

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

CRYOLIFE, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION FILE
	)	NO: 1:09-CV-1150-CAP
MEDAFOR, INC.	)	
	)	
Defendant.	)	

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFF’S  
SECOND AMENDED COMPLAINT**

Defendant Medafor, Inc. (“Medafor”) respectfully submits this Memorandum of Law in Support of its Motion to Dismiss Plaintiff CryoLife, Inc.’s (“CryoLife”) Second Amended Complaint.

**I. INTRODUCTION.**

On December 9, 2009, the Court entered an Order [Doc. No. 43] dismissing CryoLife’s First Amended Complaint in this action. The Court described the deficiencies in CryoLife’s complaint and explained in detail what CryoLife needed to do to attempt to cure the deficiencies and submit a satisfactory complaint.

CryoLife ignored or defied the Court’s instruction in submitting its Second Amended Complaint. It has reasserted claims that the Court dismissed without

leave to replead, it has failed to correct deficiencies that the Court identified, and it has failed to follow the Court's direction for submitting a satisfactory complaint.

In particular:

- The Court found that the First Amended Complaint was a “shotgun pleading” because each of its nine counts incorporated by reference all of the paragraphs and counts preceding it. (Order, p. 18). Ignoring the Court's admonition, CryoLife incorporates by reference all of the paragraphs and counts preceding all but one of the seven counts in its new complaint. (See, Second Amended Complaint, ¶¶ 176, 322, 326, 330, 336, 338). The Second Amended Complaint remains a “shotgun pleading.”<sup>1</sup>

- The Court dismissed CryoLife's Georgia RICO claim to the extent that the claim was based upon representations that Medafor allegedly made to CryoLife before the execution of the Exclusive Distribution Agreement (“EDA”) between the parties, because where there is a merger clause in the agreement at issue, as there is in the EDA, “a pre-contractual misrepresentation cannot form the basis for a RICO claim.” (Order, p. 12). Disregarding that ruling, CryoLife once again attempts to base a RICO claim on alleged pre-contractual representations.

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<sup>1</sup> Interestingly, the complaint has grown from 225 paragraphs to 339 paragraphs.

- The Court held that “under Georgia’s civil RICO provision, the plaintiff can only recover for injuries incurred as a result of predicate acts directed toward itself, as opposed to predicate acts directed toward third parties” and that the plaintiff “must show reliance on the alleged mail or wire fraud.” (Order, p. 11). Ignoring that admonition, CryoLife attempts to base its RICO claim on alleged mail and wire fraud directed toward third parties.

- The Court dismissed CryoLife’s fraud and negligent misrepresentation claims based upon alleged representations by Medafor to CryoLife in the EDA and after the EDA was executed. (Order, p. 18). In the absence of fraud there cannot be mail fraud or wire fraud as predicate acts under Georgia RICO. Yet CryoLife alleges these representations as a basis for its RICO claim.

The Court gave CryoLife an opportunity to recast its pleading to try to assert a satisfactory RICO claim. CryoLife has tried but once again failed. Its new complaint does not meet the requirements of Rule 8 and 9(b) of the Federal Rules of Civil Procedure. In addition to attempting to assert grounds for its RICO claim that the Court has already rejected, CryoLife attempts to base its claim on trivial, immaterial representations and on speculation and conjecture. Further, CryoLife

has not demonstrated a pattern of racketeering activity as required under Georgia RICO.

CryoLife has ignored or defied the legal holdings and the directives in this Court's Order. The Second Amended Complaint should be dismissed.

## **II. STATEMENT OF FACTS.**

### **A. THE EXCLUSIVE DISTRIBUTION AGREEMENT BETWEEN MEDAFOR AND CRYOLIFE.**

The Court is by now familiar with the EDA between CryoLife and Medafor that defines the relationship of the parties and underlies this lawsuit. The EDA contains a merger clause. (EDA, § 11.5). In the EDA, Medafor granted CryoLife the exclusive right to distribute Medafor's MPH Product only within a defined Territory and only for use in a defined Field of medicine. (EDA § 2.1)(Second Am. Compl., ¶ 21-22). CryoLife may not sell the MPH Product outside of the Territory and Field set forth in the EDA. (EDA, § 2.1(a)). The EDA is the sole agreement between Medafor and CryoLife and its terms govern the parties' business relationship.

