

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NIELSEN ELECTRONICS INSTITUTE, :
:
Plaintiff, :
:
v. : Civil Action No. 99-285-JJF
:
STUDENT FINANCE CORPORATION :
and ANDREW YAO, :
:
Defendants. :

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MEMORANDUM OPINION

January 16, 2001

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion To Dismiss (D.I. 60) filed by Defendants Student Finance Corporation and Andrew Yao pursuant to Federal Rule of Civil Procedure 12(b)(6). By its Amended Complaint, Plaintiff Nielsen Electronics Institute asserts one federal cause of action against Defendant Yao, specifically a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) ("RICO"). The remaining causes of action in the Amended Complaint are claims against both Defendants under state law, including claims for breach of contract and fraud.

In response to Plaintiff's Complaint, Defendants filed the instant Motion seeking to dismiss the fraud and RICO claims raised by Plaintiff. Defendants did not move to dismiss Plaintiff's breach of contract claim, but filed an Answer denying any liability to Plaintiff and a Counterclaim seeking \$1.4 million in damages.

By Order dated September 29, 2000, the Court granted Defendants' Motion To Dismiss. However, the Court now finds that it erred and that the portion of the September 29, 2000 Order granting Defendants' Motion To Dismiss should be vacated. Accordingly, for the reasons set forth, the Court will deny Defendants' Motion To Dismiss the RICO and fraud counts of the Amended Complaint.

BACKGROUND

Plaintiff Nielsen Electronics Institute ("Plaintiff" or "the Institute") operates a private vocational training school for adults in Charleston, South Carolina. (D.I. 63 at 4). Defendant Student Finance Corporation ("Student Finance") is an organization engaged in the business of originating student loans for post-secondary education, and Defendant Andrew Yao is the controlling owner and president of Student Finance.

The majority of the students enrolled at the Institute rely heavily on loans to finance their tuition. Prior to June 1995, the federal government guaranteed the loans of most of the Institute's students and required the Institute to process the necessary paper work and operate the Institute in accordance with various applicable federal regulations. (D.I. 63 at 24).

In June 1995, Student Finance contacted the Institute in an effort to acquire the process of loaning funds to prospective students at the Institute. The parties entered into a "Student Loan Participation Agreement" ("the First Agreement") on August 1, 1995. (D.I. 43A, Exh. C). Under the terms of the First Agreement, Student Finance agreed to implement a loan program at the Institute to finance the tuition costs of students in need of financial assistance. (D.I. 43A, Exh. C). Under the First Agreement, if a loan application was approved by Student Finance, Student Finance would disburse an initial payment consisting of a

certain percentage of the face amount of the loan to Plaintiff and retain the remaining percentage as a "reserve." (D.I. 43A, Exh. C). Under the agreement, if the student loan account was current in all respects, Student Finance would disburse to the Institute, on a monthly basis, a portion of the amount held in reserve as the loan payments were received from the student. (D.I. 43A, Exh. C).

Beginning in August 1995, the Institute began sending student loan applications to Student Finance, and Student Finance began funding students in October 1995. From the Fall of 1995 to the Spring of 1996, Student Finance wired funds to the Institute on a monthly basis. However, in May 1996, Student Finance indicated that it would no longer be making the initial payments to the Institute. Alleging an excessive student default rate, Student Finance claimed that it was entitled to charge the Institute for payments not made by the students. In response to the Institute's complaints, the parties entered into a revised agreement on May 1, 1996 ("the Second Agreement"). (D.I. 43A, Exh. D). While the terms of the Second Agreement were largely the same as the First Agreement, the Second Agreement redefined the term "Defaulted Loan Agreement." (D.I. 43A Exh. D, §§ 1.1.1 & 1.1.12).

In the Summer of 1996, the parties again revisited their agreement and entered into a "Memorandum of Understanding" ("the Third Agreement"). (D.I. 43A, Exh. E). Pursuant to the Third

Agreement, the Institute agreed to continue financing student tuition through Student Finance, and Student Finance agreed to make certain advancements to the Institute. (D.I. 43A, Exh. E, § A). The parties further agreed that the disbursement schedule and defaulted loan provisions outlined in the Second Agreement would be reimplemented on December 1, 1996. (D.I. 43A, Exh. E, § D).

