IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JEREMIAH'S INTERNATIONAL TRADING COMPANY, Inc. d/b/a AMERICA'S AUCTION NETWORK,	)	
Plaintiff,	)	
vs.	)	Civil No.: 8:14-cv-584-JDW-TGW
ANTHONY CALDERONE and RAYMOND TAYLOR,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, JEREMIAH'S INTERNATIONAL TRADING COMPANY, Inc. d/b/a AMERICA'S AUCTION NETWORK ("AAN"), hereby responds to Defendants' Motion to Dismiss.

INTRODUCTION

The Amended Complaint shows that Defendants ANTHONY CALDERONE and RAYMOND TAYLOR (1) obtained kickbacks from artwork suppliers, (2) accepted fake artwork from suppliers, (3) misrepresented and sold that artwork to customers of AAN, (4) misappropriated artwork and other AAN merchandise to their own uses, (5) stole AAN's trade secrets and intellectual property and then (6) wrongfully solicited AAN's customers in violation of their agreements with AAN and (7) falsely claimed to AAN customers that they departed AAN to protest the very practices they initiated. (Doc. 4, Page 1) The Amended Complaint shows that Defendants' scheme began shortly after Defendants Calderone and Taylor were hired in September 2005 and September 2006, respectively. (Doc. 4, Page 4, Paragraphs 15 and 17) By January 2007, Defendants were dealing, on behalf of AAN, with a supplier known as Gallery. (Doc. 4, Page 5, Paragraph 24) These dealings by

Defendants, including receipt of kickbacks from Gallery, continued until November 2008 when Jeremiah Hartman, AAN's owner, prohibited Defendants from dealing with Gallery due to fraudulent invoicing. (Doc. 4, Pages 7-8, Paragraphs 34-37) By April 2009, Defendants began purchasing, on behalf of AAN, from a supplier known as Global.[1] (Doc. 4, Page 7, Paragraph 38) Much of the artwork ordered from Global was fake or misrepresented. (Doc. 4, Page 12, Paragraphs 63 and 64) Defendants continued their misconduct until May 17, 2010, when AAN confronted Defendant Calderone and he resigned. (Doc. 4, Page 13, Paragraph 71) Knowing that AAN's ongoing investigation would uncover evidence of his wrongdoing, Defendant Taylor immediately ceased reporting to work. (Doc. 1, Page 16, Paragraph 82) Defendants used stolen merchandise and customer lists to wrongfully compete with AAN. (Doc. 4, Pages 16-20, Paragraphs 83-102)[2]

Despite the pattern of predicate acts extending over several years shown in the Amended Complaint, Defendants file a Motion to Dismiss and assert that AAN has not alleged the required elements for a Federal RICO claim.[3] Although the RICO act contains four substantive provisions, 18 U.S.C. § 1962, Defendants acknowledge and discuss only two of those provisions, subsection (b) (under which AAN does not even claim), and subsection (c) (under which AAN is clearly entitled to relief). Defendants' analysis conflates the requirements of the two subsections they deign to acknowledge, and imports the "acquisition of control" requirement of subsection (b) into subsection

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[1] Unbeknownst to AAN, Global was related to Gallery and was created by Gallery's owners so that Defendants could continue their scheme. (Doc. 4, Pages 7-8, Paragraphs 38-41)

[2] As shown throughout the Amended Complaint, Defendants committed numerous other acts against AAN.

[3] Defendants quote *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"), and *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) ("…entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). Counsel have previously commented upon the detailed and lengthy factual allegations set forth by AAN, (Doc. 10, Page 2; and Doc. 11, Page 2), which belies their implication that AAN's Amended Complaint is conclusory. In any event, AAN's Amended Complaint easily surpasses the pleading standard set forth in *Twombly* and *Iqbal*.

(c), where it does not exist.

Next, Defendants' discussion of the enterprise requirement completely ignores the existence of AAN, with which both Defendants associated for many years, and instead focuses solely on Gallery and Global, companies that also defrauded AAN with Defendants' assistance. Defendants' discussion of the pattern requirement similarly ignores the fact that Defendants devised a number of methods of defrauding AAN and its customers, perpetrated those schemes over several years, continued those schemes until they were detected, and continued to harm AAN after their departure.

From the misguided premises outlined above, Defendants conclude that this Honorable Court lacks subject matter jurisdiction over this controversy. Next, Defendants assert that Florida RICO is interpreted pursuant to Federal RICO caselaw and that this Honorable Court should therefore dismiss AAN's Florida RICO claim. Despite adequate allegations that Defendants together operated AAN's art department, stole from AAN, defrauded AAN's customers, planned a competing venture, departed AAN's employ, and wrongfully competed with AAN, Defendants assert that this Honorable Court should dismiss AAN's civil conspiracy claim for failure to show that Defendants acted "in concert."[4] AAN has sufficiently alleged the required elements for a Federal RICO claim, and thus

