IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PHOENIX BOND & INDEMNITY CO., *et al.*,	)	
	)	
Plaintiffs,	)	No. 07 C 1367
	)	
v.	)	Hon. James B. Moran
	)	
HEARTWOOD 88, LLC, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANT HEARTWOOD 88, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

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INTRODUCTION

This is the third action by Plaintiffs arising out of their participation in the Cook County Tax Lien Certificate Sale (the "Sale") – an auction held each year pursuant to the Illinois Property Tax Code in which the Cook County Treasurer (the "Treasurer") sells Tax Lien Certificates ("Certificates") on properties for which the owners have failed to pay property taxes. Complaint ("Compl.") ¶¶ 1, 22-37. It rests on the central allegations that: (1) Heartwood and certain other Defendants secretly agreed before the 2003-2005 Sales to bid as related entities on the same Certificates, in violation of the Treasurer's rules governing the bidding process; and (2) if the Treasurer had known about these alleged undisclosed agreements, she would have excluded Heartwood and those other Defendants from the Sales, which would have reduced the total number of bidders and thus increased Plaintiffs' chances of purchasing a greater number of Certificates at the Sales. Plaintiffs seek recovery of profits they claim they might have obtained from any additional Certificates they might have purchased at hypothetical 2003-2005 Sales that excluded Heartwood and the other Defendants from participation. Based on these allegations, Plaintiffs assert claims against Heartwood for violations of Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO") (Counts I-II), and an Illinois state-law claim for tortious interference with prospective business advantage (Count VII). Compl. ¶¶ 79-89, 116-25.

Plaintiffs have not pleaded a viable RICO claim against Heartwood for two independent reasons. First, they have not pleaded a cognizable RICO enterprise. Second, they have not pleaded any racketeering activity that could have proximately caused their claimed injury. Plaintiffs' failure to plead a viable RICO claim against Heartwood means that the Court also should dismiss their state-law tortious interference claim against Heartwood for lack of supplemental jurisdiction. Alternatively, the Court should dismiss Plaintiffs' tortious interference claim because the facts alleged in the Complaint do not establish the required element of purposeful interference with Plaintiffs' claimed business expectation.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Annual Cook County Tax Lien Certificate Sale

The purchaser of a Certificate does not become the legal owner of the real property that is the subject of the Certificate. Rather, the purchaser acquires only a limited, contingent interest in the property. This is because, for a statutorily specified period after the Sale, the property owner who has defaulted on his or her property taxes has the right to "redeem" the property by paying the Certificate purchaser: (1) the taxes that were past-due at the time of the Sale; (2) a penalty in the amount of a specified percentage of those past-due taxes; and (3) any subsequent taxes the Certificate purchaser has paid on the property since the Sale, plus a 12% penalty on any such taxes. Compl. ¶¶ 24, 28, 33. If the owner does not redeem the property within the specified period, the Certificate purchaser may obtain a tax deed for the property, and thereby purchase the property for essentially the value of the delinquent taxes and any subsequent taxes. 35 ILCS 200/22-30. Thus, the incentive to purchase Certificates is provided by three potential sources of profit: the penalty percentage on past-due taxes, the 12% penalty accrued on any subsequent taxes, and/or enforcement of the lien if the owner fails to redeem. Compl. ¶ 33.

A Sale participant bids on a Certificate by specifying the penalty percentage on past-due taxes that the participant is willing to accept if the owner redeems the property within the statutorily specified period. Compl. ¶ 28. The maximum penalty percentage bid allowed by statute is 18%. To enable property owners to exercise their redemption right at the lowest possible cost, the Illinois Tax Code provides that the Certificate is awarded to the party bidding the lowest penalty percentage. 35 ILCS 200/21-215; Phoenix Bond & Indem. Co. v. Pappas, 194 Ill. 2d 99, 102, 107-108 (2000).

Pursuant to her statutory authority, the Treasurer has adopted procedural rules to govern the bidding process. One such rule is that, if all participants bid the same penalty percentage for a Certificate, no bid for that Certificate is accepted and the Certificate is not sold. Pappas, 194 Ill. 2d at 103. According to Plaintiffs, another rule is that, if not all participants bid the same percentage, but multiple participants bid the same lowest penalty percentage bid, the Treasurer

will "allocate th[ose] liens on a rotational basis to ensure that there is an equal apportionment of liens among the lowest bidding tax buyers." Compl. ¶ 28.