According to Plaintiff, Student Finance never advanced the sums due to the Institute under the Third Agreement. Rather, Plaintiff alleges that by December 1997, it was forced to financially restructure the Institute as a result of Student Finance's conduct.

A. The Complaint

Plaintiff filed its action against Student Finance and Defendant Yao on May 6, 1999. By its Amended Complaint, Plaintiff raises four claims. In Count I, Plaintiff contends that Student Finance breached the First, Second and Third Agreements by failing to: (1) provide Plaintiff with the money due to it; (2) provide Plaintiff with accurate accounting reports; (3) return to Plaintiff defaulted student loans which were collectable; and (4) properly review student credit applications. (D.I. 43 at ¶ 35).

In Count II, Plaintiff alleges that Student Finance defrauded Plaintiff by making material misstatements and failing to disclose relevant facts which should have been revealed in

order to avoid misleading Plaintiff. (D.I. 43 at ¶¶ 37-41). Specifically, Plaintiff alleges that as a result of these misstatements, Student Finance induced Plaintiff to enter into the First, Second, and Third Agreements and make payments to Student Finance when such payments were not due. (D.I. 43 at ¶¶ 37-41).

In Count III, Plaintiff alleges that the misrepresentations made by Student Finance were directed, ordered, ratified, and approved by Defendant Yao. (D.I. 43 at ¶¶ 42-44). In addition, Plaintiff claims that while it advised Defendant Yao, through employees of Student Finance, that it was not receiving the correct accounting reports, Defendant Yao not only failed to correct the practice of supplying false reports, but also caused Student Finance employees to fraudulently induce Plaintiff to enter into the Second and Third Agreements. (D.I. 43 at ¶¶ 42-44).

In Count IV, Plaintiff raises a claim under 18 U.S.C. § 1962(c) against Defendant Yao. Specifically, Plaintiff alleges that Defendant Yao violated section 1962(c) by directing Student Finance and its employees to commit a series of acts that constituted mail fraud under 18 U.S.C. § 1341, and wire fraud under 18 U.S.C. § 1343. According to Plaintiff, these acts included: (1) inducing Plaintiff to procure student loans for Student Finance by sending the Confidentiality Agreement and First Agreement to the Plaintiff through the United States mail

without intending to follow the terms of the agreements; (2) repeatedly wiring funds from Delaware to Plaintiff in South Carolina with the intent of obtaining subsequent student loans which Student Finance did not intend to fully fund in accordance with the First Agreement; (3) sending false monthly funding reports through the United States mail in furtherance of a scheme to deprive Plaintiff of the benefits of the First Agreement; and (4) sending student loan default reports to the Plaintiff through the United States mail that falsely failed to disclose payments made by students which Student Finance had appropriated to itself. (D.I. 43 at ¶¶ 45-50).

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). When considering a motion to dismiss, a court must accept as true all allegations in the complaint and must draw all reasonable factual inferences in the light most favorable to the plaintiff. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Piecknick v. Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). The Court is "not required to accept legal conclusions either alleged or

inferred from the pleaded facts." Kost, 1 F.3d at 183. Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). The burden of demonstrating that the plaintiff has failed to state a claim upon which relief may be granted rests on the movant. Young v. West Coast Industrial Relations Assoc., Inc., 763 F. Supp. 64, 67 (D. Del. 1991) (citations omitted).

DISCUSSION

By their motion, Defendants request the Court to dismiss the RICO and fraud claims raised by Plaintiff. Specifically, Defendants contend that Plaintiff has failed to plead with sufficient specificity the elements of a civil claim under RICO and the elements of fraud under Delaware law. The Court will address each of Defendants' arguments in turn.

I. Whether Plaintiff Has Adequately Pled A RICO Violation

The RICO statute authorizes civil suits by "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c).¹ A plaintiff seeking

¹ Title 18 U.S.C. § 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains the cost of

recovery under section 1964(c) must plead two elements: (1) a section 1962 violation; and (2) an injury to business or property by reason of such violation.² Lightning Lube, Inc. v. Witco Corporation, 4 F.3d 1153, 1187 (3d Cir. 1993). In this case, Plaintiff relies on Section 1962(c) to establish the first element of its RICO claim.