Medafor retained the rights both in the United States and the rest of the world to distribute its product in fields of medicine other than CryoLife's exclusive Field. It only promised that it would not grant to its other distributors rights that it

had granted CryoLife (except for contracts listed in EDA Schedule 2.1).<sup>2</sup> (EDA, § 2.1(c)). To the extent other contracts existed overlapping CryoLife's Field or Territory, Medafor needed only to amend or modify those agreements by specified dates, depending upon the Territory involved. Thus, much of the Second Amended Complaint asserts claims for actions that Medafor is completely entitled to do under the EDA.

**B. PROCEDURAL HISTORY.**

**1. The Original And First Amended Complaints.**

CryoLife filed its original Complaint on April 29, 2009 asserting claims of fraud in the inducement of the EDA, negligent misrepresentation, Georgia civil RICO, breach of contract, and money had and received, and seeking an accounting. In June 2009, Medafor moved to dismiss CryoLife's fraud, negligent misrepresentation, and Georgia RICO claims. While the motion was pending, CryoLife filed its First Amended Complaint, but continued to assert the same claims. CryoLife also added new allegations that Medafor made misrepresentations to CryoLife after the EDA was executed and that Medafor

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<sup>2</sup> CryoLife was well aware of Medafor's other distribution contracts. During the negotiations for the EDA, the parties discussed Medafor's other third party distributors, including the nature of the other distributor's rights that those other distributors had and how those distribution rights would change after the EDA became effective. (See, e.g., Second Am. Compl., ¶¶ 26, 27-31).

made misrepresentations to third parties. (See, e.g., Am. Compl., ¶¶ 30-34; 44-47; 52; 60; 126-132). Medafor moved to dismiss portions of the First Amended Complaint on August 17, 2009.

**2. The Order.**

This Court entered its Order on Medafor's second Motion to Dismiss on December 9, 2009. In the Order, the Court:

- Held that representations that Medafor allegedly made to CryoLife before the EDA was executed cannot form the basis for a RICO claim because there is a merger clause in the EDA. (Order, p. 12).

- Held that representations to third parties cannot form the basis for a RICO claim. (Order, p. 11).

- Held that the plaintiff must show reliance on the alleged misrepresentations that constitute the predicate acts of mail and wire fraud. (Order, p. 11).

- Held that the "unspecified" misrepresentations that CryoLife alleged Medafor made to it after the execution of the EDA were insufficiently pled under Fed.R.Civ.P. 9(b). (Order, p. 12).

- Held that CryoLife cannot base fraud and negligent misrepresentation claims on representations by Medafor before the contract was executed,

representations in the contract, or fraudulent representations in the continuation of the contract. (Order, p. 18).

- Found the First Amended Complaint to be a “quintessential shotgun pleading.” (Order, pp. 18-19).

The Court granted Medafor’s motion to dismiss CryoLife’s fraud and negligent misrepresentation claims. The Court also ordered CryoLife to recast its complaint “to cure the shortcomings which render the amended complaint a shotgun pleading” and to attempt to allege a RICO claim that was not “clearly deficient,” as the Court found the RICO claim alleged in the First Amended Complaint to be.

### **3. The Second Amended Complaint.**

In response to the Order, CryoLife submitted a Second Amended Complaint that omits claims for fraud and negligent misrepresentation, but retains its other claims, including its recast Georgia civil RICO claim.

CryoLife’s recast complaint fails to cure the deficiencies identified by the Court. As with the First Amended Complaint, each count of the Second Amended Complaint (with the exception of Count II) incorporates by reference all of the preceding paragraphs of the Complaint.

Further, CryoLife bases its RICO claim on representations that this Court has already held cannot support the claim. CryoLife attempts to base its RICO claim in part on alleged pre-contractual misrepresentations and misrepresentations to two third parties, despite the Court's admonition that it cannot do so. CryoLife also attempts to base its RICO claim on alleged misrepresentations by Medafor to CryoLife in the EDA and after the EDA was executed that the Court concluded could not support a fraud claim.

Finally, CryoLife's attempt to cure its RICO claim based on post-contract allegations is insufficient. CryoLife once again attempts to use its speculation about agreements that it believes Medafor has with other parties as a basis for its RICO fraud claim. (See, e.g., Second Am. Compl., ¶¶ 198, 208, 209, 214, 230,238). CryoLife also repeats its allegations about four post-EDA misrepresentations by Medafor, two regarding hospitals and two regarding Medafor's other distributors. These allegations of post-EDA representations do not satisfy Rules 8 and 9(b) or the direction of this Court.

