IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

LARRY KLAYMAN, Plaintiff, v. HILLARY RODHAM CLINTON, WILLIAM JEFFERSON CLINTON, and THE CLINTON FOUNDATION a/k/a The William J. Clinton Foundation a/k/a The Bill, Hillary & Chelsea Clinton Foundation, Defendants.	Case No. 15-cv-80388-DMM

INDIVIDUAL DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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INTRODUCTION

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants William Jefferson Clinton and Hillary Rodham Clinton (the "Individual Defendants") move to dismiss Plaintiff's Amended Complaint for lack of subject-matter jurisdiction and failure to state a claim. Plaintiff's lawsuit stems from two record requests directed to the U.S. State Department under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Even though Plaintiff's organization, Freedom Watch, Inc., is currently litigating claims related to those requests against the State Department, Plaintiff seeks a second venue for his grievances through this suit. Here, Plaintiff attempts to transform FOIA claims (which can only be brought against a federal agency) into claims for damages and injunctive relief against the Individual Defendants and Defendant Clinton Foundation, a not-for-profit organization founded by President Clinton. In his sprawling Amended Complaint, Plaintiff claims that Defendants engaged in criminal racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968; violated his First and Fifth Amendment rights; and misappropriated his property.

Plaintiff's claims do not present a justiciable case or controversy under Article III of the Constitution. Each of his claims rests on the speculative assumption that Secretary Clinton's use of a private e-mail address during her tenure as Secretary of State will deprive him of documents responsive to the two FOIA requests. This speculation does not constitute injury to a legally protected interest, and there is no relief this Court could order that would redress Plaintiff's speculative injury. Accordingly, and as set forth in detail in the Motion to Dismiss filed by Defendant Clinton Foundation, this Court lacks subject-matter jurisdiction under Article III.

In addition, Plaintiff's claims fail on the merits. Plaintiff does not have standing under RICO, and he has not alleged (nor could he in good faith allege) that Defendants engaged in

racketeering activity. Plaintiff has no constitutional right to Secretary Clinton's e-mail, and the existence of FOIA's comprehensive scheme for obtaining relief precludes a remedy under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Finally, because Plaintiff does not have a property right in Secretary Clinton's e-mail, he cannot state a claim for relief on a state-law misappropriation theory. If the Court does not dismiss Plaintiff's Amended Complaint for lack of subject-matter jurisdiction, it should dismiss the Amended Complaint for failure to state a claim.[1]

FACTUAL BACKGROUND AND ALLEGATIONS

Plaintiff Larry Klayman, an attorney, is Chairman and General Counsel of Freedom Watch, Inc. Am. Compl. ¶ 15. His Amended Complaint asserts claims against former Secretary of State Hillary Rodham Clinton, former President William Jefferson Clinton, and the Clinton Foundation.[2] Each of his claims is premised on two FOIA requests.

A. The FOIA Requests

Plaintiff alleges that he signed two FOIA requests directed to the State Department. *Id.* ¶¶ 15, 32–41. The FOIA requests sought documents relating to (1) the decision to grant waivers pursuant to the Comprehensive Iran Sanctions, Accountability, and Divestment Act and (2) a *New York Times* article related to purported cyber attacks on Iran. *Id.* ¶¶ 34–41. In fact, the FOIA requests were submitted by Freedom Watch, not by Plaintiff personally. *See Freedom*

[1] On May 29, 2015, the Court granted Plaintiff's Motion to Amend the Complaint and instructed Plaintiff to file the Amended Complaint by June 2, 2015 [Dkt. #39]. As of the time of the filing of this Motion, Plaintiff has not filed the Amended Complaint. References to the "Amended Complaint" in this Motion are to the proposed Amended Complaint attached to Plaintiff's Motion to Amend [Dkt. #32-1]. Plaintiff's failure to file his Amended Complaint by the deadline set by the Court constitutes procedural default and independently warrants dismissal of this case. *See* Fed. R. Civ. P. 41(b).

[2] The Clinton Foundation was renamed the Bill, Hillary & Chelsea Clinton Foundation in 2013.