In pertinent part, 18 U.S.C. § 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.

To establish a claim under section 1962(c), a plaintiff must show: (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that the defendant participated through a pattern of racketeering activity that included at least two

the suit, including a reasonable attorney's fee.

² By their Motion To Dismiss, Defendants do not challenge that portion of Plaintiff's complaint relating to the injury to business or property element of a RICO violation. Accordingly, the Court will direct its analysis to whether a section 1962 violation has been adequately pled and will not consider whether there are sufficient allegations of an injury to the Plaintiff's business or property.

racketeering acts. Annulli v. Panikkar, 200 F.3d 189, 198(3d Cir. 1999); see also Salinas v. United States, 522 U.S. 52 (1997); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985); Shearin, 885 F.2d at 1165.

A "pattern of racketeering activity" requires the commission of at least two predicate offenses, including mail and wire fraud. 18 U.S.C. §§ 1961(1)(B) & 1961(5). To establish a "pattern of racketeering activity," two critical factors must be present: (1) a relationship between the acts of racketeering charged; and (2) a threat of continuing activity, or continuity. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989); see also 31A Sheila A. Skojec, American Jurisprudence Extort § 143 (1989).

By their Motion, Defendants contend that Plaintiff has failed to adequately plead a "pattern of racketeering activity." In support of their Motion, Defendants raise three arguments. First, Defendants contend that two of the four predicate acts, as pled by Plaintiff, do not constitute federal mail fraud and wire fraud. Second, Defendants contend that Plaintiff cannot establish continuity. In this regard, Defendants raise three specific arguments: (1) Plaintiff cannot establish open-ended continuity because it has failed to plead that the alleged predicate acts are likely to continue into the future; (2) Plaintiff cannot establish closed-ended continuity because the period of alleged racketeering activity is too short in duration;

and (3) Plaintiff cannot establish either open or closed continuity because Plaintiff has alleged only a single-victim, single-perpetrator scheme. Lastly, Defendants contend that all of the alleged predicate acts are not pled with sufficient particularity as required under Rule 9(b) of the Federal Rules of Civil Procedure.

A. Whether Plaintiff Has Alleged Predicate Acts Sufficient To Constitute Mail And/Or Wire Fraud

In determining whether an entity has committed the predicate acts of mail fraud and wire fraud courts have traditionally applied the same analysis for both offenses. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) (explaining that "the mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses"); United States v. Frey, 42 F.3d 795, 797 n.2 (3d Cir. 1994) (concluding that "the cases construing the mail fraud statute are applicable to the wire fraud statute as well") (citations and internal quotation marks omitted). A plaintiff raising a claim of mail or wire fraud must establish two essential elements: "(1) a scheme to defraud; and (2) the use of the mails or wires for the purpose of executing the scheme." Schuylkill Skyport Inn, Inc. v. Rich, No. Civ.A. 95-3128, 1996 WL 502280, at *14 (citations omitted); see also Pereira v. United States, 347 U.S. 1, 8 (1954).

In evaluating the first requirement, "a scheme to defraud",

the United States Court of Appeals for the Third Circuit has required that such a scheme "need not be fraudulent on its face"; rather, it "must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 (3d Cir. 1991) (citation and internal quotation marks omitted), cert. denied, 501 U.S. 1222 (1991). The United States Supreme Court has defined the words "to defraud" which are present in this requirement as "wronging one in his property rights by dishonest methods or schemes, and usually signify[ing] the deprivation of something of value by trick, deceit, chicane or overreaching." Carpenter, 484 U.S. at 27 (citation and internal quotation marks omitted).

