argument is well taken, *see* Fed. R. Civ. Pro. 10(b), but it becomes moot because I am dismissing plaintiff's other RICO claims.

Bowman "participated in the conduct of the affairs of Bowman Trucking through the aforementioned pattern of racketeering activity in violation of 18 U.S.C. § 1962(c)."

I agree that plaintiff has alleged the existence of two distinct entities, Bowman and Bowman Trucking, and plaintiff has alleged that Bowman participated in the conduct of the affairs of Bowman Trucking. Although defendants argue that the § 1962(c) claim is little more than a boilerplate recitation of the statute, the facts pled earlier adequately match up with the four basic elements of a civil RICO violation, namely, that Bowman (1) conducted (2) an enterprise (3) through a pattern (4) of racketeering activity. *Jennings v. Auto Meter Products, Inc.*, 495 F.3d 466, 472 (7th Cir. 2007). Plaintiff, however, must plead more: for these allegations to transcend "garden variety fraud" and state a valid civil RICO claim, plaintiff also must pass the "continuity plus relationship" test. *Id.* at 472-73; *see also Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1022 (7th Cir. 1992).

The continuity requirement exists to give effect to Congress's clear intent that RICO target long-term criminal behavior rather than more discrete acts of fraud. *Jennings*, 495 F.3d at 473, citing *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 241 (1989). Continuity can be either a close-ended or open-ended concept; here, we are dealing with close-ended continuity, namely alleged criminal behavior that has come to a close but which endured for such a substantial period of time that the duration and repetition of the criminal activity carries with it an implicit threat of continued criminal activity in the future. *Jennings*, 495 F.3d at 473.

In order to be sufficiently continuous to constitute a pattern of racketeering activity, the alleged predicate acts must be somewhat separated in time and place; also relevant are the number of victims, the presence of separate schemes and the occurrence of distinct injuries,

although "the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). As the court noted in *Morgan*, this legal test still casts such a broad net that a few garden variety fraud claims may be encompassed, but any construction of the statute must comport with its unambiguously and extraordinarily broad language. 804 F.2d at 977.

Even so, the Seventh Circuit repeatedly has rejected RICO claims that rely heavily on mail and wire fraud allegations to establish a pattern of racketeering activity because a large number of mailings may be no indication of the requisite continuity of the underlying fraudulent activity. *Jennings*, 495 F.3d 466; *see also Midwest Grinding*, 976 F.3d at 1024-25 (hundreds of invoices mailed to former customers over the nine-month life of the scheme are insufficient). The court in *Midwest Grinding* further found, on the facts before it, that the other *Morgan* factors militated against a finding of RICO continuity: there was only one victim, one scheme and one type of injury, which bespoke a close-ended scheme that had none of the trappings of a long-term criminal operation that threatens society). 976 F.2d 1024. As the court noted,

> At its most basic level, this is a purely private business dispute between [plaintiff] and [defendant]; moreover, that dispute is occasioned solely by their previously existing business relationship. Congress did not have such a dispute in mind in fashioning the civil treble damage remedy to the federal RICO statute.

Midwest Grinding, 976 F.3d at 1025.

Similarly in *Roger Whitmore's Automotive Services, Inc. v. Lake County, Ill*, 424 F.3d 659 (7th Cir. 2005), the court found that plaintiff's civil RICO claim lacked continuity when it lasted "only" two years, involved a "fairly small" number of predicate acts (mailings and face-to-face meetings)

and a small group of about a dozen alleged victims, and did not allege any other racketeering schemes before, during or after the alleged scheme;

> Thus, the fact that we are faced with a single, isolated scheme with a confined set of victims also supports the conclusion that [plaintiff] has not shown close-ended continuity, even if we generously assume that the alleged scheme brought about distinct injuries to the affected [victims].

Id. at 673-74.

