UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:	:	Chapter 11
ENRON CORP., et al.,	:	Case No. 01-16034 (AJG)
Reorganized Debtors.	:	(Confirmed Case)
JOHN ROBERT SPARGER,	:	
Plaintiff,	:	
v.	:	Adversary Proceeding
ENRON CORP., ENRON EXPAT SERVICES, INC., AND ROBERT W. JONES, TODD MIGLIORE, AND C. ROBERT VOTE, et al., ACTING AS AGENTS FOR ENRON CORP. AND/OR ENRON EXPAT SERVICES, INC.	:	No. 03-08266 (AJG)
Defendants.	:	

OPINION GRANTING DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

A P P E A R A N C E S:

WEIL, GOTSHAL & MANGES LLP
Attorneys for Reorganized Debtors and Defendants
767 Fifth Avenue
New York, NY 10153

Martin J. Bienenstock, Esq.
Brian S. Rosen, Esq.
Of Counsel

JOHN ROBERT SPARGER, appearing *Pro Se*

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

Before the Court is the Motion to Dismiss the Plaintiff's Amended Complaint (the "Motion") filed by the defendants (collectively, the "Defendants") in the above-referenced adversary proceeding (the "Adversary Proceeding"), Enron Corp. ("Enron"), Enron Expat Services, Inc. ("Expat") (together, with Enron, the "Debtors"), and Robert W. Jones, Todd Migliore, and C. Robert Vote (the "Employees"), who were identified by the Plaintiff as agents of Enron and/or Expat. The Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7012, arguing that the Plaintiff, John Robert Sparger ("Sparger"), has failed to state a claim upon which relief may be granted.

In the Amended Complaint for Breach of Employment Agreement (the "Amended Complaint"), Sparger seeks two forms of relief. In the first count, Sparger argues that he is owed contractual termination payments (the "Termination Payment") per his employment agreement (the "Agreement") with Expat and seeks to have that claim classified as an administrative claim under 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1) (2004).[1] In the second count, Sparger asserts a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") action against the Defendants under 18 U.S.C. §§ 1962(c), 1964(c) (2006), predicated on the Defendants' alleged mail and wire fraud under 18 U.S.C. §§ 1341, 1343 (2006). Sparger argues that the Defendants' continued refusal to meet their obligations under the Agreement constitutes willful fraud and a pattern of

[1] Sections 503 and 507 were amended by the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402, 119 Stat. 23, 214. The former section 507(a)(1) has been redesignated as section 507(a)(2). The former section 503(b)(1)(A) has been redesignated with slight modification as section 503(b)(1)(A)(i). As the Amended Complaint was filed more than two years prior to the effective date of the BAPCA amendments, the Court will cite to and apply the former sections throughout this Opinion.

racketeering activity intended to deprive Sparger of his contractual rights. The Defendants deny these allegations and assert that both counts are defective as a matter of law, even assuming the facts are true as alleged.

Background

Many of the issues presented here have also been raised in the parallel proceeding ("Claim Proceeding") regarding Sparger's proof of claim, # 797400 ("Sparger Claim"), and the Reorganized Debtors' objection to the Sparger Claim, though the Court is treating each action separately. Briefly, the disputes between Sparger and the Defendants concern Sparger's employment status following Enron's filing for bankruptcy on December 2, 2001. Sparger, as an employee of Expat, was assigned to Enron Europe Limited ("EEL") until EEL entered insolvency proceedings in the United Kingdom on November 29, 2001, at which time the administrator terminated Sparger's service with EEL. Sparger communicated this fact to Expat and subsequently returned to the United States on December 4, 2001. The factual record from this point on is unfortunately muddied. It is not clear on whose directive Sparger repatriated, and the parties dispute whether Sparger informed Enron of his status. Nonetheless, it is clear that Sparger contacted Enron on January 16, 2002, following Expat and Enron's failure to make payment for the first bimonthly pay period of that year. Enron at that time informed Sparger that his employment had been terminated on January 1, 2002, and that no payment was therefore due on January 15, 2002.

