No.

IN THE

Supreme Court of the United States

GRACE INTERNATIONAL ASSEMBLY OF GOD,

Petitioner,

v.

GENNARO FESTA AND FALCON GENERAL CONSTRUCTION SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether only the entity sustaining the greatest direct injury may be considered a victim for the purposes of determining if there is closed- or open-ended continuity sufficient to establish a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO")?

Whether racketeering activity committed for over two years, that inflicts multiple, distinct injuries upon multiple victims is nevertheless insufficient to form a pattern under RICO if the defendant's related schemes have the primary goal of defrauding a limited number of victims, or if the activity concerns an ongoing project between the defendant and the primary victim?

Whether racketeering activity is insufficient to fulfill the requirements of a RICO pattern of open-ended continuity if it concerns two schemes that are "inherently terminable", regardless of how far into the future the endpoint is, or how great the defendant's incentive is to postpone it continuously?

Whether, on a Fed. R. Civ. P. 12(b)(6) motion, courts should dismiss a civil RICO claim for lack of open-ended continuity where the complaint does not imply the racketeering activity would cease, the defendant has consistently engaged in wire fraud and has also engaged in money laundering and non-predicate criminal acts, and the nature and extent of the defendant's dealings with clients other than the plaintiff is within the defendant's exclusive knowledge?

PARTIES TO THE PROCEEDINGS

Petitioner is Grace International Assembly of God. The other parties are defendants-appellees Gennaro Festa and Falcon General Construction Services, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Grace International Assembly of God has no parent corporation, and there is no publicly held company that owns ten percent (10%) or more of its stock.

LIST OF RELATED PROCEEDINGS

The following cases are directly related to the case in this Court:

Grace International Assembly of God v. Gennaro Festa and Falcon General Construction Services, Inc., United States District Court, Eastern District of New York, Case No. 17-CV-7090 (SJF) (AKT). Judgment was entered on March 26, 2019.

Grace International Assembly of God v. Gennaro Festa and Falcon General Construction Services, Inc., United States Court of Appeals for the Second Circuit, Docket No. 19-1101-cv. Judgment was entered on December 30, 2019.

Grace International Assembly of God v. Gennaro Festa and Falcon General Construction Services, Inc., Supreme Court of the State of New York, County of Nassau, Index No. 607577/2019. No judgment has been entered in this case.

People v. Gennaro Festa, Nassau County Court, Criminal Term, Case No. 01692N-2019. Gennaro Festa has pled guilty to a violation of N.Y. Penal Law § 190.65(1)(b), scheme to defraud in the first degree. No judgment has been entered yet, as Festa is awaiting sentencing.

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The opinion of the United States Court of Appeals for the Second Circuit, *Grace International Assembly of God v. Festa*, 797 Fed. Appx. 603 (2d Cir. 2019), is reprinted in the Appendix to the Petition ("App.") at 1a-8a. The Second Circuit order denying rehearing and rehearing *en banc* is unreported and is reprinted at App. 33a-34a. The Memorandum and Order of the United States District Court, Eastern District of New York, issued on March 26, 2019, is unreported, but is available at *Grace International Assembly of God v. Festa*, No. 17-CV-7090 (SJF) (AKT), 2019 WL 1369000 (E.D.N.Y. Mar. 26, 2019), and is reprinted at App. 9a-32a.

STATEMENT OF THE BASIS FOR JURISDICTION

The order of the United States Court of Appeals sought to be reviewed was entered on December 30, 2019. The order denying petitioner's motion for rehearing and rehearing *en banc* was entered on February 12, 2020. This Court has jurisdiction to review, on a writ of certiorari, the order in question pursuant to 28 U.S.C. § 1254(1). By order dated March 19, 2020, the Supreme Court extended, to 150 days after an order denying a timely motion for rehearing, the deadline to file a petition for a writ of certiorari due on or after March 19, 2020, so that the new deadline is July 13, 2020.

STATUTES AND RULES INVOLVED IN THE CASE

The following statutes and rules involved in this case are reproduced at App. 35a-46a:

18 U.S.C. § 1961(1) and (5)
18 U.S.C. § 1962(c)
18 U.S.C. § 1964(c)
18 U.S.C. § 1343
18 U.S.C. § 1956
Fed. R. Civ. P. 12(b)(6)
N.Y. Lien Law § 70
N.Y. Lien Law § 71
N.Y. Lien Law § 72
N.Y. Lien Law § 79-a
N.Y. Penal Law § 155.30
N.Y. Penal Law § 210.05

STATEMENT OF THE CASE

The following is a summary of pertinent portions of the Amended Complaint (District Court Docket ["Dkt."] 22) ("AC"),[1] and is intended to summarize detailed pleading allegations.

A. The Parties

Petitioner Grace International Assembly of God ("Grace") is a New York religious corporation located at 172 Willis Avenue, Mineola, New York ("Premises") (AC ¶ 1).

Respondent Falcon General Construction Services, Inc. ("Falcon"), a New York corporation (AC ¶ 3), is a general construction contractor (AC ¶ 4) under the control of Respondent Gennaro Festa ("Festa"), Falcon's President and sole shareholder (AC ¶ 5).

1. References to the Amended Complaint shall be in the form of "AC ¶ __."

B. Grace's Contract With Falcon

Falcon agreed with Grace to perform construction services ("Project") on the Premises. (AC ¶ 9.) Grace entered into a written contract with Falcon (Dkt. 22-1) (the "Contract"), summarizing the Project's scope (*see* AC ¶ 10). Contract payments were made based upon the cost of materials purchased and the percentage of the work completed as to each Project item. (*See* AC ¶¶ 11-154; Dkt. 22-2.)

C. Festa's Schemes

Utilizing his control over Falcon, Festa perpetrated two interrelated fraudulent schemes, of which Grace and at least five others were victims. In the first scheme ("Wire Fraud Scheme"), Festa committed predicate acts of wire fraud involving the payment of Falcon's fraudulent Project billings. In the second scheme ("Money Laundering Scheme"), Festa engaged in money laundering involving diversion and concealment of trust funds.

1. The Wire Fraud Scheme

Festa's Wire Fraud Scheme defrauded Grace into paying for materials and services that were either never purchased or performed at all, or were purchased or performed to a materially lesser degree than Festa had represented. This scheme was effectuated through predicate acts of wire fraud that Festa committed during the 29-month period from March 2014 through August 2016.

Festa first made fraudulent oral and written misrepresentations to Grace as to the necessity of a $24,500 advance payment to Falcon in exchange for providing steel shop drawings for the Project ("Steel Shop Drawings"), which payment Festa misrepresented would be forwarded to American Buildings Company ("ABC"). (AC ¶¶ 18(a), (c)-(d), 19). Actually, ABC required no payment up front (AC ¶ 20(a)), and Festa paid to ABC only $6,000 of the $24,500 that Grace paid to Falcon (AC ¶¶ 20(b), 23, 24).

The first wire fraud act occurred on March 22, 2014, when the Steel Shop Drawings were sent by interstate wire from ABC's Georgia office, to the New York office of an agent of Festa and Falcon's. (AC ¶¶ 20(a), 26, 211). The Steel Shop Drawings were essential to the Wire Fraud Scheme, because the Project's architect needed them to prepare building designs. (AC ¶ 213.)

In 2014 and 2015, Falcon provided four fraudulent invoices to Grace. Then, from August 2015 to August 2016, Falcon provided Grace with eleven bills in the form of Applications and Certificates for Payment ("A&Cs"). (*See* Dkt. 22-2.) Each A&C purportedly represented work performed, and materials provided, during a set period of time (the "A&C Period"). Each A&C contained misrepresentations as to materials purchased and labor performed. (AC ¶¶ 16, 241.)

Festa made misrepresentations concerning eleven separate Project items, including, *inter alia*, Steel Shop Drawings (*see* AC ¶¶ 20-27); building frame steel ("Building Frame Steel") and mezzanine steel that were never provided (*see* AC ¶¶ 28-46, 56-60); and first floor

steel that was only partially delivered and installed, not completely as Festa claimed (*see* AC ¶¶ 47-55) (*see also* AC ¶¶ 61-154 [discussing other items that were misrepresented]).

Each A&C set forth the amounts (a) paid for each Project item, prior to the A&C Period (column D) and (b) payable during the A&C Period (column E). In the next A&C, the sum of the figures in columns D and E for each item were carried over into column D. (*See* Dkt. 22-2 *passim*.) Thus, each A&C built incrementally upon misrepresentations in the immediately preceding A&C, causing the accumulation of the frauds over the entire Project. Since there were misrepresentations in the first A&C, A&C 1 (*see* AC ¶¶ 69, 71, 81, 83, 93-94, 99-100, 105-06, 111, 118, 121), all subsequent A&Cs repeated these historic misrepresentations; additionally, in six of the ten subsequent A&Cs, new misrepresentations were made as to work performed or materials supplied during the subject A&C Period. (*See* AC ¶¶ 125-26 [A&C 4], 131-32 [A&C 5], 87-88, 137-38 [A&C 8], 75-76 [A&C 9], 143-44 [A&C 10], 41-42, 49-50, 56-57, 149-50 [A&C 11].)

In each A&C, Festa swore:

> the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous certificates for Payment were issued and payments received from the Owner, and that current payment shown therein is now due.

(AC ¶ 15; *see also* Dkt. 22-2 *passim*.) Festa perjured himself by falsely verifying that work had been performed, or materials been supplied, to the extent misrepresented in each A&C, and that Falcon had fully paid subcontractors for work or suppliers for materials for which Grace had paid based on prior A&Cs. (*See* AC ¶ 16.) *See* N.Y. Penal Law § 210.05 (setting forth elements of perjury).

Festa's wire fraud was accompanied by oral misrepresentations to Grace as to the Steel Shop Drawings (AC ¶¶ 18, 20), and the purported need for Grace to pay $116,760 in advance for Building Frame Steel that Falcon never purchased or installed (AC ¶¶ 28-40). The dozen acts of wire fraud which occurred between May 2015 and August 2016 furthered Grace's efforts to obtain funds from interstate sources to pay the inflated bills. These acts consisted of interstate wire transmissions between Grace in New York and either AG Financial in Missouri ("AG"), an umbrella company that held money for Grace (AC ¶ 214(a)), or Heritage Investment Services Fund ("Heritage") in Pennsylvania, which lent money to Grace to finance the Project (AC ¶¶ 159, 214(b)).

Grace sent both AG and Heritage interstate facsimile transmissions requesting funds, and also sent Heritage, via interstate facsimile, A&Cs 2-11, which were wired in three batches and provided justification for Grace's requests (AC ¶¶ 214(a)-(b), 222). In response, the institutions sent, over interstate wires, the requested funds to Grace's New York bank account (AC ¶ 215(a)-(b)). Grace then used those funds to pay Falcon what Festa had misrepresented was due. (*See* AC ¶¶ 220-222.) These wire transactions, and Grace's payments to Falcon, continued until Grace discovered the Money Laundering Scheme,

as defined and discussed below. The last predicate act of wire fraud occurred on August 23, 2016 (AC ¶ 215(b)(iii)), approximately 29 months after the first.

Because the Project was paid on progress billings, the Wire Fraud Scheme inflicted multiple, distinct injuries. Each payment to Falcon based on Festa's misrepresentations inflicted a distinct injury. Grace made seven payments of A&Cs containing new misrepresentations. (*See* AC ¶¶ 121 [A&C 1]; 129 [A&C 4]; 135 [A&C 5]; 91, 141 [A&C 8]; 79 [A&C 9]; 48, 147 [A&C 10]; 45, 54, 153 [A&C 11].)