Watch, Inc. v. Nat'l Sec. Agency, 49 F. Supp. 3d 1, 3 (D.D.C. 2014) ("*Freedom Watch I*"), *aff'd and remanded*, 783 F.3d 1340 (D.C. Cir. 2015); *Freedom Watch, Inc. v. U.S. Dep't of State*, No. 14-1832(JEB), --- F. Supp. 3d ----, 2015 WL 109837, at *1 (D.D.C. Jan. 8, 2015) ("*Freedom Watch II*").[3]

Defendant Hillary Rodham Clinton was Secretary of State from January 2009 until February 2013. Am. Compl. ¶ 20. Plaintiff alleges that, during that time, Secretary Clinton used a private e-mail address and server to conduct official business. *Id.* ¶¶ 7–8. Plaintiff speculates that, as a result of Secretary Clinton's use of a private e-mail address, "Defendants concealed from the Plaintiff public records to which the Plaintiff was entitled to under the FOIA Act." *Id.* ¶ 12. The only injury alleged in the Amended Complaint is the State Department's purported failure to search for and produce e-mails responsive to Freedom Watch's FOIA requests. *See id.* ¶¶ 12, 33, 281, 307, 310.

The FOIA requests described in the Amended Complaint are the subject of ongoing litigation between Freedom Watch and the State Department. Freedom Watch brought two FOIA actions against the State Department, among other agencies, challenging the adequacy of the Department's search for responsive documents. *See Freedom Watch I*, 49 F. Supp. 3d at 3; *Freedom Watch II*, 2015 WL 109837, at *1. The district court granted summary judgment to the Department in both cases. Freedom Watch appealed both rulings to the U.S. Court of Appeals for the D.C. Circuit. *See* Case Nos. 14-5174 (appeal of *Freedom Watch I*), 15-5048 (appeal of *Freedom Watch II*).

[3] The Court may take judicial notice of public court filings in deciding a motion to dismiss without converting the motion into one for summary judgment. *See Universal Express, Inc. v. U.S. SEC*, 177 F. App'x 52, 53 (11th Cir. 2006) (per curiam).

While the appeal of *Freedom Watch I* was pending, as Plaintiff alleges in his Amended Complaint, Secretary Clinton provided the State Department with a copy of more than 30,000 e-mails from her @clintonemail.com account. Am. Compl. ¶ 60. The D.C. Circuit recently remanded *Freedom Watch I* to the district court to oversee the Department's search of Secretary Clinton's e-mails for records responsive to the FOIA request. *See Freedom Watch, Inc. v. Nat'l Sec. Agency*, 783 F.3d 1340 (D.C. Cir. 2015). According to a May 29, 2015 joint status report filed in the district court, the Department will have Secretary Clinton's e-mails loaded into a searchable database by mid-June 2015 and the parties are currently engaged in discussions regarding search terms. *See* Dkt. #33, Case No. 1:12-cv-1088-CRC (D.D.C. May 29, 2015). The appeal of *Freedom Watch II* is still pending in the D.C. Circuit. In that case, the Department has pledged to make Secretary Clinton's e-mails available to the public and review the e-mails to determine if any are responsive to Freedom Watch's FOIA request. Mot., Case No. 15-5048, at 3–4 (D.C. Cir. May 22, 2015). In a recent filing in the D.C. Circuit, the Department noted, however, that "it is . . . unlikely that any of the emails provided by former Secretary Clinton to the State Department are responsive to plaintiff's FOIA request," given that the Department previously did not find any responsive records at all. *Id.* at 4.

On May 22, 2015, the Department released the first set of Secretary Clinton's e-mails to the public, and it has been ordered to continue releasing e-mails on a set production schedule. *See* Notice, Dkt. #13, *Leopold v. U.S. Dep't of State*, No. 15-cv-00123-RC (D.D.C. May 26, 2015); Order, Dkt. #17, *Leopold v. U.S. Dep't of State*, No. 15-cv-00123-RC (D.D.C. May 27, 2015).

B. The Amended Complaint

Plaintiff does not bring this action under FOIA (nor could he, as such claims can be brought only against federal agencies). Instead, he asserts civil RICO claims, *Bivens* claims for

violation of his First and Fifth Amendment rights, and a state-law claim for "misappropriation of chattel property." Each of these claims appears to be based on the assertion that Plaintiff has "a vested property right" in, or other constitutional right to, Secretary Clinton's e-mails. *E.g.*, Am. Compl. ¶¶ 33, 280, 307, 310. In particular, Plaintiff claims that Defendants "stole[] . . . the documents which the Plaintiff is entitled to as a vested property right and property pursuant to FOIA law." *Id.* ¶ 33.

With respect to Secretary Clinton's use of a private e-mail address, Plaintiff contends that Defendants used the "concealed communications on the private email server" to

> negotiate[], arrange[] and implement[] the sale of influence and access to U.S. Government officials and decision-makers and official acts by State and other instrumentalities of the U.S. Government in return for bribes disguised as donations to Defendant The Clinton Foundation and extraordinarily high speaking fees paid to [the Individual Defendants].