The second requirement, "use of the mails or wires to execute the scheme", requires that the mailings or wire communications be "incident to an essential part of the scheme," or "a step in [the] plot," although they need not contain misrepresentations. Schmuck v. United States, 489 U.S. 705, 710-11 (1989) (citation and internal quotation marks omitted); see also Kehr Packages, 926 F.2d at 1413. Even if a defendant does not mail or intend the mailing of such a communication, if that defendant "act[s] with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen," then that defendant "causes" the mails

or wires to be used. United States v. Bentz, 21 F.3d 37, 40 (3d Cir. 1994) (quoting Pereira, 347 U.S. at 8-9). Mailings or wire communications made after the perpetrators accomplish the scheme's goal are not "for the purpose of executing" a scheme, with the exception of subsequent mailings designed to lull victims into a false sense of security or otherwise make apprehension of the perpetrators less likely. See United States v. Maze, 414 U.S. 395, 403 (1974); United States v. Lebovitz, 669 F.2d 894, 896 (3d Cir. 1982).

By his Motion to Dismiss, Defendant Yao challenges two predicate acts alleged by Plaintiff in paragraphs 49(a) and 49(b) of the Amended Complaint. These two predicate acts are: (1) that "SFC induced Nielsen to procure student loans for SFC by sending the Confidentiality Agreement and First Agreement to Nielsen through the United States mail on or about August 1, 1995 while SFC did not intend to follow the terms of the First Agreement and return defaulted loans to Nielsen to collect. . . ." (D.I. 43 at ¶49(a)); and (2) "To further induce Nielsen to generate student loans for it, SFC repeatedly wired funds from Delaware to Nielsen in South Carolina as down payments on those student loans, beginning on or about December 15, 1995 and as part of the same pattern again wiring funds to Nielsen on or about January 15, 1996; February 15, 1996; March 15, 1996; April 15, 1996 and May 15, 1996, all with the intent to obtain these and subsequent student loans which SFC did not intend to fully

fund in accordance with the First Agreement. . . ." (D.I. 43 at ¶149(b)).

Defendant Yao contends that these allegations do not qualify as "predicate acts" because they fail to (1) identify a "scheme or artifice;" (2) allege that Student Finance intended to defraud Plaintiff; and (3) set forth the manner in which Student Finance intended to obtain money or property from Plaintiff "by means of false or fraudulent pretenses, representations, or promises." (D.I. 61 at 22, 23).

In response to Defendant Yao's arguments, Plaintiff contends that taken as a whole the allegations of the Amended Complaint assert Defendant Yao's scheme to defraud Plaintiff. (D.I. 63 at 23). Plaintiff further contends that Defendants have "misunderstood" the RICO count, because the count is only directed to Defendant Yao and not to Student Finance. Thus, Plaintiff contends that only Defendant Yao's intent is at issue in the RICO count.

After reviewing the Amended Complaint, the Court concludes that taken as a whole, Plaintiff has alleged sufficient facts at this juncture to plead the predicate acts of mail and/or wire fraud. Reading the Amended Complaint liberally, the Court construes the allegations pled to allege a scheme by Defendant Yao to defraud Plaintiff. The Court also concludes that the Amended Complaint alleges that Defendant Yao, through Student Finance, used the mail and wires to further the scheme. Thus,

reading the Amended Complaint "generously" as the Third Circuit requires and accepting as true all the allegations in the Amended Complaint, and the reasonable inferences which can be drawn from those allegations, the Court concludes that the allegations of Plaintiff's Amended Complaint are sufficient to withstand dismissal. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

B. Whether Plaintiff Has Alleged Sufficient Facts To Establish The Continuity Requirement

In addition to the existence of at least two predicate offenses, a "pattern of racketeering activity" requires "relatedness" and "continuity."³ To establish the continuity requirement, a RICO plaintiff must show that the predicate acts of racketeering either constitute or threaten long-term criminal activity. H.J., 492 U.S. at 239; American Jurisprudence Extort § 145. Continuity is centrally a temporal concept which may either refer 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., 492 U.S. at 241; Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (3d Cir. 1987). Stated another way, continuity may be either "closed-ended" or "open-ended."

³ Defendants do not challenge the relatedness requirement and concede that the predicate acts alleged by Plaintiff are related to each other. Accordingly, the Court will not discuss the relatedness element.