[4] As stated in the Amended Complaint, Global, a supplier with whom AAN dealt at Defendants' behest, sued AAN shortly after Defendants' departure from AAN's employ. (Doc. 4, Page 9, Paragraph 47) This lawsuit, *Global Fine Art Distributors v. Jeremiah's International Trading Company,* 2010-CA-7098 (6th Cir. Pinellas) ("State Case") ultimately fell dormant for nearly two years. Shortly after the filing and service of the Amended Complaint (Doc. 4), the lawyer representing Global in the State Case suddenly moved to withdraw. The lawyers representing Defendants in this action then appeared in the State Case as well. Concurrent with the filing of their Motion to Dismiss, the lawyers representing Defendants sent nearly identical "litigation hold" letters to undersigned counsel pertaining to each case. Counsel for Defendants confirm that they are compensated by Global and / or John Caldwell, who operated both Gallery and later Global. Undersigned counsel is further informed that Defendants remain in Global's employ. These facts, combined with the facts shown in the Amended Complaint, show that Defendants conspired not only with each other, but also with Gallery, Global, Caldwell, and others. At the very least, the fact that each bad actor named in the Amended Complaint maintains a continuing relationship to this day buttresses AAN's case.

this Honorable Court has supplemental jurisdiction over each subsequent count in AAN's Amended Complaint. AAN similarly pleads a proper Florida RICO claim. AAN has also provided sufficient basis to show the Defendants acted "in concert" to satisfy the requirements for civil conspiracy. Defendants blatantly misconstrue both the Amended Complaint and controlling RICO caselaw and this Honorable Court should deny Defendants' Motion to Dismiss.

AAN ALLEGES FACTS SUPPORING SEVERAL RICO CLAIMS

A Plaintiff may demonstrate a RICO claim by pleading the elements of any of the four subsections of 18 U.S.C. § 1962, which is entitled "Prohibited Activities." Nonetheless, Defendants fail to acknowledge that 18 U.S.C. § 1962 is comprised of four subsections and instead only purport to address subsections (b) and (c). Although AAN also claims under subsections (a) and (d), Defendants argue that by purportedly failing to meet the criteria of subsections (b) and (c), AAN has failed to properly plead any RICO claim. Contrary to Defendants' assertions, which misconstrue both the requirements of the RICO Act and the allegations of the Amended Complaint, AAN satisfies all of the elements of three of the subsections, including and especially subsection (c).

Subsection (a) prohibits investing income derived from a pattern of racketeering activity in "the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Defendants violated subsection (a) by investing misappropriated artwork, collectibles, and intellectual property in their competing venture.[5] Defendants appropriated AAN artwork while at AAN (Pages 12-13, Paragraphs 65-67) and sold it to cruise lines, (Page 13, Paragraph 68) purported to consign it to other merchants, (Pages 14-

[5] Defendants also undoubtedly used funds derived from their scheme (either the kickbacks or profits from sale of stolen merchandise) to further their scheme, both during their employ with AAN and thereafter. *See Colombia v. Diageo*, 531 F.Supp.2d 365, 429 (E.D.N.Y. 2007) (finding plaintiff need not explicitly allege defendant invested proceeds from RICO enterprise to properly plead 1962(a) claim because investment of enterprise profits was reasonably inferred).

15, Paragraph 77) and sold it on Ebay. (Page 15, Paragraph 78) Upon their departure, Defendant Taylor invested stolen U.S. coins into EmVee TV by offering those coins to AAN customers to entice them to open accounts with EmVee TV. (Doc. 4, Page 16 and 18, Paragraphs 83-86 and 92) *see also Ideal Steel v. Anza*, 652 F.3d 310, 322 (2d Cir. 2011) (holding that investment of racketeering proceeds in a new competing venture constituted 1962(a) violation).[6] Defendants also used AAN's intellectual property, including its customer lists, to establish relationships with new customers. (Pages 17-19, Paragraphs 89, 93 and 99) *see also Lightening Lube v. Witco*, 4 F.3d 1153, 1188-89 (3d Cir. 1993) (discussing investment of intellectual property under subsection (a)). These acts harmed AAN not only because AAN lost merchandise, but also because Defendants invested this merchandise, along with AAN's customer lists, to solicit AAN customers and compete with AAN, resulting in a loss of valuable customers. (Doc. 4, Pages 17-18, Paragraphs 89-93) These investments did not merely sustain Defendants and allow them to commit predicate acts, they were necessary for Defendants to begin their new ventures. AAN was thus injured twice: once when the merchandise was stolen, and again when its merchandise and trade secrets were used against it to deprive it of sales volume and customers.[7]

Subsection (c) states that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce,

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[6] The court also noted that Congress did not intend for "income" to be read restrictively for purposes of 1962(a). *Ideal*, 652 F.3d at 322.