Id. ¶ 14. Plaintiff does not substantiate this accusation with any well-pleaded factual allegations. To the contrary, Plaintiff repeatedly accuses the Individual Defendants of engaging in unethical *quid pro quo* transactions without any alleged factual basis. *See, e.g.*, *id.* ¶ 89 ("Interested parties bribed U.S. Secretary of State Hillary Clinton to influence her official actions in office by making large donations to the Clinton Foundation."); *id.* ¶ 242 ("[T]here is nothing that is not for sale by the Clintons to the foreign governments and foreign businesses and individuals who donate to Defendant The Clinton Foundation or to the Clintons personally.").

Relying on these unfounded allegations, Plaintiff claims that Defendants "conspired to violate FOIA and other laws" through an "ongoing criminal enterprise." *Id.* ¶ 245. He does not identify the participants in this enterprise, although he does suggest that it is engaged in "terrorist" activity. *Id.* ¶ 287. According to Plaintiff, Defendants' alleged criminal racketeering caused him to suffer "loss of valuable property, financial services and support, and . . . other

business and pecuniary damages." *Id.* ¶ 288. Plaintiff also claims that Defendants violated his right to life, liberty, and property under the Fifth Amendment, *id.* ¶¶ 304–307; deprived him of his First Amendment right to freedom of speech and association by withholding documents requested under FOIA, *id.* ¶ 310; and misappropriated his personal property, *id.* ¶ 282.

Plaintiff requests, among other forms of relief, $5 million in compensatory damages, $100 million in punitive damages, treble damages under RICO, an injunction granting access to Secretary Clinton's private e-mail server, and an order requiring Defendants to produce documents responsive to Freedom Watch's FOIA requests. *Id.* at 62–63.

STANDARD OF REVIEW

Rule 12(b)(1). Federal courts are courts of limited jurisdiction and are "'empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution.'" *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (quoting *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994)). The law presumes that "a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citation omitted). In deciding whether a plaintiff has alleged facts establishing subject-matter jurisdiction, a court considers the plaintiff's well-pleaded allegations to be true. *See McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007).

Rule 12(b)(6). "'[T]o survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Franklin v. Curry*, 738 F.3d 1246, 1250 (11th Cir. 2013) (per curiam) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim to relief is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In making this determination, the court need not accept as true "conclusory legal allegations" or "a formulaic recitation of the elements of a cause of action." *Franklin*, 738 F.3d at 1251 (quotation marks omitted). "Similarly, unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of [a] plaintiff's allegations." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (quotation marks omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).[4]

When, as here, a plaintiff alleges mail or wire fraud as the predicate acts supporting a civil RICO claim, the allegations of mail or wire fraud must also satisfy the heightened pleading standard of Rule 9(b). *E.g.*, *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). This heightened standard serves to "protect[] defendants against spurious charges of immoral and fraudulent behavior," such as the unsupported accusations that Plaintiff makes here. *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quotation marks omitted). Rule 9(b) requires a civil RICO plaintiff to allege "the precise statements, documents, or misrepresentations made"; "the time, place, and person responsible for the statement"; and "what the defendants gained by the alleged fraud." *Am. Dental Ass'n*, 605 F.3d at 1291.

[4] Although courts read the pleadings of *pro se* plaintiffs liberally, such indulgence is inappropriate where, as here, the plaintiff has legal training. *See Lampkin-Asam v. Volusia Cnty. Sch. Bd.*, 261 F. App'x 274, 277 (11th Cir. 2008) (per curiam). It is also unwarranted in this case because two different attorneys have held themselves out to defense counsel as representing Plaintiff in this case, despite not having filed appearances.

ARGUMENT

I. PLAINTIFF HAS NOT ALLEGED A JUSTICIABLE CASE OR CONTROVERSY UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION.

For the reasons set forth in the Motion to Dismiss filed by Defendant Clinton Foundation, even accepting Plaintiff's allegations as true, Plaintiff has not alleged a justiciable case or controversy under Article III of the U.S. Constitution. Plaintiff has not alleged a concrete injury in fact, and a favorable decision in this case could not redress his claimed injury. As a result, he lacks standing, and this Court should dismiss this action for lack of subject-matter jurisdiction under Rule 12(b)(1). The Individual Defendants hereby join and incorporate by reference Part I of Defendant Clinton Foundation's Motion to Dismiss and Incorporated Memorandum of Law.