1. Whether Plaintiff has sufficiently pled open-ended continuity

A RICO plaintiff may establish open-ended continuity in several ways. First, open ended continuity may be established by evidence that the predicate acts themselves involve a distinct threat of long-term racketeering activity either implicitly or explicitly. Second, open-ended continuity may be established by evidence that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Whether the alleged predicate acts are sufficient to establish a threat of continued racketeering activity under either of these examples depends on the specific facts of each case. H.J., 492 U.S. at 242.

Defendant Yao maintains that the alleged predicate acts raised by Plaintiff in its Amended Complaint fail to constitute an open-ended period of racketeering activity. (D.I. 61 at 12). Specifically, Defendant Yao contends that open-ended continuity cannot be demonstrated because the Amended Complaint does not allege that the "commission of the predicate acts is indicative of the regular way that [Student Finance] conducts its business." (D.I. 61 at 12).

In response to Defendant Yao's argument, Plaintiff contends that the alleged predicate acts are indicative of the regular way in which Student Finance conducts its business. Plaintiff contends that Student Finance made false representations about

its expertise and its business practice from the very beginning of its relationship with Plaintiff. (D.I. 63 at 19). Plaintiff contends that these misrepresentations continued on a monthly basis in each monthly statement regarding the student loans and continued on several other occasions through different rounds of negotiations and agreements. (D.I. 63 at 19). Plaintiff further alleges that Defendants' deceptive conduct extended to entities other than Plaintiff as evidenced by a lawsuit filed against the Defendants by the Federal Deposit Insurance Company ("FDIC") in the United States District Court for the District of Colorado.

Again, reading the allegations of the Amended Complaint in the light most favorable to the Plaintiff, the Court concludes that the Amended Complaint satisfies the requirement of open-ended continuity. In amending its Complaint, Plaintiff added the allegation that "SFC's conduct of collecting on student loans and not crediting Nielsen for those collection is ongoing." Although Defendants contend that this statement is false, on a motion to dismiss, the Court is required to accept the allegations of the pleading as true. Taking this allegation in the context of the Amended Complaint as a whole, the Court concludes that Plaintiff has alleged that Defendants' regular way of conducting business includes the commission of the predicate acts. Thus, the Court concludes that Plaintiff has sufficiently pled a threat of continued racketeering activity so as to avoid dismissal under Rule 12(b)(6).

2. Whether Plaintiff has sufficiently pled closed-ended continuity

A party alleging a RICO violation may demonstrate closed-ended continuity by proving a series of related predicate acts "extending over a substantial period of time." H.J., 429 U.S. at 242. Elaborating on what is meant by a substantial period of time, the Supreme Court has cautioned that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." H.J., 492 U.S. at 242.

Since the Supreme Court's decision in H.J., the Third Circuit has considered the "closed-ended continuity" prong of RICO's "pattern" requirement in several cases, each time concluding that conduct lasting less than twelve months does not meet the standard for closed-ended continuity. Hughes v. Consolidated Pennsylvania Coal Co., 945 F.2d 594, 611 (3d Cir. 1991) ("twelve months is not a substantial period of time"); Hindes, 937 F.2d at 873-75 (conducting extending over eight months where there is no threat of repetition is not continuous); Kehr Packages, 926 F.2d at 1417-18 (predicate acts of fraud extending over eight months not continuous where there was no threat of repeated conduct); Marshall-Silver II, 894 F.2d at 597-98 (predicate acts that extended for a period of less than seven months were not continuous where there was no threat of repeated criminal

conduct); Banks, 918 F.2d at 418 (period of eight months is not continuous).

In addition, this Court has addressed the continuity prong of the RICO pattern analysis in several cases finding that an "eleven to fourteen month closed-ended period of criminal activity is simply not substantial enough to constitute long-term criminal activity." Young v. West Coast Industrial Relations Association, Inc., 763 F. Supp. 64, 74 (D. Del. 1991); see also Helman v. Murry's Steaks, Inc., 742 F. Supp. 860 (D. Del. 1990) (finding that fraudulent activities extending over twelve months were not sufficient to constitute the requisite pattern); Hindes v. Castle, 740 F. Supp. 327 (D. Del. 1990) (concluding that eight months of alleged fraudulent activity did not satisfy the pattern requirement).

