

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN D. MURPHY, :  
*Individually and on behalf of other* :  
*similarly situated current and former* :  
*homeowners in Pennsylvania* :  
: CIVIL ACTION  
v. :  
: NO. 13-5719  
BANK OF AMERICA, N.A., ET AL. :

**SURRICK, J.**

**NOVEMBER 17, 2014**

**MEMORANDUM**

Presently before the Court is the Motion to Dismiss Plaintiff’s Complaint Pursuant to Rule 12(b)(6) of Defendants, McCabe Weisberg & Conway, P.C., Terrence J. McCabe, Marc S. Weisberg, and Edward D. Conway (ECF No. 41), and the Motion of Defendants Bank of America, N.A. and the Bank of New York Mellon, N.A., to Dismiss Plaintiff’s Complaint (ECF No. 42). For the following reasons, Plaintiff is directed to file a Civil RICO Case Statement. Defendants’ Motions will be denied without prejudice to refile after receipt of Plaintiff’s Civil RICO Case Statement.

**I. BACKGROUND**

On September 30, 2013, Plaintiff Brian D. Murphy filed a Complaint on behalf of himself and similarly situated Pennsylvania homeowners against Defendants Bank of America, N.A. (“BOA”); Bank of New York Mellon (“BNY Mellon”); McCabe, Weisberg and Conway, P.C. (“MWC”); Terrance J. McCabe; Marc S. Weisberg; Edward D. Conway; QBE Insurance Corporation; and QBE First Insurance Agency. (Compl. ¶¶ 3-11.) The Complaint alleges violations of § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (“RICO”);

violations of the Pennsylvania Loan Interest and Protection Law (“Act 6”), 41 Pa. Stat. Ann. §§ 101, *et seq.*; violations of Act 6 and/or the Pennsylvania Housing Finance Agency Law (“Act 91”), 35 Pa. Stat. Ann. §§ 1680.401c, *et seq.*; violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692, *et seq.*; violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 Pa. Cons. Stat. §§ 201-1, *et seq.*; breach of contract; violations of the Real Estate Settlement and Procedures Act (“RESPA”), 12 U.S.C. §§ 2601, *et seq.*; violations of the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601, *et seq.*; unjust enrichment; interference with contractual relations; and civil conspiracy. (*Id.* ¶¶ 67-178.) The gravamen of Plaintiff’s complaint is that Defendants charged Plaintiff and others for illegal foreclosure-related attorneys’ fees and unauthorized insurance premiums in violation of state and federal law. (*Id.*)

Defendants filed motions to dismiss the complaint. The QBE Defendants also filed a motion to sever the force-placed insurance claims. (ECF Nos. 39-42.) Plaintiff subsequently filed a Notice of Dismissal that dismissed with prejudice all force-placed insurance claims and removed the QBE Defendants from this litigation. (ECF No. 87.) As a result, the only remaining counts in this action are Count I and Counts III-VII, which encompass the claims under RICO, Act 6, Act 91, FDCPA, UTPCPL, and breach of contract. (*Id.*) Since the QBE Defendants were no longer in this action, their Motion to Sever (ECF No. 39) and Motion to Dismiss (ECF No. 40) were dismissed as moot. (ECF No. 88.)

## **II. DISCUSSION**

Count I of the Complaint alleges a cause of action for RICO violations under 18 U.S.C. § 1962(c). (Compl. ¶¶ 67-82.) Congress enacted RICO to “eradicate organized crime in the United States,” *United States v. Turkette*, 452 U.S. 576, 589 n.11 (1981) (quoting 116 Cong. Rec.

591 (1970) (remarks of Sen. McClellan)); as an enforcement mechanism, it also provided a “civil cause of action for any person ‘injured in his business or property by reason of a violation of section 1962.’” *Beck v. Prupis*, 529 U.S. 494, 496 (2000) (quoting 18 U.S.C. § 1964(c)).