Although Enron subsequently hired Sparger on January 16, 2002 to provide transition assistance, which temporary employment ended February 15, 2002, Sparger and the Defendants were engaged in a dispute throughout January, February, and March

of 2002 concerning Sparger's January 1st termination. The Defendants took the position that Sparger had been terminated as part of the Enron bankruptcy and that Enron was therefore not required to satisfy any termination and severance obligations under the Agreement. Sparger vociferously objected to this interpretation, arguing that his employment had been with Expat, which at that time had not yet declared bankruptcy, and that the Enron bankruptcy thus did not affect his rights under the Agreement.[2] Sparger has offered as exhibits copies of the voluminous correspondence between the parties during the period, in which the parties continue to reiterate their respective positions.

On May 13, 2002, Sparger filed suit against Expat in the 165th Judicial District for Harris County, Texas, alleging that Expat had breached the terms of the Agreement and seeking damages. Proceedings in that action were subsequently stayed upon the filing of Expat's petition for bankruptcy in this Court on November 14, 2002. Sparger thereafter filed the instant adversary proceeding on June 9, 2003, and filed the Amended Complaint with the consent of the Defendants on July 21, 2003. The Defendants filed the Motion in response on October 22, 2003.

Standard for Rule 12(b)(6)

Fed. R. Civ. P. 12(b)(6) is incorporated into bankruptcy procedure by Fed. R. Bankr. P. 7012(b). In considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure

[2] This factual dispute is the critical substantive issue in the Claim Proceeding, and would be the critical substantive issue in this Adversary Proceeding if the Amended Complaint were found to be legally sufficient. The severity of the dispute reflects the legal consequences of the issue. As Enron argues in the Claim Proceeding, if Sparger was an Enron employee when he was terminated, his severance and termination rights are likely limited by the class-action settlement reached on behalf of former Enron employees. *See* Order of Final Approval, Approving Settlement of Severance Claims of Similarly-Situated Claimants, Docket No. 6148 (August 28, 2002). If, however, Sparger was an Expat employee at the time he was terminated, it is not clear whether the same settlement applies or whether the severance provisions of the Agreement govern. This Opinion does not consider this factual issue but only addresses the legal sufficiency of the Amended Complaint.

to state a claim for relief, the court accepts as true all material facts alleged in the complaint and draws all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). A motion to dismiss is granted only if no set of facts can be established to entitle the plaintiff to relief. *Id*.

In considering such a motion, although a court accepts all the factual allegations in the complaint as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986). Thus, where more specific allegations of the complaint contradict such legal conclusions, "[g]eneral, conclusory allegations need not be credited." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995). Rather, to withstand a motion to dismiss, there must be specific and detailed factual allegations to support the claim. *Friedl v. City of New York*, 210 F.3d 79, 85-86 (2d Cir. 2000).

"Although bald assertions and conclusions of law are insufficient, the pleading standard is nonetheless a liberal one." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998). Pursuant to Fed. R. Civ. P. 8(a), which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7008, in asserting a claim the pleader need only set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The purpose of the statement is to provide "fair notice" of the claim and "the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99,103, 2 L. Ed. 2d 80 (1957). The simplicity required by the rule recognizes the ample opportunity afforded for discovery and other pre-trial procedures that permit the parties to obtain more detail as to the basis of the claim and as to the disputed facts and issues. *Id*. 355 U.S. at 47-48, 78 S. Ct. at 103. Based upon the liberal pleading standard established by Fed. R. Civ. P. 8(a),

even the failure to cite a statute, or to cite the correct statute, will not affect the merits of the claim. *Northrop v. Hoffman of Simsbury, Inc*., 134 F.3d 41, 46 (2d Cir. 1997). In considering a motion to dismiss, it is not the legal theory but, rather, the factual allegations that matter. *Id.*