In this case, Defendant Yao contends that the predicate acts described in paragraph 49 of the Amended Complaint lasted only sixteen and a half months, from August 1, 1995 through December 18, 1996. Without the threat of continuing RICO activity, Defendant Yao contends that this period of time is insufficient to establish closed-ended continuity.

In response to Defendant Yao's argument, Plaintiff urges the Court to consider the duration of the entire alleged fraudulent scheme. According to Plaintiff this scheme began on or before June 1995, when Student Finance approached Plaintiff about taking over the process of loaning funds to prospective Institute

students and continued with the mailing of false monthly reports to Plaintiff until February 1998, a period of 33 months. In support of their argument that the duration of the entire scheme should be considered, Plaintiff relies on the Third Circuit's decision in Tabas v. Tabas, 47 F.3d 1294 (3d Cir. 1995).

The Tabas decision has generated much debate, as the decision of the en banc court was fragmented. However, that portion of Tabas suggesting that the continuity requirement must focus on the duration of the underlying scheme relies on the Third Circuit's previous decision in Kehr Packages, 926 F.2d at 1414. The circumstances in Kehr involved numerous innocent mailings, and the Third Circuit was required to determine whether such innocent mailing could create a RICO pattern. Declining to look at only the sheer number of predicate acts, which might prove continuity at first glance, the Third Circuit concluded that it was appropriate to look beyond the actual mailings to the underlying scheme.

Although the Third Circuit's decision in Tabas was divided, it appears to the Court that the six judges dissenting in Tabas agreed with the Kehr approach, and thus, a total of nine judges accepted the proposition that the underlying scheme should be evaluated. Reading Plaintiff's Amended Complaint generously and in the light most favorable to Plaintiff, the Court concludes that Plaintiff has sufficiently pled closed-ended continuity so as to withstand a motion to dismiss. Examining the underlying

scheme alleged by Plaintiff, and not just the period of the predicate acts, it appears that Plaintiff alleges a scheme extending from June 1995 until February 1999, a period of 33 months. Accordingly, at this juncture, the Court concludes that Plaintiff has sufficiently pled closed-ended continuity.

3. The Absence of Multiple Victims and Multiple Perpetrators

Defendant Yao next contends that Plaintiff's RICO count should be dismissed, because Plaintiff has alleged only a single-victim, single-perpetrator scheme. According to Defendant Yao, continuity cannot be established without multiple victims and multiple perpetrators. In support of its position, Defendant Yao relies on Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36 (3d Cir. 1987).

In Barticheck, the Third Circuit set forth six-factors for determining whether a plaintiff demonstrated the existence of a pattern of racketeering activity: (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. However, the continued viability of the Barticheck factors is debatable since the Third Circuit's decision in Tabas. Moreover, the Court is not aware of any case law establishing a bright line rule for continuity. Indeed, as the Supreme Court has acknowledged continuity may be established "in a variety of

ways, thus making it difficult to formulate in the abstract any general test for continuity." H.J., 492 U.S. at 241. Further, the Supreme Court has emphasized that continuity is a "temporal" concept. Id. at 241, 242. As the Court has previously discussed, Plaintiff has sufficiently pled continuity as a temporal matter. Accordingly, the Court declines to dismiss Plaintiff's Amended Complaint for failure to allege multiple victims and multiple perpetrators.

4. Whether Plaintiff has Sufficiently Pled The Predicate Acts Under Rule 9(b)

Defendant Yao next contends that the predicate acts alleged in the Amended Complaint fail to satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. To this effect, Defendant Yao contends that the predicate acts are pleaded too generally to give him adequate notice of the precise misconduct of which he is accused.

Because the predicate acts alleged by Plaintiff are mail and wire fraud, Rule 9(b) applies to the allegations. See e.g. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984), cert. denied, 469 U.S. 1211 (1985). Rule 9(b) requires allegations of fraud to be plead with particularity. The purpose of Rule 9(b) is to provide a defendant with notice of the precise misconduct with which he or she is charged and to prevent false or unsubstantiated charges. See Rolo v. City Investing Company Liquidating Trust, 155 F.3d 644, 658 (3d Cir.