2. The Money Laundering Scheme

The Money Laundering Scheme proceeded in three phases: (1) Falcon's obtaining, from the Wire Fraud Scheme, trust funds that were deposited into Falcon's bank account ("Account"), which Festa controlled; (2) Falcon's failure to pay subcontractors for materials furnished and work performed; and (3) Festa's illegal withdrawal of the trust funds from the Account, disguising and concealing their ultimate use.

Falcon was required to hold funds received from Grace in trust for supplier Ace-Tec Enterprises Inc. ("Ace-Tec"), and subcontractors Amano Contracting, Inc. ("Amano"), and Liberty Pipe, Inc. ("Liberty") (collectively, Ace-Tec, Amano, and Liberty are the "Subcontractors"), which Falcon was required to pay, under both the Contract and New York Lien Law §§ 70-72 (AC ¶¶ 224-226), and which Festa falsely swore, in each A&C, had been paid to the extent Falcon had previously billed Grace for their work (AC ¶ 15). Festa used his control of the Account to

withdraw and disguise the funds' disposition (AC ¶¶ 226, 228, 231, 238). Falcon never paid Amano and Liberty Pipe (AC ¶¶ 178, 199), and paid Ace-Tec only $30,000 out of $79,900 due (*see* AC ¶ 188).

For each Subcontractor, Grace alleged separate details as to the agreed work, its performance, the amounts the Subcontractor was supposed to be paid and was paid, and the outstanding balance due. To illustrate, as to Amano, which fully performed "demolition/removal" and "excavation/removal" work (AC ¶¶ 169, 177; *see* AC ¶ 155), Festa billed Grace for work performed (*see* AC ¶¶ 170-77), Grace paid Falcon for same (AC ¶ 175); and Falcon submitted subsequent A&Cs falsely swearing (AC ¶ 178) that Amano had been paid for its work (*see* AC ¶ 176), but Amano received no such payments (AC ¶ 178). Festa repeated the same method with respect to Ace-Tec (AC ¶¶ 181-89) and Liberty (AC ¶¶ 191-200).

Account funds withdrawals constituted money laundering under 18 U.S.C. § 1956, because Festa misappropriated the trust funds and concealed and disguised their nature, location, source, ownership, and control. (AC ¶¶ 233-38.) Festa told Grace that Falcon did not have any money to pay subcontractors (AC ¶ 228(a)). However, absent Festa's misappropriation of trust funds, there would have been at least $123,900 in the Account, the minimum amount of trust fund withdrawals. (*See* AC ¶¶ 156, 178, 188.) To Subcontractors and others, Festa misrepresented that Falcon could not pay them because Grace had not paid Falcon. (AC ¶ 228(d).) This misrepresentation concealed that Grace's payments for Subcontractors' services had been misappropriated.

Subcontractors were therefore victims of the Money Laundering Scheme. (AC ¶¶ 179, 189, 200-202.) Amano filed a mechanic's lien against the Premises. (AC ¶ 157.) Grace stopped paying Falcon upon discovering Falcon's failure to pay Amano (AC ¶ 162), and Falcon ceased all Project work (*see* AC ¶ 158). Therefore, Falcon's failure to pay Subcontractors was a part of the fraud that ultimately resulted in injury to Grace through the Project's delay. (AC ¶ 246.)

Festa's misappropriations of trust funds also constituted larceny under N.Y. Lien Law § 79-a (AC ¶ 230); given the amounts owed to each Subcontractor exceeded $1,000, the crime involved at least felonious grand larceny in the fourth degree under N.Y. Penal Law § 155.30 (AC ¶¶ 231-32).

D. The Pattern of Racketeering Activity

The AC sets forth the nexus between the predicate acts, the repetitious manner of their commission, their timing, and their furtherance of related schemes. (AC ¶¶ 239-246.) The racketeering acts were neither random nor sporadic. Rather, they were part of a pattern.

The predicate acts occurred for a period exceeding two years (AC ¶ 240), and, had the scheme not been discovered, there was a threat that Festa would have committed future acts of racketeering (AC ¶¶ 241-44). As support for alleging predicate acts were "the means by Falcon's business was regularly operated," the AC alleges "the misrepresentations were made with regard to all eleven (11) [A&Cs] that Festa submitted to Grace with regard to the Project, and in multiple oral representations…." (AC ¶ 241.)

Grace pled, in detail, the basis for expecting that Festa would have continued committing predicate acts had Grace not discovered Festa's fraudulent schemes. Festa continued to make misrepresentations in A&Cs, and to commit wire fraud, "through the time Grace last paid Falcon in August 2016." (AC ¶ 242.) "Festa's racketeering activity ended only because Grace discovered Falcon's fraud and nonperformance and terminated Falcon." (AC ¶ 243.) Because the Project was only 38.5% complete at the time Grace terminated Falcon, at the rate Falcon was progressing, the Project would have taken approximately three and a half more years to complete. (*See id.*) Similar predicate acts would have continued had Falcon continued the Project; Grace would have continued to request funds from interstate wire transfers to make payment (*id.*); and Festa would have continued to engage in wire fraud and money laundering in the same manner as before (AC ¶ 244). Festa could be expected to continue his predicate acts because he had consistently engaged in fraudulent conduct and money laundering throughout the Project and there was no reason to believe he would have changed his conduct. (*Id.*)

In addition, it could reasonably be inferred that the nature of the racketeering acts anticipated the need to continue the fraud. Project overbilling from the inception necessitated future frauds to cover up the schemes and to provide Falcon with the means of paying subcontractors enough money to continue with the Project, while failing to pay at least some the amount owed. The nature and number of the predicate acts, and accompanying state crimes, showed Festa's willingness to use Falcon as a RICO enterprise, and his proclivity for criminal behavior.

E. The Six Victims of Festa's Pattern of Racketeering

Grace alleged that the two interrelated schemes had a total of six victims: (1) Grace, victimized as set forth above; (2)-(4) Amano (AC ¶ 179), Ace Tec (AC ¶ 189), and Liberty (AC ¶ 200), each suffering from money laundering of funds it was supposed to be paid; (5) Heritage, which lent Grace funds for the Project in reliance on the fraudulent A&Cs (AC ¶ 222), and which Grace has been unable to pay back because of Grace's weakened financial condition resulting from the fraud (AC ¶ 246); and (6) ABC, which did not receive the profit it would have, had Falcon purchased materials from ABC as Festa represented (AC ¶¶ 20(a)-(b), 28-29, 40, 245).

F. Procedural History

The original summons and complaint were filed in United States District Court, Eastern District, New York. Federal jurisdiction in the district court, over Grace's claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, arose under 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c). Jurisdiction over the pendent state claims asserted arose under 28 U.S.C. § 1367(a).

Defendants Festa and Falcon (collectively, "Defendants") initially defaulted, but after Grace obtained a certificate of default, Defendants successfully moved to vacate. Grace then filed the AC, asserting one RICO claim under 18 U.S.C. §§ 1962(c) and 1964(c), and pendent state claims.

Defendants filed a pre-answer Fed. R. Civ. P. 12(b)(6) motion to dismiss the AC. By order entered March 26, 2019, the District Court (per Hon. Sandra J. Feuerstein, U.S.D.J.) granted Defendants' motion, finding relatedness but not continuity, and dismissing the civil RICO claim with prejudice, and dismissing without prejudice the pendent state claims (the "District Court Order"). (App. 9a-32a.)

On April 22, 2019, Grace timely filed a notice of appeal from the District Court Order to the United States Court of Appeals for the Second Circuit. (Dkt. 32.) By summary order dated December 30, 2019 (the "Second Circuit Order"), a panel of the Second Circuit affirmed, without disagreeing with the District Court's finding of relatedness, but opining that Grace had failed to plead either closed-ended or open-ended continuity for a pattern of racketeering activity. The Second Circuit found that although Grace had alleged two schemes injuring six entities, "[a]t bottom, the RICO scheme alleged in the complaint had the limited goal of defrauding Grace" and thus "d[id] not support a finding of closed-ended continuity." (App. 5a-6a.) Although recognizing open-ended continuity where the acts of the defendant or the enterprise are inherently unlawful and in pursuit of inherently unlawful goals, the Second Circuit concluded Grace failed to allege this. (App. 6a-7a.) The Second Circuit also recognized open-ended continuity where the enterprise primarily conducts a legitimate business, but only when "there is some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity." (App. 6a [internal quotation marks and citations omitted].) However, the Second Circuit found Grace had failed to allege this adequately:

> Although Grace conclusorily alleges that the predicate acts were the means by which Falcon, a construction company, "regularly operated," AC ¶ 241, it points only to its own limited interactions with Festa in support of that contention, AC ¶ 241. At best, Grace alleges conclusorily and speculatively that the "nature of the predicate acts implied a threat of continuing activity" because "[t]he Project remained incomplete and similar predicate acts could continue to occur," AC ¶ 242, since the contract was only "38.5% complete," AC ¶ 243. … Even accepting that the project remained unfinished, Grace's construction project was ultimately terminable, and Grace has offered no other facts to suggest the activities would continue in the future.

(App. 7a [citation omitted].)

The Second Circuit then stated, apparently regarding both closed-ended and open-ended continuity, "While Grace attempts to magnify the racketeering scheme by expanding the number of victims and predicate acts, in reality this is one scheme with one clear victim. That is clearly insufficient to establish a pattern for the purposes of RICO." (App. 7a [citations and quotation omitted].)

The Second Circuit affirmed the District Court Order.

On January 13, 2020, Grace timely moved for panel rehearing and rehearing *en banc*. (Circuit Court Docket No. 66.) Both motions were denied on February 12, 2020. (App. 33a-34a.)

REASONS FOR GRANTING THE PETITION

PRELIMINARY STATEMENT

Several issues raised by the Second Circuit Order are the subject of sharp divisions among the federal circuits. These include the holding that a RICO claim does not lie where "at bottom" there was a limited goal of defrauding one entity, and there was one scheme with "one clear victim." Another circuit conflict arises from the Second Circuit Order's reasoning that there is no open-ended continuity where the scheme is "ultimately terminable." In addition, the Second Circuit, in holding that Grace made only conclusory allegations as to continuation in the future, undermines well-settled precedent that pleadings, including those for RICO violations, be liberally construed.

This Court has repeatedly rejected civil RICO defendants' invitations "to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008) (collecting cases) (rejecting argument that RICO be interpreted to require first-party reliance to exclude "garden-variety disputes") (citation and internal quotation marks omitted). The Court should take this case to resolve conflict among the circuits, reaffirm its longstanding liberal interpretation of RICO, and reject the narrow reasoning of decisions that are corrosive of pleading rules requiring liberal interpretation of RICO pleadings.

Congress intended that RICO, enacted under Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941, provide a novel remedy for fighting racketeering acts that cause economic injury. *Sedima,*

S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985); *Russello v. United States*, 464 U.S. 16, 26-29 (1983). Fighting corruption of economic activities through racketeering places not only predicate acts such as narcotics trafficking and money laundering within RICO's ambit, but also, mail and wire fraud in the perpetration of "garden-variety fraud." *See Bridge*, 553 U.S. at 660. Congress directed RICO's application to economic abuses through predicate acts of racketeering, provided they occurred as part of a pattern. However, a number of circuits have applied factors in determining if there is a pattern of activity, to create judicial gloss that has devolved into what is essentially a "know it when I see it" test, that defies RICO's plain language, and the intent of Congress that it be liberally applied. *See* Note, Bart A. Karwath, *Has the Constituency of Continuity Plus Relationship Put an End to RICO's Pattern of Confusion?*, 18 Am. J. Crim. L. 201, 211-41 (Winter 1991) (discussing continuity issues that persisted after *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), and which, after the article, became more confused).