In reviewing a Fed. R. Civ. P. 12(b)(6) motion, a court may consider the allegations in the complaint; exhibits attached to the complaint or incorporated therein by reference; matters of which judicial notice may be taken; *Brass v. Am. Film Technologies, Inc*., 987 F.2d 142, 150 (2d Cir. 1993); and documents of which plaintiff has notice and on which it relied in bringing its claim or that are integral to its claim. *Cortec Indus. v. Sum Holding, L.P*., 949 F.2d 42, 48 (2d Cir. 1991). However, mere notice or possession of the document is not sufficient. *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002). Rather, a necessary prerequisite for a court's consideration of the document is that a plaintiff relied "on the terms and effect of a document in drafting the complaint." *Id*. As such, the document relied upon in framing the complaint is considered to be merged into the pleading. *Id*. at 153 n.3 (internal citation omitted). In contrast, when assessing the sufficiency of the complaint, a court does not consider extraneous material because considering such would run counter to the liberal pleading standard which requires only a short and plain statement of the claim showing entitlement to relief. *Id*. at 154. Nevertheless, in considering a Rule 12(b)(6) motion, a court may consider facts as to which the court may properly take judicial notice under Fed. R. Evid. 201. *In re Merrill Lynch & Co*., Inc., 273 F. Supp. 2d 351, 357 (S.D.N.Y. 2003) (citing *Chambers*, 282 F.3d at 153).

To survive a motion to dismiss, a plaintiff need only to allege sufficient facts, not prove them. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999). A court's role in ruling on a motion to dismiss is to evaluate the legal feasibility of the complaint, not to undertake to weigh the evidence which may be offered to support it. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998).

Administrative Claim

In the first count of the Amended Complaint, Sparger alleges that the Debtors breached the involuntary termination provisions of the Agreement and seeks to have his claim for the Termination Payment classified as a priority administrative claim under sections 503(b)(1)(A) and 507(a)(1).[3,4]

The Court has previously addressed the legal standards for administrative expense claims under sections 503(b)(1)(A) and 507(a)(1) in three decisions, *In re Enron Corp.*, 279 B.R. 79, 84-88 (Bankr. S.D.N.Y. 2002) ("*Trailblazer*"), *In re Enron Corp.*, 279 B.R. 695, 704-07 (Bankr. S.D.N.Y. 2002) ("*Florida Gas*"), and *In re Enron Corp.*, 300 B.R. 201, 207-08 (Bankr. S.D.N.Y. 2003) ("*Arnold*"). Pursuant to these sections, a claim for

[3] As previously noted, Sparger and the Defendants disagree as to which entity was party to the Agreement and terminated Sparger's employment on January 1, 2002. In the first count of the Amended Complaint, Sparger does not plead his position alone. Rather, it appears to the Court that Sparger intended to plead this count against both Enron and Expat in the alternative or collectively, reflecting the parties' factual disagreement. The Court need not resolve this factual issue and assumes for the purposes of this Opinion that Sparger has a valid claim against either or both Enron and Expat.

[4] Article 2.1(b) of the Agreement provides:

> b. Involuntary Termination: Involuntary termination at Company's option may occur for any reason whatsoever, including termination without cause, in the sole discretion of the Company. Upon an Involuntary Termination before the Term expires [July 15, 2003], Employee is entitled to receive the Monthly Base Salary on Exhibit A, payable in semi-monthly installments, as if Employee's employment (which ends on the date of Involuntary Termination) had continued for the full Term; provided, however, that if Employee accepts employment with a competitor as described in section 3.4a., b., c., or d. of Article 3, Company's obligations to pay Employee pursuant to this section shall cease as of the first day of such employment by Employee. Employee will not accrue or receive any vacation pay, benefits, or bonus during the Term following Involuntary Termination.