In addition, the Treasurer has adopted a "Single, Simultaneous Bidder Rule," which requires each participant to affirm that no "Related Bidding Entity" will bid simultaneously with the participant on the same Certificates at the Sale, and that the participant does not have any pre-Sale contractual arrangement to transfer Certificates it purchases at the Sale to any "Related Bidding Entity." Id. ¶¶ 39-41; see also "Acknowledgement of Single, Simultaneous Bidder Rule," Compl. Ex. A at 7. The Rule defines "Related Bidding Entity" as "any individual, corporation, partnership, joint venture, limited liability company, business organization, or other entity that has a shareholder, partner, principal, officer, general partner or other person or entity having an ownership interest in common with, or contractual relationship with, any other registrant" at the Sale. Compl. Ex. A at 7. "The determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the *sole and exclusive discretion* of the Cook County Treasurer or her designated representatives." Id. (emphasis in original).

B. Plaintiffs' Previously Filed Lawsuits

Before bringing this action, Plaintiffs brought two other actions arising out of the Sales held in 2002-2005. Both actions are pending.

First, on July 15, 2005, Plaintiffs filed an action in this Court, asserting RICO and tortious interference claims against 25 entities (not including Heartwood) based on the central allegations that those entities fraudulently circumvented the Single, Simultaneous Bidder Rule by (1) entering into pre-Sale agreements with each other to transfer the Certificates that they acquired at the 2002-2005 Sales, and (2) falsely representing to the Treasurer in their registrations for those Sales that they had complied with the Rule. Phoenix Bond & Indem. Co. v. Bridge, No. 05 C 4095, 2005 U.S. Dist. LEXIS 34912, at *9 (N.D. Ill. Dec. 21, 2005) (the "Phoenix Action"). In December 2005, Judge Holderman dismissed the RICO claims on the grounds that Plaintiffs had not adequately pleaded the required element of proximate causation

because the alleged false statements were made to the Treasurer rather than to Plaintiffs, and that Plaintiffs therefore were not direct victims of the alleged fraud. Id., at **17-18. He also noted that Plaintiffs had failed to plead their RICO claims with the particularity required by Fed. R. Civ. P. 9(b), and declined to exercise supplemental jurisdiction over the tortious interference claim. Id., at **18-22.

Plaintiffs appealed the dismissal to the Seventh Circuit. On February 20, 2007, the Seventh Circuit reversed and remanded. Phoenix Bond & Indem. Co. v. Bridge, 477 F.3d 928 (7th Cir. 2007).

Second, on June 2, 2006, Plaintiffs filed another action in the Circuit Court of Cook County, asserting a claim for tortious interference against 22 additional entities, including Heartwood. BCS Servs., Inc. v. Heartwood 88, L.L.C., Case No. 2006 L 5751 ("BCS Action"). That claim is based on factual allegations similar to those in the Phoenix Action. On April 5, 2007, after briefing but before the hearing on Defendants' pending motions to dismiss, Cook County Circuit Court Judge Daniel J. Kelley granted Plaintiffs' motion to stay the BCS Action pending the outcome of this action, which, as described below, asserts the same claim (plus RICO claims) against the same Defendants.

C. This Action

On March 9, 2007, Plaintiffs filed this action, asserting RICO and tortious interference claims against Heartwood (Counts I-II and VII), the other Defendants named in the BCS Action, and certain additional Defendants. On May 22, 2007, Defendants Sass Muni-IV, LLC and Sass Muni-V, LLC filed a motion to re-assign this case to Judge Holderman. That motion is scheduled to be heard on June 21, 2007.