[7] Defendants assert that AAN fails to state a RICO claim because it fails to allege that Defendants had control in Global and Gallery. Whether or not Defendants had control in Global and / or Gallery, they certainly had control in AAN, which is an enterprise as set forth in the Amended Complaint. (Doc. 4, Page 20, Paragraph 106) In any event, subsection (b), is the only RICO subsection that requires control. Defendants' statement that control by an individual defendant in a corporation is required for any RICO claim is completely misplaced. Although Defendants had control of AAN, they admittedly did not acquire that control through a pattern of racketeering activity, as required by subsection (b), and AAN therefore does not assert such a claim in this action.

to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." As set forth in detail below, Defendants were employed by AAN, an enterprise engaged in interstate and foreign commerce, and conducted and participated in AAN's affairs through a pattern of racketeering activity. Defendants also affected interstate commerce through their various predicate acts committed after leaving AAN's employ.

Subsection (d) declares it unlawful for "any person to conspire to violate any of the provisions of subsection (a), (b), or (c)…" The relationships, both between Defendants, and with Gallery, John Caldwell, Global, John Ward, EmVee TV, and WSN among others, show that they intended to further an endeavor to invest their racketeering proceeds in various ventures, to defraud AAN and its customers, and to steal from AAN. *Salinas v. United States*, 522 U.S. 52, 65 (1997) (agreement in furtherance of the overall object of a criminal scheme shows a subsection (d) violation). Furthermore, AAN suffered damages that were proximately caused by Defendants' violations of subsections (a) and (c), as required by *Beck v. Prupis*, 529 U.S. 494 (2000), and therefore satisfies the requirements of 1962(d).

Satisfaction of the criteria for *any* subsection of 18 U.S.C. § 1962 supports a valid RICO claim and, as demonstrated above, AAN has alleged the elements of three of the four subsections. Defendants discuss only subsections (b) and (c) in their memorandum. Although AAN does not pursue a subsection (b) claim against Defendants, their arguments regarding subsection (c) are addressed in detail below.

AAN PROPERLY PLEADS A RICO CLAIM

Defendants rely on *Sedima v. Imrex*, 473 U.S. 479, 496 (1985), to establish the four elements of a successful subsection (c) claim, which "requires (1) conduct (2) of an enterprise (3) through a

pattern (4) of racketeering activity." Notably, *Sedima* demonstrates the Supreme Court's liberal interpretation of the Federal RICO statute after delineating this four-pronged test:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

473 U.S. at 497-98. Sedima alleged that Imrex, a joint venture partner, presented inflated bills and attempted to collect for nonexistent expenses. *Id*. at 484. The Supreme Court allowed the claim even though the dispute involved legitimate businesses. *Id*. at 499, *see also United States v. Turkette*, 452 U.S. 576 (1981) (holding that RICO applies to legitimate and illegitimate businesses alike.) We thus consider Defendants' arguments against the background legislative intent, expounded by the Supreme Court, that courts should liberally apply the RICO statute to provide a civil remedy for racketeering injuries involving otherwise legitimate businesses.

AAN Shows that Defendants Conducted the Affairs of an Enterprise

The enterprise requirement is easily satisfied. 18 U.S.C. § 1961(4) states that an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Defendants seem to confuse this prong of the test, placing inordinate emphasis on "control" of an enterprise.[8] Of the subsections of

[8] Defendants argue, without citation to any authority except the statute itself, that "…in situations in which a company is an 'enterprise' and an individual defendant is named rather than the corporation, a plaintiff must allege that the defendant *had control in* an enterprise which is engaged in or affects interstate or foreign commerce and that he conducted such enterprise through a pattern of racketeering activities." (Doc. 13 at 6-7) (emphasis in original). This blanket assertion misconstrues the statute.

18 U.S.C. § 1962, only subsection (b) requires "interest in or control of any enterprise . . ."[9] Defendants fail to provide any relevant authority for their assertion that *any* RICO claim requires interest or control, referencing only *United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), which does not even discuss control, much less state that control is a critical element to any successful RICO claim.[10] In any event, interest or control is only required under 1962(b), which AAN does not assert here, and not under any other subsection, including subsection (c).[11]

Defendants' discussion of the "enterprise" requirement is also misleading because it repeatedly discusses Defendants lack of control in Global and Gallery (Doc. 13, Page 7) but ignores the fact that AAN is also an enterprise. (Doc. 5, Page 20, Paragraph 106) Defendants cannot seriously dispute that, as the manager and auctioneer of the artwork department, they conducted AAN's affairs. *See United States v. Marino*, 277 F.3d 11, 27-28 (1st Cir. 2002) ("When the defendant uses his position in the enterprise to commit the racketeering acts, the "through" requirement is fulfilled. In addition, when the resources, property, or facilities of the enterprise are used by the defendant to commit the predicate acts, the "through" requirement is fulfilled.") (citations omitted)[12] Because Defendants were employed by AAN as a manager and auctioneer, and

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[9] Defendants fail to even mention "interest," simply arguing that Defendants lack of "control" dooms AAN's RICO claim. By clearly stating "interest *or* control" in the disjunctive, the statute demands nothing in the way of control as a critical element.