II. PLAINTIFF'S RICO CLAIMS LACK MERIT.

Plaintiff asserts three RICO claims: (1) that Defendants conducted the affairs of a RICO enterprise "through a pattern of racketeering activity," in violation of 18 U.S.C. § 1962(c) (Third Cause of Action); (2) that Defendants acquired and maintained "an interest in or control of" an enterprise "through a pattern of racketeering activity," in violation of 18 U.S.C. § 1962(b) (Second Cause of Action); and (3) that Defendants conspired to violate Section 1962(b), in violation of 18 U.S.C. § 1962(d) (Fourth Cause of Action). Each of these claims is meritless.

A. Plaintiff Has Not Stated a Claim Under 18 U.S.C. § 1962(c).

Section 1962(c) prohibits persons "employed by or associated with any enterprise" from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). To prove a violation of Section 1962(c), a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006) (per curiam) (quotation marks omitted). In addition, to have standing to pursue a civil RICO

claim, a plaintiff must show (1) "injury to 'business or property'" and (2) "that such injury was 'by reason of' the substantive RICO violation." *Id.* at 1282–83 (quoting 18 U.S.C. § 1964(c)).

Plaintiff's claim under Section 1962(c) fails for three reasons. First, Plaintiff has not alleged facts establishing his standing to bring a RICO claim. Second, he has not alleged the element of racketeering activity. And, third, he has not alleged the existence of a RICO enterprise.

1. Plaintiff Lacks RICO Standing.

Only persons "injured in [their] business or property by reason of a violation of section 1962" have standing to pursue a civil RICO claim.[5] 18 U.S.C. § 1964(c). This standing test entails two requirements. The plaintiff must have suffered "an injury to business or property." *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 708 (11th Cir. 2014) (quotation marks omitted). And the plaintiff must establish "proximate cause linking the defendants' pattern of racketeering activity with the injury that the plaintiff[] suffered." *Id.* Plaintiff's allegations fail both steps of this test.

a. Plaintiff Has Not Alleged Injury to Business or Property.

Plaintiff has not alleged injury to his business or property. "[T]he injury to business or property limitation on RICO standing has a 'restrictive significance.'" *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1361 (11th Cir. 2011) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). "It helps to assure that RICO is not expanded to provide a federal cause of action and treble damages to every tort plaintiff." *Id.* (quotation marks omitted).

[5] Despite the label "standing," courts typically review the question of RICO standing under Rule 12(b)(6), not Rule 12(b)(1). *See Adell v. Macon Cnty. Greyhound Park, Inc.*, 785 F. Supp. 2d 1226, 1237 (M.D. Ala. 2011) (citing cases).

The Eleventh Circuit construes the terms "business or property" to require "economic injury." *Id*. Thus, "[a] plaintiff asserting a claim under § 1964(c) of RICO must allege economic injury arising from the defendant's actions." *Id.* Put another way, "[t]he requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage." *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988) (alteration in original) (quotation marks omitted). Noneconomic injuries—such as personal injuries, alleged violations of constitutional rights, or expectancy interests—do not give rise to RICO standing. *See id.* ("personal injuries"); *Spence-Jones v. Rundle*, 991 F. Supp. 2d 1221, 1254 (S.D. Fla. 2013) (Middlebrooks, J.) ("individual constitutional rights" and "personal reputation"); *Adell v. Macon Cnty. Greyhound Park, Inc.*, 785 F. Supp. 2d 1226, 1237 (M.D. Ala. 2011) ("expectancy interests" or "intangible property interest" in potential gambling earnings (quotation marks omitted)).[6]

As set forth in the Clinton Foundation's Motion to Dismiss, Plaintiff has not suffered any cognizable injury attributable to Defendants, and therefore lacks standing under Article III of the Constitution. Setting aside that threshold defect, however, Plaintiff has not alleged any *economic* injury to his business or property. Although he claims that he "suffered the loss of valuable property, financial services and support, and suffered other business and pecuniary damages," Am. Compl. ¶ 288, he does not plead any facts to support those conclusory, "formulaic" assertions, and therefore the Court need not accept them as true. *Franklin*, 738 F.3d at 1251 (quotation marks omitted). The only "injury" identified in the Amended Complaint is Plaintiff's belief that Freedom Watch has not yet received all documents responsive to its FOIA requests.

[6] Other courts similarly require "concrete financial loss" to establish RICO standing. *E.g.*, *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 492 n.16 (5th Cir. 2003); *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1086–87 (9th Cir. 2002).