1998); Satellite Financial Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 402 (D. Del. 1986). Although allegations of "date, place or time" fulfill the purpose of Rule 9(b), such allegations are not required as long as the plaintiff uses "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Rolo, 155 F.3d at 658.

Reading the Amended Complaint as a whole, the Court concludes that Plaintiff has alleged sufficient facts to satisfy the pleading requirements of Rule 9(b). While the predicate acts alleged in paragraph 49 may be unclear, they are illuminated by other paragraphs of the Amended Complaint. Thus, taken as a whole and construed in the light most favorable to Plaintiff, the Court concludes that the allegations of the Amended Complaint are sufficient to withstand a motion to dismiss at this juncture.

4. Summary

In sum, the Court concludes that the allegations of Plaintiff's Amended Complaint are sufficient to state a RICO claim at this juncture. Accordingly, the Court will deny Defendants' Motion To Dismiss the RICO count of Plaintiff's Amended Complaint.

II. Whether Plaintiff Has Adequately Pled Fraud Under Delaware Law

Counts 2 and 3 of the Amended Complaint raise claims of fraud against Student Finance and Defendant Yao, respectively.

The elements of common law fraud under Delaware law are: "(1) defendant's false representation, usually of fact, (2) made either with knowledge or belief or with reckless indifference to its falsity, (3) with an intent to induce the plaintiff to act or refrain from acting, (4) the plaintiff's action or inaction resulted from a reasonable reliance on the representation, and (5) reliance damaged the defendant." Browne v. Robb, 583 A.2d 949, 955 (Del. 1990).

By their Motion, Defendants contend that Plaintiff has failed to plead the elements of fraud as required under Delaware law. In addition, Defendants contend that Plaintiff has failed to plead the elements of fraud with particularity as required under Federal Rule of Civil Procedure 9(b).

In response, Plaintiff sets forth various paragraphs of the Amended Complaint which it contends satisfy each of the required elements of common law fraud. Plaintiff further contends that the wording of these paragraphs is sufficient to satisfy the requirements of Rule 9(b).

After reviewing the allegations in Plaintiff's Amended Complaint in light of the elements of common law fraud and the requirements of Rule 9(b), the Court concludes that Plaintiff's Amended Complaint satisfactorily pleads fraud against Student Finance and Defendant Yao. Plaintiff has alleged at least eight specific factual representations by Student Finance and/or

Defendant Yao.⁴ (D.I. 43, ¶39, 40). Plaintiff has also alleged that Student Finance and Defendant Yao knew these representations were false and intended to induce Plaintiff into acting based on them. (D.I. 43 ¶ 24, 43-44). Finally, Plaintiff has alleged both reasonable reliance and harm. (D.I. 43, ¶38, 40-41).⁵ Accordingly, at this juncture, the Court concludes that Plaintiff has sufficiently pled fraud so as to withstand a motion to dismiss.

CONCLUSION

For the reasons discussed, the Court will deny Defendants' Motion To Dismiss the RICO and fraud counts of Plaintiff's Amended Complaint. Paragraph 1 of the Order dated September 29, 2000 will be vacated and an Order consistent with this Memorandum Opinion will be entered.

⁴ Defendants challenge whether some of these alleged misrepresentations are actionable. For example, Defendant contends that some of these misrepresentations are mere opinions which are insufficient to constitute fraud. Although Defendants may pursue these arguments at a later stage in this case, at this juncture, the Court concludes that Plaintiff has sufficiently pled factual misrepresentations so as to satisfy the requirements of Rule 9(b) and withstand a motion to dismiss.

⁵ Defendants also contend that Plaintiff has not established that their reliance on any alleged misrepresentations was reasonable. However, courts are generally reluctant to determine whether reliance is reasonable as a matter of law. See e.g. Cliff House Condominium Council v. Capaldi, 1991 WL 165302, *4 (Del. Ch. 1991). Accordingly, at this juncture, the Court declines to determine as a matter of law whether Plaintiff's reliance on Defendants' alleged misrepresentations was reasonable.