[10] *Hewes* offers yet more support for AAN's argument, citing *United States v. Cagnina*, 697 F.2d 915, 920-921 (11th Cir. 1983), *cert. denied*, 464 U.S. 856 (1983) (holding that "a group of persons that had committed a variety of unrelated offenses with no agreement as to any particular crime could be convicted of a RICO offense, because they were associated for the purpose of making money from repeated criminal activity.")

[11] Defendants specifically cite not only subsection 1962(b) but also subsection 1962(c) after their assertion that "a plaintiff must allege that the defendant had control in an enterprise . . ." (Doc. 13, Page 7) 1962(c) does not even contain the word "control" and this citation is therefore completely inappropriate.

[12] *See also United States v. Scotto*, 641 F.2d 47, 54 (2d. Cir. 1980) (noting that "one conducts the activites of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control

controlled the art department and conducted the affairs thereof, their relationship to AAN satisfies the "enterprise" requirement for AAN's RICO claim. *See Reves v. E&Y*, 507 U.S. 170 (1993) (entertaining a claim involving a victim enterprise); *NOW v. Scheidler*, 510 U.S. 249, 259 n.5 (1994) (noting that a enterprise under Section 1962 may be a "prize, "instrument," "victim," or "perpetrator); *Bank of America v. Touche Ross*, 782 F.2d 966, 969 (11th Cir. 1986) (noting that "a civil cause of action under RICO could arise [when] the racketeer/defendant manipulates the affairs of the enterprise by committing multiple criminal acts, *i.e.*, a pattern of racketeering injury, that have primary impact on the enterprise and collateral impact (adverse economic impact) on others");[13] *Allwaste v. Hecht*, 65 F.3d 1523 (9th Cir. 1995) (apparently applying victim enterprise theory in case involving former employees who accepted kickbacks from counterparties); *Sun Savings v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (noting, in a suit by a bank against its former president for accepting kickbacks from customers in exchange for loans, that the "enterprise that Sun has alleged in its complaint is Sun itself.")

AAN Shows a Pattern of Racketeering Activity

Defendants also assert that AAN fails to allege a pattern of racketeering activity. Defendants invoke the "continuity plus relationship"[14] test discussed by the Supreme Court in *H.J. v.*

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over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.")

[13] Under *Sedima*, collateral impact is no longer necessary and direct injury alone suffices. *Bank of America*, *Id*. at 970. Of course, Defendants' scheme here would meet even the more stringent standard because Defendants sold misrepresented artwork to AAN's customers and therefore caused not only direct injury to AAN but also injury to those customers.

[14] Defendants interchange a "relationship plus continuity test" with a "continuity plus relationship test" in sequential paragraphs of their brief. (Doc. 13, Pages 7-8) This switch of terminology likely results from their reliance on *Fototec v. Polaroid*, 889 F.Supp. 1518, 1523 (N.D. Ga 1995). However, *Fototec* directly references the aforementioned "continuity plus relationship" test developed in *H.J.*, and did not create a new test. *Fototec* simply cites the established "continuity plus relationship" test and happens to re-word the label. *Fototec* is, in any event, easily distinguishable because the predicate acts occurred over only six months and

Northwestern Bell, 492 U.S. 229 (1989).[15] A relationship can be demonstrated by "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J.*, *Id.* at 240. (citations and internal quotes omitted) Defendants do not challenge the relationship element because AAN clearly shows that Defendants' various criminal acts had the purpose and result of enriching defendants by victimizing AAN and its customers through acts of fraud and theft.

Defendants assert that "AAN must show that (a) the Defendants engaged in two or more predicate acts over a closed period of time that demonstrate Defendants' long-term criminal activity, or (b) that the Defendants have committed two or more predicate acts that threaten future criminal conduct." (Doc. 13, Page 7) Defendants are referring to the two continuity tests discussed in *H.J.*:

> 'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept-and particularly so in the RICO concept, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.

492 U.S. at 241-42. In this case, Defendants' criminal acts demonstrate both closed-ended and

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involved the failure to disclose prior art in the submission and amendment of the same patent application. *Id*. at 1522. This failed to show either long-term criminal activity or a threat of repetition in the future. *Id.* at 1524-5.

[15] Defendants also cite *Jones v. Childers*, 18 F.3d 899, 910-11 (11th Cir. 1994), which actually applies the Florida RICO statute, not the federal RICO statute. See *Jones*, 18 F.3d at 901 (noting that the case was removed on the basis of diversity jurisdiction). In *Jones*, like in *H.J.*, the court found that a pattern was shown. *Jones*, 18 F.3d at 912-914. Importantly, *Jones* also held that a Plaintiff may recover not only his damages but also the money he paid a RICO defendant during their relationship (Childers was Jones' investment advisor), and that those amounts are also subject to trebling. *Id*. at 915.

open-ended continuity.