See Am. Compl. ¶ 33. This injury is not economic in nature, and the Individual Defendants are unaware of any case holding that a plaintiff's inability to obtain documents pursuant to FOIA constitutes injury to "business or property" for purposes of RICO.

In an apparent attempt to establish RICO standing, Plaintiff asserts that Defendants deprived him of "legally protected vested property rights" in documents responsive to his FOIA requests. *Id.* ¶ 16. But a private citizen does not have a property interest in government records. *See Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1236 (10th Cir. 2007); *N'Jai v. U.S. Envt'l Prot. Agency*, No. 13-1212, 2014 WL 2508289, at *18 (W.D. Pa. June 4, 2014); *Christensen v. United States*, No. 5:11-321-KKC, 2013 WL 4521040, at *13 (E.D. Ky. Aug. 26, 2013). Nor does FOIA create such a property interest. FOIA "represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). Federal agencies fulfill their statutory obligations under FOIA by conducting a search that is "reasonably calculated to uncover all relevant documents." *Ray v. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990) (quotation marks omitted), *rev'd on other grounds*, 502 U.S. 164 (1991). If the agency conducts such a search, it has satisfied FOIA, whether or not "it actually uncovered every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). In other words, FOIA gives the public the right to a reasonable search for responsive documents. It does not create property rights in an agency's records.

b. Plaintiff Has Not Alleged Injury Proximately Caused by a Pattern of Racketeering Activity.

Even if Plaintiff could allege an injury to his business or property, he also must allege that the claimed pattern of racketeering activity proximately caused the injury. *Simpson*, 744

F.3d at 708. In this context, "proximate cause . . . requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). To have standing to assert a claim under Section 1962(c), the plaintiff's injury must have a direct relationship to the conduct prohibited by that section—*i.e.*, the pattern of racketeering activity. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) ("[T]he compensable injury flowing from a violation of [section 1962(c)] necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . . ." (quotation marks omitted)); *see also Simpson*, 744 F.3d at 713.

As set forth in more detail below, although Plaintiff purports to plead a number of statutory violations as predicate racketeering acts, the only violations asserted in the Amended Complaint that are actually predicate acts under RICO are mail and wire fraud. *See infra* Part II.A.2; *see also* 18 U.S.C. § 1961(1). Plaintiff alleges that Defendants engaged in mail and/or wire fraud by "utiliz[ing] false or fraudulent pretenses, representations, and/or promises in order to defraud and/or obtain money from illicit payments disguised as donations." Am. Compl. ¶¶ 258, 264. This wholly unsupported accusation has nothing to do with Plaintiff's claimed FOIA-related injury. Where "[t]he cause of [a plaintiff's] asserted harms . . . is a set of actions . . . entirely distinct from the alleged RICO violation," the proximate cause requirement is not met. *Anza*, 547 U.S. at 458. Plaintiff has not alleged any injury that directly flowed to him from the alleged acts of mail and wire fraud. Plaintiff's failure to plead proximate cause independently deprives him of RICO standing.

2. Plaintiff Has Not Alleged Predicate Acts of Racketeering.

To state a claim under Section 1962(c), Plaintiff must allege a "pattern of racketeering activity." 18 U.S.C. § 1962(c). For purposes of RICO, a pattern of racketeering activity

"requires at least two acts of racketeering activity," commonly referred to as "predicate acts." *Williams*, 465 F.3d at 1283 (quotation marks omitted); *see also* 18 U.S.C. § 1961(5). 18 U.S.C. § 1961(1) sets forth "an exhaustive list of acts of 'racketeering.'" *Beck v. Prupis*, 529 U.S. 494, 497 n.2 (2000).

Plaintiff lists the "predicate criminal acts" that he alleges Defendants committed at paragraphs 247 to 278 of his Amended Complaint. He alleges violations of seven sections of Title 18 of the U.S. Code: Sections 371, 793, 1001, 1341, 1343, 1519, and 2071. Of these, only Sections 1341 (mail fraud) and 1343 (wire fraud) are included in RICO's exhaustive list of "racketeering activity." *See* 18 U.S.C. § 1961(1)(B). Even if Plaintiff could plead violations of the remaining five statutory provisions (he has not, and cannot), such violations would not support a RICO claim. *See Homes by Michelle, Inc. v. Fed. Sav. Bank*, 733 F. Supp. 1495, 1500 (N.D. Ga. 1990) (holding that the plaintiffs failed to state a RICO claim where the federal statutes cited as predicate acts in their complaint did not appear in RICO's "exhaustive" list of predicate acts).

The federal mail and wire fraud statutes are identical "save for the method of execution." *United States v. Bradley*, 644 F.3d 1213, 1238 (11th Cir. 2011); *see* 18 U.S.C. §§ 1341, 1343. Both statutes require a two-part showing: (1) that the defendant "intentionally participate[d] in a scheme or artifice to defraud another of money or property," and (2) that the defendant "use[d] or cause[d] the use of the mails or wires for the purpose of executing the scheme or artifice." *Bradley*, 644 F.3d at 1238 (quotation marks omitted). To show a scheme or artifice to defraud, a plaintiff must offer "proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *Id.* (quotation marks omitted). As described above, in the context of a civil RICO claim based on predicate acts of

mail and/or wire fraud, Rule 9(b) requires that the plaintiff allege with particularity "the precise statements, documents, or misrepresentations made"; "the time, place, and person responsible for the statement"; and "what the defendants gained by the alleged fraud." *Am. Dental Ass'n*, 605 F.3d at 1291 (quotation marks omitted).

Plaintiff alleges in summary fashion that Defendants "utilized false or fraudulent pretenses, representations, and/or promises in order to defraud and/or obtain money from illicit payments disguised as donations." Am. Compl. ¶¶ 258, 264. He does not, however, allege any "material misrepresentation, or the omission or concealment of a material fact" related to his unsupported accusations about illicit payments. *Bradley*, 644 F.3d at 1238 (quotation marks omitted). Nor does he plead facts plausibly suggesting that Defendants intended "to deceive another out of money or property." *Id.* (quotation marks omitted). The Amended Complaint therefore does not plead mail or wire fraud, even under Rule 8(a)'s plausibility standard. *See, e.g.*, *Spence-Jones*, 991 F. Supp. 2d at 1253 (finding that the plaintiff had not pleaded mail or wire fraud when none of her allegations "ha[d] anything to do with making a material false statement with the intent to deceive or cheat someone out of money or property").

Plaintiff's failure to satisfy the heightened burden of Rule 9(b) is all the more compelling. Because he has not even *identified* any misrepresentations or omissions, he necessarily has failed to particularize his allegations with details about the speaker and/or time of any alleged misrepresentation or omission. Without such basic details, Plaintiff cannot meet his burden to plead mail and/or wire fraud with particularity under Rule 9(b). *See, e.g.*, *Am. Dental Ass'n*, 605 F.3d at 1291; *Spence-Jones*, 991 F. Supp. 2d at 1253.

3. Plaintiff Has Not Alleged a RICO Enterprise.

To state a claim under Section 1962(c), Plaintiff must allege that Defendants conducted or participated in the conduct of an "*enterprise's* affairs through a pattern of racketeering

activity." 18 U.S.C. § 1962(c) (emphasis added). RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4); *see also Boyle v. United States*, 556 U.S. 938, 946 (2009) (defining an "association-in-fact" enterprise). Plaintiff does not identify any such "enterprise." While Plaintiff summarily asserts that "[a]ll Defendants did associate with a RICO enterprise of individuals who were associated in fact," Am. Compl. ¶ 293, he does not even attempt to define this association-in-fact enterprise or identify its participants. Therefore, he has not pleaded the existence of a viable "enterprise."

B. Plaintiff Has Not Stated a Claim Under 18 U.S.C. § 1962(b).

Plaintiff's claim under Section 1962(b) fails for similar reasons. Section 1962(b) provides in relevant part that "[i]t shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise." 18 U.S.C. § 1962(b).

Plaintiff also lacks standing to assert this claim. To have standing to assert a claim under Section 1962(b), Plaintiff must allege (a) injury to business or property that (b) was proximately caused by the conduct prohibited by that section—*i.e.*, Defendants' "gaining an interest in, or control of, the enterprise through a pattern of racketeering activity." *Coursen v. JP Morgan Chase & Co.*, No. 8:12-cv-690-T-26EAJ, 2013 WL 5437348, at *12 (M.D. Fla. June 25, 2013), *aff'd sub nom. Coursen v. Shapiro & Fishman, GP*, 588 F. App'x 882 (11th Cir. 2014). This so-called "acquisition or maintenance" injury must be "distinct from injury caused by the predicate acts." *Id.* (quotation marks omitted). Even if Plaintiff had pleaded an injury to his business or property, he has not pleaded that any such injury was caused by the specific act of acquiring or maintaining an interest in an enterprise.

Indeed, Plaintiff has not even alleged that Defendants "acquire[d] or maintain[ed], directly or indirectly, any interest in or control of any enterprise," which is the conduct prohibited by this section. 18 U.S.C. § 1962(b). "The 'enterprise' referred to in subsection[] . . . (b) is . . . something acquired through the use of illegal activities." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994). In this scenario, "[t]he enterprise . . . is the victim of unlawful activity." *Id.* The Amended Complaint lacks any allegation that Defendants used illegal activities to acquire or maintain "any interest in or control of any enterprise." 18 U.S.C. § 1962(b). Absent such an allegation, Plaintiff cannot state a claim under Section 1962(b). *See Coursen*, 2013 WL 5437348, at *12 (dismissing a Section 1962(b) claim where the plaintiff "fail[ed] to provide any description of the acquisition or maintenance of any interest in or control of the alleged enterprise").

Moreover, for the reasons already discussed, Plaintiff has not alleged any facts showing that Defendants engaged in a pattern of racketeering activity. This failure to plead racketeering activity provides an independent ground for dismissal of Plaintiff's Section 1962(b) claim.[7]

C. Plaintiff Has Not Stated a Claim Under 18 U.S.C. § 1962(d).

Section 1962(d) prohibits the act of conspiring to violate subsections (a) through (c). Plaintiff alleges that Defendants conspired to violate Section 1962(b).

[7] Although the caption of this count refers to Section 1962(b), Plaintiff also cites Section 1962(a) in the text of the count. *See* Am. Compl. ¶¶ 287–288. To the extent Plaintiff purports to assert a claim under Section 1962(a), that claim should also be dismissed. Section 1962(a) prohibits investing the proceeds of a pattern of racketeering activity into an enterprise. *See* 18 U.S.C. § 1962(a). Plaintiff has not alleged that Defendants invested any proceeds into an enterprise, nor has he identified any injury to his business or property that arose by reason of such investment. *See Super Vision Int'l Inc. v. Mega Int'l Commercial Bank Co.*, 534 F. Supp. 2d 1326, 1342 (S.D. Fla. 2008) (to have standing under Section 1962(a), a plaintiff must "show an injury resulting from the investment of racketeering proceeds"), *aff'd*, No. 08-15031, 2009 WL 1028034 (11th Cir. Apr. 17, 2009). And, as with the other RICO claims, Plaintiff has not alleged a pattern of racketeering activity or identified the alleged enterprise.

To state a RICO conspiracy claim, "a plaintiff must allege an illegal agreement to violate a substantive provision of the RICO statute." *Super Vision Int'l Inc. v. Mega Int'l Commercial Bank Co.*, 534 F. Supp. 2d 1326, 1342 (S.D. Fla. 2008) (quotation marks omitted), *aff'd*, No. 08-15031, 2009 WL 1028034 (11th Cir. Apr. 17, 2009). Conclusory allegations of a conspiracy "unsupported by actual allegations of fact"—such as those set forth in the Amended Complaint, Am. Compl. ¶ 299—do not satisfy this standard. *Super Vision Int'l*, 534 F. Supp. 2d at 1343.

Furthermore, for a plaintiff to prevail under Section 1962(d), the overt act causing injury to the plaintiff must itself be an act of racketeering. *Beck*, 529 U.S. at 495–96. As previously set forth, Plaintiff has not alleged a predicate act of racketeering or any injury caused by such an act. He therefore has failed to state a viable conspiracy claim. *See Super Vision Int'l*, 534 F. Supp. 2d at 1342 (where a Section 1962(d) claim is based on the same factual allegations as the underlying claim, the plaintiff's failure to plead the underlying count requires dismissal of the related conspiracy claim as well).

III. PLAINTIFF HAS NOT STATED A *BIVENS* CLAIM.

Bivens provides a cause of action for damages against a federal official who, acting under color of federal law, violates a plaintiff's constitutional rights. *Hardison v. Cohen*, 375 F.3d 1262, 1264 (11th Cir. 2004). Plaintiff asserts that Defendants violated his First and Fifth Amendment rights. He claims that Defendants violated his First Amendment rights to freedom of speech and association "by not providing the misappropriated records and documents which Plaintiff is entitled to under FOIA law." Am. Compl. ¶ 310. He further claims in even vaguer terms that, under the Fifth Amendment, "his rights [were] violated under FOIA, his business and property rights have been violated, and [he lost] his rights and property under the due process clause." *Id.* ¶ 307. Supreme Court precedent squarely forecloses Plaintiff's *Bivens* claims.