Plaintiff alleges mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343 as the predicate acts that form the basis for his civil RICO claim. (Compl. ¶ 79.) As fraud-based claims, these predicate acts must be alleged with particularity under Federal Rule of Civil Procedure 9(b). *Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002). “In the context of RICO mail fraud allegations, this means that the complaint must ‘identify the purpose of the mailing within the defendant’s fraudulent scheme and specify the fraudulent statement, the time, place, and speaker and content of the alleged misrepresentation.’” *Bonavitacola Elec. Contr., Inc. v. Boro Developers, Inc.*, 87 F. App’x 227, 231 (3d Cir. 2003) (nonprecedential) (quoting *Annulli v. Panikkar*, 200 F.3d 189, 201 n.10 (3d Cir. 1999)).

To clarify his civil RICO claim, Plaintiff will be required to file a Civil RICO Case Statement within 20 days of the date hereof in the form set forth in the accompanying Order. *See Healthguard of Lancaster, Inc. v. Gartenberg*, No. 02-2611, 2002 WL 32107627, at \*3-4 (E.D. Pa. Dec. 6, 2002) (requiring plaintiff to file civil RICO case statement); *Breslin v. Brainard*, No. 01-7269, 2002 WL 31513429, at \*4 (E.D. Pa. Nov. 1, 2002) (same). Even though the Civil RICO Case Statement does not directly apply to Plaintiff’s statutory and common-law claims, “the filing of this statement [may] also serve to clarify those claims as well because Defendants’ alleged misconduct is the basis for these claims.” *Va. Sur. Co. v. Macedo*, 08-5586, 2010 WL 3429530, at \*7 (D.N.J. Aug. 27, 2010) (internal quotation marks and citations omitted). Defendants may supplement and renew their Motions to Dismiss within 20 days after the Plaintiff’s filing of the Civil RICO Case Statement.

An appropriate Order follows.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read "R. Surrick", written in a cursive style.

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**R. BARCLAY SURRICK, J.**

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**ORDER**

**AND NOW**, this 17<sup>th</sup> day of November, 2014, it is **ORDERED** as follows:

I. The Motion to Dismiss Plaintiff's Complaint Pursuant to Rule 12(b)(6) of Defendants, McCabe Weisberg & Conway, P.C., Terrence J. McCabe, Marc S. Weisberg, and Edward D. Conway (ECF No. 41); and the Motion of Defendants Bank of America, N.A. and the Bank of New York Mellon, N.A., to Dismiss Plaintiff's Complaint (ECF No. 42); are **DENIED** without prejudice.

II. Within 20 days of the date of this Order, Plaintiff shall file a Civil RICO Case Statement that includes the facts Plaintiff is relying upon to prove his RICO claim. In particular, the Civil RICO Case Statement shall be in a form that uses the numbers and letters as set forth below, and shall provide the following information:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).
2. List each defendant and state the alleged misconduct and basis of liability of each defendant.
3. List the alleged victims and state how each victim was allegedly injured.

4. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:
  - a. List the alleged predicate acts and the specific statutes that were allegedly violated;
  - b. If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the “circumstances of fraud or mistake shall be stated in particularity”;
  - c. Describe how the predicate acts form a “pattern of racketeering activity”; and
  - d. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe.
5. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:
  - a. State the names of the individuals, partnerships, corporations, associations, or other legal entities that allegedly constitute the enterprise;
  - b. Describe the structure, purpose, function and course of conduct of the enterprise;
  - c. State whether any defendants are employees, officers or directors of the alleged enterprise;
  - d. State whether any defendants are associated with the alleged enterprise; and
  - e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself; or members of the enterprise.
6. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.
7. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

8. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:
  - a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and
  - b. Describe the use or investment of such income.
9. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe the acquisition or maintenance of any interest in or control of the alleged enterprise.
10. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:
  - a. State who is employed by or associated with the enterprise; and
  - b. State whether the same entity is both the liable “person” and the “enterprise” under § 1962(c).
11. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe the alleged conspiracy.
12. Describe the alleged injury to business or property.
13. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.
14. Provide any additional information that you feel would be helpful to the court in trying the RICO claim.

III. Within 20 days of the date on which Plaintiff files the Civil RICO Case Statement, Defendants may renew their Motions to Dismiss. Defendants may supplement their renewed Motions to Dismiss to address any new information contained in the Civil RICO Case Statement.

**IT IS SO ORDERED.**

**BY THE COURT:**



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**R. BARCLAY SURRICK, J.**