Defendant Calderone and Taylor began working for AAN in September 2005 and September 2006, respectively. (Doc. 4, Page 4, Paragraphs 15 and 17) Defendants began ordering artwork on behalf of AAN from Gallery in January 2007. (Doc. 4, Page 5, Paragraph 24). Their unlawful conduct began in 2007, if not earlier.[16] After AAN stopped ordering from Gallery due to improper billing, Defendants continued their unlawful conduct with Global, a related company. (Doc. 4, Page 7, Paragraph 38) These dealings continued until AAN confronted Defendant Calderone and Defendants left AAN's employ in 2010. Up to that point, Defendants' scheme spanned at least three years and therefore easily demonstrated closed-end continuity.[17] Courts have held that schemes lasting a substantially shorter period of time satisfy closed-ended continuity. For example, in *Wilson v. De Angelis*, 156 F.Supp.2d 1335, 1339 (S.D. Fla. 2001), cited by Defendants, the court held that a scheme involving sales of gold coins as inflated prices, which lasted only eleven months, satisfied closed-ended continuity. *See also Allwaste v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (closed-ended continuity satisfied by predicate acts that occurred over thirteen months); *United States v. Stodola*, 953 F.2d 266, 270 (7th Cir. 2002) (closed-ended continuity satisfied by bribery scheme that lasted twenty months).

Of course, the story does not end there. Defendants used stolen customer lists and AAN

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[16] Defendants' repeated assertion that the Amended Complaint fails to allege sufficient dates is belied by even a cursory examination of the document, which is replete with references to specific months and even days, and only rarely refers only to years. Defendants concealed the exact start date of their scheme, which in any event was shortly after AAN began ordering from Gallery, based upon the timing of the problems AAN encountered.

[17] Of course, three years is not required to show closed-ended continuity. In *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), decided just before *H.J.*, the Second Circuit held that a simultaneous triple murder sufficed to show a closed-ended pattern. *See also United States v. Aulicino*, 44 F.3d 1102, 1113 (2d Cir. 1995) (three and one half month pattern sufficient when there was no indication that defendants planned to stop) and *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999) (pattern lasting only 34 days was sufficiently continuous).

merchandise in order to solicit former AAN customers after they left AAN's employ. Defendants were so incorrigible that they continued to commit predicate acts despite first AAN's (attempt to) change suppliers and later their departure from AAN. Defendants' determination to commit predicate acts in various situations further illustrates the continuity of their conduct. *H.J.* states that the "continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" 492 U.S. at 243. Defendants' persistent commission of predicate acts shows that theft and fraud is Defendants "regular way of doing business."

Defendants also demonstrate open-ended continuity in two ways. Defendants' scheme at AAN continued for several years until AAN confronted Defendant Calderone. Defendants' scheme therefore threatened to continue until it was stopped, and indeed, continued at least until Defendant Calderone was confronted and resigned from AAN. In other words, if AAN had not detected Defendants' scheme, it would have continued indefinitely. In *Allwaste v. Hecht*, 65 F. 3d 1523, 1530 (9th Cir. 1995), the defendants were fired for participating in a kickback scheme:

> [defendants'] willingness to participate in the kickback scheme and their affirmative misrepresentations regarding transportation costs demonstrate that if they had not been fortuitously interrupted by termination, the predicate acts could have recurred indefinitely. Therefore, Allwaste's allegations as to [defendants] satisfy the open-ended continuity requirement.

Id. at 1530. *See also Heinrich v. Waiting Angels Adoption*, 668 F. 3d 393, 410 (6th Cir. 2012) (rejecting assertion that shut down of defendants' scheme after several months due to criminal prosecution precluded open-ended continuity); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (holding that filing of false annual reports carried threat of continuity even though company ceased to operate due to plaintiff's legal action because there was no evidence that defendant

would have stopped filing reports if company had not ceased to do business); *Sun Savings v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (holding that predicate acts that occurred over only a few months satisfied open-ended continuity requirement even though defendant resigned, because predicate acts concealed kickbacks but did not complete the scheme); *United States v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991) (holding that trustee's embezzlement of money, over a period of two and a half months, to pay his legal fees showed threat of continuity despite "fortuitous interruption" of the end of his trial, the guilty verdict, and his removal as trustee, court noted that "all racketeering activity must necessarily come to an end sometime"); *BCBS v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989) (finding open-ended continuity because "if he had not been caught, there is no reason to believe Kamin would not still be submitting false claims.")

AAN also shows open-ended continuity because Defendants continued their illegal actions even after they were caught and departed AAN. At that time, Defendants began competing with AAN and sold and / or gave away merchandise stolen from AAN. Defendants also used AAN's trade secrets, including customer lists, and attempted to entice customers away from AAN. In *Global Oil Tools v. Barnhill*, 2012 U.S. Dist. LEXIS 164888 (E.D. La. Nov. 19, 2012), the defendants, who worked for the plaintiff, routed customers to their competing ventures, billed the plaintiff for certain expenses of those businesses, and stole tools and blueprints. The court first found that the scheme, which continued over two years, established closed-ended continuity. *Id*. at *23. The court also noted, however, that a predicate act committed after a defendant left the plaintiff's employ negated the argument that all harm and threat of harm ceased because the defendants had departed. *Id*. at *23 n.4. Moreover, the court noted that the use of stolen intellectual property, tools, and blueprints also showed harm that could project into the future and thereby satisfied open-ended continuity. *Id*. Because

Defendants used AAN's customer lists and coins to entice customers to their new venture, they similarly demonstrated a threat of ongoing harm. Moreover, in this case, as in *Global*, the predicate acts include interstate transportation of stolen goods in violation of 18 U.S.C. §§ 2314 and 2315. (Doc. 4, Page 22, Paragraphs 113 and 114) and *Global*, *Id*. at *21. Thus, Defendants' sale and transportation of stolen AAN merchandise after departing AAN supports open-ended continuity.