### **III. ARGUMENT AND CITATION TO AUTHORITIES.**

#### **A. THE SECOND AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS A SHOTGUN PLEADING.**

The Second Amended Complaint is still a "quintessential shotgun pleading" and fails to cure that deficiency as the Court directed. (Order, p. 19). The new

complaint contains seven counts, each of which (with the exception of Count II) expressly incorporates by reference all of the paragraphs and counts preceding it. (See, Second Amended Complaint, ¶¶ 176, 322, 326, 330, 336, 338). It is still “virtually impossible to ascertain what factual allegations correspond with each claim...” (Order, pp. 18-19)(citing, Beckwith v. Bellsouth Telecomms., Inc., 146 Fed. Appx. 368, 372 (11th Cir. 2005)).

Because CryoLife has not complied with this Court’s Order to cure the problems in its shotgun pleading, its Second Amended Complaint should be dismissed. The Eleventh Circuit has expressed the view that where a plaintiff fails to comply with a court’s order to re-plead a shotgun complaint the court *should* dismiss its complaint. Byrne v. Nezhat, 261 F.3d 1075, 1128-1133 (11th Cir. 2001); See also, Johnson Enter. v. FPL Group, Inc., 162 F.3d 1290, 1332-33 (11th Cir. 1998). In affirming dismissal of plaintiff’s claims and the imposition of sanction against the plaintiff’s attorney, the Eleventh Circuit in Byrne held that where the plaintiff files a shotgun pleading the district court should *sua sponte*, as this Court did here, intervene and order a repleader. It went on to note that: “[i]mplicit in such instruction [where the court orders a repleader] is the notion that **if the plaintiff fails to comply with the court’s order--by filing a repleader with the same deficiency--the court should strike his pleading or, depending on the**

circumstances, dismiss his case and consider the imposition of monetary sanctions.” Id. at 1133 (Emphasis Supplied); See also Giles v. Wal-Mart Distrib. Ctr., No. 09-14223, 2009 U.S. App. LEXIS 28446, at \*4-5 (11th Cir. Dec. 28, 2009)(district court did not abuse its discretion in dismissing plaintiff’s amended complaint which amounted to a shotgun pleading); Abimbola v. Broward County, 266 Fed. Appx. 908, 910 (11th Cir. Feb. 27, 2008)(affirming dismissal of amended complaint where plaintiff failed to follow the court’s instructions on re-pleading, the amended complaint did not comply with Fed.R.Civ.P. 8 and amounted to a shotgun pleading which contained the same deficiencies as the original complaint).

Having again submitted another shotgun pleading in its Second Amended Complaint, CryoLife flouted this Court’s instruction and the Complaint should be dismissed.

**B. CRYOLIFE’S RICO CLAIM FAILS AS A MATTER OF LAW.**

**1. None Of The Four Categories Of Predicate Acts Alleged By CryoLife Support Its Georgia RICO Claim.**

CryoLife alleges that the alleged predicate acts that form the basis of its RICO claim fall into four general categories: (1) Alleged misrepresentations to CryoLife before the EDA was executed; (2) Misrepresentations to CryoLife in the EDA; (3) Misrepresentations to CryoLife after the EDA was executed; and (4) Misrepresentations to third parties. The Court has already dismissed CryoLife’s

RICO claim based upon two of these categories of representations, and the Court's rulings in the Order require dismissal of the claim based upon representations in the other two categories. None of these "categories" of alleged mail and wire fraud meet the requirements of Rules 8 and 9(b) to allege a RICO claim.

a. **CryoLife's RICO Claim Based Upon Pre-Contractual Misrepresentations Has Already Been Dismissed By This Court.**

The Court has already expressly dismissed CryoLife's RICO claim based upon pre-contractual misrepresentations, without leave to recast this claim. (Order at p. 15). In dismissing this claim, this Court held that **"where there is a merger clause in the agreement at issue, a pre-contractual misrepresentation cannot form the basis for a RICO claim."** (Order, p. 12)(citations omitted)(Emphasis Supplied). Accordingly, the merger clause in the EDA precludes CryoLife from relying on any pre-contractual misrepresentations in its RICO claim.