In *Pizzo v. Bekin Van lines Co.*, 258 F.3d 629 (7th Cir. 2001), the court dismissed the civil RICO complaint involving a single bait-and-switch furniture sale for lack of a pattern, finding that a criminal enterprise for RICO purposes is one that habitually resorts to illegal methods of doing business, as shown by a pattern of illegal acts frequent enough and similar enough to enable an inference that the enterprise is criminally-disposed, namely, that the owner habitually uses his business as an instrument of fraud. *Id.* at 633. The court denied plaintiff's request to conduct pretrial discovery by which she might discover additional fraud, concluding that this should have been done before filing a RICO complaint and that defendant should be spared defending a RICO claim so thinly supported. *Id.*

Plaintiff's RICO claim in the instant case alleges facts that cut in both directions. A 4½ year fraud scheme is long enough, and although the pattern of racketeering activity during that time is simply a series of mailed invoices arising out of one contract, each mailing was a new fraudulent act that increased plaintiff's losses, not just a follow-up to the precipitating transaction in 2006. Even so, we are talking one victim of one scheme arising out of one business contract between a multistate cooperative and a trucking company. The contract itself was legitimate and unexceptional; the alleged racketeering activity occurred when the company's

owner, defendant Bowman, falsified the invoices, starting with the first and not stopping until he got caught and plaintiff canceled the contract. Plaintiff has not alleged that Bowman has generated false invoices to other customers before, during or since allegedly generating the false invoices to plaintiff. $800,000 in losses is a relatively hefty sum, but the amount of the alleged losses are not a factor in determining whether a plaintiff sufficiently has stated a RICO violation as opposed to a claim for common fraud.

So do plaintiff's allegations transcend garden-variety fraud? As noted at the outset of this order, it's a wobbler. Taking into account this circuit's pronouncements on continuity, construing the allegations in the light most favorable to the plaintiff, and drawing all inferences from those allegations in plaintiff's favor, I find that Count 6 plausibly suggests that plaintiff is entitled to relief under 18 U.S.C. § 1963(c). The relentless nature of the fraud tips the balance. Bowman allegedly falsified every invoice for 4½ years, habitually using his business as an instrument of fraud. It is possible to infer that Bowman had fraud in mind from the outset, agreeing to a low mileage rate in order to win the contract, then systematically and incrementally bilking his customer in a manner that was hard to discover, stopping only when caught. The § 1963(c) claim in Count VI and its WOCCA analogue in Count V shall not be dismissed.

B. § 1962(a)

Section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such

> income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce [with one exception not relevant to this case].

To prove a violation of § 1962(a), a plaintiff must show that a defendant: 1) received income from a pattern of racketeering activity; 2) used or invested that income in the operation of an enterprise; and 3) caused the injury complained of by the use or investment of racketeering income in an enterprise. *Rao v. BP Prods North America, Inc.*, 589 F.3d 389, 398-99 (7th Cir. 2009) (citing *Vicom, Inc., v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778 n. 6 (7th Cir. 1994)).[4] It is not sufficient for a plaintiff to allege injury flowing solely from the predicate acts of racketeering; rather, there must be a causal nexus between the defendant's use or investment of racketeering income in the enterprise and the plaintiff's injury. *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1231 (D.C. Cir. 1991). Unlike § 1962(c), § 1962(a) does not require that the liable person and enterprise be separate. *Masi v. Ford City Bank and Trust Co.*, 779 F.2d 397 (7th Cir. 1985).

Unlike the § 1962(c) claim, plaintiff's § 1962(a) claim fails to state a plausible claim for relief. Apart from its conclusory recitation of the statutory elements, plaintiff has alleged no facts to show that money received from racketeering was used or invested in the operation of an enterprise, or that plaintiff suffered an injury caused by the use or investment of racketeering income. Even if it could be reasonably inferred that Bowman and Bowman Trucking reinvested

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[4] In *Vicom*, the Seventh Circuit noted a split in the authority concerning whether a plaintiff asserting a § 1962(a) claim had to show a separate use-or-investment injury different from the injury caused by the predicate acts of racketeering. 20 F.3d at n.6. Although the majority of the circuits had answered this question in the affirmative, the court in *Vicom* decided the case on other grounds and therefore did not answer the question. Although one might have expected more fanfare, it appears from the court's perfunctory citation in *Rao* to *Vicom* that it has joined the majority.

some of the funds obtained fraudulently from plaintiff into Bowman Trucking, this reinvestment alone is not enough to establish the use-or-investment injury requirement. *See, e.g., Brittingham v. Mobil Corp.*, 943 F.2d 297, 305 (3d Cir. 1991) ("If [reinvestment] were to suffice, the use-or-investment injury requirement would be almost completely eviscerated when the alleged pattern of racketeering is committed on behalf of a corporation . . .. Over the long term, corporations generally reinvest their profits, regardless of source.") (cited in *Vicom*, 20 F.3d at n.6.). This claim and its WOCCA corollary must be dismissed.