Defendants claim that "closed-ended continuity is not established where the alleged scheme had one victim or one set of victims," and cite two cases. (Doc. 13, Page 8) Neither of Defendants' authorities are applicable to this case. In *Menasco v. Wasserman,* 886 F.2d 681, 684 (4th Cir. 1989), the nature of the scheme was extremely limited in scope and involved only one perpetrator, one transaction, one set of victims, and took approximately one year. *Wasserman* compares the scheme to *H.J.*, stating that the scheme in *H.J.* was on a scale that "dwarfs the present venture." 886 F.2d at 684. Defendants in the instant case similarly "dwarfed" the scheme in *Wasserman*, by engaging in a systematic, continuous scheme to defraud not just AAN, but also numerous unwitting purchasers of artwork and collectibles in countless transactions over several years.[18]

Park v. Jack's Food, 907 F.Supp. 914, 919 (D. Md. 1995), in which the district court noted that it was applying the Fourth Circuit's "strict view toward the pattern requirement," is similarly distinguishable. The transactions at issue in *Park* occurred over a relatively short period of time[19] and "ended before investigation and before suit was brought . . ." *Id*. at 920. In this case, Defendants' conduct spans a substantial period of time and continued not only until but through

[18] *Wasserman* notes that "the H.J. Inc. Court rejected, as had this court and most other circuits, the rigid notion that predicate acts form a pattern only when they are part of separate illegal schemes." *Id*. at 684. *Swistock v. Jones*, 884 F.2d 755, 759 (3d. Cir. 1989), also decided just after *H.J.*, holds that predicate acts during a transaction involving a single coal mine show closed-ended continuity.
[19] *Park* notes that "even if a scheme is close-ended and poses no future threat, continuity may still be established if the scheme occurred over a substantial period of time." *Id*. at 919.

AAN's investigation as Defendants sold their booty in competition with AAN after departing.

Defendants' argument that a single scheme involving only one victim or set of victims fails to show a pattern was rejected by the Eleventh Circuit long ago. *Bank of America v. Touche Ross*, 782 F.2d 966, 971 (11th Cir. 1986). Moreover, in *H.J.*, which forms the linchpin of Defendants' brief, and which they cite over half a dozen times, the very reason for the grant of certiorari was to resolve that issue. 492 U.S. at 235 ("[m]ost Courts of Appeals have rejected the Eight Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes, and we granted certiorari to resolve this conflict.") The Supreme Court noted that the "[multiple schemes] test brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of "continuity" itself; and it does so, moreover, by introducing a concept—the "scheme"—that appears nowhere in the language or legislative history of the Act." *H.J.* at 241-42. The Supreme Court then explained why such a test would be completely unworkable:

> A "scheme" is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. For example, petitioners' allegation that Northwestern Bell attempted to subvert public utility commissioners who would be voting on the company's rates might be described as a single scheme to obtain a favorable rate, or as multiple schemes to obtain favorable votes from individual commissioners on the ratemaking decision. Similarly, though interference with ratemaking spanning several ratemaking decisions might be thought of as a single scheme with advantageous rates as its objective, each ratemaking decision might equally plausibly be regarded as distinct and the object of its own "scheme." There is no obviously "correct" level of generality for courts to use in describing the criminal activity alleged in RICO litigation. . . .we prefer to confront these problems directly, not "by introducing a new and perhaps more amorphous concept into the analysis" that has no basis in text or legislative history.

Id. at 241 n. 3, *see also BCBS v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989) ("we do not believe that Congress intended that one could insulate himself from the reach of RICO simply by repeatedly bilking the same victim.") In any event, Defendants' acts could easily be characterized as comprising at least four schemes: accepting kickbacks from suppliers,

defrauding AAN customers by selling misrepresented artwork, stealing artwork from AAN, and using stolen merchandise and information to wrongfully compete with AAN. Such a characterization is possible without even noting that Defendants dealt with two wholesalers - Gallery and Global - as well as other vendors and numerous customers in countless transactions. Defendants' attempt to characterize their years-long misconduct as a single short-term scheme involving only one victim ignores the fact that both AAN and its customers unwittingly purchased misrepresented artwork at Defendants' behest.

As to the fourth prong set forth in *Sedima*, racketeering activity, AAN easily demonstrates Defendants' commission of various predicate acts. The Amended Complaint (Doc. 4) sets forth Defendants' repeated illegal dealings. Defendants Calderone and Taylor sold misrepresented artwork to AAN customers, (Page 12, Paragraphs 63 and 64) which constituted mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 and trafficking in counterfeit labels and documentation in violation of 18 U.S.C. § 2318. *See e.g. United States v. Hasson*, 333 F.3d 1264 (11th Cir. 2003) (affirming mail and wire fraud convictions of jewelry dealer who misrepresented merchandise to customers). Defendants appropriated AAN artwork (Pages 12-13, Paragraphs 65-67) and sold it to cruise lines, (Page 13, Paragraph 68) purported to consign it to other merchants, (Pages 14-15, Paragraph 77) and sold it on Ebay, (Page 15, Paragraph 78), which constituted theft from interstate shipments in violation of 18 U.S.C. § 659, and, in some instances, transportation and sale of stolen goods in violation of 18 U.S.C. §§ 2314 and 2315. Defendant Calderone's acceptance of kickbacks from AAN suppliers, (Pages 13-15, Paragraphs 69, 71, 72, 79-80) constituted honest services mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343 and 1346. *See e.g. United States v. Browne*, 505 F.2d 1229, 1265 (11th Cir. 2007) (affirming honest services mail fraud conviction of union official who accepted payments from

employer) Defendant Taylor's appropriation of valuable Morgan Silver Dollars from AAN's inventory (Page 16, Paragraph 83), and Defendant Taylor's use of those Morgan Silver Dollars to solicit AAN's customers, (Page 16, Paragraph 85) also constituted theft from interstate shipments in violation of 18 U.S.C. § 659, and transportation and sale of stolen goods in violation of 18 U.S.C. §§ 2314 and 2315. This is by no means an exhaustive list of Defendants' illegal conduct, and Defendants do not even attempt to contest the sufficiency of these predicate acts.

AAN ADEQUATELY PLEADS A FLORIDA RICO CLAIM

Defendants assert that Florida RICO "had consistently been interpreted using Federal RICO cases. . . . So the analysis applicable to Count I is identical to Count II." (Doc. 13, Pages 11-12) In fact, although Florida courts indeed refer to federal caselaw, they appear to apply a standard even more favorable to AAN. In *State v. Lucas*, 600 So.2d 1093 (Fla. 1992), the Florida Supreme Court considered a RICO scheme which lasted only six months. During that scheme, former employees of a "boiler room" operation that had been shuttered by the authorities used former customer lists both (1) solicit further investments and (2) offer to help the customers obtain refunds. The Florida Supreme Court discussed *H.J.*, and stated that:

> we are not convinced that a series of related fraudulent activities which occur over a six-month period cannot demonstrate the requisite closed-end continuity. In any event, we believe the information sufficiently alleges the threat of continued criminal activity necessary to demonstrate open-ended continuity.

Id. at 1095. In *Lugo v. State*, 845 So.2d 74, 99-100 (Fla. 2003), the Florida Supreme Court noted that the scheme in *Lucas* satisfied open-ended continuity because "the only thing that prevented the enterprise form perpetrating the subsequent fraudulent acts was the arrest of some of its key members." *Lugo*, *Id.* at 99, and again found open-ended continuity in a scheme that lasted only six

months because the scheme was interrupted only by the defendants' arrest. *Id.* at 100.[20]

Federal courts have also rejected the assertion that Florida Statute § 772.102(4) requires any more stringent application of the pattern requirement than Federal RICO. In *Lockheed Martin v. Boeing*, 314 F.Supp.2d 1198, 1221-22 (M.D. Fla. 2004), the court dealt with a scheme to "steal and use Lockheed's EELV secrets." The court noted that:

> the fact that only a single scheme is alleged does not render a Florida RICO Act claim insufficiently pled if there are several incidents alleged." The Complaint alleges several incidents that took place at *several different times* spanning at least two years, satisfying the Florida Act pleading requirements. Erskine and Branch's motions to dismiss the section 772.103(3) claims against them are denied.

Id. at 1222. (emphasis in original) Here, AAN alleges incidents spanning an even greater period of time and involving numerous different transactions. *Wilson v. De Angelis*, 156 F.Supp.2d 1335 (S.D. Fla. 2001) (ten purchases over an eleven month period satisfied Florida RICO pattern requirement).

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[20] Defendants argue that they should be awarded attorney fees and costs under the Florida RICO statue. Defendants provide an improper citation (citing F.2d) for *Chang v. Chen*, 95 F.3d 27 (9th Cir. 1996), which actually denied attorney fees after granting a motion to dismiss. The court stated that because "the RICO statute does not preclude prevailing defendants from recovering attorneys' fees when authorized elsewhere, we hold that it does not preclude prevailing defendants from recovering attorneys' fees when specified by an agreement of the parties." *Chang, Id.* at 28. Chang thus did not support the award of attorney fees under any state RICO statute and in fact denied attorney fees under the circumstances. *Id*. at 29. There is no "agreement of the parties" in the instant case which would allow Defendants to collect attorney fees. Defendants also cite *O'Ferral v. Trebol Motors*, 45 F.3d 561, 564 (11th Cir. 1995), a fraud case in which "the complaint sought $225 million for a large class, and the litigation consumed more than two years and generated a record that stands nearly a foot high." *O'Ferral,* which awarded fees and costs pursuant to Rule 11, not any state RICO statute, is an extreme example of careless litigation unrelated to the instant case. *Johnson v. Fpl Group*, 162 F.3d 1290, 1331 (1998), held that an award of fees was warranted after dismissal of a claim that lacked "substantial fact or legal support." This case has substantial factual and legal support and any assertion to the contrary simply ignores the years of facts that AAN has presented as well as Defendant Calderone's own admissions. Defendants' request for attorney fees under Fla. Stat. 772.104(3) should be denied. *See Allstate v. Father & Son Auto Sales*, 2009 U.S. Dist. LEXIS 45529, at *6 (S.D. Fla. May 14, 2009) (denying motion for attorney's fees and costs based on Fla. Stat. 772.104(3) holding that circumstantial evidence was sufficient to support RICO claim, and Plaintiff's allegations demonstrated that Defendants agreed to commit more than two predicate acts). AAN has provided significantly more than circumstantial evidence in support of this claim.

DEFENDANTS ENGAGED IN A CIVIL CONSPIRACY

Defendants contend that the "Amended Complaint fails to properly allege that Defendants were acting in concert," which requires that "they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." (Doc. 13, Page, 13). Defendants cite *In re Chira*, 353 B.R. 693 (Bankr. S.D. Fla. 2006), in support of this assertion, yet this opinion goes on to state "[h]owever, a civil conspiracy does not require more than knowledge and general participation in the conspiracy to commit a civil wrong." *Id.* at 732, *citing Voll v. Randazzo*, 674 So.2d 892 (Fla. 5th DCA 1996). AAN clearly demonstrates Defendants' knowledge and general participation in a conspiracy to commit a civil wrong, including, but not limited to, civil RICO, breach of fiduciary duty, tortious interference with an advantageous business relationship, defamation, civil theft, conversion, misappropriation of trade secrets, breach of contract, and unfair and deceptive trade practices. Defendant Calderone admitted to receiving "cash payments and product from vendors for selling their product on air" (Doc. 4, Page 13, Paragraph 71), which required Defendant Taylor's cooperation as an auctioneer. Moreover, Defendants' simultaneous departure from AAN (Doc. 4, Page 16, Paragraph 82), their creation of a business plan (Page 17, Paragraph 87), their coordinated activities after departing AAN (Pages 17-18, Paragraphs 88-91), their employment with WSN (Page 19-20, Paragraphs 96, 99, and 100), and their apparent continued cooperation to this date, discussed supra, all demonstrate action "in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result." Although Defendants assert that "Count III is not clear what, if any, independent wrong or tort is relied upon," the Amended Complaint explicitly states that "Defendants conspired to breach their fiduciary duty to AAN, defraud AAN's customers, steal AAN's merchandise and trade secrets, receive kickbacks from AAN's vendors, and engage in acts of unfair competition with AAN," (Doc. 4, Page 24, Paragraph

31) each of which would present an independent wrong upon which a civil conspiracy claim can be based. Even if these allegations are deemed insufficient, AAN can easily plead additional facts that show Defendants' agreement and action in concert against AAN.

AAN RESPECTFULLY REQUESTS LEAVE TO AMEND ANY DISMISSED CLAIM

Although each claim is adequately pled, AAN hereby requests leave to amend any claim dismissed by this Honorable Court. Rule 15, Federal Rules of Civil Procedure, states that the "court should freely give leave when justice so requires." In *Bryant v. Dupree*, 252 F.3d 1161 (11th Cir. 2001), the court noted that a district court's discretion to dismiss a complaint without leave to amend is "'severely restrict[ed]' by [Rule 15(a)]," *id*. at 1163, and that a previous amendment did not justify a refusal to allow the plaintiffs to amend their complaint. *Id*. at 1163-64. In *Shipner v. Eastern Airlines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989), the court noted that "unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." This court has granted leave to amend when justice so requires. *See Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198 (M.D. Fla. 2004) (granting 30 days' leave to file amended complaint in case involving RICO claims); *Lawrie v. Ginn Dev. Co., LLC*, LEXIS 13487 (M.D. Fla. Jan. 9, 2013) (recommending grant of 20 days' leave to file third amended complaint for alleging RICO claims). Other courts have adopted a similar approach in the RICO context. *Allwaste v. Hecht*, 65 F. 3d 1523, 1530-31 (9th Cir. 1995) (noting that district court should allow RICO plaintiff to amend); *Heinrich v. Waiting Angels Adoption*, 668 F. 3d 393, 400 (6th Cir. 2012) (noting that plaintiffs received leave to amend).

CONCLUSION

For the foregoing reasons, this Honorable Court should deny Defendants' Motion to Dismiss. In the alternative, AAN hereby requests leave to amend.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael Beltran, certify that a true and correct copy of the foregoing has been served on counsel for all parties via the Court's CM/ECF system this the 19th day of August, 2014.

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