Disregarding the Court's ruling, CryoLife devotes **11 pages and 40 paragraphs** of its Second Amended Complaint to allegations of pre-contractual misrepresentations by Medafor that CryoLife claims constitute predicate acts for a Georgia RICO claim. (Second Am. Compl., ¶¶ 273-312).

In an attempt to justify its disregard of the Court's ruling, CryoLife asserts that "reliance is not an element of a claim for wire fraud." (Second Am. Compl., ¶

189). Reliance is an element of mail or wire fraud. In its Order, this Court concluded that “[t]he plaintiff must show reliance on the alleged misrepresentations that constitute the predicate acts of mail or wire fraud.” (Order, p. 11)(citations omitted)(Emphasis Supplied). Thus, CryoLife’s RICO claim based on pre-contractual representations by Medafor to CryoLife should be dismissed.

**b. CryoLife’s RICO Claim Based Upon Misrepresentations To Third Parties Has Already Been Dismissed By This Court.**

This Court previously dismissed CryoLife’s RICO claim to the extent that the claim was based on acts directed toward third parties, without leave to recast this claim. (Order, p. 15). The Court expressly held that “**under Georgia’s civil RICO provision, the plaintiff can only recover for injuries incurred as a result of predicate acts directed towards itself, as opposed to predicate acts directed towards third parties.**” (Order, p. 11)(citations omitted)(Emphasis Supplied).

Disregarding that dismissal, CryoLife continues to allege violations based on claimed misrepresentations made to two customers, UNC Hospitals and Clarian West Medical Center (Second Am. Compl., ¶¶ 313-319) after the EDA was executed. Such representations, even if made, were not made to CryoLife and thus cannot form the basis for a fraud claim by CryoLife. Under the Court’s Order, the claim based upon these alleged representations should once again be dismissed.

CryoLife attempts to justify its disregard of the Court's Order, as it does in relation to pre-contractual representations, on its assertion that reliance is not an element of mail fraud or wire fraud under Georgia RICO. (Second Am. Compl., ¶ 190). This Court already ruled adversely to CryoLife on this issue and its RICO claim based on alleged misrepresentations to third parties should be dismissed.

c. **CryoLife Cannot Base Its RICO Claim On Alleged Misrepresentations to CryoLife In The EDA Or After The EDA Was Executed.**

CryoLife bases its RICO claim on the predicate acts of mail fraud and wire fraud on the basis of representations made by Medafor to CryoLife in the EDA and after the EDA was executed. CryoLife cannot maintain its claim based upon these representations.

In its First Amended Complaint, CryoLife did not base its RICO claim on any misrepresentations in the EDA, and instead tried to make representations in the EDA a basis for a fraud in the inducement of contract claim. Post-EDA, CryoLife only referred to "numerous" unspecified misrepresentations. This Court granted leave to CryoLife to recast its RICO claim to adequately plead the alleged post-contractual misrepresentations it relies upon for its RICO claim. (Order, pp. 13, 15). CryoLife now attempts to base its RICO claim on alleged misrepresentations

both in the EDA and after the EDA was executed. (Second Am. Compl., ¶¶ 192-242; 243-272). Once again, CryoLife ignored this Court's Order.

In addressing CryoLife's fraud and negligent misrepresentation claims, this Court expressly held that **“the plaintiff also cannot rely upon any contractual or post-contractual representations as a basis for its claims of fraud and negligent misrepresentation** as this court is not aware of any authority, and the plaintiff has not presented any authority, to show that Georgia recognizes a tort of fraud in the continuance of a contract.” (Order, p. 18)(Emphasis Supplied). Accordingly, CryoLife's claims for fraud and negligent misrepresentation based upon contractual or post-contractual representations were dismissed.

CryoLife now attempts to circumvent this Court's Order by characterizing the exact same contractual and post-contractual misrepresentations as the predicate acts of mail or wire fraud in its Georgia RICO claim. (Second Am. Compl., ¶¶ 193-242; 243-272). But Georgia law is clear that where a RICO claim is based upon the underlying predicate act of fraud, as is the case here, *and the fraud claim fails*, as is also the case here, the RICO claim necessarily fails. Prince Heaton Enterprises, Inc. v. Buffalo's Franchise Concepts, Inc., 117 F.Supp.2d 1357, 1363 (N.D. Ga. 2000)(“Quite simply, where there is no fraud there is no mail fraud.”)