POINT I

THE SECOND CIRCUIT ORDER CONFLICTS WITH SUPREME COURT AND OTHER CIRCUITS' CASELAW ON WHO IS CONSIDERED A RACKETEERING VICTIM

In addition to its injuries to itself, as discussed *supra*, Grace pled that Festa's predicate acts caused direct injuries to ABC, Amano, Ace-Tec, Liberty, and Heritage. Nevertheless, the Second Circuit, in finding the scheme had the "limited goal of defrauding Grace" (App. 5a-6a), the "one clear victim" (App. 7a), disregarded all of the

other victims' injuries in determining both closed-ended and open-ended continuity. The Second Circuit Order apparently considered only the party that suffered the greatest direct injury to be a victim.

The issue of the number of victims of Festa's scheme relates to the continuity component of pattern (*see* Point II, *infra*). Although the test of whether a person is a victim for the purposes of showing continuity of predicate acts should be subject to a more relaxed standard than whether a person is a victim for the purposes of standing to bring suit under RICO or RICO proximate causation, there is similarity, so we proceed to examine the latter, more stringent standard to demonstrate that the Second Circuit should have considered the presence of six victims in determining continuity.

In contrast to the Second Circuit Order, the Seventh Circuit has held, as to civil RICO proximate cause, that courts may not disregard one victim's status as a plaintiff simply because a more badly injured victim could be one. *See RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688-89 (7th Cir. 2008) (holding "[t]he existence of a 'better' plaintiff" is not "grounds for denying a claim to a plaintiff directly injured by one predicate act in the hopes that a different one will emerge. As alleged, the defendants robbed Peter to defraud Paul; the former is as foreseeable a plaintiff as the latter with as direct an injury.").

Moreover, the Third, Seventh, and Ninth Circuits have held that a RICO plaintiff need not have been injured by all of the predicate acts in a pattern. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1117 (9th Cir. 2017) ("[N]o requirement exists that the plaintiff must suffer an injury

from two or more predicates, or from *all* of the predicate acts.") (quoting *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988)) (citation and internal quotation marks omitted) (emphasis in *Deppe*); *Buono*, 847 F.3d at 1117-18 (citing *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987), for proposition that RICO requires "only injury from 'any predicate act,' not from an entire pattern of racketeering").

If a RICO plaintiff itself need not be injured by all predicate acts, it necessarily follows that non-plaintiffs may be victims even if injured by only some of the predicate acts, and thus even if they are not the primary victims.

The Second Court Order also implicitly conflicts with Supreme Court precedent regarding civil RICO proximate causation. The Supreme Court has limited civil RICO liability to cases in which the predicate acts proximately cause the plaintiff's injury, *i.e.*, there is "some direct relation between the injury asserted and the injurious conduct alleged." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) (quoting *Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258, 268 (1992)) (internal quotation marks omitted). However, this Court does not impose a separate, independent requirement for proximate causation that a victim be the primary target of the pattern of racketeering activity as a whole.

Here, Subcontractors were direct victims of the Money Laundering Scheme; Festa's money laundering depleted funds owed to Subcontractors. *See Maiz v. Virani*, 253 F.3d 641, 674 (11th Cir. 2001) (holding money laundering that concealed defendants' diversion of funds from RICO plaintiffs' investment accounts proximately injured

plaintiffs). Heritage was a direct victim of the Wire Fraud Scheme, because it relied on the misrepresentations in the A&Cs in lending funds to Grace to finance the Project. ABC was a direct victim of the Wire Fraud Scheme because it lost out on profits from the Project. *See United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 572 (8th Cir. 1996) (RICO plaintiff could recover damages when it "failed to receive the benefit of its bargain").

A person need not sustain a maximum level of direct damages to be considered a RICO victim. For example, a RICO plaintiff has a cognizable injury even if the harm inflicted is receipt of less money or value as a consequence of the predicate acts. *See Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 364 (9th Cir. 2005) (plaintiffs settling claims for smaller portion of damages because of fraudulent inducement suffered RICO injury), *cert. denied*, 547 U.S. 1192 (2006); *Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc.*, 262 F.3d 260, 265 (4th Cir. 2001) (plaintiff who paid service provider for services performed under certain specifications that were not followed, could recover difference between amount paid and amount it would have paid for actual work performed). Here, two Subcontractors were not paid at all, and a third was paid only partly; Heritage lent funds based on misrepresentations and was not repaid; and ABC lost projected Project profits.

Irreconcilable with the aforesaid authority, the Second Circuit Order artificially narrows a RICO pattern, disregarding victims sustaining direct injuries. Festa defrauded the plaintiff by falsely claiming Falcon paid Subcontractors, and robbed Subcontractors by misappropriating trust funds owed to them through money laundering. The Second Circuit first denies

Subcontractors' victimization, then dismisses on the ground that only one victim remained. The Second Circuit's approach frustrates RICO prosecution through the "one clear victim" obstacle.

POINT II

THE SECOND CIRCUIT ORDER REFLECTS A PRONOUNCED SPLIT AMONG CIRCUITS ON WHAT CIRCUMSTANCES PRECLUDE FINDING RICO CONTINUITY

The RICO provision upon which Grace relies, 18 U.S.C. § 1962(c), provides, in relevant part, "It shall be unlawful for any person employed by or associated with any enterprise…, to conduct or participate…in the conduct of such enterprise's affairs through a pattern of racketeering activity." The gravamen of this case is what constitutes a "pattern of racketeering activity."

A. *H.J. Inc.* as the Starting Point

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the Supreme Court held that multiple schemes are not necessary for a RICO pattern, *id.* at 240-41, and set forth a framework for determining what constitutes a pattern, which is not formed by "sporadic activity." *Id.* at 239 (quoting S. Rep. No. 91-617, p. 158 (1969)) (internal quotation marks omitted). A pattern consists of "*continuity plus relationship*." *H.J. Inc.*, 492 U.S. at 239 (emphasis in original) (citation and internal quotation marks omitted). It must "be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *Id.* at 240 (emphasis in original). Continuity can be

closed-ended, referring to "a closed period of repeated conduct," *id.* at 241, or open-ended, referring to "past conduct that by its nature projects into the future with a threat of repetition," *id.* Closed-ended continuity can be demonstrated "by proving a series of related predicates extending over a substantial period of time," *id.* at 242, which period must be more than a few weeks or months, *id.* Alternatively, open-ended continuity can exist if a RICO action were "brought before continuity can be established in this way," *id.*, "depend[ing] on whether the *threat* of continuity is demonstrated," *id.* (emphasis in original).

Open-ended continuity can exist "if the related predicates themselves involved a distinct threat of long-term racketeering activity, either implicit or explicit." *H.J. Inc.*, 492 U.S. at 242. As one example, the Court cited a protection racket, wherein "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." *Id.* Threat of continued activity could also "be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," *id.*, *e.g.*, "a regular way of conducting defendant's ongoing legitimate business." *id.* at 243.

Given the kaleidoscope of decisions among the Circuits as to continuity, as discussed below, the Court should intervene, 31 years after *H.J. Inc.*, to provide further guidance.

B. The Circuit Courts Have Splintered on What Factors Preclude Continuity

Preliminarily, Grace disputes the Second Circuit Order's characterization of Festa's conduct as a single

scheme aimed at defrauding Grace. This conclusion mischaracterizes Grace's allegations and fails to construe liberally the AC as required. Even assuming *arguendo* the characterization is correct, there is a circuit split.

Post-*H.J. Inc.*, federal circuits, endeavoring to restrict RICO to non-sporadic racketeering activity, have splintered. Some focus on the number of racketeering injuries, holding that multiple injuries, even to a single victim, is sufficient. Some preclude a pattern where there is a narrow or limited "goal" or "objective" ("Goal Restriction"), or a single scheme with one victim ("Single Scheme/Victim Restriction"). Another rejects continuity when activities arise out of one "transaction" or "event" ("Transaction Restriction"). Others, including the First Circuit and, as will be argued, the Second Circuit Order, have imposed all three restrictions. Consequently, circuits have gone in at least four different directions in addressing continuity, resulting in unpredictability.

1. Closed-Ended Continuity

a. Four Circuits Impose the Goal Restriction, Apparently Even If There Are Multiple Injuries

The Fourth, Sixth, Tenth, and Eleventh Circuits have rejected closed-ended continuity *per se* when the activities have a limited goal. *See Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 230, 238 (4th Cir. 2000) ("narrow focus" of three separate schemes between formerly close family friends to defraud single victim precluded continuity); *Moon v. Harrison Piping Supply*, 465 F.3d 719, 725 (6th Cir. 2006) (all predicate acts "were keyed to Defendants' single objective of depriving Moon of his

benefits"); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir. 1994) (scheme had a "single purpose"); *Hall v. Witteman*, 584 F.3d 859, 867-68 (10th Cir. 2009) ("single scheme to accomplish a discrete goal"); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990) ("single scheme to accomplish 'one discrete goal'") (citation omitted); *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1267 (11th Cir. 2004) ("single scheme with a discrete goal"). None of these cases indicated the result would have been different had the victims suffered multiple injuries, and at least in *Al-Abood* multiple injuries were inflicted, *see Al-Abood*, 217 F.3d at 230, 238.

b. Two Circuits Impose the Single Scheme/ Victim Restriction

The Sixth Circuit appears to have imposed the Single Scheme/Victim Restriction, whereby continuity is not satisfied by a single scheme with a single victim, but may be if there are multiple victims. *Compare Moon*, 465 F.3d at 725 (no closed-ended continuity from fraudulent termination of one employee's workers' compensation benefits), *with Brown v. Cassens Transport Co.*, 546 F.3d 347, 355 (6th Cir. 2008) (finding closed-ended continuity where multiple employees of employer were fraudulently denied workers' compensation benefits).[2]

One other circuit implicitly adopts a variation on the Single Scheme/Victim Restriction, finding no continuity where a single scheme causes a single injury to a small number of victims, but implies there could be continuity

2. Situations of a "single victim" and a single or limited goal may overlap. *See, e.g.*, *Vemco*, 23 F.3d at 136 (observing that defendant's conduct "involv[ed] a single victim and a single scheme for a single purpose").

where there are multiple injuries. *See Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995).

Assuming *arguendo* the Second Circuit Order's single-scheme and single-victim conclusions are correct, the Sixth Circuit's standard would preclude finding continuity, but the D.C. Circuit's might not, because Grace suffered multiple injuries.

c. At Least Three Circuits Hold Infliction of Multiple Injuries Upon a Plaintiff, in Pursuit of the Same Object or Scheme, Is Sufficient

In sharp contrast to the Fourth, Sixth, Tenth, and Eleventh Circuits, the Third, Seventh, and Eighth Circuits have held that racketeering activity directed at a single victim or limited number of victims, and inflicting multiple, distinct injuries, is sufficient for closed-ended continuity, regardless of whether the activities are in service of a common goal or scheme. *See Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1338 (7th Cir. 1997) (single victim); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516, 523-24 (7th Cir. 1995) (single victim); *Tabas v. Tabas*, 47 F.3d 1280, 1285-86, 1294-96 (3d Cir. 1995) (en banc) (victim is a decedent's estate); *Handeen v. Lemaire*, 112 F.3d 1339, 1344, 1353 (8th Cir. 1997) (single victim); *see also United States v. Hively*, 437 F.3d 752, 757, 761-62 (8th Cir. 2006) (multiple injuries inflicted on two victims).[3]

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3. The Ninth Circuit also so held in an unpublished decision, *see Kearney v. Foley & Lardner, LLP*, 607 Fed. Appx. 757, 759 &

Under this standard, Grace would have sufficiently pled continuity, even assuming *arguendo* Festa's sole "goal" was to defraud Grace and there was only one scheme, because each separate fraudulently induced payment to Falcon inflicted a separate injury.

d. The Fifth Circuit Imposes the Transaction Restriction

The Fifth Circuit differs from the circuits previously discussed, in that it has held that "where alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction, a 'pattern of racketeering activity' has not been shown." *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118, 123 (5th Cir. 1996). There, because the alleged predicate acts occurred during the production of television news reports, "a single, lawful endeavor," there was no pattern. *Id.* Under this standard, Festa's conduct likely would not give rise to continuity, since it originated from the "lawful endeavor" of a construction contract.

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n.1 (9th Cir. 2015) (citing *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191-94 (9th Cir. 1987)), but in a published decision more recent than *Sun Savings*, the Ninth Circuit held no continuity existed when defendant inflicted multiple injuries on one victim, for "the singular purpose of impoverishing [plaintiff]," *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1532-33, 1535-36 (9th Cir. 1992).

e. The First Circuit and Second Circuit Order Impose the Goal, Single Scheme/Victim, and Transaction Restrictions, and Preclude Closed-Ended Continuity Even If Multiple Injuries Are Inflicted

The First Circuit employs the Goal Restriction, Single Scheme/Victim Restriction; and a modified version of the Transaction Restriction. *See Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 525-26, 529-30 (1st Cir. 2015) (collecting cases) (no continuity where there is "a single, narrow scheme targeting few victims," or where predicate acts originate from a single "event" or "transaction" for the purpose of "accomplishing a singular, narrow goal" and facilitating "a single financial endeavor", even though plaintiff had been induced to make "numerous payments" so that multiple injuries had been inflicted) (citations and internal quotation marks omitted).

The Second Circuit Order imposes the same three restrictions respecting continuity, because Festa's racketeering purportedly had "the limited goal of defrauding Grace" (Goal Restriction), there was purportedly "one scheme with one clear victim" (Single Scheme/Victim Restriction), and purportedly "a single episode of fraud involving one victim and relating to one basic transaction" (Transaction Restriction) (App. 7a-8a) (quoting *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (quoting, in turn, *Tellis v. U.S. Fid. & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986)).[4]

4. Since Grace alleged multiple, distinct injuries, in the form of separate overpayments, the Second Circuit Order appears to hold the infliction of multiple injuries upon a victim is insufficient

2. Circuit Courts Have Similarly Splintered in Imposing Restrictions Upon Open-Ended Continuity

The aforementioned restrictions imposed on closed-ended continuity have been largely repeated in the respective circuit courts' treatment of open-ended continuity. *See Tabas*, 47 F.3d at 1295 (Third Circuit finding open-ended continuity, in situation where multiple injuries had been inflicted upon estate); *Brown*, 546 F.3d at 355 (Sixth Circuit finding open-ended as well as closed-ended continuity, considering same factors as to each); *Hively*, 437 F.3d at 761-62 (same, in Eighth Circuit); *Rodriguez*, 781 F.3d at 531 (First Circuit finding "an open-ended pattern would fail here for largely the same reasons that a closed pattern would"); *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 52 (1st Cir. 2000) (First Circuit finding no open-ended continuity where predicate acts originated from a single contract).

C. An Expansive Approach to Considering the Number of Victims, Injuries, and Transactions in Determining Closed- and Open-Ended Continuity Should Prevail

Even if racketeering activity pursues a "limited goal" or a single objective, targets a single or limited number of victims, or arises from a single transaction, that should not preclude a finding of closed-ended or open-ended continuity when the defendant has inflicted multiple injuries. "As we read the statute, we do not believe that Congress intended that one could insulate himself from

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for closed-ended continuity.

the reach of RICO simply by repeatedly bilking the same victim." *Blue Cross & Blue Shield of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989); *Kapoor*, 115 F.3d at 1338 (hypothetically, RICO prohibits progressive fleecing of widow). Since, under *H.J. Inc.*, continuity is "centrally a temporal concept," 492 U.S. at 241-42, the circumstance that a defendant repeatedly victimized the same person over time, rather than varying among multiple victims, should not be dispositive.

Following *H.J. Inc.*, the circuits have derived multi-factor tests for determining whether closed-ended continuity is satisfied, assuming one of the aforesaid preclusive restrictions is not being applied. For instance, the Third Circuit considers (1) number of unlawful acts; (2) length of time over which the acts were committed; (3) similarity of the acts; (4) number of victims; (5) number of perpetrators; and (6) character of the unlawful activity. *Tabas*, 47 F.3d at 1292 (citing *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987)).

Where, as here, there are multiple victims, two schemes, multiple injuries, thirteen acts of wire fraud, and three acts of money laundering, continuity should be found, balancing the factors set forth in cases like *Tabas*. This also serves the purpose of deterring racketeering activity. *Rotella v. Wood*, 528 U.S. 549, 557 (2000).

The length of time over which the acts were committed appears paramount, *see H.J. Inc.*, 492 U.S. at 241-42. The number of predicate acts is also given considerable weight; a greater number of acts indicates the perpetrator's propensity to commit coherent racketeering. The number of perpetrators is the least important factor, because the

presence of multiple perpetrators implies the need for each member's continued participation to engage in the pattern. One among many perpetrators may withdraw, potentially halting the activity. In addition, to the extent the enterprise is an entity, if multiple persons are operating or managing the enterprise, as those persons change over time, they may choose to cease the racketeering. With a single person managing the enterprise, as Festa does Falcon, there is no chance of such a power shift, and Falcon can continue as the racketeering enterprise as long as Festa desires.

The number of victims is also less important. One may be victimized over an extended period of time as easily as many. Indeed, some circuits do not distinguish between one victim and a limited number of victims. *See Edmondson & Gallagher*, 48 F.3d at 1265 ("single discrete goal" is a "far more important" factor to continuity than distinction between one and three victims); *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1556 (10th Cir. 1992) (applying *Sil-Flo*, concerning scheme directed at one individual, to scheme directed "at a finite group of individuals" without noting distinction).

While lower courts emphasize the nature of the racketeering acts, dismissiveness of predicate acts of mail or wire fraud because they reflect "garden-variety fraud" perceived as beyond RICO's reach, has been rejected by this Court. *See Bridge*, 553 U.S. at 660. In any event, money laundering is also involved here, as a second, related, racketeering scheme.

POINT III

WHETHER A SCHEME'S "INHERENTLY TERMINABLE" NATURE PER SE PRECLUDES OPEN-ENDED CONTINUITY IS THE SUBJECT OF A CIRCUIT SPLIT

A number of circuits have held that where a scheme is "inherently terminable" or has a "natural endpoint," open-ended continuity cannot be found. *See, e.g.*, *Vemco*, 23 F.3d at 134-35 (scheme with single goal of plaintiff paying cost of one paint system is insufficient for open-ended continuity). Some courts rely upon *H.J. Inc.*'s language that activity must have the potential to continue "indefinitely" to give rise to open-ended continuity. *See McDonald v. Schencker*, 18 F.3d 491, 498 (7th Cir. 1994) (rejecting open-ended continuity for ongoing litigation because "every lawsuit has a foreseeable end in sight" so related fraud could not "extend *indefinitely*") (emphasis in original).

However, interpreting language in *H.J. Inc.*, 492 U.S. at 242, as always requiring the prospect of indefinite continuation, largely defeats the purpose of open-ended continuity. In most cases where courts have rejected open-ended continuity based on a fixed endpoint, the racketeering's speedy conclusion benefited the defendant. *See, e.g., Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 19-20 (1st Cir. 2000) (defendant had obvious reason to squeeze out partnership's other principals quickly, *i.e.*, to reap quickly greater profits).

Here, however, there was an incentive to prolong the racketeering. With each successive A&C, Festa obtained

more ill-gotten funds through further misrepresentations. Ending the Project quickly would have deprived Festa of further opportunities to provide A&Cs overbilling Grace.

This case invites differentiation of instances in which defendants have an incentive to complete the activity expeditiously, from those where defendants have reason to postpone it. The former does not contain a future threat of racketeering; the latter presents its likelihood.

Moreover, there is an implicit conflict among the circuits on this issue. As discussed in greater detail in Point IV below, multiple circuits have held that a fortuitous interruption of criminal activity is insufficient to defeat open-ended continuity. As *United States v. Busacca*, 926 F.2d 232, 238 (6th Cir. 1991), states, "An analysis of the threat of continuity cannot be made solely from hindsight. All racketeering activity must necessarily come to an end sometime." Yet any activity that must come to an end is, by definition, not indefinite.

POINT IV

THE SECOND CIRCUIT ORDER CONFLICTS WITH OTHER CIRCUITS ON REQUIREMENTS FOR PLEADING ANTICIPATED CONTINUATION OF RACKETEERING ACTIVITY

The Second Circuit Order held that Grace's allegations that the predicate acts were the means by which Falcon "regularly operated" were insufficient because Grace cited only "its own limited interactions with Festa in support of that contention" (App. 7a), and that Grace's allegation there was a threat of continuing racketeering activity at

the time of the Project's fortuitous interruption was too speculative (*id.*).

These holdings imposed a heavy pleading burden inconsistent with the Fed. R. Civ. P. 12(b)(6) dismissal standard, that all reasonable inferences be afforded the pleader. In addition, requiring a civil RICO plaintiff to plead detailed facts concerning continuation, runs directly counter to decisions from other circuits, and is implicitly contrary to others.

A. Multiple Circuits Have Granted Civil RICO Plaintiffs Favorable Inferences as to Open-Ended Continuity That Were Denied Grace

The Sixth Circuit holds civil RICO plaintiffs may sufficiently plead open-ended continuity even without specifically alleging ongoing racketeering activity. *Brown*, 546 F.3d at 355. Because open-ended continuity may be inferred from other circumstances alleged by the plaintiff, it is error to burden the plaintiff with pleading details of continued racketeering.

The Fourth, Fifth, and Sixth Circuits have held Rule 12(b)(6) motions against civil RICO claims should be denied unless future termination may be inferred from the complaint. *See Abraham v. Singh*, 480 F.3d 351, 355-56 (5th Cir. 2007) (faulting lower court for "turning the Supreme Court's explanation of the continuity prong into a stringent pleading requirement"); *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393, 411 (6th Cir. 2012) (at time of predicate acts, "there was no indication that their pattern of behavior would not continue indefinitely into the future"); *CVLR Performance*

Horses, Inc. v. Wynne, 524 Fed. Appx. 924, 928 (4th Cir. 2013) ("the Amended Complaint creates no inference that [defendant] has ended its fraudulent activities"); *see also Kamin*, 876 F.2d at 545 (reversing post-discovery *sua sponte* grant of dismissal).

Two other circuits have held, in a summary judgment context, that the plaintiff was entitled to an inference that racketeering activity would continue. *See Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1296 (7th Cir. 1992) (where defendant majority shareholder extorted minority shareholders all three times they impeded defendant's goals, court inferred extortion was defendant's regular way of operation); *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (defendant filed, in consecutive years, two allegedly false annual reports for company that shut down the next year). If on summary judgment a plaintiff with the benefit of discovery is entitled to a presumption that the predicate acts will continue, a plaintiff facing a Rule 12(b)(6) dismissal without discovery should fare no worse.

In the instant case, as in *Shields* and *Ikuno*, the defendant repeatedly engaged in racketeering activity when circumstances allowed. Those courts acknowledged that one may infer that a defendant would continue to engage in the same actions. In *Shields* this involved three predicate acts over eight months, while *Ikuno* involved two acts over approximately one year. At bar, plaintiff alleged all of Falcon's eleven repetitious A&Cs issued from August 2015 to August 2016 contained misrepresentations, including repetitious historical misrepresentations, such that all uses of the wires involving the A&Cs were fraudulent. Yet the Second Circuit found it "speculative"

to expect Festa to act the same way in the future as he had on all eleven previous occasions, despite the Project being only 38.5% finished, so that the relationship between Grace and Defendants would have continued, but for its fortuitous interruption.

B. The Second Circuit's Holding That a Defendant's Consistent Past Conduct Cannot Serve as a Basis to Anticipate Future Conduct, Conflicts with Four Other Circuits

Taken to its logical conclusion, the Second Circuit's holding is in conflict with the approach, adhered to by at least four other circuits, that intervening events disrupting racketeering activity cannot defeat open-ended continuity. *See Busacca*, 936 F.2d at 238 ("[t]he lack of a threat of continuity of racketeering activity cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict"); *accord*, *Heinrich*, 668 F.3d at 410-11; *United States v. Baker*, 598 Fed. Appx. 165, 173 (4th Cir. 2015); *Wynne*, 524 Fed. Appx. at 929; *United States v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999).

Without the inference that activity would have continued if not fortuitously interrupted, it would almost always be "speculative" whether the racketeering would have continued. *See Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 356 (7th Cir. 2019) (Hamilton, J., dissenting) ("In the law we ordinarily assume that people are rational actors. Here, that means that we would expect defendants to continue with their profitable venture.").

C. The Second Circuit Not Only Denied Grace Favorable Inferences, It Disregarded Grace's Factual Allegations

In concluding Grace had alleged only predicate acts of wire fraud, the Second Circuit Order necessarily disregarded Grace's detailed pleadings as to money laundering. This omission both narrowed the number of Festa's victims, and avoided caselaw that money laundering is inherently unlawful activity, raising an inference of open-ended continuity. *See United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir. 1991).

Similarly, the Second Circuit disregarded many allegations substantiating a threat of continuing activity, then characterized Grace's pleading on the subject as conclusory and speculative. This characterization ignores Grace's allegations that: every single A&C Festa provided to Grace was fraudulent (AC ¶¶ 16, 241); Festa had continued making misrepresentations to Grace and causing the use of interstate wires to further the Wire Fraud Scheme through Grace's last payment to Falcon (AC ¶ 242); there was no reason to believe Festa would change his custom of consistently making misrepresentations and engaging in money laundering (AC ¶ 244); Festa made oral misrepresentations to Subcontractors and defrauded them as well (AC ¶ 228(d)); and Festa committed non-predicate acts of grand larceny (AC ¶¶ 230-32) and perjury (*see* AC ¶ 16), along with wire fraud and money laundering. The Sixth, Seventh, and Tenth Circuits have held that conduct other than predicate acts should be considered in determining whether racketeering activity is likely to continue. *See Heinrich*, 668 F.3d at 410; *Brown*, 546 F.3d at 355; *Busacca*, 936 F.2d at 238; *United States v. Palumbo*

Brothers, Inc., 145 F.3d 850, 878 (7th Cir. 1998); *Tal v. Hogan*, 453 F.3d 1244, 1268 (10th Cir. 2006); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1544 (10th Cir. 1993).

Furthermore, an allegation that a defendant acted in a certain way on all eleven prior iterations of an A&C is not "conclusory" as the Second Circuit held, because that term ordinarily means the expression of a factual inference *without* stating the underlying facts on which the inference is based, *Hamilton v. Sikorsky Aircraft Corp.*, 760 Fed Appx. 872, 877 (11th Cir. 2019) (quoting *Black's Law Dictionary*).

D. Requiring RICO Plaintiffs to Plead Defendants' Racketeering Conduct Towards Others Is Counter to Other Circuits' Precedent and Disregards the Dismissal Motion Rule That Plaintiffs Be Granted Favorable Inferences

The Second Circuit's holding that Grace cannot demonstrate how Falcon regularly operated by "point[ing] only to its own limited interactions with Festa" (App. 7a) is deeply flawed. First, it inverts the requirement that plaintiffs be granted all favorable inferences on a Rule 12(b)(6) motion. *See, e.g., Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC,* 797 F.3d 160, 171 (2d Cir. 2015) ("As always at the Rule 12(b)(6) stage, we credit all non-conclusory factual allegations in the complaint and draw all reasonable inferences in Plaintiffs' favor.") Instead, the Second Circuit gave a favorable inference to Festa by effectively assuming that Falcon's racketeering activity as to Grace operations, *as a matter of law*, could not possibly be representative of its "regular[] operat[ions]" (App. 7a).

Second, the Second Circuit disregarded that Grace also alleged that Festa had made misrepresentations to the Subcontractors, not just Grace, and committed repeated crimes against them, further demonstrating Festa's propensity to engage in racketeering activity.

Moreover, other federal circuits have not interpreted *H.J. Inc.*'s language, "regular way of doing business," as encompassing *all* operations of a RICO defendant. In *Shields*, the Seventh Circuit found that the defendant majority shareholder's alleged extortion of the minority shareholders raised an issue of fact as to continuity, although *Shields* did not indicate that the defendant's sole function was ownership of that corporation. 975 F.2d at 1296. Similarly, in *Ikuno* the Ninth Circuit found that the defendant attorney's filing of two consecutive fraudulent annual reports for a company was sufficient to support a finding of a threat of continuity, though presumably the defendant's practice consisted of more than filing one annual report each year. 912 F.2d at 309.

Furthermore, whether Festa engaged in racketeering activities towards others would be peculiarly within his knowledge. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (plaintiff may plead facts upon information and belief "where the facts are peculiarly within the possession and control of the defendant"). Under the circumstances, the presumption should be made in Grace's favor.

CONCLUSION

The Second Circuit Order's imposition of a narrow substantive and procedural approach to construction of a civil RICO complaint curtails RICO's congressionally intended scope. "It is not for the judiciary to eliminate the private action in situations where Congress has provided it". *Bridge*, 553 U.S. at 660 (quoting *Sedima*, 473 U.S. at 499-500) (internal quotation marks omitted)). For the reasons discussed herein, the Court should grant certiorari.

Dated: July 13, 2020

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 30, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-1101-cv

GRACE INTERNATIONAL ASSEMBLY OF GOD,

Plaintiff-Appellant,

v.

GENNARO FESTA, FALCON GENERAL CONSTRUCTION SERVICES, INC.,

Defendants-Appellees.

December 30, 2019, Decided

Appeal from a judgment of the United States District Court for the Eastern District of New York. (Sandra J. Feuerstein, *Judge*).

PRESENT: AMALYA L. KEARSE,
CHRISTOPHER F. DRONEY,
RICHARD J. SULLIVAN,
Circuit Judges.

SUMMARY ORDER

Appendix A

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Grace International Assembly of God ("Grace") appeals from a decision of the district court (Feuerstein, J.) dismissing its claims against Defendants-Appellees Gennaro Festa and Falcon General Construction Services, Inc. under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c), and state law. On appeal, Grace argues that the district court erred in finding that Grace failed to adequately plead a pattern of predicate acts sufficient to state a claim under RICO. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

We review a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *See Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility 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 addressing the sufficiency of a complaint we accept as true all factual allegations and draw from

them all reasonable inferences; but we are not required to credit allegations that are speculative or conclusory." *See, e.g., Twombly*, 550 U.S. at 555, 557.

I. RICO

"To state a claim for damages under RICO a plaintiff . . . must allege . . . (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invest[ed] in, or maintain[ed] an interest in, or participate[d] in (6) an 'enterprise' (7) the activities of which affect[ed] interstate or foreign commerce.'" *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (quoting 18 U.S.C. § 1962(a)-(c) (1976)), *cert. denied Moss v. Newman*, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984).

As the primary basis for its racketeering claim, Grace alleges that Defendants committed numerous counts of wire fraud, in violation of 18 U.S.C. § 1343, during the course of a construction project commissioned by Grace. Grace also alleges that Defendants committed money laundering, in violation of 18 U.S.C. § 1956, although it disclaims any specific harm resulting from those offenses. Instead, Grace merely argues that the money laundering counts support its claim of a RICO pattern. We assume for the purposes of this Order that Grace has adequately pleaded both wire fraud and money laundering, but find nonetheless that Grace has not alleged a pattern of racketeering activity as required under RICO.

II. RICO Pattern

A "pattern of racketeering activity" must consist of at least two predicate acts, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). Racketeering activities must "amount to or pose a threat of continued criminal activity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)). To meet this so-called "continuity" requirement, a "plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (*i.e.*, past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (*i.e.*, past criminal conduct extending over a substantial period of time)." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 180 (2d Cir. 2004) (quoting *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 466 (2d Cir. 1995)). "Given the routine use of mail and wire communications in business operations, . . . 'RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.'" *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (quoting *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000), *cert. denied*, 532 U.S. 905, 121 S. Ct. 1228, 149 L. Ed. 2d 138 (2001)).

Appendix A

A. Closed-ended Continuity

Like the district court, we find that Grace has failed to allege closed-ended continuity. As noted above, "[t]o satisfy closed-ended continuity, the plaintiff must prove 'a series of related predicates extending over a substantial period of time.'" *Cofacredit*, 187 F.3d at 242 (*quoting H.J. Inc.*, 492 U.S. at 242). Since the Supreme Court decided *H.J. Inc.*, we have never found predicate acts spanning less than two years to be sufficient to constitute closed-ended continuity. "[W]hile two years may be the *minimum* duration necessary to find closed-ended continuity, the mere fact that predicate acts span two years is insufficient, without more, to support a finding of a closed-ended pattern." *First Capital*, 385 F.3d at 181. The court must also consider the number and variety of predicate acts, the presence or absence of multiple schemes, and the number of participants and victims. *See Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008); *First Capital*, 385 F.3d at 181.

Grace argues it has adequately alleged the requirements of closed-ended continuity because "the acts took place for a period extending longer than two (2) years," Plaintiff's Amended Complaint ("AC") ¶ 240, since the scheme allegedly lasted a total of twenty-nine months. However, the scheme involved few victims — most generously Grace, its principal investor, and a handful of subcontractors who were left unpaid — and fewer perpetrators — just Festa, acting through his construction company, Falcon. At bottom, the RICO scheme alleged in the complaint had the limited goal of

defrauding Grace. We therefore agree with the district court that such a scheme does not support a finding of closed-ended continuity. *See First Capital*, 385 F.3d at 182 (holding that predicate acts over two-and-a-half years did not constitute closed-ended continuity because the complaint "alleged that [defendant] engaged in a single scheme to defraud two creditors by quickly moving his assets to his relatives and then concealing the existence of those assets during his bankruptcy proceeding").

B. Open-ended Continuity

Grace also fails to allege open-ended continuity. There are two ways to show open-ended continuity – (1) "where the acts of the defendant or the enterprise [are] inherently unlawful, such as murder or obstruction of justice, and [are] in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement," *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995), or (2) "where the enterprise primarily conducts a legitimate business" but there is "some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity," *Cofacredit*, 187 F.3d at 243 (citing *H.J. Inc.*, 492 U.S. at 243). The allegation of a scheme that was inherently terminable does not plausibly imply a threat of continued racketeering activity. *Id.* at 244

Grace has failed to allege the first type of open-ended continuity, which primarily targets organized crime. *See Reich v. Lopez*, 858 F.3d 55, 60 (2d Cir. 2017), *cert.*

denied, 138 S. Ct. 282, 199 L. Ed. 2d 127 (2017) ("Even if [the defendant] pays bribes, it is primarily in the energy business; it is not a narcotics ring or an organized crime family."). And Grace fares no better in establishing open-ended continuity under the second method. Although Grace conclusorily alleges that the predicate acts were the means by which Falcon, a construction company, "regularly operated," AC ¶ 241, it points only to its own limited interactions with Festa in support of that contention, AC ¶ 241. At best, Grace alleges conclusorily and speculatively that the "nature of the predicate acts implied a threat of continuing activity" because "[t]he Project remained incomplete and similar predicate acts could continue to occur," AC ¶ 242, since the contract was only "38.5% complete," AC ¶ 243. But Grace's speculative claims regarding how long the fraud would continue do not, on their own, support a showing of open-ended continuity. *See GICC Capital Corp.*, 67 F.3d at 466 (rejecting claim that defendant would have continued scheme had plaintiff not commenced litigation on the grounds it was "entirely speculative"). Even accepting that the project remained unfinished, Grace's construction project was ultimately terminable, and Grace has offered no other facts to suggest the activities would continue in the future.

While Grace attempts to magnify the racketeering scheme by expanding the number of victims and predicate acts, in reality this is one scheme with one clear victim. That is clearly insufficient to establish a pattern for the purposes of RICO. *See Crawford*, 758 F.3d at 489 ("[M]ultiple acts of mail fraud in furtherance of a single episode of fraud involving one victim and relating to

one basic transaction cannot constitute the necessary pattern.") (quoting *Tellis v. U.S. Fid. & Guar. Co.*, 826 F.2d 477, 478 (7th Cir. 1986)).

We have considered Grace's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MARCH 26, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

17-CV-7090 (SJF) (AKT)

GRACE INTERNATIONAL ASSEMBLY OF GOD,

Plaintiff,

v.

GENNARO FESTA AND FALCON GENERAL CONSTRUCTION SERVICES, INC.,

Defendants.

March 26, 2019, Decided
March 26, 2019, Filed

MEMORANDUM AND ORDER

FEUERSTEIN, District Judge:

Plaintiff Grace International Assembly of God ("Plaintiff" or "Grace") commenced this case against defendants Gennaro Festa ("Festa") and Falcon General Construction Services, Inc. ("Falcon") (collectively, "Defendants") asserting claims against Festa pursuant to the Racketeer Influenced and Corrupt Organizations

Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, against Falcon for breach of contract and negligence under state law, and against both Defendants for fraud and breach of trust under state law. Defendants have moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* Motion, Docket Entry ("DE") [25]. Plaintiff opposes the motion. For the reasons set forth below, the motion is granted, and the case dismissed.

I. BACKGROUND

A. Factual Background

The following facts are taken from the amended complaint ("Am. Compl."), DE [22], and are assumed to be true for purposes of this motion. In addition, various documents have been incorporated by reference in, and attached to, the amended complaint including: a contract dated May 19, 2014, (the "Contract"), DE [22-1], and; eleven (11) documents entitled "Application and Certification for Payment" ("A&C"), numbered one (1) through eleven (11) and dated periodically from August 1, 2015 to August 19, 2016. DE [22-2 & 22-3].

Grace is a New York religious corporation that maintains a place of worship at 172 Willis Avenue, Mineola, New York (the "Premises"). Am. Compl. ¶ 1. Falcon, a general construction contractor, is a New York corporation, and Festa is the President and sole shareholder of Falcon. *Id.* ¶¶3-5. Prior to 2014, the church located on the Premises consisted of two attached buildings: the sanctuary and a fellowship hall. *Id.* ¶8. In or about February 2014, Falcon

agreed to act as general contractor on a project (the "Project") to: (1) refurbish the existing sanctuary, which was to become the fellowship hall; and (2) demolish the existing fellowship hall and build a new sanctuary in its place. *Id.* ¶9.

On or about February 4, 2014, Festa met with Grace's governing Council and its minister, Pastor Wilson. Am. Compl. ¶18. During that meeting Festa represented that steel shop drawings ("Steel Shop Drawings") would be prepared by American Buildings Company ("ABC"), a Georgia company that would also provide prefabricated steel. *Id.* ¶18. The Steel Shop Drawings would be ordered from ABC by American Building Services of New York, Inc. ("ABS"), an entity that the Amended Complaint refers to alternatively as either "an agent of Falcon's," *id.* ¶18(b), or "Festa's agent." *Id.* ¶¶20(a); 212(a). There are no factual allegations to support this legal conclusion. Plaintiff further alleges that ABC and ABS entered into an agreement, *id.* ¶20(a), but provides no specifics regarding the timing or scope of that agreement.

On or about May 14, 2014, Grace and Falcon entered into a written Contract for the Project. *Id.* ¶10 & Ex. A. The Contract provides for the scope of work including, labor and materials, for a contract amount of $900,000. Contract, Ex. A. Plaintiff alleges that over the course of the Project, Festa, on behalf of Falcon, made numerous fraudulent misrepresentations which Grace organizes into eleven (11) categories. The alleged misrepresentations pertain to: (1) the Steel Shop Drawings, Am. Compl. ¶¶18-27; (2) Steel Building Frame, *id.* ¶¶ 28-46; (3) Steel for

First Floor Framing, *id.* ¶¶47-55; (4) Steel for Mezzanine Framing, *id.* ¶¶56-60; (5) Sewer Pump, *id.* ¶¶61-68; (6) Plumbing Fixtures, *id.* ¶¶69-80; (7) Electric Utility Room, *id.* ¶¶81-92; (8) Drywall Trim and Hardware, *id.* ¶¶93-98; (9) Finishes, Paint, and Ceramic Tile, *id.* ¶¶99-104; (10) Electric Fan Outlets, *id.* ¶¶105-10; and (11) "General Conditions: Insurance, Labor." *Id.* ¶¶111-54.

Regarding the Steel Shop Drawings, Festa, having told the Council that ABC required payment in advance, invoiced Grace for $24,500, which Grace paid on February 27, 2014. Am. Compl. ¶¶18(d)(e), 23. In 2017, Grace learned that no advance payment was required, that Festa knew no advance payment was required, and that ABC had received only $6,000.00. *Id.* ¶20. Grace alleges that the balance of the amount ostensibly paid for the Steel Shop Drawings was not used on the Project. *Id.* ¶24.

The alleged misrepresentations regarding the Steel Building Frame include that Festa attended at least four meetings with members of the Council in April and May 2014 during which he made oral representations that Grace must make an initial payment of $116,760 to be used to purchase building frame steel from ABC. Am. Compl. ¶28. Festa submitted an invoice to Grace for $116,760, which Grace paid by check dated May 29, 2014. *Id.* ¶¶29, 31. Grace alleges that Festa had no intention of using these monies to purchase steel. *Id.* ¶30. During eight (8) meetings held between June 3, 2014 and August 2, 2016, Festa represented to Grace Council members and Pastor Wilson that the monies had been paid to ABC "and that the steel for which it was to be used had been

ordered, secured, and stored somewhere." *Id.* ¶32. The same representation was made in multiple meetings from January 2017 through March 2017. *Id.* ¶33. The Building Frame Steel was never delivered, stored or installed at the Premises, and Plaintiff alleges, upon information and belief, that the steel was never purchased "from ABC or anyone else." *Id.* ¶35.

Detailed recitation of the allegations regarding the nine remaining categories of alleged misrepresentations is unnecessary to resolve the motion before the Court. Suffice it to say that for each category, Grace alleges that Festa, on behalf of Falcon, made misrepresentations, either verbally or through submission of the A&Cs, regarding the purchase of materials and/or the progress of the construction, and that Grace relied on those misrepresentations and continued to make payments. From August 1, 2015 to August 19, 2016, Falcon submitted eleven (11) separate A&Cs to Grace requesting payments totaling $359,950. Am. Compl. Ex. A. In addition, the Amended Complaint contains allegations regarding other invoices submitted by Falcon and paid by Grace. *See, e.g.*, Am. Compl. ¶19 (invoice 211001 for $24,500); ¶29 (invoice 2 for $116,760); ¶61 (invoice 6 for $6,200); ¶62 (invoice 12 for $1,200).

Falcon also subcontracted out work on the Project to various subcontractors including Amano Contracting, Inc. ("Amano), which was to perform demolition of the existing fellowship hall, removal of fill and debris, and excavation of the foundation for the new sanctuary. Am. Compl. ¶155. Grace alleges that Amano fully performed under the subcontract, but Falcon did not pay it any of the

$74,000 owed for that work. *Id.* ¶156. On June 16, 2016, Amano filed a notice of lien against the Premises. *Id.* ¶157. Falcon ceased performing work on the Premises in July 2016 and "effectively abandoned the Project." *Id.* ¶158. In late August 2016, Grace was advised about the notice of lien by Heritage Investment Services Fund ("Heritage"), a lender that had been providing funds to Grace to finance the Project. *Id.* ¶159.[1] Heritage ceased lending money to Grace for the Project in late August 2016. *Id.* ¶160. Grace terminated Falcon as general contractor on the Project on or about April 26, 2017 "after investigating the facts so as to uncover Festa and Falcon's fraud." *Id.* ¶161. Plaintiff alleges that at the time of its termination, Falcon had completed only 38.5% of the Project. *Id.* ¶164.

B. RICO Allegations

Plaintiff alleges that Defendants perpetrated two interrelated fraudulent schemes, which it has named the "Project Invoicing Fraud Scheme" and the "Subcontractor Nonpayment Fraud Scheme." In the Project Invoicing Fraud Scheme, Defendants "defraud[ed] Grace into paying for aspects of the Project, including the purchase of materials, that either were not performed or purchased at all or had been performed or purchased only in part." Am. Compl. ¶11. According to Plaintiff, the alleged victims of this scheme include Grace, the institution lending Grace money for the Project, and the subcontractors and materialmen retained by Falcon. *Id.*

1. Although this paragraph alleges that Heritage had been providing funds to Falcon, Plaintiff notes in its Memorandum of Law that this is a mistake and that Heritage was Grace's lender. Pl. Mem. of Law at 18, n.5.

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The Subcontractor Nonpayment Fraud Scheme relates to Falcon's alleged nonpayment or partial payment to subcontractors or materialmen for labor or materials while misrepresenting to Grace that those subcontractors and materialmen had been paid in full. Am. Compl. ¶12. Grace acknowledges that it "is not claiming injury from the Subcontractor Nonpayment Fraud Scheme" but is including these allegations "simply to demonstrate additional victims of Festa's misconduct, and additional facts concerning Festa's pattern of racketeering activity." *Id.* Grace contends that Falcon sought monies from Grace to pay certain subcontractors, Grace made those payments to Falcon, and Falcon failed to pay the subcontractors. In addition to failing to pay its subcontractor Amano, Plaintiff alleges that Falcon paid Ace-Tec Enterprises, Inc. ("Ace-Tec") only $30,000 of the $79,000 it is owed, *see id.* ¶¶180-88, did not pay Liberty Pipe, Inc. ("Liberty") $3,000 it is owed. *Id.* ¶¶190-99.

Grace alleges that Falcon is a RICO enterprise, and that it has engaged in activities affecting interstate commerce such as its purchase of: (a) the steel shop drawings from ABC, a Georgia corporation, through ABS; (b) steel from Ace-Tec, which was originally shipped from Pennsylvania and/or North Carolina; (c) materials and services from ABS, located in New Jersey; (d) materials from Home Depot and Staples, national chain stores. Am. Compl. ¶206.

Regarding the Project Invoicing Scheme, Grace identifies thirteen (13) predicate acts of wire fraud as defined by 18 U.S.C. §1343 including that Festa caused the

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Steel Shop Drawings to be sent by e-mail from ABC in Georgia to ABS in New York on or about March 22, 2014 (the "First Predicate Act"). Am. Compl. ¶¶211-12. Festa knew, or it was reasonably foreseeable, that the drawings would be transmitted electronically.

Grace further enumerates twelve (12) wire transfers of monies that Festa "caused to be sent":

- From Grace in New York to AG Financial, an umbrella company holding monies for Grace located in Missouri—three (3) written requests by facsimile requesting the wire transfer of funds into Grace's checking account in New York;

- From AG Financial in Missouri to Grace in New York—three (3) wire transfers of the monies corresponding to Grace's requests as referenced in the preceding paragraph;

- From Grace in New York to Heritage, a lending institution in Pennsylvania—three (3) written requests transmitted by facsimile requesting the wire transfer of funds to Grace's checking account in New York;

- From Heritage in Pennsylvania to Grace in New York—three (3) wire transfers of monies corresponding to Grace's requests as referenced in the preceding paragraph.

Am. Compl. ¶¶214-15. Festa caused these uses of the interstate wires "in that he knew, or it was reasonably foreseeable, that such uses would occur in the ordinary course of business." *Id.* ¶216. The first of these transmissions took place on or about May 7, 2015, and the last on or about August 23, 2016.

Regarding the Subcontractor Nonpayment Fraud Scheme, Grace identifies predicate acts of money laundering and misappropriation of trust funds, alleging that the monies Grace paid to Falcon which were to be paid to the latter's subcontractors and materialmen constituted "trust funds within the meaning of Article 3-A of the Lien Law" in New York, Am. Compl. ¶223, and that Falcon's failure to pay trust claims by its subcontractors violates New York state law and constitutes grand larceny pursuant to New York Penal Law §155.30. Grace claims that the predicate acts constitute a pattern of racketeering related to the same Project.

C. Procedural History

Plaintiff filed the complaint on December 5, 2017 alleging federal question jurisdiction based on the RICO claim. The Clerk's Office issued a notice of entry of default on January 25, 2018, noting Defendants' failure to appear. Defendants moved to vacate the Clerk's entry of default shortly thereafter, and that motion was granted on April 10, 2018. Plaintiff filed its amended complaint on May 23, 2018, and Defendants filed the current motion to dismiss, arguing that the amended complaint fails to state a civil RICO claim.

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II. LEGAL STANDARDS

A. Motion to Dismiss

Defendant seeks dismissal of the action pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The standards for analyzing a motion to dismiss are well-established. The court must accept the factual allegations in the complaints as true and draw all reasonable inferences in favor of the plaintiff. *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 113 (2d Cir. 2013) (citations omitted). The court determines "whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

The determination of "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." *Iqbal*, 556 U.S at 679. A pleading that does nothing more than recite bare legal conclusions, however, is insufficient to "unlock the doors of discovery." *Iqbal*, 556 U.S. at 678-679; *see also Twombly*, 550 U.S. at 555 (holding that a "formulaic recitation of cause of action's elements will not do. Factual

allegations must be enough to raise a right to relief above the speculative level."). While Rule 8 does not require "detailed factual allegations," it does require more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678 (citing *Twombly*, 550 U.S. at 555).

B. Civil RICO Claims

"RICO's private right of action is contained in 18 U.S.C. § 1964(c)," *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008), which provides that, with an exception not relevant here, "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee[.]" 18 U.S.C. § 1964(c). The amended complaint alleges that Festa violated §1962(c) of RICO, which provides in pertinent part that "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...." 18 U.S.C. § 1962(c).

To state a claim under §1962(c), a plaintiff must allege: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly ... participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719

F.2d 5, 17 (2d Cir.1983). A plaintiff alleging a RICO claim "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). A plaintiff must plead, at a minimum, "(1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380 (2d Cir. 2001).

Racketeering activity "is defined to include a host of so-called predicate acts," *Bridge*, 553 U.S. at 647, including "any act which is indictable under . . . section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(a).[2] A "pattern" of racketeering activity requires a showing of at least two predicate acts of racketeering within ten years of one another. 18 U.S.C. §1961(5).

Where a plaintiff alleges racketeering activity based on mail or wire fraud, it "must prove three elements: (1) scheme to defraud, including proof of intent; (2) money or property as object of [the] scheme; (3) use of mails or

2. Wire fraud occurs whenever a person, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice...." 18 U.S.C. § 1343.

wires to further the scheme." *K&D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525, 539 (S.D.N.Y. 2014) (internal quotation marks and citation omitted). However, "[g]iven the routine use of mail and wire communications in business operations, . . . 'RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.'" *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (quoting *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)); *see also Bigsby v. Barclays Capital Real Estate, Inc.*, 170 F. Supp. 3d 568, 575-76 (S.D.N.Y. 2016) (noting that "predicate acts of mail and wire fraud merit particular scrutiny . . . lest the courts allow the RICO statute 'to federalize garden-variety state common law claims" (internal quotation marks and citations omitted)); *Gross v. Waywell*, 628 F. Supp. 2d 475, 493 (S.D.N.Y. 2009) (observing that "virtually every ordinary fraud is carried out in some form by means of mail or wire communication").

In addition, where the predicate acts sound in fraud, including wire fraud, the complaint must also satisfy the provision in Rule 9(b) that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake [must] be stated with particularity." FED. R. CIV. P. 9(b). To comply with Rule 9(b), "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*,

459 F.3d 273, 290 (2d Cir. 2006) (internal quotation marks and citation omitted).

Defendants claim that the Amended Complaint fails to state a claim for in that it fails to plausibly allege: (1) an enterprise; (2) a pattern of racketeering; and (3) proximate causation.

III. DISCUSSION

A. RICO

1. Enterprise

"[T]o establish liability under §1962(c), one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to be a different name." *Cedric Kushner Promotions, Ltd., v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). Defendants argue that Falcon, a corporate entity, and its President, Festa, are not adequately distinct and cannot be both the "enterprise" and the "person" necessary for RICO liability. Addressing a similar factual scenario, the Supreme Court found that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner*, 533 U.S. at 163. Thus, where an employee "conducts the affairs of a corporation through illegal acts," that employee may be the RICO "person" separate and apart from the corporation and "the employee and the corporation are different

'persons,' even where the employee is the corporation's sole owner." *Id.* Applying this precedent to the current case, the Amended Complaint sufficiently alleges that Festa is the "person" and Falcon is the "enterprise."

2. Pattern of Racketeering

"To satisfy the "pattern" requirement, the factual allegations must meet two standards: relatedness and continuity. The pleadings must show that the predicate acts asserted are related and amount to or pose a threat of continuing criminal activity." *Gross*, 628 F. Supp. 2d at 485. "[T]hese two constituents of RICO's pattern requirement must be stated separately though in practice, their proof will often overlap." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

a. Relatedness

"Predicate acts are 'related' for RICO purposes, when they '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.'" *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 97 (2d Cir 1997) (quoting *H.J. Inc.*, 492 U.S. at 240). "A relationship to show the existence of a pattern is indicated by temporal proximity of the acts, by common goal, methodology, and their repetition." *Cosmos Forms Ltd. v. Guardian Life Ins. Co.*, 113 F.3d 308, 310 (2d Cir. 1997).

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Twelve of the thirteen alleged predicate acts consist of six pairs of transactions — Grace's request for funds from a financial institution followed by that institution's forwarding of the requested funds — that occurred from May 7, 2015 to August 23, 2016. The acts are repeated and have the common goal of funding the Project, funding which Plaintiff claims was wrongfully diverted by Defendants. For the purposes of withstanding a motion to dismiss, the amended complaint adequately alleges the relatedness of these twelve acts.

The First Predicate Act, transmission of the Steel Shop Drawings on or about March 22, 2014, is more isolated and not clearly intertwined with the subsequent acts. It occurs at the very beginning of the alleged scheme and is temporally removed from the other acts, occurring over a year before the next act. The methodology of this act is also distinct as it concerns a transmission between ABC, an entity unrelated to any party in this litigation, to ABS. ABS is summarily alleged to be the purported "agent" of Festa and/or Falcon, but there are no allegations to support the legal conclusion that ABS was acting as an agent. The nature of the First Predicate Act is also different in that it involves the transmission of technical materials and is not directly related to crux of the scheme -- the transfer of funds. Plaintiff argues that the transmission of the Steel Shop Drawings was essential to the overall scheme since the Project could not have progressed without them, implying that the First Predicate Act was in furtherance of the common goal. Drawing all inferences in Plaintiff's favor, the Amended Complaint plausibly alleges that the predicate acts are

related. Relatedness of the predicate acts, however, "is not alone enough to satisfy §1962's pattern element." *H.J. Inc.*, 492 U.S. at 240.

b. Continuity

As to continuity, a "plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 180 (2d Cir. 2004) (internal quotation marks and citation omitted). Grace claims that it has plausibly alleged both types of continuity.

Closed ended continuity is demonstrated "over a closed period by proving a series of related predicates over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242. The length of the time period is significant, as the Second Circuit "has never held a period of less than two years to constitute a 'substantial period of time'" for purposes of establishing closed-ended continuity. *De Falco v. Bernas*, 244 F.3d 286, 321 (2d Cir. 2001) (citing cases); *see generally H.J. Inc.*, 492 U.S. at 242 (noting that given Congress's concern in RICO with long-term criminal conduct, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct" do not satisfy the pattern requirement). Including all the alleged predicate acts, the scheme encompassed only twenty-nine months; excluding the First Predicate Act, the time period is less than eighteen months.

The duration of the scheme is not the only consideration, however, because while "closed-ended continuity is primarily a temporal concept, other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are also relevant in determining whether closed-ended continuity exists." *De Falco*, 244 F.3d at 321. "Courts in the Second Circuit have generally held that where the conduct at issue involves a limited number of perpetrators and victims and a limited goal, the conduct is lacking in closed-ended continuity." *FD Prop. Holding, Inc. v. U.S. Traffic Corp.*, 206 F. Supp. 2d 362, 372 (E.D.N.Y. 2002); *see also Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 420 (E.D.N.Y. 2017); *Ray Larsen Assocs., Inc. v. Nikko Am., Inc.*, No. 89 CIV. 2809, 1996 U.S. Dist. LEXIS 11163, 1996 WL 442799, at *8 (S.D.N.Y. Aug. 6, 1996). Here, the scheme involved only two participants (Festa and his company, Falcon), affected a small number of victims (Grace),[3] and was limited in scope because it had one goal — defrauding Grace of monies meant to be used in the Project. Thus, even if the temporal component has been satisfied, Plaintiff still would not have established closed-ended continuity. *See Bernstein v. Misk*, 948 F. Supp. 228, 238 (E.D.N.Y. 1997) (finding no closed-ended continuity where acts took place over four and one half years, but the criminal activity alleged "involved only one major perpetrator who focused his activity on one group

3. Plaintiff urges the inclusion of three subcontractors, victims of the Subcontractor Nonpayment Scheme, as part of this number. As will be discussed *infra*, this alleged scheme is not well-pled. The inclusion of these entities as victims, however, still leads to a relatively small number of victims.

of purchasers in a single, non-complex scheme to obtain financing for a purchase of property and then default on the loan").

Plaintiff also argues that it has established open-ended continuity by showing "past criminal conduct coupled with a threat of future criminal conduct." *GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463, 466 (2d Cir. 1995). "To satisfy open-ended continuity, the plaintiff need not show that the predicates extended over a substantial period of time but must show that there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999). "Where an inherently unlawful act is performed at the behest of an enterprise whose business is racketeering activity, there is a threat of continued criminal activity, and thus open-ended continuity." *De Falco*, 244 F.3d at 323. However, where the enterprise conducts primarily legitimate business, "there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity." *Cofacredit*, 187 F.3d at 243.

Plaintiff has not plausibly alleged that Defendants' conduct poses an indefinite threat of continued criminal activity. The alleged Project Invoicing Fraud Scheme arises from a discrete, finite construction project. Plaintiff argues that given the pace of work on the Project up to the date Falcon ceased working, it calculates that the Project would have taken an additional seventy-five (75)

months to complete. Am. Compl. ¶243. Disregarding the sheer conjecture of this argument, the length of time required does not change the fact that the Project itself was inherently terminable.[4]

Furthermore, Plaintiff has not demonstrated open-ended continuity by plausibly alleging that the predicate acts were part of Falcon's regular way of doing business. It fails to allege how Falcon, a primarily legitimate business, regularly operates in an allegedly illegal manner as to any client other than Grace.

Assuming *arguendo* that Plaintiff had plausibly alleged that Falcon regularly defrauded its clients, the implied threat of continued criminal activity theory "only applies to "'inherently unlawful' criminal activities in pursuit of 'inherently unlawful' goals, such as murder, obstruction of justice, narcotics trafficking, embezzlement, extortion, bribery, and money laundering." *Albunio v. Int'l Safety Grp.*, 15-CV-152, 2016 U.S. Dist. LEXIS 42427, 2016 WL 1267795, at *7 (S.D.N.Y. Mar. 30, 2016); *see also United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995) (the threat of continuity is established "where the acts of the defendant or the enterprise were inherently unlawful,

4. This is not to suggest that a construction project can never be the basis for a civil RICO claim. *See generally Procter & Gamble Co. v. Big Apple Indus. Bldgs, Inc.*, 879 F.2d 10 (2d Cir. 1989). In the current case, however, given the limited scope of the alleged scheme, the lack of allegations regarding criminal conduct beyond this Project, and the other factors discussed, the fact of the Project's discreteness further supports a finding that there is no viable RICO claim.

such as murder or obstruction of justice, and were in pursuit of inherently unlawful goals, such as narcotics trafficking or embezzlement" but "in cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property, the courts generally have found no threat of continuing criminal activity"). Ordinary fraud supported by wire fraud predicates are not "inherently unlawful" for purposes of RICO continuity. *See, e.g., Aulicino*, 44 F.3d at 1111("in cases concerning alleged racketeering activity in furtherance of endeavors that are not inherently unlawful, such as frauds in the sale of property, the courts generally have found no threat of continuing criminal activity"); *Albunio*, 2016 U.S. Dist. LEXIS 42427, 2016 WL 1267795, at * 7 ("ordinary fraud is not considered 'inherently unlawful'"); *Int'l Bhd. of Teamsters v. Carey*, 297 F. Supp. 2d 706, 715 (S.D.N.Y. 2004) (noting that "fraud (the object of which is by definition to obtain money or property from others) has been held not to be 'inherently unlawful' in the RICO continuity context"), *aff'd sub nom. Int'l Bhd. of Teamsters v. Blitz*, 124 F. App'x 41 (2d Cir. 2005); *In re Basic Food Grp., LLC*, No. 15-10892, 2016 Bankr. LEXIS 2463, 2016 WL 3677673, at *11 (Bankr. S.D.N.Y. July 1, 2016) ("[m]ail fraud and wire fraud are not 'inherently unlawful'"). Plaintiff does not claim that acts in addition to wire fraud would occur, but rather alleges that "similar predicate acts could continue to occur as long as work on the Project continued." Am. Compl. ¶242. As these predicate acts were simply fraud, they are not inherently unlawful for purposes of the continuity analysis.

Plaintiff tries to enhance its allegations by pointing to the secondary Subcontractor Nonpayment Scheme in an

attempt to make Defendants' actions appear more complex and to add to the "victim" count by including three subcontractors. *See* Am. Compl. ¶165 (Grace asserts that it does not seek damages for racketeering resulting from the Subcontractor Nonpayment Scheme, but rather puts it forth "to provide further evidence of Festa's participation in Falcon through a pattern of racketeering activity and the existence of additional victims"). As a threshold matter, the scope of the Subcontractor Nonpayment Scheme is not alleged with any specificity. The Amended Complaint identifies only three subcontractors who were victims without stating that there were, or were not, others at work on the Project. Thus, it is unclear whether this purported scheme was employed uniformly against all of Falcon's subcontractors or rather was carried out selectively against the three entities identified.

The allegations concerning the three subcontractors identified are also conclusory and lack factual support. As to each of three subcontractors, Amano, Ace-Tec, and Liberty, the allegations follow the same formula.[5] First, Grace claims there was a subcontract with Falcon. *See, e.g.*, Am. Compl. ¶180 (Grace alleges that Falcon had subcontracted work to Ace-Tec, defining the "agreement" as the "Ace-Tec Project Subcontract"). None of the purported subcontracts is provided with the Amended Complaint. Without reference to any provision in the alleged subcontract in question or any other source of its information, Grace alleges that each subcontractor was to

5. For the sake of brevity, an example from only one of the subcontractors, Ace-Tec, is provided here for illustration.

perform specific acts or provide specific materials. Grace then points to an A&C submitted for payment by Falcon, and identifies acts or materials on the A&C that it claims were, in fact, performed or provided by a subcontractor. *See, e.g., id.* ¶ 182 (citing A&C No. 10, Grace claims that work performed under the categories "steel for first floor framing" and Steel for Mezzanine framing" was done by Ace-Tec pursuant to the subcontract). The name of the purported subcontractor, however, does not appear on any of the A&Cs. Finally, Grace summarily concludes that although it paid the amount specified on the A&C to Falcon, the subcontractor remained unpaid. *See, e.g., id.* ¶¶185-89 (Grace paid Falcon for the work in the A&C, Ace-Tec was not paid in full, there Ace-Tec "was a victim of the Subcontract Nonpayment Scheme.").

This thinly pled scheme does not provide support to Plaintiff's claim that Defendants were involved in racketeering activity. Simply put, Grace's allegations throughout the Amended Complaint, which may state law fraud or contract violations, do not constitute the type of long-term, criminal conduct meant to be remedied by RICO.

B. Remaining State Law Claims

The remaining claims asserted by Plaintiff — breach of contract, negligence, fraud and breach of trust — all arise under state law. A court may decline to exercise supplemental jurisdiction over state law claims if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367 (c)(3). The decision whether

to exercise supplemental jurisdiction is discretionary. *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 85 (2d Cir. 2018). In making this determination, the court "must still meaningfully balance the supplemental jurisdiction factors." *Id.* However, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)).

Upon consideration of all relevant factors, this Court declines to exercise supplemental jurisdiction over the remaining claims. Accordingly, any state law claims asserted by plaintiff are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss, DE [25] is granted and the case dismissed.

SO ORDERED.

/s/_____
Sandra J. Feuerstein
United States District Judge

Dated: March 26, 2019
Central Islip, New York

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED FEBRUARY 12, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 19-1101

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand twenty.

GRACE INTERNATIONAL ASSEMBLY OF GOD,

Plaintiff-Appellant,

v.

GENNARO FESTA, FALCON GENERAL CONSTRUCTION SERVICES, INC.,

Defendants-Appellees.

ORDER

Appellant, Grace International Assembly of God, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX D — STATUTORY PROVISIONS AND FEDERAL COURT RULES INVOLVED

STATUTORY PROVISIONS AND FEDERAL COURT RULES INVOLVED

18 U.S.C. § 1961.

As used in this chapter—

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1343 (relating to wire fraud); . . . section 1956 (relating to the laundering of monetary instruments) . . .

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .

18 U.S.C. § 1962.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate

or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1964.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1343.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be

transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1956.

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

* * *

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

* * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

* * *

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment

securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

* * *

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

Fed. R. Civ. P. 12.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

* * *

(6) failure to state a claim upon which relief can be granted;

* * *

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. . . .

Appendix D

N.Y. Lien Law § 70.

> 1. The funds described in this section . . . received by a contractor under or in connection with a contract for an improvement of real property, . . . shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter. . . .
>
> 2. . . . The funds received by a contractor . . . and the rights of action with respect thereto, under or in connection with each contract . . ., shall be a separate trust and the contractor . . . shall be the trustee thereof.
>
> 3. Every such trust shall commence at the time when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust. . . . The trust of which a contractor or subcontractor is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time prior to the completion of the contract or subcontract has been paid or discharged, or until all such assets have been applied for the purposes of the trust. . . .
>
> * * *
>
> 6. The assets of the trust of which a contractor is trustee are the funds received by him and his rights of action for payment thereof

(a) under the contract for the improvement of real property, or home improvement or the public improvement;

* * *

N.Y. Lien Law § 71.

2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his contract or subcontract, as the case may be:

(a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;

(b) payment of the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement;

(c) payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which such claims arose;

(d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

(e) payment of premiums on a surety bond or bonds filed and premiums on insurance accrued during the making of the improvement, including home improvement, or public improvement;

(f) payment to which the owner is entitled pursuant to the provisions of section seventy-one-a of this chapter.

3. * * *

(b) With respect to the trusts of which a contractor or subcontractor is trustee, "trust claims" means claims arising at any time for payments for which the trustee is authorized to use trust funds as provided in subdivision two of this section.

* * *

Appendix D

N.Y. Lien Law § 72.

1. Any transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated in subdivision one or subdivision two of section seventy-one, before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust.

* * *

N.Y. Lien Law § 79-a.

1. Any trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money or an instrument for the payment of money for any purpose other than the trust purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if

* * *

(b) such funds were received by the trustee as contractor or subcontractor, as such

terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time; provided, however, that if the trustee who received such funds as contractor or sub-contractor disputes in good faith the existence, validity or amount of a trust claim or disputes that it is due, the application of trust funds for a purpose other than a trust purpose, or the consent to such application, shall not be deemed larceny by reason of failure to pay the disputed claim within thirty-one days of the date when it is due if the trustee pays such claim within thirty-one days after the final determination of such dispute.

N.Y. Penal Law § 155.30.

A person is guilty of grand larceny in the fourth degree when he steals property and when:

1. The value of the property exceeds one thousand dollars;

* * *

Grand larceny in the fourth degree is a class E felony.

Appendix D

N.Y. Penal Law § 210.05.

A person is guilty of perjury in the third degree when he swears falsely.

Perjury in the third degree is a class A misdemeanor.