06-5698-cv

In the

United States Court of Appeals

For the Second Circuit

ROGER SPOOL, CHILD & FAMILY ADOPTION,
BRUCE FERGUSON and CHARLENE FERGUSON,

Plaintiffs-Appellants,

v.

WORLD CHILD INTERNATIONAL ADOPTION AGENCY, JENKINS & POVTAK, SUSAN DIBBLE, DOREEN WHITTAKER, SHARRELL J. GOOLSBY, CARL A. JENKINS, YAROSLAV PANASOV, FOUNDATION OF WORLD CHILD, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

MARSH MENKEN & WEINGARDEN PLLC
Attorneys for Plaintiffs-Appellants
81 Main Street
White Plains, New York 10601
(914) 686-4456

Of Counsel:
MITCHELL I. WEINGARDEN

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (12582)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Appellants brought this case against the Appellees in June 2006 for violations of the federal Racketeer Influenced and Corrupt Organizations Act [RICO] and the Computer Fraud and Abuse Act [CFAA] and state claims based fraud, breach of fiduciary duty, conversion, tortuous interference with contracts, gross negligence and negligence.

The Appellees moved to dismiss and on October 24, 2006, the United States District Court for the Southern District of New York (Brieant, J.), dismissed the RICO and CFAA claims with prejudice and dismissed the state claims without prejudice. This appeal followed.

JURISDICTIONAL STATEMENT

The district court from which this appeal is taken had jurisdiction of this action pursuant to 28 USC § 1331 and 18 USC § 1965(a)-(b). In particular, jurisdiction under this statute was proper because it was brought under two federal statutes: 18 USCA § 1961 et. seq., the Racketeer Influenced and Corrupt Organizations Act, and 18 USC § 1030(A), the Computer Fraud and Abuse Act.

This Court has jurisdiction over this appeal pursuant to 28 USC § 1291 because this appeal is timely taken from a final judgment rendered and entered in the United States District Court for the Southern District of New York. The judgment is "final" within the meaning of 28 USC § 1291 because it disposes of all claims of all parties to this action.

The judgment appealed from was entered on October 24, 2006. Appellant's Notice of Appeal was filed on November 9, 2006.

ISSUE PRESENTED FOR REVIEW

The district court erred in granting the Appellees' Motion to Dismiss this action for failure to state a claim on which relief can be granted because Appellants failed to particularly

plead a claim under RICO. As a result all of Appellants' claims should be restored and remanded to the District Court for further consideration.

STATEMENT OF CASE

This is an action for violations of the federal Racketeer Influenced and Corrupt Organizations Act [RICO] and the Computer Fraud and Abuse Act [CFAA] for fraud, breach of fiduciary duty, conversion, tortuous interference with contracts, gross negligence and negligence.

On October 24, 2006, the District Court granted the Appellants' FRCP 60 motion and entered an Amended Judgment dismissing the Appellants' first, second, third and fourth claims against all the Appellees with prejudice and dismissing the Appellants' state law claims without prejudice. This appeal was timely brought by Appellants on November 9, 2006.

STATEMENT OF FACTS

A. The Parties

Appellant Roger Spool [Spool] is a New York licensed social worker and Executive Director of an adoption agency he founded called Child and Family Adoption [CFA], which is an authorized adoption agency in the State of New York. Appellants Bruce and Charlene Ferguson [the Fergusons] are New York residents and were clients of CFA.

Appellee World Child International Agency [World Child] is headquartered in Silver Springs, Maryland and is a non-profit child-placing agency that specializes in international adoption. Appeellee Foundation of World Child, Inc. [the Foundation] is chartered in Washington, DC and is a non-profit foundation created by the Appellees. Appellee Carl Jenkins [Jenkins] is its Executive Director, World Chid's Attorney and a partner in Appellee Jenkins & Povtak which is a Maryland law firm.

Appellee Susan Dibble [Dibble] is a New York resident and a former employee of CFA. Appellee Dorene Whitaker [Whitaker] is a resident of Ulster County, New York and a former employee of CFA. Appellee Sharrell J. Goolsby [Goolsby] is a resident of Maryland and the Executive Director of World Child. Appellee Yaroslav Panasov [Panasov] is a Russian national and the Moscow Representative for World Child.

Each and every Appellee is a "principal" pursuant to 18 USC § 2(a)-(b) and each and every Appellee is a "co-conspirator" pursuant to 18 USC § 371.

B. Factual History of Appellant CFA's Financial Relationship with the Appellees

In August 1994, a medium sized international adoption agency, World Child, partnered with a well-respected New York domestic adoption agency, CFA to expand World Child's international adoption program to New York State. Throughout this partnership, World Child located children and processed international dossiers while CFA provided social work services to adoptive parents and conducted home studies and post placement visits. CFA also did all the marketing for the joint venture in New York State and assisted New York clients in assembling and processing their international dossiers.

The joint-venture's clients paid two basic fees for their foreign adoption: the agency fee and the foreign program fee. Both of these fees were paid directly to World Child. World Child paid CFA a fixed amount of the agency fee for the services CFA provided to the joint-venture's clients. CFA did not receive any portion of the foreign program fees.

The Appellants allege that the Appellees' criminal activity began in 2002, when Jenkins and Goolsby informed Spool that they were increasing the foreign program fee charged to clients and were utilizing the increase to cover general agency expenses, while informing

clients that the entire fee was necessary to pay foreign affiliates to process their adoptions. These fees were billed to clients directly by World Child. CFA's payments from World Child did not increase as a result of this action.

World Child further informed Spool that it was forming a nonprofit foundation, The Foundation of World Child, to deposit monies, including the fraudulent foreign fees and ordinary profits, in order to hide the monies from creditors and litigators. Appellee Jenkins told Spool that he and Goolsby, who reside together, would not retire until the Foundation had amassed at least $2 million in assets.

The Foundation of World Child was incorporated in Maryland in 2002. The Appellants believe that the Appellees have been collecting the fraudulent program fees from their clients and depositing them into the Foundation since the date the Foundation was incorporated. The Foundation's most recent IRS Form 990 indicates that the majority of the Foundation's income is "foreign agency adoption fees." The net assets of the foundation as of June 30, 2003 totaled nearly $1.5 million. The form lists Appellee Jenkins as its sole executive director.

The Appellants believe that only a fraction of the money obtained and controlled by the Foundation is paid out to charitable institutions as the Appellees claim on their IRS Form 990. Rather monies are transferred between the Foundation, Appellee Panasov, World Child and other related entities.

C. Deterioration of the Joint Venture

In the fall of 2003, World Child's payments to CFA grew increasingly delinquent. The parties exchanged an increasingly contentious series of letters regarding the delinquency until the spring of 2004, when Jenkins sent Spool a letter on Jenkins & Povtak letterhead accusing

CFA of terminating the joint-venture. Jenkins announced that World Child immediately and unilaterally "revokes and renounces any authority you feel you may have had to act on their behalf, including but not limited to contractual abilities or commitments, authorization for payment of debts, dues, claims and representations of any nature whatsoever."

The next day, April 3, 2004, Spool left with his wife Lilyan on a one week foreign vacation. They entrusted their two longtime employees, Dibble and Whittaker, with CFA's operation during their absence. Due to the ongoing dispute with World Child, Spool instructed both Whittaker and Dibble not to have any conversations with Jenkins or Goolsby. He specifically admonished his employees not to answer any questions from them and to refer their calls to him on his cell phone.

On April 7, 2004, in the middle of Spool's vacation, Jenkins faxed a letter to the CFA office on Jenkins & Povtak letterhead confirming a threatened "shut-off" of World Child operations in New York and offering a "transfer of business matters" including "costs of telephones, mail handling or incidentals" from CFA to World Child. This letter was copied to Goolsby and was time stamped 18:55 GMT or 1:55 PM. In reality, this conversation between Spool and Jenkins never occurred.

Approximately one hour before this fax, at 12:47 PM, a fax from CFA's office was sent to American Long Lines in Horsham, Pennsylvania, instructing them to immediately transfer the forwarding of CFA's toll free number to a new number. At the bottom of the fax were Spool and Goolsby's typed names. Spool never approved this transfer of the account, which had long belonged to CFA. The next day Jenkins sent a letter on World Child letterhead to American

Long Lines stating that "World Child is no longer sharing office space with Child and Family Adoption, Inc." and requesting that all billing for the toll free number be redirected.

Jenkins further stated that Spool "resigned as World Child's authorized NY representative, and consequently, has renounced his authority to act on behalf of World Child." Jenkins concluded the letter stating that Goolsby and Dibble were authorized to make all arrangements with American Long Lines and that Dibble "continues in World Child's NY Representative Office." The letter closed with "[f]eel free to contact . . . me through my law firm, Jenkins & Povtak, at 301-977-8249, regarding Spool's revocation of authority to act."

Spool further alleges that on or about April 8, 2004, Dibble and Whittaker, acting at the direction of Jenkins and Goolsby, removed the contents of dozens of confidential CFA client and computer files—including case notes—and made copies of child abuse clearances, criminal clearances and other documents. All that remained in the CFA office were empty files. They also made unauthorized copies Spool's social work license and CFA agency licenses and removed these copies from the CFA office. Finally, they removed office supplies, marketing materials including agency letterhead, and accessed and removed computer files without authorization from the CFA office.

On that same day, Dibble and Whittaker, acting at the direction of the remaining Appellees, created the NY Representative Office in Dibble's home utilizing the looted assets of CFA. The NY Representative Office was not a foreign subsidiary of World Child, but a separate and distinct entity created to conduct business in New York. It was staffed solely by Dibble and Whitaker who were not licensed to perform adoptions in New York State.

During that same week, Goolsby sent a letter on World Child letterhead to CFA's clients announcing that World Child's New York Office had a new address. The letter reassures clients that:

> "some of you may have questions about your individual cases, and if so, you may contact either your case manager directly, or Susan or Dorene at the new, New York office number. . . . All of us at World Child are excited about this new arrangement, and are ready to help with your adoption adventure . . . I felt it was important to let everyone know that even though we are relocating, World Child is still moving forward on your individual case."

Appellees knew or should have known that the new "New York Representative Office" was not a licensed adoption agency in the state of New York, nor was it a registered foreign subsidiary of World Child, and it was therefore impossible to process the adoptions as stated in the letters.

On April 23, 2004, Jenkins sent an email to Goolsby which was copied to Dibble and Whittaker. The purpose of the email was to discuss the NY Representative Office's operations. The email concluded with the following admonition: "I am sure Dibble and Whitaker want to keep things as smooth and hassle-free as possible; we can work out the details or whatever when things are less hectic, if the issue right now is just keeping the clients' moving thru the system."

During this entire period, Appellees Goolsby, Jenkins and World Child were located in Maryland and Appellees Dibble and Whitaker, as well as CFA's former clients, were located in New York. All of the above-alleged communications were conducted using interstate mails and wire systems.

The Appellants allege that all of the above actions were intended for one purpose: to further defraud World Child clients, like the Fergusons, in order to continue to collect substantial fees for adoption services that would never be rendered (since it was impossible for

the New York Representative Office to legitimately provide these services in the first place), and to avoid paying legitimate vendors like the Spools for the services they had already provided. The Appellees not only looted the legitimately owned assets of CFA and the Spools, but they committed overt and admitted criminal acts to perpetuate their fraud against clients like the Fergusons.

D. Appellees' Criminal Activities Against the Fergusons

On January 21, 2003, the Fergusons submitted a World Child application to adopt a child from Russia. They submitted this form to World Child/New York at CFA's address in New Paltz, New York. On May 12, 2004, they paid World Child $12,200.00 in foreign program fees.

On or about April 6, 2004, the Fergusons received the aforementioned letter from Goolsby on World Child letterhead stating that "World Child's New York Office has a NEW Address." There was no indication whatsoever that this new office was no longer affiliated with CFA or that the NY Representative Office was now being run by unlicensed individuals through a fake adoption agency which was not recognized by the State of New York as an authorized adoption agency.

On or about May 21, 2004, Dibble forged the Ferguson's home study. Dibble then notarized the report and attached an unauthorized copy of CFA's license dated June 25, 2004. The Appellants believe that Dibble also forged all of the updated supporting documents needed to finalize the Ferguson's adoption in Russia and that these documents were printed on stolen CFA letterhead with forged signatures. One document was a New York State updated Child Abuse Clearance.

The NY Representative Office charged the Fergusons $313 to obtain the necessary county and state certifications for documents which were forged by Dibble and never in fact submitted. Appellees then sent the forged and fraudulent documents from the New York Representative Office to World Child headquarters in Maryland. The Maryland office then submitted the documents to the Russian government.

In early August, 2004, the Fergusons traveled to Russia to finalize their adoption and pick up their child. They were met in Moscow by Appellee Panasov who was their constant companion during their stay in Russia. Panasov provided translation and transportation services for the Fergusons and legally represented them before the local civil court which conducted the adoption proceeding. The Fergusons were required to entertain and feed Panasov and provide cash and other gifts for him, his staff and his family. World Child knew about this arrangement and had in fact instructed the Fergusons to bring the cash for Panasov.

On August 10, 2004, the Russian civil court denied the Fergusons adoption based on numerous irregularities in the documents submitted by the NY Representative Office through World Child's office in Maryland and Appellee Several of these documents contained Dibble's forgeries.

E. Appellees' Criminal Activity Against Other Clients

In addition to the Appellees' criminal activities to carry out the Fergusons' adoption, the Appellants are aware of at least three other instances of fraud or forgery against former CFA clients.

On or about April 14, 2004, either Dibble or Whitaker, acting through the NY Representative Office, forged Spool's name on a former CFA client's documents, including

Spool's social work license, agency license and home study, which were then submitted to the Immigration and Naturalization Service and placed in the client's foreign dossier package and sent to the Guatemalan government. Whitaker notarized the signature as though Spool was present in front of her.

Sometime between April 9, 2004 and August 25, 2004, Dibble and/or Whitaker forged and improperly notarized child abuse clearances for another former CFA client.

Sometime between April 9, 2004 and August 25, 2004, Dibble and/or Whittaker forged and improperly affixed and notarized CFA's agency license on a home study destined for Russia for yet another of CFA's former clients.

Since the New York Representative Office was not registered as a corporation in New York and was not licensed to perform adoptions in New York it is not possible for them to have processed any of the dozens of adoptions of former CFA clients without using similar methods to those described above.

The Appellants believe that the NY Representative Office collected money from these and similar acts and forwarded the funds to World Child and the Foundation in Maryland. The processing of the adoptions and the collection and depositing of the fees for these adoptions were all accomplished using interstate and international mails and wires. The Appellants believe that each of the Appellees knew and approved of Dibble and Whitaker's criminal activities in processing the adoptions.

F. Appellees Dibble and Whitaker's Arrests

On July 21, 2004, Dibble and Whitaker were arrested and arraigned on felony forgery and stolen document charges. Immediately after this occurred, Spool sent a letter to Goolsby

informing her that "the recent arrest on felony charges of your personnel in the World Child New York office, is the result of their forging Child & Family documents, stealing, and illegally using my social work license and this agencies state license. These are very serious offenses." In 2005, Dibble pled guilty to forgery charges involving several CFA clients including the Fergusons.

As late as December 2004, Dibble continued to be employed by World Child and continued the same criminal activities that led to her arrest and conviction. On December 3, 2004, the Appellants believe that someone in the NY Representative Office forged the Ferguson's signatures on a New York State Central Register Database Check. This check is required for international adoptions and contains sensitive and confidential information about an applicant's child abuse and neglect history. This information was not requested by the Fergusons.

As of January 2005, World Child still listed Dibble's telephone number and post office box as the NY Representative Office contact information. And as late as April 19, 2005, Dibble continued to be employed by World Child and issued a joint communiqué with Goolsby to World Child staff members and affiliates.

RICO ENTERPRISE/PATTERN OF ACTIVITY ALLEGATIONS

A. The Appellees have defrauded clients and deposited illicitly gained profits into the Foundation of World Child, a RICO enterprise, from 2002 to present.

The Appellant's believe and alleged that from 2002 to the present Appellees have been fraudulently overcharging their clients for foreign program fees and depositing monies from these fees and other profits into the Foundation of World Child. The Foundation receives little or no money from individual or outside contributors. Rather the Foundation's assets and

income are derived solely from World Child profits and agency fees, stock and bond dividends from assets purchased with those fees, as well as rental income from real estate owned by the Foundation and paid to the Foundation by World Child and its affiliates.

The Appellant's also believe and alleged that the sole purpose for the Foundation's creation was to hide and shelter World Child assets and profits from various clients who have sued World Child during the past decade. Spool was present at meetings with the Appellees when the creation of the Foundation was discussed, and overheard Appellees Goolsby and Jenkins explain that the Foundation was created to shelter assets in order to avoid legal judgments and was, in reality, a 'retirement account.'

On information and belief money from the Fergusons' foreign program fee was deposited into the Foundation and never returned to them despite the conviction of one of the Appellees for creating fraudulent and forged documents in order to process their unlicensed New York adoption.

B. The Appellees illegally created the New York Representative Office, a RICO enterprise, to avoid their financial obligation to their vendor, CFA, and committed numerous criminal acts in furtherance of that enterprise.

From April 8, 2004 to the present, the Appellees have operated the New York Representative Office as an unlicensed and unregistered New York adoption agency while charging exorbitant fees to clients for services that could not have been legally rendered. The Appellees have engaged in criminal activities in furtherance of that operation, while making numerous fraudulent statements via interstate federal wires and federal mail to convince the Fergusons and other former CFA clients that World Child would continue to represent them in

their adoption in the same manner and with the same professional standards as CFA and that there was essentially no difference between the joint-venture and the NY Representative Office.

The Appellees, employing interstate federal wires and federal mails, have also submitted documents in connection with these adoptions to the Immigration and Naturalization Service, the State of New York, and foreign governments including Russia and Guatemala, utilizing stolen CFA letterhead to create the impression that CFA, an authorized New York adoption agency, was still working on the file when in fact Dibble had created and oftentimes forged the documents.

Throughout this entire period, the parties communicated extensively utilizing interstate wires and federal or international mails including fax, email, postal mail, express mail systems such as FedEx, local and long distance telephone, toll free telephone, cell phone and international telephone systems.

C. Appellees have demonstrated an intent to continue their illicit activities to the present date and beyond.

The Appellees direct and control the affairs of the NY Representative Office, including the solicitation of joint-venture clients and potential clients, to commence and/or continue their international adoption through World Child.

World Child continued to operate the New York office and to employ Appellees Dibble and Whitaker despite their arrests in the summer of 2004 for forgery and fraud in connection with their operation of the NY Representative Office. The Appellants believe that Appellee Whitaker was still employed by World Child as of the date of the filing of Appellants' original complaint.

Despite her arrest in July 2004 for forging the Fergusons' adoption documents, Dibble and the NY Representative Office, incredibly, appear to have once again forged the Fergusons' signatures on a Child Abuse Clearance form and submitted that form to the New York State Office of Child and Family Services in December 2004.

SUMMARY OF ARGUMENT

The Appellants argue that the District Court erred when it granted Appellees' Motions to Dismiss their claim for failure to state a claim on which relief can be granted. Specifically, the Appellants argue that (1) they properly alleged in their complaint a closed-ended, continuing pattern of RICO activity; (2) they properly alleged in their complaint an open-ended, continuing pattern of RICO activity; and, (3) the Appellants' claims do not fail simply because the specific RICO acts committed against them individually were finite.

STANDARD OF REVIEW

The Appellants appeal as of right from the District Court's dismissal of all of their claims pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) [FRCP] for failure to state a claim on which relief could be granted [see Amended Judgment]. The dismissal for failure to state a claim under FRCP 12(b)(6) is a "judgment on the merits." See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Angel v. Bullington*, 330 U.S. 183 (1947); *Bell v. Hood*, 327 U.S. 678 (1946).

An appellate court reviews *de novo* a district court's dismissal of a compliant for failure to state a claim pursuant to FRCP 12(b)(6). *Gmurzynska v. Hutton*, 355 F.3d 206 (2d Cir. 2004); see also *Hayden v. County of Nassau*, 180 F.3d 42 (2d Cir. 1999); *Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996).

"In reviewing the district court's dismissal, the appellate court must accept as true all allegations contained in the complaint and must resolve all inferences in favor of the non moving party." *Gmurzynska* at 47.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED THE APPELLANT'S RICO CLAIMS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

A. The Appellants' Complaint Properly Alleged a Closed-ended and Continuing Pattern of RICO Activity.

The seminal Supreme Court case, *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989), outlines the requirements for a plaintiff to prove a pattern of RICO activity. The Court explained that "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." *Id.* at 242.

A plaintiff may be one of many victims of a series of discreet predicate acts by a defendant, so long as the underlying scheme lasted for a sufficient period of time to allege a pattern of RICO activity. In *Kemp v. American Telephone and Telegraph*, 393 F.3d 1354 (11th Cir. 2004), the plaintiff participated once in a fraudulent marketing scheme operated by AT&T called "Let's Make a Deal." He was consequently overcharged approximately $115.00 on his phone bill. AT&T operated its "Let's Make a Deal" program for approximately two years. The Eleventh Circuit upheld a jury's RICO verdict in favor of the plaintiff even though his individual damages were marginal and he only participated in the scheme once. *Id.*

The Appellants have pled a sufficiently long period of predicate acts to support a closed-ended continuity argument. The Second Circuit has historically recognized RICO claims where

the predicate series of acts occurred over a period of two years, see *Metromedia v. Fugazy*, 983 F.2d 350 (2d Cir. 1992), or over "a matter of years, see *Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989).

1. Overcharging and defrauding all World Child clients: 2002-present

The Appellants allege in their complaint that "[i]n 2002, Appellees Jenkins and Goolsby informed Spool that they were increasing the foreign program fee charged to clients and were utilizing the increase to cover general agency expenses while informing clients that the entire fee was necessary to pay foreign affiliates to process their adoptions. These fees were billed to clients directly by World Child and were payable directly to World Child." (¶ 41).

The Appellants further allege that, beginning in 2002, the Appellees deposited clients' foreign program fees into the Foundation, a RICO enterprise created exclusively to shelter these and other legally and illegally gained profits from World Child and its affiliates. The Appellants allege that the Appellees deposited the Fergusons' foreign program fees into the Foundation and did not return this fee, even after the Fergusons' adoption failed. Finally, the Appellants allege that the Foundation, which is worth approximately $1.5 million, has donated little if any of its substantial assets to any charitable cause and that its sole executive director is Appellee Jenkins. (¶¶ 109-113; 120-124).

The Appellants alleged a pattern of corrupt activity by the Appellees beginning in 2002 and continuing to this date. The Appellants have specifically alleged in their complaint that the Foundation is a RICO enterprise that is operated solely for the personal benefit of the RICO Appellees and not for any legitimate charitable purpose. The Appellees have been overcharging clients and depositing their foreign program fees into the Foundation while telling them that

the entire fee was being used for foreign expenses for an undetermined period of time. The Fergusons are one of many victims of this particular fraud. The Appellants' complaint does not state that this practice ever stopped. In fact, the Appellants believe that this practice continues to the present day.

The Appellants' allegations are not confined to the Appellees' acts against the Appellants alone. As explained above, the Appellants allege that the Appellees overcharged all its clients in foreign program fees beginning in 2002 and deposited those fees into a RICO enterprise to shield them from outside interests.

2. Theft against CFA/defrauding of all New York clients: 2004-present

In 2004, the Appellees escalated their fraudulent practices, particularly against their New York clients. In a blatant attempt to circumvent paying CFA—their primary New York vendor—Appellees literally stole their business and fraudulently informed CFA clients that World Child was able to continue to legitimately represent them as CFA did.

On April 8, 2004, the Appellees stole nearly all of CFA's client files. After that date, the CFA Appellants' international adoption business was effectively destroyed. The Appellants believe and alleged that the Appellees processed or attempted to process all the international adoptions contained in those files without a legitimate New York adoption agency license and without registering as a foreign corporation in New York. The Appellees operated this scheme using interstate mails to deliberately lead clients to believe that the NY Representative Office was a legitimate, licensed adoption agency and charged clients for legitimate services that were never rendered. (¶¶ 49-67, 72, 74, 78-80, 90, 130).

The Appellants' allege that the Appellees forged the Ferguson's adoption documents and forged documents in at least three other adoptions *about which the Appellants specifically know.* (¶¶ 68-70). The Appellants' complaint further alleges that the Appellees created fraudulent and forged documents in potentially dozens of adoptions since they were operating an unlicensed New York adoption agency utilizing the looted assets of CFA which included dozens of incomplete adoption files. Appellees Dibble and Whitaker were arrested and arraigned on felony forgery charges involving *several* former CFA clients, including the Fergusons. (¶ 75).

The Appellants' believe and alleged that the NY Representative Office continues to operate as an unlicensed adoption agency and an unregistered New York corporation. The Appellants complaint avers that "[u]pon information and belief, additional victims exist and the instances and identities referenced in this complaint are cited by example and not by restriction." (¶ 137).

3. Conclusion

The Appellees' behavior, beginning in 2002 and continuing to the present day, evinces an intent by all of the Appellees to enrich themselves personally at the expense of vulnerable clients, their vendors and their agents. The Appellants have specifically alleged a related and continuous series of events that are cited as examples of this pattern.

Specifically, the Appellants alleged that the Appellees began defrauding all of their clients in 2002 by unjustifiably charging them excess amounts in foreign program fees and depositing those fees into a private foundation created for their own benefit while informing clients that the fees would be used to pay foreign program expenses. (¶¶ 41, 109, 120-122). The Appellees defrauded all their New York clients beginning in April 2004 by conspiring to create

and creating an unlicensed and unregistered New York adoption agency and continuing to collect fees from clients without informing them of this fact (¶¶ 49-67, 72, 78-79); by marketing the NY Representative Office to CFA's former clients as a continuation of its previous goodwill as CFA in order to mislead them into believing that they were continuing to deal with a legitimate licensed agency (¶¶ 57-60, 63-64, 66-67, 74, 80, 90, 130); by forging documents and utilizing stolen and fraudulent certifications to process clients' adoptions, charging clients for legitimate certifications that were never obtained while leading clients to believe they were paying for legitimate services (¶¶ 68-70, 72, 75-76, 82, 100-101, 103, 106, 130); and by continuing to employ two agents, namely Dibble and Whitaker, long after they were criminally indicted for forging adoption documents, leading clients to believe that Dibble and Whitaker were running a legitimate, licensed adoption agency. (¶¶ 75-76, 78-79, 106, 132-135).

The Appellants represent a tiny but typical fraction of the Appellee's RICO victims. The Appellees failed to pay Appellants CFA and Spool any of the substantial amounts of the fees owed to them for their work (¶¶ 42-49, 77); conspired to commit and did commit the theft of CFA's adoption license, confidential and proprietary adoption files, phone number, letterhead and marketing materials and illegally processed adoptions with these materials to the financial detriment of Spool and CFA (¶¶ 49-73, 80-82, 130, 133); and conspired to create and created two separate RICO enterprises over the course of at least a four year period for the purposes of conducting unlicensed adoptions as an unregistered foreign corporation in New York; and of hiding the illicitly gained profits of all of these RICO activities from outside creditors and for the benefit of the RICO Appellees. (¶¶ 54-67; 114-124).

The Appellees deliberately misled the Fergusons, who were clients of the NY Representative Office, about all of these activities in order to continue to collect substantial adoption fees from them. (¶¶ 41; 57-58; 67; 72-74; 80-82; 90-99).

Nearly all of these activities were conducted using interstate and international mail and wire systems. (See entire "RICO Factual Allegations.") The Appellees operate a nationwide adoption agency and communicate with all of their clients, including CFA's former New York clients, by letter, fax and e-mail from their offices in Maryland.

All of the foregoing activities occurred between 2002 and the present day and include hundreds of clients who detrimentally relied on the Appellees' statements regarding their fees and services. The Appellants have therefore sufficiently alleged a closed-ended pattern of RICO activity by Appellees. The district court erred in finding that the Appellants did not allege a sufficiently longstanding series of predicate acts to constitute a closed-ended pattern of RICO activity and should be overturned in this regard.

B. The Appellants' Complaint Properly Alleged an Open-ended and Continuing Pattern of RICO Activity.

The United States Supreme Court outlined the standard for open-ended RICO continuity in *H.J. Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989), stating:

> "A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. . . Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. . . . The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business

(in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise.""

H.J. Inc. at 242.

The Second Circuit has recognized open-ended RICO continuity in several situations where the Appellant alleged predicate acts over a limited period of time that evince an ability or intent by Appellees to continue their corrupt behavior. In *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (en banc), *vacated and remanded on other grounds*, 492 U.S. 914, *adhered to on remand*, 893 F.2d 1433, *cert. denied*, 493 U.S. 992 (1989) the Court held, "allegations that Defendants had engaged in a one-time mailing of 8,000 copies of fraudulent documents in connection with a condominium conversion plan was sufficient to plead a pattern of racketeering activity, where there was a basis to infer that similar mailings would occur in the future." See *Beauford* at 1392.

In *Azrielli v. Cohen Law Offices*, 21 F.3d 512 (2d Cir. 1994), the Court held that "a series of fraudulent sales of securities over at least one year," coupled with the fact that the Defendants "apparently ha[d] been trying to continue to sell" securities over a longer period, permitted a jury to find a RICO pattern. *Azrielli,* 21 F.3d at 521. See also *DeFalco v. Bernas*, 244 F.2d 286 (2d Cir. 2001). See also *NAFTA v. Feniks International House of Trade*, 932 F.Supp. 422 (E.D.N.Y. 1996).

The Appellants' complaint alleges two RICO enterprises, specifically the Foundation of World Child and the NY Representative Office. The NY Representative Office started operating as an unlicensed and unregistered New York adoption agency in April 2004. (¶ 65). All of its New York employees were arrested and pled guilty to forging clients' documents. The Foundation of World Child, on information and belief, continues to receive clients' foreign

program fees for the personal benefit of the RICO Appellees. Both of these enterprises constitute the Appellees' "regular way of conducting" business. The very fact that both RICO enterprises continue to operate constitutes a continued threat of harm by the Second Circuit's standard.

Even if the Appellants did not allege that the Appellees continue to operate both RICO enterprises to the present day, it is obvious that the Appellees continue to pose a threat of harm to their past, present and future clients and vendors like Appellants CFA and Roger Spool.

On July 28, 2004, Appellant Spool sent a letter to Appellee Goolsby informing her that "the recent arrest on felony charges of your personnel in the World Child New York office, is the result of their forging Child & Family documents, stealing, and illegally using my social work license and this agency's state license. These are very serious offenses." (¶ 76).

As the Appellants allege, the Appellees continued to employ both Dibble and Whitaker after receiving this letter and the Appellants believe and alleged that Appellee Whitaker remains employed by World Child. Until at least April 19, 2005, Appellee Dibble was utilizing interstate mails to represent the NY Representative Office to World Child clients. (¶ 79).

In addition, the Appellees continued to process adoption paperwork on behalf of clients, including incredibly the Fergusons, without their consent even after being informed of Appellee Dibble's arrest for the previous forgery of the Fergusons' adoption documents. The Appellants allege that Appellee Dibble and the NY Representative Office once again forged the Fergusons' signatures on confidential child abuse clearance requests as late as December 2004. This was long after Appellee Dibble's arrest for the prior forgery of the Fergusons' adoption documents. (¶ 106).

The Appellees never returned any of the materials that were stolen from CFA on April 8, 2004. The Appellants believe and allege that all of these files—approximately 100 of them—were and may continue to be processed utilizing materials and authorizations stolen from CFA's offices on April 8, 2004. (¶ 137). Because the NY Representative Office remains unlicensed in New York, almost none of these adoptions could be processed without the use of forgery and fraud. The Appellants' complaint alleges that the Appellees continued to charge all of their clients, including the Fergusons, substantial sums to 'update' their files, when in fact they were not forwarding the fees to government agencies or performing additional work, but forging documents and affixing stolen certifications on the documents to process them as quickly as possible. (¶¶ 66-73).

The Appellees' activities clearly indicate a continuing pattern of collecting unjustified fees from clients by any means necessary, while using interstate mails to deliberately mislead clients about how those fees were being spent. The Appellees then deposited and skimmed their illicitly gained profits into the Foundation that is currently worth $1.5 million and which shows little evidence of distributing any of its substantial assets to actual charities. (¶¶ 109-112). Appellant Spool was present when Appellees Goolsby and Jenkins stated that the Foundation was created for the sole purpose of hiding World Child profits from outside creditors and litigators. (¶ 113).

The Appellants have successfully alleged that the Appellees created both the NY Representative Office and the World Child Foundation as "legitimate RICO enterprises" with the sole purpose of utilizing them to carry on their pattern of racketeering activity. Both RICO enterprises continue to exist and operate. The Appellees continue to charge clients foreign

programs fees and substantial adoption fees to process international adoptions through the NY Representative Office. The district court completely ignored these allegations—which must be assume as true—in ruling that the Appellants did not sufficiently allege an open-ended pattern of racketeering activity.

The Appellants are entitled to discovery to determine what happened to the remainder of the Ferguson's monies, and CFA's client files, and whether the stolen license, letterhead and other authorizations continue to be used.

C. The Appellants' RICO Claim does not Fail Simply because the Events Involving the Individual Appellants were Finite

The district court found in its initial October 4, 2006 order that "[t]he wrongs inflicted on Spool/CFA were concluded by July 2004. The wrongs inflicted on the Ferguson Appellants, if such they were, were concluded by at least August 2004. . . ." As a result, the court found that "[h]ere there is no showing that the acts occurred over a substantial period of time, and no evidence of continuity." (Amended Judgment and Order p. 6).

This finding is incorrect because the Appellants do not need to allege a continuing pattern of RICO activity against themselves to sustain a RICO claim. They merely need to allege a continued pattern of RICO activity by the Appellees where the named Appellants were victims of different predicate acts by those Appellees.

The Supreme Court stated in *H.J., Inc.,* that "[c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.* at 240, citing 18 U.S.C. § 3575(e). See also *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.,* 63 F.3d 516 (7th Cir. 1995).

In *Kemp v. AT&T*, supra, the plaintiff participated one time in the defendant's fraudulent telephone scheme. He received one phone bill with an overcharge of approximately $115.00. Because the Court found that he had been one of thousands of other AT&T customers who were invited to participate in the scheme, the scheme itself continued for a period of two years, and the plaintiff suffered some damages for the one time he participated, the jury properly awarded him treble damages in the amount of approximately $345.00 and punitive damages in the amount of over $1 million dollars. See *Kemp*, supra.

In this case, the Appellees began a pattern of fraudulent activity over four years ago when they began overcharging clients for foreign program fees. The same Appellees escalated their criminal behavior in early 2004 by conspiring with Appellees Dibble and Whitaker to steal CFA's business and defraud New York clients out of an untold amount of money by charging them for legitimate adoption services that were never rendered and inducing them to continue to pay World Child to process adoptions utilizing fraudulent and forged documents. The Appellees created two RICO enterprises to accomplish this scheme, namely the Foundation and the NY Representative Office. The Appellants were merely a handful of the numerous victims of years of Appellees' fraudulent and criminal behavior.

1. The district court's rejection of Appellants CFA and Spool's claim

The district court's Judgment and Order found that Appellant's CFA/Spool's RICO case is not actionable because it involves a finite act (a "business dispute"), seemingly accepting Appellees' reliance on the Second Circuit's reasoning in *GICC Capital Corp. v. Technology Finance Group*, 67 F.3d 463 (2nd Cir. 1995). In that case, the Second Circuit rejected the plaintiff's continuity argument because the scheme was 'inherently terminable' since the

Defendants allegedly looted all of the company's assets. It further rejected the plaintiff's vague assertion that there were other possible victims. In that case however, the plaintiff failed to identify *any other victims* or their injuries. *Id.* at 466-467.

GICC Capital should not apply to this case. The entire alleged RICO scheme in that case consisted of the looting of a company's assets which ended when the looting was complete. Although the Appellees did loot nearly all of CFA's assets in this case, this is only one allegation in a series of expansive and continued criminal activity against a variety of victims by the Appellees. The Appellants allege that the NY Representative Office continues to exist and to charge existing and new clients to process adoptions. The Appellants believe and alleged that it continues to overcharge clients for foreign program fees and deposits those monies into the Foundation while telling clients that all of the money is being used to cover foreign program expenses. The Appellants believe and alleged that the NY Representative Office continues to operate as an unregistered New York corporation while marketing itself as a legitimate, licensed adoption agency.

In addition, unlike the plaintiff in *GICC Capital*, Appellants CFA, Spool and the Fergusons have identified themselves as separate victims, have explicitly explained their injuries and have identified at least three other known victims of the Appellees' forgery and fraud. (¶ 68-70).

The fact that the Appellees' "raid" of CFA's assets stopped does not mean that the pattern of RICO activity has ended. Rather, their wholesale looting of CFA's business assets was merely a predicate act that enabled the Appellees to illegally process dozens of adoption files over an undetermined period of time. In addition, the Appellant's believe and alleged that the

Appellees charged all or nearly all of the clients in those adoptions for services it did not provide (unless the Appellees believe that forgery and fraud are 'legitimate adoption services'). This act was also a continuation of the Appellees' longstanding scheme to overcharge clients and deposit the monies into the Foundation. The Appellees do not explain how they feel *GICC Capital* is related to this case on this point and the Appellants respectfully submit that there is no factual relation from a continuity standpoint.

2. The district court's dismissal of the Ferguson's claim

Similarly, the Appellants need not show an ongoing threat of criminal activity against the Fergusons to sustain a RICO claim against Appellees. The Appellees' claim that the Appellants' "allegations of future harm to other families are simply too vague. . ." conveniently ignores the Appellants' specific allegations that at least three other families were victims of the Appellees' forgery and fraud (¶¶ 68-70), and that the Appellees who committed these forgeries continued to be employed long after their arrest and arraignment for said fraud. (¶¶ 75-76; 78-79; 106; 132-135). The Appellants believe and alleged that Appellee Whitaker continues to be employed by World Child. In addition, the Appellants' complaint alleges that nearly all of the CFA's adoption files were stolen by the Appellees and processed as legitimate adoptions. These adoptions could not have been processed legitimately, since the Appellees did not have a license to practice adoption in New York. Because of this, nearly all of World Child's New York clients were victims and potential victims of the Appellee's criminal activity. There is nothing vague about this argument and the Appellants respectfully submit that the Appellees could not possibly show that the rest of these nearly 100 adoptions were processed without some form of forgery or fraud.

3. Conclusion

The Appellants need not show a continuing pattern of racketeering activity against the Appellants specifically to prevail. The Appellants only must show a series of predicate acts by the Appellees that are related and that evince similar motives or methods. The Appellants have more than adequately met this burden in their complaint.

Since April 8, 2004, the Appellees have committed numerous forgeries and fraud in order to process CFA clients' adoption paperwork while using interstate mails to tell clients that their adoptions were being processed legitimately. The Appellants respectfully submit that this behavior represents a longstanding pattern of corruption and deliberate fraud, aimed at personally benefiting the RICO Appellees at the expense of emotionally vulnerable clients who desperately want a child and are willing to pay any price to obtain one without question.

CONCLUSION

". . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Appellant can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41 (1957).

The Appellants have specifically pled a continuing pattern of RICO activity by the Appellees that began in 2002 and continues to the present. This is more than enough time to meet the "substantial period of time" test in the Second Circuit under either the "closed-ended" or "open-ended" theory of liability available under RICO for all the Appellants.

The Appellants are entitled to seek discovery to prove the allegations in the complaint and to seek additional information to support its allegations. As such the district court's findings and judgment should be vacated and the case remanded for further consideration.

The judgment of the district court should be reversed.

Dated: February 9, 2007

Respectfully submitted,

MARSH MENKEN & WEINGARDEN PLLC

By: _____
Mitchell I. Weingarden

81 Main Street – Suite 305
White Plains, New York 10601-1719

Phone (914) 686-4456
Fax (914) 206-3998
Email MWeingarden@MMWLaw.us

Attorneys for the Appellants
Roger Spool, Child and Family Adoption
and Bruce and Charlene Ferguson

CERTIFICATE THAT BRIEF COMPLIES WITH LENGTH LIMITATIONS

(Fed. R. App. P. 32(a)(7)(C))

I, Mitchell I. Weingarden, am the attorney for the appellants, Roger Spool, Child and Family Adoption and Bruce and Charlene Ferguson, in this appeal. I certify that the preceding brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the brief contains no more than14,000 words, as indicated by the word count of the word-processing system used to prepare the brief.

Mitchell I. Weingarden

Marsh Menken & Weingarden pllc
81 Main Street – Suite 305
White Plains, New York 10601-1719