This Court has expressly held that CryoLife cannot rely on contractual or post-contractual representations as a basis for its claim for fraud in the inducement or continuance of the contract. (Order, p. 18). Without a fraud claim, no RICO claim can exist, and CryoLife's RICO claim based upon representations to CryoLife in the EDA and after the execution of the EDA in the continuance of the contract should be dismissed.

**2. CryoLife's RICO Claim Arises From Isolated Incidents Relating To A Single Transaction, Not A "Pattern" Of Racketeering Activity Required For A Georgia RICO Action.**

CryoLife attempts to stitch together four isolated "incidents" that are a part of a single transaction to try to show a "pattern" of racketeering activity. That attempt is not successful.

CryoLife continues to attempt to base its RICO claim on "at least two transactions: (1) several predicate acts leading up to the EDA, and (2) several other predicate acts occurring after the EDA was executed." (Order, p. 8). The Court has found that one of those two transactions, the acts leading up to the EDA, cannot support a RICO claim because of the EDA's merger clause. The EDA is the sole agreement and CryoLife is left with a single alleged transaction – representations made by Medafor after the EDA was executed.

CryoLife alleges four isolated incidents post-EDA: a representation about Michigan being “open;” a representation about Janus’s distributor contract; a representation about a cancelled flight; and a representation relating to whether “contact” had been made with a Wilkes-Barre hospital. These isolated incidents, even if CryoLife’s characterization of them were correct, cannot demonstrate a necessary “pattern” of racketeering activity.

Georgia’s RICO statute defines “pattern of racketeering activity” as:

Engaging in at least **two** acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics **and are not isolated incidents**. . . . O.C.G.A. § 16-14-3(8)(Emphasis Supplied).

See Emrich v. Winsor, 198 Ga. App. 333, 333 (1991)(“Liability under both the federal and the Georgia RICO statutes is dependent upon the showing of a ‘pattern of racketeering activity.’”).

While CryoLife has based much of its previous argument on a 2001 amendment to the RICO statute, the amended statute still expressly states that the required “acts” of racketeering activity must not be “isolated” incidents.<sup>3</sup> Here, CryoLife alleges only isolated incidents.

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<sup>3</sup> In enacting the statute, the General Assembly expressly noted its intent that the statute was intended to address an “interrelated pattern of criminal activity” and

Georgia courts have held that a “pattern” of racketeering activity cannot arise out of a single transaction. Overton v. State, 295 Ga. App. 223, 230 (2008); Jones v. Infocure Corp., 2005 U.S. Dist. LEXIS 46745, \*60-63 (N.D. Ga. Sept. 2, 2005). CryoLife has argued that the 2001 amendment eliminated the requirement that the “pattern of racketeering activity” must arise from more than one isolated incident or transaction. No cases support CryoLife’s argument, and neither does the statute’s language quoted above.

Courts have twice since the 2001 amendment considered whether a “pattern” can arise from an isolated transaction. Both courts decided that it cannot. In November 2008, the Georgia Court of Appeals in Overton, 295 Ga. App. at 230, recognized that to constitute a “pattern of racketeering activity,” the predicate acts must be more than an isolated transaction or incident. In that case the defendant was convicted of multiple crimes, including a RICO violation. The Court of Appeals affirmed the defendant’s conviction. Quoting the **amended** RICO statute, the court noted that the predicate acts at issue were “sufficiently linked to form a

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**not** intended to address isolated incidents. See, O.C.G.A. § 16-14-2(b). Although the language refers to “isolated incidents of misdemeanor conduct or acts of civil disobedience” this language indicates the General Assembly’s intent that RICO was meant to address repeated, not isolated, conduct such as the sole agreement between the parties in this case.

RICO pattern, **but sufficiently distinguishable so that they were not mere single transactions.**” (Emphasis Supplied).<sup>4</sup>

Similarly, in Jones v. Infocure Corp., 2005 U.S. Dist. LEXIS 46745, \*60-63 (N.D. Ga. Sept. 2, 2005), in express reliance on a post-amendment Georgia Court of Appeals case that cited the **amended statute**, this Court noted that a “pattern” under the Georgia RICO statute consists of at least two “incidents” of racketeering activity.<sup>5</sup> Under this definition, this Court noted that evidence showing “two joint victims of one isolated transaction” was insufficient to establish a pattern of racketeering activity under the statute. Id. at \*62. Further, the alleged securities fraud involved in the case was “limited to a single transaction and cannot be considered multiple distinct predicate acts.” Id. at \*63.<sup>6</sup>

CryoLife’s post-EDA allegations are of isolated incidents that relate to a single transaction—the EDA. Unlike the acts alleged in Overton, these alleged

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<sup>4</sup> The court cited Stargate Software International v. Rumph, 224 Ga. App. 873 (1997) and Raines v. State, 219 Ga. App. 893 (1996) as examples of cases involving a single transaction.