"the actual, necessary costs and expenses of preserving the state, including wages, salaries, or commissions for services rendered after the commencement of the case" may be treated as an administrative expense claim and accorded first priority in any distribution. 18 U.S.C. 503(b)(1)(A) (2004). "This priority is based on the premise that the operation of the business by a debtor-in-possession benefits pre-petition creditors; therefore, any claims that result from that operation are entitled to payment prior to payment to 'creditors for whose benefit the continued operation of the business was allowed.'" *Arnold*, 300 B.R. at 207 (citing *Cramer v. Mammoth Mart, Inc.* (*In re Mammoth Mart*), 536 F.2d 950, 954 (1st Cir. 1976)). Administrative expense claims are, however, construed strictly in order to preserve the estate for the benefit of all creditors and to ensure no creditor is unjustly favored. *Id*. (citing *Amalgamated Ins. Fund v. McFarlin's Inc.*, 789 F.2d 98, 101 (2d Cir. 1986)).

For a claim to be accorded administrative priority, the debtor must receive a real, and not potential, benefit. *In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 482, 489 (Bankr. S.D.N.Y. 1991). This benefit must have been received post-petition; even where the right to payment arises post-petition, the claim will not be granted administrative priority if the consideration was offered pre-petition. *In re Jartan, Inc.*, 732 F.2d 584 (7th Cir. 1984). In granting a claim administrative priority, a court acts to prevent unjust enrichment to the estate, and not to compensate a creditor for its loss. *In re R.H. Macy & Co., Inc.*, 170 B.R. 69, 78 (Bankr. S.D.N.Y. 1994). Therefore, the Court must examine the actual benefit to the estate and not the extent of the creditor's loss. *In re CIS Corp.*, 142 B.R. 640, 642 (S.D.N.Y. 1992).

The Court's decision in *Arnold* is directly applicable here. In *Arnold*, a former employee sought to elevate his claim for contractual termination payments to administrative priority. Although the Court first determined that the claimant did not have a right to payment, the Court further found that the contractual termination payments were properly classified as damages and not severance payments. *Arnold*, 300 B.R. at 216. Like the plaintiff in *Arnold*, Sparger cites in support of his claim for administrative priority a line of cases following the Second Circuit's decision in *Straus-Duparquet, Inc. v. Local Union No. 3, Int'l Bhd. Of Elec. Workers, AFL-CIO*, 386 F.2d 649 (2d Cir. 1967). *See Amal. Ins. Fund*, 789 F.2d at 104; *In re Unishops, Inc*., 553 F.2d 308 (2d Cir. 1977); *In re Spectrum Information Technology Inc.*, 193 B.R. 400, 405 (Bankr. E.D.N.Y. 1996). In *Straus-Duparquet, Inc.* the court held that severance payments are administrative expenses within the meaning of section 503(b)(1)(A), reasoning that severance pay is compensation for termination and is thus earned upon termination. Sparger argues that the Termination Payment, which would be triggered under the Agreement if Sparger were involuntarily terminated, is similarly a severance payment and asserts that *Straus-Duparquet*, as controlling authority, requires the conclusion that his claim is entitled to administrative priority.

In *Arnold*, this Court rejected a similar argument, reasoning that severance payments could not simply be defined as any payments made upon termination. "The Second Circuit has held that severance pay policies serve two objectives: first, to protect employees from the economic hardship of joblessness, and second, to reward employees for past service to the company. *Arnold*, 300 B.R. at 216 (citing *Bradwell v. GAF Corp.*, 954 F.2d 798, 801 (2d Cir. 1992)). Regarding the second objective, the Court noted that

the termination payment at issue in *Arnold* "cannot be regarded as a reward for past service to the Company, since the amount of such payment decreases the longer the Claimant is employed." *See also In re Hooker Investments, Inc.*, 145 B.R. 138, 149-50 (Bankr. S.D.N.Y. 1992) (holding that termination payment was not severance pay because, *inter alia*, "the amount of the payments is inversely proportional to the length of service"). The same observation can be made here. The Termination Payment is inversely related to the length of Sparger's employment under the Agreement, and no provision is made to increase the payment to reflect the length of Sparger's tenure.