Plaintiffs' factual allegations in this action are similar to those in the Phoenix and BCS Actions. Plaintiffs allege that Heartwood and Sabre Group LLC ("Sabre") (which is a named Defendant in the Phoenix Action but not in the BCS Action or this action) falsely affirmed their compliance with the Single, Simultaneous Bidder Rule in their registrations for the 2003-2005 Sales, and that Defendants Bamp, LLC ("Bamp") and Richarony, LLC ("Richarony") falsely

affirmed their compliance with the Rule in their registrations for the 2004 Sale. Compl. ¶¶ 44-45, 49, 81. According to Plaintiffs, these affirmations were false because Heartwood, Sabre, Bamp, and Richarony had entered into secret pre-Sale agreements under which Heartwood would transfer to Sabre the Certificates that it purchased at the 2003-2005 Sales, and Bamp and Richarony would transfer to Sabre (through Heartwood) the Certificates that they purchased at the 2004 Sale. Id. Plaintiffs further allege that, if the Treasurer had been told about the alleged secret agreements: (1) she would have excluded Heartwood, Sabre, Bamp, and Richarony from bidding at the Sales; and (2) this exclusion would have reduced the total number of bidders at the Sales, and thereby increased Plaintiffs' chances of purchasing a greater number of Certificates under the Treasurer's "rotational" allocation process. Id. ¶¶ 28, 54, 122.

Plaintiffs allege that Heartwood, Sabre, Bamp, Richarony, and other Defendants "constitute an association-in-fact 'enterprise' (the 'Sabre Rigged Bidding Enterprise') as that term is defined in 18 U.S.C. § 1964(4)." Id. ¶ 81. They also allege that "[t]he members of the Sabre Rigged Bidding Enterprise are and have been associated through time, joined in purpose and organized in a manner amenable to hierarchal and consensual decision-making, with each member fulfilling a specific and necessary role to carry out and facilitate its purpose" of "acquir[ing] additional liens through violations of the [Single Simultaneous Bidder] Rule." Id. ¶¶ 81, 85. They further allege that Defendants played the following "role[s] to carry out and facilitate" this alleged purpose: (1) the "Individual Defendants incorporated and became the principals of entities, and pretended to act as legitimate, unrelated bidders at annual tax sales on behalf of those entities," id. ¶ 81; (2) the alleged "Sabre Nominees," including Heartwood, "registered to bid at annual tax sales, submitted false registrations to the Cook County Treasurer's Office stating that they had adhered to the Single, Simultaneous Bidder Rule, and purchased liens at the annual tax sales for Sabre's benefit," id.; (3) Sabre "registered to bid at the [2002-2004] sales, submitted false registrations to the Cook County Treasurer's Office in connection with those sales stating that it had adhered to the Single, Simultaneous Bidder Rule, purchased liens at those tax sales in its own name, acquired liens by transfer from the Sabre

Nominees from the [2002-2005] tax sale[s]," id.; and (4) Bridge and Rochman "directed the affairs of Sabre and of others which included forming entities to bid at the annual tax sale, registering those entities to bid, submitting false registrations to the Cook County Treasurer's Office falsely stating adherence to the Single, Simultaneous Bidder Rule, purchasing liens at auction, having liens or profits transferred to Sabre, and insuring that participants were compensated for their participation." Id.

The only type of RICO predicate act alleged by Plaintiffs is mail fraud. See Compl. ¶¶ 71-78. According to the Complaint, *after* each Sale, each Certificate purchaser is required to send a "22-5 notice" to the County, which the County then sends via U.S. Mail to the owner of the underlying property. Compl. ¶ 30. If the property is unredeemed after two to three years from the date of purchase, additional notices (the "22-10 notice" and "22-25 notice") are mailed to the property owner. Compl. ¶¶ 31-32. However, Plaintiffs do not allege that these or any other mailings caused their claimed injury – the loss of the additional Certificates they claim they would have had an increased chance of purchasing at hypothetical 2003-2005 Sales that excluded Heartwood, Sabre, Bamp, and Richarony. Rather, according to Plaintiffs, the sole cause of that claimed injury was the alleged fraudulent registrations for the Sales, which Plaintiffs do not allege were submitted by mail.

ARGUMENT

Plaintiffs have not pleaded a viable RICO claim against Heartwood for two independent reasons. First, they have not pleaded a cognizable RICO enterprise. Second, they have not pleaded any racketeering activity that could have proximately caused their injury. Plaintiffs' failure to plead a viable RICO claim against Heartwood means that the Court should also dismiss their state-law tortious interference claim against Heartwood for lack of supplemental jurisdiction. Alternatively, the Court should dismiss Plaintiffs' tortious interference claim against Heartwood because the facts alleged in the Complaint do not establish the required element of purposeful interference with Plaintiffs' claimed business expectation.

I. PLAINTIFFS HAVE NOT PLEADED A VIABLE RICO CLAIM AGAINST HEARTWOOD

A. Plaintiffs Have Not Pleaded A Cognizable RICO Enterprise

To state a claim under § 1962, a plaintiff must allege a RICO "enterprise" that "is distinct, separate, and apart from a pattern of racketeering activity." Jennings v. Emry, 910 F.2d 1434, 1440 (7th Cir. 1990); Richmond v. Nationwide Cassel L.P., 52 F.3d 640, 645 (7th Cir. 1995) (RICO enterprise is "more than a group of people who get together to commit a 'pattern of racketeering activity'") (internal citations and quotations omitted). This means that the alleged enterprise must have "an organization with a structure and goals separate from the predicate acts themselves." Stachon v. United Consumers Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000) (internal citation and quotations omitted).

In determining whether this requirement is met, "it is appropriate for the Court 'to consider whether the enterprise would still exist were the predicate acts removed from the equation,' and whether the defendants' actions were motivated by anything other than self-interest." Starfish Inv. Corp. v. Hansen, 370 F. Supp. 2d 759, 770 (N.D. Ill. 2005) (quoting Okaya, Inc. v. Denne Indus., 2000 U.S. Dist. LEXIS 20352, at **10-11 (N.D. Ill. Nov. 17, 2000)); see also id. ("we find that if we strip away the predicate acts as described in the … complaint, … there simply would be no 'criminal enterprise.'"). Plaintiffs' allegations confirm that, if the alleged "predicate acts" were "removed from the equation," the alleged enterprise would not "still exist."

First, as described supra at 5-6, the only purpose of the alleged Sabre Rigged Bidding Enterprise was to carry out the alleged predicate acts in furtherance of the alleged scheme to defraud the Treasurer in order to obtain additional Certificates. For this reason alone, the Court can and should conclude that there would be no alleged Sabre Rigged Bidding Enterprise without the alleged racketeering activity. See, e.g., LaFlamboy v. Landek, 2006 U.S. Dist. LEXIS 11595, at *14 (N.D. Ill. Mar. 21, 2006) (no RICO enterprise because "Plaintiff has not alleged that the purported enterprise has a purpose apart from the alleged scheme"); Timm, Inc. v. Bank

One Corp., N.A., 2005 U.S. Dist. LEXIS 21039, at *11 (N.D. Ill. Sept. 22, 2005) (no RICO enterprise because "participants associated for the single purpose of" committing alleged fraud and "[t]here were no goals or organization independent of the alleged scheme.").

Second, as also described supra at 5-6, the roles of the participants in the alleged Sabre Rigged Bidding Enterprise consisted exclusively of committing and/or directing the commission of the alleged predicate acts necessary to carry out the alleged scheme. This provides an additional, independent basis to conclude that there was no alleged enterprise apart from the alleged racketeering activity. See, e.g., Starfish, 370 F. Supp. 2d at 770 (no RICO enterprise because "with the exception of [one individual defendant's] role as director of the activity[,] each member's role was to engage in the predicate acts underlying [plaintiff's] RICO claims."); ABN AMRO Mortgage Group, Inc. v. Maximum Mortgage, Inc., 2005 U.S. Dist. LEXIS 17612, at *33 (N.D. Ind. May 16, 2005) (no RICO enterprise because "no allegations regarding the role of the players in the enterprise, beyond their roles in the specific transactions by which [plaintiff] claims to have been injured."); Sears Roebuck & Co. v. Emerson Elec. Co., 2003 U.S. Dist. LEXIS 332, at *16 (N.D. Ill. Jan. 7, 2003) (no RICO enterprise because "[t]he only 'affairs of the enterprise' described" are "the very predicate acts that [plaintiff] alleges have caused its injuries.").

Third, the very name of the alleged enterprise – the "Sabre Rigged Bidding Enterprise" – further confirms that the alleged enterprise had no structure or goals apart from the alleged racketeering activity. See id. ("If the 'enterprise' is just a name for the fraudulent acts alleged, or for the agreement to commit these acts, then it is not an enterprise within the meaning of the statute.").

B. Plaintiffs Have Not Pleaded Any Racketeering Act That Could Have Proximately Caused Their Claimed Injury

RICO allows a civil damages action only by a "person injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). This means that the plaintiff must plead and prove facts sufficient to show "both 'but for' causation and

proximate cause." Corley v. Rosewood Care Ctr., Inc. of Peoria, 388 F.3d 990, 1005 (7th Cir. 2004). An allegation of "injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO … is not sufficient" to satisfy this requirement. Rather, a RICO § 1962(c) or (d) plaintiff must plead and prove an injury caused by "an act that is independently wrongful under RICO" – i.e., a RICO predicate act. Beck v. Prupis, 529 U.S. 494, 505-506 (2000). See also Evans v. City of Chicago, 434 F.3d 916, 933 n.27 (7th Cir. 2006) (civil RICO plaintiff must establish injuries "caused by a predicate act within the meaning of" § 1962) (citing Beck).

The only type of predicate act alleged by Plaintiffs here is mail fraud. Compl. ¶¶ 71-78. The two essential elements of mail fraud are (1) a scheme to defraud and (2) the actual use of the mails. United States v. Swenson, 993 F.2d 1299, 1300 (7th Cir. 1993). Unless and until both of these elements are present, there is no completed act of mail fraud. Id. (overturning mail fraud conviction for lack of "sufficient evidence of a mailing"); see also Midwest Grinding Co., Inc. v. Spitz, 769 F. Supp. 1457, 1459-1460, 1466 n.12 (N.D. Ill. 1991) (dismissing RICO claim because, "[a]lthough the initial stages of defendants' scheme may have begun" earlier, the actual mailings necessary to complete the "predicate act of mail fraud" occurred over too short a period to constitute a "pattern" of racketeering activity), aff'd, 976 F.2d 1016, 1024 n.5 (7th Cir. 1992); Flextronics Int'l P.A., Inc. v. Copas, 327 F. Supp. 2d 934, 936 (N.D. Ill. 2004) (dismissing RICO claim because, although the "scheme started" earlier, actual "us[e] [of] the U.S. mail" occurred over too short a period to constitute "pattern" of racketeering activity).

The sole injury that Plaintiffs claim to have sustained is the loss of each Certificate they allege they would have had an increased chance of purchasing if Defendants had been excluded from the 2003-2005 Sales. Compl. ¶¶ 1, 54, 85, 89, 124-25; see also Phoenix Bond, 477 F.3d at 930 (alleged "loss" is "reduc[tion]" in Plaintiffs' "chance of winning any given auction" at a Sale). Thus, in order to have standing under § 1964(c), Plaintiffs must allege facts sufficient to show that their claimed loss of each of those Certificates was caused by a completed predicate act of mail fraud. Beck, 529 U.S. at 505. Their Complaint does not do so.

Although Plaintiffs allege that the fraudulent scheme began earlier, the only *mailings* alleged by Plaintiffs regarding each Certificate that they claimed to have lost were the statutorily required notices sent to the property owner *after* the conclusion of the Sale at which the Certificate was sold.[1] This means that the only completed acts of alleged mail fraud occurred after, and therefore could not possibly have caused, Plaintiffs' claimed injury. Plaintiffs thus have failed to plead a basis for standing under § 1964(c). See, e.g., Ryan v. Illinois, 1999 U.S. Dist. LEXIS 1095, at **24, 26 (N.D. Ill. Feb. 2, 1999) (no RICO causation because "alleged injury" occurred "before" predicate act), aff'd, Illinois ex rel. Ryan v. Brown, 227 F.3d 1042, 1046 (7th Cir. 2000) (no causation because "racketeering activity" happened "*after* the injuries" … "had already occurred.") (emphasis in original); Barry Aviation, Inc. v. Land O'Lakes Mun. Airport Comm'n, 366 F. Supp. 2d 792, 807 (W.D. Wis. 2005) (no causation because, although the scheme began earlier, "the alleged violation of § 1962" – actual mailing in furtherance of the scheme – "did not arise until after" injury had occurred); Roger Whitmore's Auto. Servs. v. Lake County, 2002 U.S. Dist. LEXIS 8289, at *28 (N.D. Ill. May 8, 2002) (no causation where "only injuries alleged by plaintiffs *preceded*" RICO violation) (emphasis in original); Henry v. Farmer City State Bank, 651 F. Supp. 17, 19-20 (C.D. Ill. 1985) (no causation because the "only thing that could arguably be the RICO injury" occurred "before" the predicate act), aff'd on other grounds, 808 F.2d 1228, 1232 (7th Cir. 1986); Vicon Fiber Optics Corp. v. Scrivo, 201 F. Supp. 2d 216, 218-219 (S.D.N.Y. 2002) (no causation because "mail and wire frauds identified as the predicate acts … could not possibly have been the proximate cause of" injury that occurred before use of mail and wires); Oki Semiconductor Co. v. Wells Fargo Bank, 298 F.3d 768, 774 (9th Cir. 2002) (no causation because predicate acts occurred "[o]nly after" the "loss."); Citadel Mgmt., Inc. v. Telesis Trust, Inc., 123 F. Supp. 2d 133, 140-141, 152-153 (S.D.N.Y. 2000) (no

[1] Plaintiffs also allege that Defendants lied to the Treasurer before each Sale regarding their compliance with the Single, Simultaneous Bidder Rule. Id. ¶¶ 44, 45, 49, 81; see supra at 4-5. But "telling a lie . . . is not included among the list of [RICO] predicate acts." Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1021 (7th Cir. 1992). See also id. at 1022 (RICO should not be used as "a surrogate for garden-variety fraud actions properly brought under state law.").

causation because "[n]o subsequent" predicate act "could have 'caused'" an "injury" that "had already" occurred); Line v. Astro Mfg. Co., Inc., 993 F. Supp. 1033, 1038 (E.D. Ky. 1998) (no causation because, although scheme began earlier, mailings "occurred" only after injury).

Relying on United States v. Wolf, 1993 U.S. Dist. LEXIS 6765 (N.D. Ill. May 17, 1993), Plaintiffs argued in their oppositions to certain Defendants' motions to dismiss in the Phoenix Action that when the actual mailings occurred was immaterial as long as they mailings were essential to the realization of profits from the alleged fraudulent scheme. Wolf does not assist Plaintiffs because it was a criminal RICO case that was not subject to the standing requirements of § 1964(c) and, in any event, pre-dated Beck. See supra at 9.[2]

II. PLAINTIFFS' TORTIOUS INTERFERENCE CLAIM AGAINST HEARTWOOD ALSO SHOULD BE DISMISSED

A. This Court Should Decline To Exercise Supplemental Jurisdiction Over Plaintiffs' Tortious Interference Claim

Plaintiffs invoke this Court's jurisdiction based solely on their RICO claims. Compl. ¶ 2. Because Plaintiffs' RICO claims against Heartwood should be dismissed, this Court should decline to exercise supplemental jurisdiction over their state-law tortious interference claim against Heartwood and dismiss that claim as well. See, e.g., Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1251 (7th Cir. 1994) ("[W]hen all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits."); Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 682 (7th Cir. 1986) ("[W]hen the federal claims are disposed of before trial, the state claims should be dismissed without prejudice almost as a matter of course."). Dismissal of the tortious

[2] This ground for dismissal is consistent with the Seventh Circuit's decision in Phoenix Bond because, unlike the grounds for dismissal that the Seventh Circuit rejected in that case, it does *not* rest on any requirement of either: (a) a mailing that includes fraudulent representations or omissions; or (b) a fraudulent representation or omission made directly to or relied upon by the victim. Phoenix Bond, 477 F.3d at 932.

interference claim is especially appropriate in view of the pendency of the BCS Action in state court. See supra at 4.

B. Alternatively, This Court Should Dismiss Plaintiffs' Tortious Interference Claim Because The Facts Pleaded In The Complaint Do Not Establish The Required Element Of Purposeful Interference

If this Court exercises supplemental jurisdiction over Plaintiffs' tortious interference claim, it should dismiss the claim because the facts alleged in the Complaint do not establish that Heartwood acted with the specific purpose of interfering with Plaintiffs' claimed business expectation.

To recover for tortious interference with prospective economic advantage, a plaintiff must plead and prove (among other things) "an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy." Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502, 508 (7th Cir. 2007) (internal citations and quotations omitted). Because intentional interference "is a purposely caused tort," a plaintiff cannot satisfy this element by establishing that the defendant knew of the plaintiff's expectancy and intended to commit the act that interfered with the expectancy. Rather, the plaintiff must establish "that the defendants acted with the purpose of injuring plaintiff's expectancies." Crinkley v. Dow Jones & Co., 67 Ill. App. 3d 869, 880 (1st Dist. 1978) (internal citations omitted). See also, e.g., Hoopla Sports & Entm't, Inc. v. Nike, Inc., 947 F. Supp. 347, 357 & n.6 (N.D. Ill. 1996) (dismissing Illinois tortious interference claim alleging that "defendants knew of" and "intentionally interfered with" plaintiffs' expectancies because "[n]othing in the complaint supports the inference that [defendants] were specifically targeting [those] expectancies") (internal citation and quotations omitted); Hayes & Griffith, Inc. v. GE Capital Corp., 1989 U.S. Dist. LEXIS 12625, at **29-30 (N.D. Ill. Oct. 24, 1989) (dismissing interference claim alleging that defendant "was aware of" and "caused" termination of plaintiff's expectancies, because no indication "'that the defendants acted with the purpose of injuring plaintiff's expectancies.'") (quoting Crinkley, 67 Ill. App. 3d at 880); Kemmerer v. John D. & Catherine T. MacArthur

Found., 594 F. Supp. 121, 122-123 (N.D. Ill. 1984) (dismissing interference claim because, "[a]lthough defendants may have known about plaintiff and his [expectancy], no allegation or exhibit in the complaint suggests that defendants were anything but indifferent to him."); Romanek v. Connelly, 324 Ill. App. 3d 393, 406 (1st Dist. 2001) (dismissing interference claim because no allegations "suggesting that the defendant acted intentionally with the aim of injuring the plaintiff's expectancy."); Parkway Bank & Trust Co. v. City of Darien, 43 Ill. App. 3d 400, 403-04 (2d Dist. 1976) (dismissing interference claim because nothing "to suggest that defendants had as their purpose the interference with plaintiffs' … business").

The facts pleaded here do not satisfy this requirement. Plaintiffs allege that Defendants "knew of the Plaintiffs' expectancies" and "purposefully interfered in the respective tax sales." Compl. ¶¶ 123-24. But nothing in their Complaint suggests that Defendants were "specifically targeting" Plaintiffs' claimed expectancies. Hoopla, 947 F. Supp. at 357 & n.6. To the contrary, the Complaint alleges that Defendants' purpose was simply "[t]o … acquire liens." Compl. ¶ 88. This does not establish the required element of purposeful interference with Plaintiffs' specific claimed expectancies.

Indeed, there was no way even to predict before the Sales what effect Defendants' participation in the Sales might have on the number of Certificates that any other individual participant might have had a chance of purchasing under the alleged "rotational" allocation system. This is because it was impossible to know before the Sales: (1) how many Certificates offered at the Sales would have multiple "lowest" bids, and therefore be subject to allocation under the "rotational" system in the first place; and (2) which other participants would be among the "lowest" bidders, and therefore eligible to be selected as the winning bidder, for Certificates allocated under the "rotational" system. Without a way of knowing this information in advance of any Sale, neither Heartwood nor any other Defendant could possibly have had the required

purpose of "specifically targeting" Plaintiffs' claimed expectation of purchasing more Certificates.[3]

CONCLUSION

For the foregoing reasons, this Court should dismiss with prejudice all claims asserted in the Complaint against Heartwood (Counts I-II and VII).

Respectfully submitted,

HEARTWOOD 88, LLC

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Dated: June 18, 2007

[3] Heartwood joins and adopts the arguments made in Section IV of the Memorandum of Law in Support of the Motion to Dismiss filed by Defendants BG Investments, Inc. and Bonnie J. Gray (Doc. 34), all of the arguments made in the Sass Defendants' Memorandum in Support of Their Motion to Dismiss (Doc. 58), and all of the arguments made in Defendant Salta Group, Inc.'s Motion to Dismiss (Doc. 86).

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification to the following:

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