A. Plaintiff Does Not Have a Constitutional Right to Government Records.

The Supreme Court has repeatedly rejected the argument that citizens possess a constitutional right to access government records. *See, e.g.*, *McBurney v. Young*, 133 S. Ct. 1709, 1718 (2013) ("[T]here is no constitutional right to obtain all the information provided by FOIA laws."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality op.) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *id.* at 16 (Stewart, J., concurring in judgment) (same); *see also Foto USA, Inc. v. Bd. of Regents of Univ. Sys. of Fla.*, 141 F.3d 1032, 1035 (11th Cir. 1998) ("There is no First Amendment right of access to public information."). Plaintiff's constitutional claims should therefore be dismissed.

B. FOIA Precludes a *Bivens* Remedy.

As Plaintiff admits in his Amended Complaint, the "right" he purportedly seeks to enforce in this case is one created by a federal statute—in this case, FOIA. *See* Am. Compl. ¶¶ 307, 310. When a plaintiff alleges an "unconstitutional denial of a statutory right" and the statute contains "'comprehensive procedural and substantive provisions giving meaningful remedies against the United States,'" courts must decline to imply a *Bivens* claim. *Schweiker v. Chilicky*, 487 U.S. 412, 422, 428 (1988) (quoting *Bush v. Lucas*, 462 U.S. 367, 368 (1983)); *see also Lee v. Hughes*, 145 F.3d 1272, 1276–77 (11th Cir. 1998) (holding that the comprehensive nature of the Civil Service Reform Act precluded a *Bivens* remedy, even where the Act did not provide a procedure by which to remedy the alleged wrong).

The federal courts have recognized that the comprehensive nature of FOIA precludes courts from implying a private right of action under *Bivens* to remedy alleged injuries arising from FOIA. *See, e.g.*, *Johnson v. Exec. Office for U.S. Att'ys*, 310 F.3d 771, 777 (D.C. Cir. 2002); *Smith v. Lopez*, No. 2:13-cv-0892-GMN-PAL, 2014 WL 7368884, at *3 (D. Nev. Dec.

29, 2014); *Franklin v. Drug Enforcement Agency*, No. CV 14-3701-CBM, 2014 WL 2931702, at *2 (C.D. Cal. June 30, 2014); *Kroposki v. Fed. Aviation Admin.*, No. 3:08CV01519(AWT), 2009 WL 2710223, at *2 (D. Conn. Aug. 26, 2009). For example, in *Johnson*, the plaintiff alleged that a federal official's mishandling of a FOIA request violated his due process rights. 310 F.3d at 777. The D.C. Circuit observed that "[i]t is clear that courts are precluded from granting [*Bivens*] relief if the statute at issue provides a comprehensive system to administer public rights." *Id.* (quotation marks omitted). Finding the statute to be "just such a comprehensive scheme," the Court of Appeals concluded that "FOIA precludes the creation of a *Bivens* remedy." *Id.*

Because Plaintiff's purported injury arises under FOIA, he is foreclosed from pursuing *Bivens* claims for damages.

IV. PLAINTIFF HAS NOT STATED A STATE-LAW CLAIM FOR "MISAPPROPRIATION OF CHATTEL PROPERTY."

Finally, Plaintiff asserts a state-law claim for "Misappropriation of Chattel Property (Common law crime)." Am. Compl. ¶¶ 279–282. In particular, he claims that Defendants misappropriated "the records responsive to Plaintiff's FOIA request" to which he purportedly "has a vested property right." *Id.* ¶ 280.

A search of Florida case law does not reveal any cause of action called "misappropriation of chattel property." To the extent Plaintiff intends to plead a claim for "civil theft" and/or "conversion," those claims are just as meritless as Plaintiff's federal claims. To prevail on a claim for civil theft or conversion under Florida law, "a plaintiff must show ownership of the subject property and . . . that the other party wrongfully asserted dominion over that property." *Prou v. Giarla*, No. 13-24266-CIV, --- F. Supp. 3d ----, 2014 WL 6725213, at *10 (S.D. Fla. Nov. 26, 2014) (alteration in original) (quotation marks omitted). For all the reasons previously

set forth, Plaintiff cannot establish an ownership interest in Secretary Clinton's e-mails. This claim therefore fails at the outset.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Clinton Foundation's Motion to Dismiss, Plaintiff's Amended Complaint—in the event it is accepted for filing following Plaintiff's procedural default—should be dismissed for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim.

Date: June 5, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2015, a true and correct copy of the foregoing Motion to Dismiss the Amended Complaint and Incorporated Memorandum of Law was served via CM/ECF on all counsel or parties of record.

By: /s/ Jeffrey E. Marcus
JEFFREY E. MARCUS