Regarding the first objective, this Court noted, "Although the Termination Payment could be construed as protecting Claimant from the economic hardship of joblessness, it does not fit the profile of severance pay as described in *Straus-Duparquet*, nor does the Termination Payment possess the elements of severance as they are generally understood." *Arnold*, 300 B.R. at 216. In contrast with the severance plan at issue in *Straus-Duparquet*, the term "severance" was never used in the *Arnold* plaintiff's employment agreement, nor was the plaintiff required to have been employed for a minimum period of time before becoming eligible for the termination payment. The same is true here. Although severance plans may vary and do not uniformly share the same features, it is necessary to relate the function of the Termination Payment to its conditions and components. Simply, as this Court hinted in *Arnold*, any post-termination payment protects the terminated employee from the hardship of joblessness to a certain extent, and therefore a functional analysis alone is of limited utility. In light of the noted features and conditions, the Court concludes that the Termination Payment is intended "more to encourage the Debtors to retain the Claimant than to protect the Claimant from

the economic hardship of joblessness." *Hooker*, 145 B.R. at 150. The Termination Payment entitles Sparger to no more than his monthly salary for the remaining length of the term and is unrelated to any other factor of Sparger's employment. Therefore, the "proper classification of the Termination Payment is as damages as opposed to severance pay." *Arnold*, 300 B.R. at 216.

The Court concludes, therefore, that Sparger has failed as a matter of law to state a claim for administrative priority under sections 503(b)(1)(A) and 507(a)(1).

RICO Claim

In the second count of the Amended Complaint, Sparger asserts a cause of action against the Defendants under the civil RICO provision of 18 U.S.C. § 1964(c). Section 1964(c) provides a private right of action for "[a]ny person injured in his business or property by reason of a violation of Section 1962," the criminal RICO statute. Sparger founds his civil RICO action on the Defendants' alleged violation of 18 U.S.C. § 1962(c), predicated on the Defendants' violations of the mail and wire fraud statutes at 18 U.S.C. §§ 1341, 1343.[5] As Sparger states his claim:

> [Enron], Expat, and/or [the Employees] knew the true nature of the Agreement between Expat and plaintiff, and Expat's obligation under the Agreement. Plaintiff believes the actions described in [the Amended Complaint] relating to Plaintiff's termination by [Enron], Expat, and/or [the Employees] are willful and knowing fraudulent acts by persons, employed by an enterprise to conduct the enterprise's affairs through a pattern of racketeering activities within the meaning of 18 U.S.C. § 1962(c) and 1961(1)(B). Amended Complaint, Docket No. 12, ¶ 69.

The Defendants deny these allegations and argue that the second count of the Amended Complaint is flawed as a matter of law. The Court agrees.

[5] Section 1962(c) provides: "It shall be 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 or collection of unlawful debt." 18 U.S.C. § 1962(c) (2006).

As an element of his action under section 1964(c), Sparger alleges a violation of section 1962(c), which consists of seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an enterprise (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). The Court concludes that Sparger has failed to allege a "pattern" of racketeering activity.

"To establish a RICO pattern it must … be shown that the predicates themselves amount to, or that they constitute a threat of, continuing racketeering activity," *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). *See also Cofacredit, S.A., v. Windsor Plumbing Supply Co. Inc.*, 187 F.3d 229 (2d Cir. 1999); *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 467 (2d Cir. 1995); *United States v. Kaplan*, 886 F.2d 536 (2d Cir. 1989); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 811, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). "'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc.* at 241. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 242. Proof of open-ended continuity "depends on the specific facts of each case," but may generally be established "if the related predicates themselves involve a distinct threat of long-term racketeering activity" or "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* at 242-43. Generally, the plaintiff

must show that the alleged racketeering activity was neither isolated nor sporadic. *Kaplan*, 886 F.2d at 542-43.