<sup>5</sup> In defining a “pattern of racketeering activity,” the Court relied upon Faillace v. Columbus Bank & Trust Co., 269 Ga. App. 866, 868 (2004), a post-amendment case that quotes the **amended** definition of “pattern of racketeering activity” in the Georgia RICO act.

<sup>6</sup> Other courts have also recognized that a pattern must arise from more than one transaction. In Cincinnati Gas & Electric Co. v. General Electric Co., 656 F. Supp. 49, 89 (S.D. Ohio 1986), the court noted that “more than one transaction or criminal episode is required to constitute a pattern of racketeering activity.”

acts are **not “sufficiently distinguishable”** so that they are not merely a single transaction. They do not demonstrate a “pattern” of racketeering activity. CryoLife’s RICO claim should be dismissed.

**3. CryoLife’s Alleged Post-Contractual Misrepresentations Cannot Support Its Georgia RICO Claim.**

In its Order, the Court held that CryoLife’s pleading of “numerous” unspecified post-EDA misrepresentations through the use of mail and wires was insufficient under Fed. R. Civ. P. 9(b), which requires civil RICO plaintiffs alleging fraud to plead “(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; **(3) the content and manner in which the statements misled the plaintiffs; and (4) what the defendants gained by the alleged fraud.**” (Order, p. 12)(citation omitted). The Court granted limited leave to CryoLife to replead these *post-EDA allegations*. In response, CryoLife alleges four post-EDA “misrepresentations,” two relating to hospitals (Wilkes-Barre General Hospital and Jewish Hospital) and two relating to Medafor’s distributors (Janus and Gunstar) (Second Am. Compl., ¶¶ 243-272). The misrepresentations CryoLife alleges as to Janus and Gunstar are based upon speculation and fail to meet the pleading requirements of Fed. R. Civ. P. 8 and 9(b). The alleged misrepresentations relating to Wilkes-Barre and Jewish Hospitals add triviality and lack of materiality to these

defects. Further, CryoLife's vague description of how it was misled and what Medafor gained does not meet the plausibility requirement of Rule 8 or the particularity requirement of Rule 9(b).

a. **The Janus and Gunstar Allegations Are Based Upon Speculation And Fail To Meet The Pleading Standards Of Rules 8 or 9(b).**

The United States Supreme Court recently held that, to survive a motion to dismiss, a plaintiff's allegations must "contain sufficient factual matter" to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007). A court is not required to accept as true allegations that are conclusory or constitute "unwarranted deductions" of fact. Although the Court must accept well-pleaded facts as true, "the court is not required to accept a plaintiff's legal conclusions." Sinaltrainal v. The Coca-Cola Co., 578 F.3d 1252, 1260-61 (11th Cir. 2009), citing Iqbal, 129 S.Ct. at 1949. The Eleventh Circuit explained:

In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, 'but we are not required to draw plaintiff's inference.' Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, 'unwarranted deductions of fact' in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. Id.; see also Iqbal, 129 S.Ct. at 1951 (stating conclusory allegations are 'not entitled to be assumed true').

Determining whether a complaint states a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id.; Iqbal, 129 S.Ct. at 1950.

Courts have also repeatedly held that allegations pleaded “upon information and belief” must plead “a statement of facts upon which their belief is based.” Am. Gen. Life & Accident Ins. Co. v. Ward, 509 F. Supp. 2d 1324, 1336 (N.D. Ga. 2007); See, Hill v. Morehouse Medical Associates, Inc. 2003 WL 22019936, \*3 (11th Cir. Aug. 15, 2003)(noting that a pleading “upon information and belief” must allege “factual allegations that make [a] theoretically viable claim plausible”). CryoLife’s RICO allegations relating to Janus and Gunstar are based upon speculation and “naked assertion[s]” without any “further factual enhancement.” Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974 (internal citations omitted). In addition, CryoLife does not explain how it was misled or what Medafor gained by the alleged representations. CryoLife’s conclusory allegations and unwarranted deductions do not meet the Rule 8 requirements enunciated by the Eleventh Circuit or the particularity requirements described in the Order. These allegations fail to meet the pleading standards of Rule 8 and Rule 9(b):

- **Janus:** CryoLife alleges that a Medafor representative, Kraig Black, sent an email to CryoLife, after the EDA was executed, stating that all “new and

amended contracts specifically prohibit [distributors] from selling into CV [cardiac and vascular].” (Second Am. Compl., ¶ 261). CryoLife claims that this email was false because Medafor had a competing distributor agreement with Janus that it failed to amend or terminate, as required by the EDA. (Second Am. Compl., ¶ 262). CryoLife claims the email was false based on rank speculation that Medafor was “apparently” operating under its “old” agreement with Janus and on a representation that Janus supposedly made to CryoLife about its distribution rights, which, so far as CryoLife’s pleading reveals, CryoLife did nothing to attempt to verify.

- **Gunstar:** CryoLife alleges that Mr. Black sent an email to CryoLife representatives stating that the state of Michigan was “open” (Second Am. Compl., ¶ 268). CryoLife speculates about the meaning of “open,” thereby adding to the defects that permeate its allegations about Janus and apply, as well, to the Gunstar allegations. CryoLife speculates that the alleged statement that Michigan was “open” was false, based solely on its unsupported assertion that Gunstar continued to distribute in Michigan. (Second Am. Compl., ¶ 269).

**b. The Wilkes-Barre And Jewish Hospital Allegations Are Not Material.**

This Court has recognized that materiality is an essential element to mail or wire fraud RICO claims. Moorman v. Unumprovident Corp., NO. 1:04-CV-2075-BBM, 2005 U.S. Dist. LEXIS 46390, at \*43-44 (N.D. Ga. Feb. 17, 2005)(elements of a civil RICO action predicated upon federal mail and wire fraud include a scheme to defraud “by means of material misrepresentations. . . .”) See also, United States v. Hasson, 333 F.3d 1264, 1271 (11th Cir. 2003)(noting that a scheme to defraud requires proof of material misrepresentations or omission of a material fact)(citing, Neder v. United States, 527 U.S. 1, 25 (1999)). In addition to the deficiencies set forth above, CryoLife’s allegations regarding these hospitals fall far short of meeting the materiality requirement:

- **Wilkes-Barre General Hospital:** CryoLife alleges that, in January 2009, Mr. Black wrote in an email which CryoLife concludes contained the “implicit” representation that he had contacted Wilkes-Barre about a meeting to transition from Arista to HemoStase,<sup>7</sup> when he had not had such contact. (Second Am. Compl., ¶¶ 245-47).

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<sup>7</sup> Arista is Medafor’s trade name for the MPH Product; HemoStase is CryoLife’s trade name for the product.

- **Jewish Hospital:** CryoLife alleges that Mr. Black sent an email to CryoLife representatives stating that he would call Jewish Hospital and arrange a meeting about transitioning from Arista to HemoStase. (Second Am. Compl., ¶ 252). CryoLife then claims that Mr. Black said that he had arranged to meet with Jewish Hospital on February 9, 2009 but on the day of the meeting falsely texted that he could not make it to the meeting because his flight had been cancelled. (Second Am. Compl., ¶¶ 253-54).

These allegations suffer from the deficiencies of speculation about what was “implicit” in Mr. Black’s email, the absence of any factual support for CryoLife’s assertions that the representations were false, and only the vaguest reference to how CryoLife was misled or what Medafor gained. Those deficiencies alone doom any RICO fraud claim based on the allegations. Further, even if CryoLife’s assertions were to be believed, statements about whether a contact had been made or a meeting arranged or a flight missed cannot conceivably be considered material in the context of a worldwide, multi-million dollar, five-year contract. The inclusion of such trivial allegations reveals CryoLife’s lack of any meaningful basis to allege a RICO claim.

**IV. CONCLUSION.**

For the foregoing reasons, Medafor respectfully requests that this Court dismiss CryoLife's Second Amended Complaint.

This **11th** day of **January**, 2010.<sup>8</sup>

/s/ Lisa L. Heller

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<sup>8</sup> Counsel hereby certifies that this document has been prepared in Times New Roman font (14 point), in accordance with Local Rule 5.1C.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2010, I electronically filed **Memorandum of Law in Support of Motion to Dismiss Plaintiff's Second Amended Complaint** using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

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