C. § 1962(b)

Section § 1962(b) provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

To establish a claim under this subsection, plaintiff must allege that at least one of the defendants acquired or maintained an interest in an enterprise through a pattern of racketeering activity. As with the § 1962(a) claim, plaintiff must allege more than injury resulting from the predicate acts of racketeering; rather, there must be a nexus between the plaintiff's injuries and the defendants' acquisition or maintenance of an interest in the enterprise. *Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007); *Danielsen*, 941 F.2d at 1231 ("Plaintiffs do not allege that their purported injury (underpayments of wages and benefits) was caused by the acquisition of an enterprise . . . . [P]laintiffs allege . . . simply that their injuries result from 'the intentional and continuous underpayment of legally required minimum wages and fringe benefits.'").

Plaintiff asserts that each act of sending a fraudulent invoice constitutes a separate act that contributed to the maintenance of the racketeering enterprise, Bowman Trucking. Although I am not sure I understand plaintiff's argument, I see no difference between this scenario and the reinvestment argument advanced in support of plaintiff's § 1962(a) claim. Whether defendants "reinvested" the money they obtained from plaintiff or used it to "maintain" the enterprise in order to commit more fraud, in either case plaintiff has failed to allege any injury separate from the harm that was caused by the fraudulent billing scheme. Plaintiff's mere invocation of the statutory elements of § 1962(b) fails to plausibly suggest it is entitled to relief. This claim and its WOCCA corollary must be dismissed.

III. Count VII: Conspiracy

Count VII of the complaint reads:

> **Count VII**
> **Conspiracy to Commit Fraud, Fraudulent Concealment, Theft and Racketeering**
>
> CROPP Cooperative restates all of the foregoing paragraphs of this Complaint and further states and alleges as follows:
>
> 67. Bowman Trucking, Mr. Bowman and other currently unknown persons and entities conspired with each other to perpetrate the fraud, fraudulent concealment, theft and racketeering alleged in this Complaint.
>
> 68. Accordingly, Bowman Trucking, Mr. Bowman and their co-conspirators are all jointly and severally liable for CROPP Cooperative's damages.

Defendants argue that this count must be dismissed under the intra-corporate conspiracy doctrine, which provides that a corporation cannot conspire with its employees. *See, e.g., Norkol/Fibercore, Inc. v. Gubb*, 279 F. Supp. 2d 993, 1000 (E.D. Wis. 2003).

Plaintiff's response is twofold: first, it contends that this doctrine applies only to common law conspiracy claims and not to statutory conspiracy claims under RICO and WOCCA, dkt. 8, at 19; second, with respect to common law conspiracy, plaintiff contends that it is entitled to discovery to determine whether defendants might have conspired with others, such as an outside entity that might have mailed the invoices, or whether there was a lack of a complete unity of purpose between Bowman and Bowman Trucking that would preclude application of the intra-corporate conspiracy doctrine. *E.g., Hartman v. Board of Trustees of Community College*, 4 F.3d 465, 470 (7th Cir. 1993) (exception to intra-corporate conspiracy doctrine exists where corporate employees are shown to have been motivated solely by personal rather than corporate bias).

Responding to plaintiff's first argument, defendants accuse plaintiff of attempting to amend its complaint in its response brief, pointing out that Count VII contains no mention of RICO or WOCCA nor any reference to any of the statutorily required elements of a conspiracy claim under either the federal or state racketeering statutes. Although defendants are correct, Count VII refers back to the "racketeering alleged in this complaint," which, of course, includes claims under RICO and WOCCA. Although I agree that the complaint is not a model of clarity,

when construing all allegations in plaintiff's favor, they suffice to assert a conspiracy claim under RICO and WOCCA.[5]

The next question is whether the complaint contains allegations sufficient to support a conspiracy claim under either statute.

> To state a claim for conspiracy under § 1962(d), [RICO's conspiracy provision], a plaintiff must allege (1) that each defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity and (2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals.

Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 784 (7th Cir. 1999) (quoting *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 726 (7th Cir. 1998)). Defendants assert that because Bowman is the sole agent and officer of Bowman Trucking, plaintiff cannot show an agreement necessary to prove its civil RICO conspiracy claim. Plaintiff responds by citing to *Cedric Kushner*, 533 U.S. at 163, in which the Supreme Court held that a corporation is a distinct legal entity different from that of its sole owner. However, the Supreme Court's discussion in *Cedric Kushner* arose in the context of 18 U.S.C. § 1962(c), not § 1962(d),the civil RICO conspiracy statute. The fact that a sole owner of a corporation who participates in the affairs of that corporation through a pattern of racketeering activity can be found liable under § 1962(c) does not necessarily mean that he becomes a "co-conspirator" with his corporation under § 1962(d).

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[5] Unlike RICO, WOCCA contains no specific conspiracy provision. *State v. Evers*, 163 Wis. 2d 725, 732 n.2, 472 N.W. 2d 828 (Wis. App. 1991). Thus, it is questionable whether a statutory cause of action for conspiracy to violate WOCCA even exists. Given where I land on the RICO conspiracy claim, there is no need to answer this question.

The only Seventh Circuit case that I have found addressing the intra-corporate conspiracy doctrine in the RICO context is *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989). In that case, the court rejected the defendant corporation's contention that, under the intra-corporate conspiracy doctrine, the corporation could not be found liable for conspiring to violate RICO based on the actions of its only two officers, Toy and Thomas Arnett. The court held that, whereas it made sense to apply the doctrine in the antitrust context, "intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits." *Id*. at 1281. The facts of *Ashland Oil*, however, are inapposite. Not only were there *two* officers of the corporation in that case, but the plaintiffs had alleged that "[the defendant corporation] conspired with Toy and Thomas Arnett to conduct *another* enterprise's affairs through a pattern of racketeering activity, not its own." *Id*. (emphasis in original).

In the instant case, by contrast, the plaintiff is alleging that Thomas Bowman conspired with his own corporation to conduct this corporation's affairs through a pattern of racketeering activity. To characterize this as a "conspiracy" is to entertain a legal fiction that pushes beyond the bounds of the case law known to the court and beyond the constraints of common sense. If plaintiff is suggesting that Bowman Trucking is one of the co-conspirators, then allowing this claim would violate § 1962(c)'s requirement that the "person" and the "enterprise" be distinct. Finally, if Bowman conspired solely with his inanimate corporation, why doesn't this merge with the alleged § 1963(c) violation? In this circumstance, plaintiff's conspiracy claim is unsupported (and functionless) ornamentation of plaintiff's only viable substantive racketeering claim.

Plaintiff's common law conspiracy claim also must be dismissed. Not only is the use of fictitious names for parties frowned upon, *K.F.P. v. Dane County*, 110 F.3d 516, 519 (7th Cir. 1997), but to survive dismissal a plaintiff "must plead some facts that suggest a right to relief that is beyond the 'speculative level.'" *Atkins v. City of Chicago*, ___ F.3d ___, 2011 WL 206155, 7 (7th Cir. Jan. 25, 2011) (quoting *In re marchFIRST Inc.*, 589 F.3d 901, 905 (7th Cir. 2009)). Plaintiff has alleged no facts suggesting any basis to believe that defendants reached an agreement with any third party to inflict harm on plaintiff or to facilitate the alleged racketeering activities of the enterprise, nor has plaintiff alleged facts that would support its theory that Bowman was pursuing his own interests and not those of the corporation when committing the fraud. On the complaint as written, the common law conspiracy claim is pure speculation.

IV. Conclusion

Plaintiff asks that if the court grants the motion to dismiss, then plaintiff should be given an opportunity to file an amended complaint. Given where the court has landed, I would be surprised if plaintiff deemed it worth the time and effort to amend, but plaintiff may have until March 29, 2011 to do so, with any objections to the proposed amendments due two weeks later, no reply. All other dates in the schedule shall remain in place during any repeat of this process.

ORDER

IT IS ORDERED that the motion of defendants Thomas Bowman and Bowman Trucking to dismiss the complaint, dkt. 4 , is GRANTED IN PART and DENIED IN PART:

(1) The motion is GRANTED with respect to plaintiff's claims under 18 U.S.C. §§ 1962(a), 1962(b), and § 1962(d); Wis. Stat. §§ 946.83(1) and 946.83(2); and common law conspiracy.

(2) The motion is DENIED with respect to the remaining claims.

(3) The deadline to amend pleadings is extended to March 29, 2011.

Entered this 8th day of March, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge