

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**JEREMIAH'S INTERNATIONAL
TRADING COMPANY d/b/a
AMERICA'S AUCTION NETWORK,**

Plaintiff,

v.

Case No: 8:14-cv-584-T-27TGW

**ANTHONY CALDERONE and
RAYMOND TAYLOR,**

Defendants.

ORDER

BEFORE THE COURT is Defendants' Motion to Dismiss Amended Complaint and Memorandum of Law (Dkt. 13) and Plaintiff's Response (Dkt. 19). Upon consideration, the Motion is DENIED.

BACKGROUND¹

Plaintiff Jeremiah's International Trading Company d/b/a America's Auction Network ("AAN") is an auction house dealing in items such as artwork, antiques, coins, collectibles, rugs, real estate, and jewelry through its television auctions. Defendant Anthony Calderone was employed by Plaintiff as a telephone representative and later as director of the Artwork Department from approximately September 2005 until he resigned in March 2010. Defendant Raymond Taylor was employed by Plaintiff as an auctioneer from approximately September 2006 until he stopped coming to work shortly after Calderone resigned. During the time Defendants worked for AAN, they

¹ The facts as described herein are taken as true for purposes of this Rule 12(b)(6) motion to dismiss.

allegedly obtained kickbacks from artwork suppliers, accepted fake and/or overpriced artwork from suppliers, misrepresented and sold fake and/or overpriced artwork to AAN customers, created fraudulent invoices, and stole artwork and other merchandise from AAN. After leaving AAN's employ, Defendants have been working for competing businesses using AAN's trade secrets, customer lists, and stolen merchandise to compete with AAN.

AAN brings this action against Calderone and Taylor alleging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.* (Count I) and Florida Civil RICO, Fla. Stat. § 772.102 (Count II), civil conspiracy (Count III), breach of fiduciary duty (Count IV), tortious interference with an advantageous business relationship (Count V), defamation (Count VI), civil theft (Count VII), conversion (Count VIII), misappropriation of trade secrets (Count IX), breach of contract (Count X), and unfair and deceptive trade practices (Count XI). Defendants move to dismiss Counts I and III for failure to state a claim upon which relief can be granted, and the remaining counts, which are state law claims, for lack of subject matter jurisdiction. Alternatively Defendants move to dismiss Count II for the same reasons as Count I.

STANDARD

Rule 8(a)(2) requires a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (citation omitted). The claimant is not required to set out in detail the facts upon which he bases his claim. However, the plaintiff is required to allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 545 (citation omitted). While the Court must assume that all of the allegations in the complaint are true, dismissal is appropriate if the allegations

do not “raise [the plaintiff’s] right to relief above the speculative level.” *Id.* (citation omitted). The standard on a 12(b)(6) motion is not whether the plaintiff will ultimately prevail in his or her theories, but whether the allegations are sufficient to allow the plaintiff to conduct discovery in an attempt to prove the allegations. *See Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986). A motion to dismiss for failure to state a claim under Rule 12(b)(6) requires the Court to view the complaint in the light most favorable to the plaintiff. *See Murphy v. Federal Deposit Ins. Corp.*, 208 F.3d 959, 962 (11th Cir. 2000) (citing *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999)).

DISCUSSION

Defendants put forth two reasons the RICO claim (Count I) should be dismissed. They contend AAN fails to allege that Defendants are in control of an enterprise or that Defendants engaged in a pattern of racketeering activity. Defendants also request dismissal of the civil conspiracy claim (Count III) because AAN fails to allege that Defendants acted in concert.

RICO

To state a civil RICO claim under 18 U.S.C. § 1962(c), a plaintiff must allege: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346 (1985).

Participation in the Enterprise

Defendants contend that AAN must allege that Defendants had control in the company enterprise. Although AAN does not bring its RICO claim under subsection (b) of 18 U.S.C. § 1962 which expressly includes the word “control,” subsection (c) requires an element of control to the extent that Defendants “must participate in the operation or management of the enterprise itself,”

such that they have “*some* part in directing the enterprise’s affairs.”² *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S.Ct. 1163, 1173, 122 L.Ed.2d 525 (1993); *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1284 (11th Cir. 2006). They need not have a formal position in or be in the upper management of the enterprise and “RICO liability is not limited to those with primary responsibility for the enterprise’s affairs. . . .” *Reves*, 507 U.S. at 179, 184.

The allegations of this element as to both Defendants are sufficient. Calderone was the director of the artwork department of AAN. He had authority to negotiate transactions with suppliers, including the purchase of artwork. He also appears to have had significant discretion with respect to dealing with certain suppliers, handling invoices and inventory, and dealing with customers. Taylor was an auctioneer who handled artwork and other merchandise. He also dealt with customers and vendors and is alleged to have some role in handling inventory and invoices. He directed at least one vendor as to where to send items. Although Taylor’s responsibilities were not as significant as Calderone’s “[a]n enterprise is operated not just by upper management but also by lower-rung participants who are under the direction of upper management.” *Reves*, 507 U.S. at 184. It is by this conduct and through their positions within AAN and that Defendants committed the alleged racketeering activity.

The allegations of Defendants’ relationship and activity with respect to Global and Gallery, however, are insufficient to adequately plead a RICO claim with those two entities as the enterprise. There are no allegations that Defendants operated or managed Global’s or Gallery’s affairs. Accordingly, the RICO claim, as pled, cannot be based on Global and/or Gallery as the enterprise.

² AAN also claims that they are pursuing a claim under subsection (d), however that subsection is not mentioned anywhere in the Amended Complaint.

Pattern of Racketeering Activity

Defendants argue that AAN has pled neither type of continuity necessary to establish a pattern of racketeering activity. “An essential element of any RICO claim is a ‘pattern of racketeering activity.’” *Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1264 (11th Cir.2004). A “pattern” requires that the predicate criminal acts be “related” and “continuous.” *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900–01, 106 L.Ed.2d 195 (1989). “Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition.” *Id.* at 241. Thus, there are two type of continuity: closed-ended and open-ended.

As to close-ended continuity, Defendants contend that the lack of dates in the Amended Complaint makes it impossible to draw any inferences regarding the time frame of the alleged scheme. In addition, they contend that close-ended continuity cannot be established where the alleged scheme only had one victim or set of victims. As to open-ended continuity, Defendants argue that AAN has not alleged predicate acts that threatened continued criminal activity or that were the regular way the enterprise conducted its business.

“‘Closed-ended’ continuity is established by showing that related predicate acts occurred over a ‘substantial period of time.’” *Id.* at 242. In the Eleventh Circuit, “closed-ended continuity cannot be met with allegations of schemes lasting less than a year.” *Jackson*, 372 F.3d at 1266. Further, “where the RICO allegations concern only a single scheme with a discrete goal, the courts have refused to find a closed-ended pattern of racketeering even when the scheme took place over longer periods of time.” *Id.* at 1267.

The allegations include the dates Defendants started working for AAN, the dates Defendants

started ordering from Gallery and Global and the dates Defendants left AAN. It is reasonable to infer that the scheme began as early as January 2007, when Defendants started ordering artwork on behalf of AAN from Gallery and it is also reasonable to infer that the scheme continued until they resigned in April 2010. AAN has alleged related predicates occurring over a period of a little over three years, which is a substantial time period. *See Bank of Am. Nat. Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) abrogated on other grounds by *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993) (nine separate acts of wire and mail fraud, involving the same parties over a period of three years satisfied the pattern requirement). AAN has therefore sufficiently alleged a “pattern” under RICO.³

AAN has also alleged open-ended continuity. Open-ended continuity can be established by showing that the predicate acts were part of the “regular way of doing business” or threaten repetition in the future. *Jackson*, 372 F.3d at 1265. “In ‘open-ended’ cases that rely on alleging the threat of continuity, plaintiffs can meet their burden by establishing either that ‘the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future,’ or that ‘the predicate acts or offenses are part of an ongoing entity’s regular way of doing business.’” *Id.* (quoting *H.J., Inc.* at 242). Defendants’ scheme continued for approximately three years until Calderone confessed in light of AAN’s investigation. The allegations suggest that in the absence of AAN’s investigation and confrontation of Calderone, Defendants’ scheme would have continued. *See Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1529-30 (9th Cir. 1995) (“Long-term criminal conduct may

³ Defendants’ argument that an alleged scheme with only one victim or set of victim does not establish closed-ended continuity is not applicable here. *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) is distinguishable. The alleged scheme in *Menasco* only took place over one year, and involved a single fraudulent goal, with a limited purpose, and only one perpetrator and set of victims. In this case, Defendants’ scheme was broader and was not only directed towards AAN, but customers as well.

be interrupted, inter alia, by termination, the commencement of the RICO action, arrest, indictment, or guilty verdict” and would not necessarily preclude a finding of open-ended continuity). In addition, the alleged acts of Defendants were part of the “regular way of doing business” such that they took “place in the regular course of business.” *Ferrell v. Durbin*, 311 Fed. App’x 253, 257 (11th Cir. 2009).

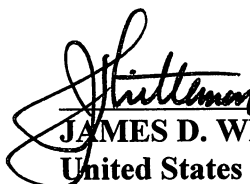
Conspiracy

Defendants contend that AAN does not allege that Defendants acted in concert, but that Defendants separately and uniquely violated various laws and harmed AAN. To state a claim for civil conspiracy under Florida law, the plaintiff must allege: (1) an agreement between two or more parties, (2) to do an unlawful act or to do a lawful act by unlawful means, (3) the doing of some overt act in pursuance of the conspiracy, and (4) damage to plaintiff as a result of the acts done under the conspiracy. *Charles v. Florida Foreclosure Placement Ctr., LLC*, 988 So. 2d 1157, 1159-60 (Fla. Dist. Ct. App. 2008). It can be reasonably inferred from AAN’s allegations that Defendants entered into an agreement to commit various torts including breaching their fiduciary duty to AAN, defrauding AAN’s customers, stealing AAN’s merchandise and trade secrets, receiving kickbacks from AAN’s vendors, and unfairly competing with AAN (*see* Dkt. 4, ¶ 131). Calderone admitted to receiving kickbacks from vendors for selling their product on air. It can be inferred that this required Taylor’s cooperation and assistance. Further, as soon as Calderone resigned, Taylor stopped coming to work. After leaving AAN, they worked together to compete with AAN using its customer lists. At this stage, these allegations are sufficient and this claim survives Defendants’ motion.

Accordingly,

Defendants' Motion to Dismiss Amended Complaint (Dkt. 13) is **DENIED**. Defendants shall answer the Amended Complaint within **fourteen (14) days**.

DONE AND ORDERED this 28th day of October, 2014.


JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record