The Amended Complaint does not adequately plead closed-ended continuity. Assuming the facts alleged to be true, the pattern of racketeering activity extended from January 2002, the first alleged predicate act of wire fraud in violation of section 1343, to May 2003, the last alleged instance of mail fraud in violation of section 1341. *See Cofacredit*, 187 F.3d at 229 ("[T]he duration of a pattern of racketeering activity is measured by the RICO predicate acts the defendants commit."); *GICC Capital Corp.*, 67 F.3d at 467. As previously noted, the related predicate acts must extend "over a substantial period of time" to establish closed-ended continuity, and as the Second Circuit has clearly stated, "[T]his Court has never held a period of less than two years to constitute a 'substantial period of time.'" *Cofacredit*, 187 F.3d at 242. This is not a bright-line rule, but precedent favors interpreting "substantial period of time" as requiring at minimum a multi-year period. *See GICC Capital Corp.*, 67 F.3d at 467 (compilation of decisions). Moreover, even though courts do consider additional factors in analyzing closed-ended continuity, "such as the number and variety of criminal acts, the number of both participants and victims, and the presence of separate schemes," consideration of those factors does not alter the Court's conclusion. *Id.* The alleged predicate acts are few in number and consist uniformly of communications in which the Defendants stated their position vis-à-vis the underlying employment controversy between the parties. Sparger has only alleged a single scheme consisting of a single fraudulent goal, a single corporate perpetrator, and a single victim, and which concerns what amounts to a simple breach of contract. *See SMS Marketing & Telecomm., Inc. v. H.G. Telecom, Inc.*, 949 F.Supp. 134,

144 (E.D.N.Y. 1996); *Continental Realty Corp. v. J.C.Penney Co., Inc.*, 729 F.Supp. 1452, 1455 (S.D.N.Y. 1990). This does not amount to "long-term criminal conduct" of the type Congress intended to address through RICO, and thus Sparger has not adequately pleaded closed-ended continuity. *H.J. Inc.*, 492 U.S. at 242.

Similarly, Sparger has failed as a matter of law to adequately plead open-ended continuity. Although the threat of future criminal conduct is not addressed in the Amended Complaint, Sparger states in his response to the Motion, "In light of the past behavior and current attitudes of Enron, its Agents, and other Enron personnel, Plaintiff has no reason to belief (sic) or any expectation that future similar acts by Enron, its Agents, and/or other Enron will not re-occur." Plaintiff's Response to Enron's Second Motion to Dismiss, Docket No. 20, ¶ 17. However, no evidence is offered in support of this assertion, and it is doubtful that this statement even properly addresses the threat of continued criminal conduct, as it merely states Sparger's lack of grounds to believe the Defendants will not continue their alleged criminal activity. More importantly, the mere allegation of continued fraud, even if it is assumed to be true, is insufficient as a matter of law to establish open-ended continuity without factual or contextual support. *See Pier Connection, Inc. v. Lakhani*, 907 F.Supp.72, 76 (S.D.N.Y. 1995) ("A simple statement that the 'scheme continues to date' … without more, does not suffice."). As the court succinctly noted in *Continental Realty*, "While any threat of continuity is by its nature hypothetical, to infer a threat of repeated fraud from a single alleged scheme would in effect render the pattern requirement meaningless." 729 F.Supp. at 1455.

Therefore, the Court concludes that Sparger has failed as a matter of law to adequately plead the element of "continuity" needed to sustain a civil RICO action under sections 1962(c) and 1964(c).

Conclusion

Thus, the Court concludes that both counts of the Amended Complaint are flawed as a matter of law and should be dismissed under Rule 12(b)(6) for failure to state a claim. As Sparger has already filed an amended complaint in response to the Debtors' original motion to dismiss, and as it appears that no facts exist that would allow Sparger to remedy the legal deficiencies of the Amended Complaint, the Court also finds that the Amended Complaint should be dismissed without leave to amend. In light of the foregoing, the Motion is GRANTED. The Debtors are to settle an order consistent with this Opinion, and attach a copy thereof, on the Plaintiff.

Dated: New York, New York
June 2, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE