

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE,

CASE NO.: 08-CIV- 80893 – MARRA/JOHNSON

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendants.

**Defendant's, Epstein, Motion To Dismiss, For More Definite
Statement & To Strike Directed To Plaintiff Jane Doe's Amended Complaint, With
Incorporated Memorandum Of Law**

Defendant, Jeffery Epstein, by and through his undersigned counsel, moves to dismiss and for more definite statement of Plaintiff, Jane Doe's Amended Complaint. Rules 12(b)(6), and 12(e) and (f), Fed.R.Civ.P. (2008). In support of his motion, Defendant states:

I. The Amended Complaint

The Amended Complaint attempts to allege four counts, entitled Count I – "*Sexual Battery Upon a Minor*," Count II – "*Cause of Action Pursuant to 18 USC §2255*," Count III – "*Intentional Infliction of Emotional Distress*," Count IV – "*Civil Remedy for Criminal Practices*" and Count VI – "*Cause of Action Pursuant to Florida Statute 796.09 Against Defendant, Jeffrey Epstein*."

Defendant seeks dismissal of Counts II and IV of the Amended Complaint or, alternatively, a motion for more definite statement as requested.

II. Applicable Standards

a. Dismissal

While the Supreme Court has held that *every* civil complaint "must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of

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action,” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), and just recently made clear that “Twombly expounded the pleading standard for “all civil actions” and not just “pleadings made in the context of an antitrust dispute,” Ashcroft v. Iqbal, No. 07–1015 (U.S. May 18, 2009) (slip op. at 20) (quoting Fed. R. Civ. P. 1), the need for enforcing these modest pleading requirements is especially acute in this context. After all, the defendant in a § 2255 action is essentially being put on trial for violating criminal laws, and the statutory remedy for proven crimes is obviously and intentionally punitive.

As a result, it not only is appropriate to require “more than an unadorned, the-defendant-unlawfully-harmed-me accusation” before allowing plaintiffs to embark upon a fishing expedition for evidence of possible crimes, Iqbal, slip op. at 14 (citing Twombly, 550 U.S. at 555), but essential that plaintiff provide the accused “with such a statement of the facts and circumstances as will inform [him] of the specific offense ... with which he is charged,” including a “specific identification of fact[s]” required to establish “fully, directly, and expressly, without any uncertainty or ambiguity, ... all the elements necessary to constitute the offence.” Russell v. United States, 369 U.S. 749, 764-65 (1962) (quoting United States v. Hess, 124 U.S. 483, 487 (1888); United States v. Carll, 105 U.S. 611, 612 (1881)). The Amended Complaint does not come close to discharging that burden. As a threshold matter, it does not—and cannot consistent with Rule 11—maintain a cause of action under § 2255.

The Supreme Court rejected the notion that “a wholly conclusory statement of claim [can] survive a motion to dismiss whenever the pleadings le[ave] open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” Id. As explained by the Supreme Court in Bell Atlantic Corp., *supra* at 1664-65:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; Sanjuan v. American Bd. of Psychiatry and

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Neurology, Inc., 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); Neitzke v. Williams, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

b. More Definite Statement, Pleading, & Motion to Strike

Next, Pursuant to Rule 12(e), a party may move for more definite statement of a pleading to which a responsive pleading is allowed where the pleading "is so vague or ambiguous that the party cannot reasonably frame a response." The motion is required to point out the defects and the desired details. Id. As to the general rules and form of pleading, Rules 8 and 10, a claim for relief must contain "a short plain statement of the claim showing that the pleader is entitled to relief;" Rule 8(a)(3); and may contain alternative claims within a count or as many separate claims. Rule 10(d)(2) and (3). Pursuant to Rule 12(f) - *Motion to Strike*, "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

III. Motion to Dismiss Count II - Cause of Action Pursuant to 18 USC §2255

Title 18 of the U.S.C. is entitled "Crimes and Criminal Procedure." §2255 is contained in "Part I. Crimes, Chap. 110. Sexual Exploitation and Other Abuse of Children." 18 U.S.C. §2255 (2003), is entitled *Civil remedy for personal injuries*, and provides:

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Any minor who is a victim of a **violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423** of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000 in value.

The Violations Alleged in the Amended Complaint
As Predicate Acts Under 18 U.S.C. §2255

Plaintiff alleges a *violation* of 18 U.S.C. §2422(b), which provides:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Plaintiff also alleges a violation of 18 U.S.C. §2423(b), which provides:

(b) Travel with intent to engage in illicit sexual conduct.--**A person who travels in interstate commerce or travels into the United States**, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

Next, Plaintiff alleges a *violation* of 18 U.S.C. §2423(e), which provides:

Attempt and conspiracy.--Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

Finally, Plaintiff alleges a *violation* of 18 U.S.C. §2423(f), which provides:

As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

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Dismissal of Plaintiff's purported §2255 claim(s) is required based on Plaintiff's failure to sufficiently allege any facts surrounding the alleged violations of the requisite predicate acts as specifically identified in subsection (a) of the statute quoted above. Relevant to Plaintiff's Amended Complaint, 18 U.S.C. 2255(a) creates a civil remedy for "a minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation . . ." Plaintiff fails to plead any factual allegations whatsoever pertaining to violations of the specified "predicate acts." See paragraphs 33(a)-(d) of the Amended Complaint, which only track portions of the applicable statutory text. Plaintiff makes reference by citation only to the following federal statutes – "18 U.S.C. §§2422(b), 2423(b), 2423(e) and 2423(f)."

In paragraphs 33 (a)-(d), Plaintiff references:

(a) ". . . *conspir[ing] with others, known and unknown to use a facility or means of interstate commerce* to knowingly persuade, induce, or entice minor females, including Plaintiff, Jane Doe, to engage in prostitution. . . ;" See Amended Complaint at ¶33(a)

(b) ". . . *conspir[ing] with others known (such as Sarah Kellen) and unknown to travel in interstate commerce* for the purpose of engaging in illicit sexual conduct with minors, including Plaintiff Jane Doe, as defined in 18 U.S.C. §2423(f), with minor females, in violation of Title 18, United States Code, Section 2423(b); all in violation of Title 18, United States Code, Section 2423(e);" See Amended Complaint at ¶33(b)

(c) the use of ". . . a facility or means of interstate or foreign commerce to knowingly persuade, induce, or entice minor females, including Plaintiff, Jane Doe, to engage in prostitution; all in violation of Title 18, United States Code, Section 2422(b);" and See Amended Complaint at ¶33(c)

(d) "travel[] in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. §2423(f), with minor females, including Plaintiff, Jane Doe, in violation of Title 18, United States Code, Section 2423(b). See Amended Complaint at ¶33(c)

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The Amended Complaint does not satisfy the pleading requirements set out above. See Iqbal and Twombly. Absent from the Amended Complaint is a statement of the facts and circumstances that will inform Defendant of the specific offenses with which he is charged and a specific identification of the facts required to establish fully, directly, and expressly, without any uncertainty or ambiguity, ... all the elements necessary to constitute the offenses. See Russell v. United States, 369 U.S. at 764-65; United States v. Hess, 124 U.S. at 487; United States v. Carll, 105 U.S. at 612; Iqbal, slip op. at 14 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”); and Twombly, 550 U.S. at 561 (it is not enough that “the pleadings le[ave] open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery”) (quotation and alteration omitted).

For instance, absent from the Amended Complaint and the Rico Statement are factual allegations identifying all the “conspirators,” the particular “facility” or means of “interstate commerce” utilized to by Epstein to accomplish the alleged goal of engaging in illicit sexual activity with minors, and the identity of the other “minor females” (by pseudonym or otherwise) referenced in the Amended Complaint. Also absent from the Amended Complaint and the Rico Statement are factual allegations identifying where the “interstate travel” occurred, if at all. Further, the Amended Complaint and the Rico Statement are devoid of any factual allegations placing Epstein on notice of how Plaintiff presumes he violated 18 U.S.C. §§2422(b), 2423(b), 2423(e) and 2423(f). Plaintiff simply makes bare conclusory and legal assertions in the Amended Complaint and the Rico Statement that attempt to track statutory language and assert bare conclusions. As Iqbal and Twombly make clear, Plaintiff cannot withstand a motion to dismiss by baldly asserting that an offense occurred and holding out hope that she “might later establish some set of undisclosed facts” to support her claims; instead, each element of the

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offense must be supported by an adequate factual allegation, and the Amended Complaint falls well short of the mark. Twombly, 550 U.S. at 561; see also Iqbal, slip op. at 14 (“The plausibility standard ... asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”)” (quoting Twombly, 550 U.S. at 557 (alteration in original))).

Indeed, Twombly itself supplies an excellent parallel to this case. In that case, plaintiffs alleged that the defendants engaged in coordinated activities that violated the antitrust laws, and asserted that defendants therefore must have agreed to restrain trade. As the Court observed, however, plaintiffs’ otherwise specific allegations of parallel conduct by the defendants were as likely to be innocent as they were consistent with the inference that defendants had entered into a conspiracy to restrain trade:

[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Id. at 556-57.

So too here. The bare assertion of a “conspiracy,” an unidentified “facility,” an unidentified means of “interstate commerce” and/or “interstate travel,” an undisclosed area of “interstate travel” and other unnamed “minor females” (by pseudonym or otherwise) and the bare-boned allegations that Epstein somehow violated 18 U.S.C. §§2422(b), 2423(b), 2423(e) and 2423(f) does not meet the strict pleading requirements set out above. Without more, the

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Amended Complaint should be dismissed as to Count II or, alternatively, the Plaintiff should be required to plead a more definite statement to cure these deficiencies.

(a) 18 U.S.C. §2255 Does Not Allow For The Recovery Of Punitive Damages. Thus, Plaintiff's Request For Punitive Damages Under §2255 Is Required To Be Dismissed Or Stricken

In Count II, Plaintiff also seeks punitive damages. A plain reading of 18 U.S.C. §2255, establishes that the statute does not allow for the recovery of punitive damages. Had Congress wanted to allow for such a recovery, it could have easily written such language into the damages provision of the statute. The legislative body chose not to write a punitive damages component into §2255 as it has done in other statutes affording civil remedies. In relevant part, §2255 reads - Any minor who is a victim of a violation of section ... of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and **shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee.** Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than \$50,000 in value." See discussion of rules of statutory construction in part III.A. of Jane Doe 101's Motion to Dismiss First Amended Complaint, which is incorporated herein by reference. See subsection (f)(2) of 18 U.S.C. §2252A, entitled *Certain activities relating to material constituting or containing child pornography*, also contained in Chapter 110, Part I, Crimes, within which specific reference is made to "compensatory and punitive damages" in setting forth the relief which may be afforded to a plaintiff in bringing a civil action under §2252A(f). Accordingly, Plaintiff's claims for punitive damages are required to be dismissed with prejudice or stricken.

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IV. Motion to Dismiss Count IV – Florida’s Civil Remedy for Criminal Practices

a. Plaintiff Lacks Standing To Bring The FCRCP Claim, Count IV, As She Seeks To Recover Personal Injury Type Damages

Significantly, Fla. Stat. Chapter 772., the Florida Civil Remedies Criminal Practices Act (hereinafter “FCRCP”) is patterned after the Federal Rico Act. Therefore, Florida’s statutes must be construed alongside the Federal Rico Act to obtain true meaning and application. Jackson v. BellSouth Telecommunications, 372 F.3d 1250 (11th Cir. 2004), *cited* in Fla. Stat. 772.103, annotated, (analysis applied to claims under the Federal Rico Act is equally applicable to claims under the Florida Rico statute); All Care Nursing Services, Inc. v. High Tech Staffing Services, Inc., 135 F.3d 740, (11th Cir. 1998)(Florida’s racketeering statutes have consistently been interpreted using the Federal RICO Act and its cases); Palmus Y Bambu, S.A. v. E.I. Dupont De Nemours & Company, Inc., 881 So.2d 565 (Fla. 3rd DCA 2004)(because of the similarities between the Florida and Federal Rico Acts, Florida looks to Federal authority regarding the interpretation and application of its Acts, *citing* 18 U.S.C. 1961, *et seq.* and Fla. Stat. 772.104); O’Malley v. St. Thomas Univ., Inc., 599 So.2d 999, 1000 (Fla. 3d DCA 1992)(“Since Florida Rico is patterned after Federal RICO. . . [f]ederal decisions should be accorded great weight,” and further confirming that a Plaintiff only has standing to sue if he/she is injured in their “business or property” (emphasis added)); RLS Business Ventures, Inc. v. Second Chance Wholesale, Inc. 784 So.2d 1194, 1195, n.2 (Fla. 2d DCA 2001)(“Florida courts have held that cases interpreting the Federal Rico Statute, title 18, U.S.C., are persuasive as to the meaning of Florida’s Rico statute. . .”).

Applying the above law with the cases cited *infra*, it is clear that Count IV fails legally because Plaintiff seeks, but cannot recover, personal injury damages under any RICO standard, Florida or Federal. In fact, Plaintiff cannot and will not be able to cite to one Florida or Federal

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case whereby personal injury damages were awarded in a civil matter under any RICO standard, State or Federal.

In Moore v. Potter, 141 Fed. Appx., WL 1600194 (11th Cir. 2005), the Court held that claims stemming from personal injury, or pecuniary losses resulting from personal injury, are not cognizable under RICO. The court reasoned that the Rico Act provides a civil remedy to recover treble damages to “[a]ny person injured in his business or property by reason of a violation” of the substantive provisions contained in §1962 of the Rico Act. Id. at **1. The court went on to hold that “[w]hile a Civil Rico plaintiff must show that the racketeering activity caused him to suffer an injury. . . , a claim stemming from personal injury is not cognizable under Rico.” Id.; see also Pilkington v. United Airlines, 112 F.3d 1532, 1536 (11th Cir. 1997); Federal Procedure, 5B Fed. Proc., L. Ed., §10:160, Standing, Private Civil Actions Under [RICO], (2008); Stansfield v. Starkey, 269 Cal. Rptr., 337, 348 (Cal. App. 3d 1990)(affirming trial court’s ruling – **general damages** (emotional distress, anguish, shock, nervousness, pain and suffering) are not recoverable under RICO), *citing*, Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169 (3d Cir. 1987)(congress intended RICO to exclude personnel injuries). Id. at 348.

In Connor v. Halifax Hospital Medical Center, 135 F.Supp.2d, 1198, 1219 (M.D. Fla. 2001), the court held that claims for money damages relating to nursing home patients’ deaths following massive overdose of morphine, and consequent deprivation of patient’s intangible right of honest medical services, were not cognizable under RICO because the losses were personal in nature and the intangible right of honest medical services was not property under RICO. Id. The court noted that breach of such an “intangible right” “occasions a state-law cause of action in tort for personal injury, not a RICO cause of action. . . .” (emphasis added) Id. In short, the court held that pecuniary losses that are most properly understood as part of a

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personal injury claim are excluded under RICO. *Id.* at 1211; see also *Magnum v. Archdiocese of Philadelphia*, 253 Fed.Appx. 224 (3rd Cir. 2007)(underlying wrong of continued childhood sexual abuse brought against the Archdiocese did not allow for recovery under RICO). Finally, even Florida's Fourth DCA confirms that in order to have a claim for RICO, there must be damage to "business or property." *Petrol, LTD. v. Radulovic*, 764 So.2d 878 (Fla. 4th DCA 2000).

Plaintiff has asserted the equivalent, that is, various state law causes of action seeking personal injury damages (e.g., Count I - Sexual Battery, Count II – Pursuant to 18 USC 2255, Count III - Intentional Infliction of Emotional Distress and Count V - Statutory Cause of Action Pursuant to Fla. Stat. 796.09 and ¶14(c) of the Rico Statement). In this matter, Plaintiff seeks relief in the form of personal injury damages. Florida's legislative history and state case law are devoid of any explanations or rulings allowing for the recovery of personal injury damages under FCRCP. Therefore, this court must look to and rely on Federal law as it has done in the past, which states clearly around the United States that RICO is not intended to be utilized to recover personal injury damages. If victims of ongoing childhood sexual abuse occurring at the hands of the Archdiocese are not able to bring a RICO claim, Plaintiff cannot expect this court to do more. Accordingly, Count IV must be dismissed with prejudice.

b. Plaintiff Cannot Satisfy The Distinctiveness Requirement Of An Enterprise Sufficient To Sustain A Rico Claim Under FCRCP

Fla. Stat. §772.103 provides:

It is unlawful for any person:

- (3) Employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such **enterprise** through a pattern of criminal activity or the collection of an unlawful debt.

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(4) To conspire or endeavor to violate any of the provisions of subsection (1), subsection (2), or subsection (3).

Pursuant to §772.102, “enterprise” is defined as:

any individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and the term includes illicit as well as licit enterprises and governmental, as well as other, entities.

In the Amended Complaint, Plaintiff makes the conclusory allegation that Epstein participated in an enterprise, or conspired or endeavored to so participate, through a pattern of criminal. Amended Complaint at ¶43. According to the Amended Complaint and the Rico Statement, the enterprise consisted of Epstein, Sarah Kellen and Nadia Marcinkova. *Id.* However, as set forth in more detail below, Plaintiff does not and cannot establish the “distinctiveness” requirement of the enterprise element in order to state a claim. As explained in Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co., 336 F.Supp.2d 1339, 1260-61 (S.D. Fla. 2004):

The relevant Florida RICO provision makes it unlawful for any person “[e]mployed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt.” Fla. Stat. § 772.103(3). Thus, for a “person” to be liable under RICO, it must be shown that the person was employed by, or associated with a distinct enterprise “that is not simply the same ‘person’ referred to by a different name.” Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (“In ordinary English one speaks of employing, being employed by, or associating with others, not oneself.”). Both the United States Supreme Court and the Florida Supreme Court have required proof of a RICO “enterprise” that is separate and distinct from the person charged with the RICO violation. See United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); Gross v. State, 765 So.2d 39, 43 (Fla.2000) (adopting Turkette as a matter of Florida RICO law); see also U.S. v. Goldin Indus., Inc., 219 F.3d 1268, 1270-71 (11th Cir.2000) (en banc) (ruling that the “plain language” of RICO requires that the “enterprise” be “separate and distinct” from the “person” who is the defendant), *cert. denied*, 531 U.S. 1015, 121 S.Ct. 573, 148 L.Ed.2d 491 (2001). Thus, there is a “distinctiveness” requirement for RICO enterprises.

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Plaintiff simply cannot meet or plead the requirement that Epstein is distinct from the supposed “enterprise.” If all the allegations in the Amended Complaint and the Rico Statement are accepted as true, Epstein is the enterprise and, therefore, the claim fails in its entirety on this element alone. As set forth above, both the United States Supreme Court and the Florida Supreme Court have required proof of a RICO “enterprise” that is separate and distinct from the person charged with the RICO violation. Here, Epstein is charged with the alleged RICO violations. See ¶14(d) of the Rico Statement, which provides “the defendant ‘person’ in the Florida Civil Rico action is, at this time, only defendant Epstein. . . .” However, the RICO enterprise must be distinct from the RICO defendant person. St. of Fla. Off. of the Atty. Gen. v. Tenet Healthcare Corp., 420 F.Supp.2d 1288, 1305 (S.D.Fla.2005) (citations omitted). “RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or part of the person.” United States v. Goldin Indus., Inc., 219 F.3d 1271, 1276 (11th Cir.2000)(“to allege an enterprise, Plaintiffs must name a RICO person distinct from the enterprise); see also, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161-162, 121 S.Ct., 2087, 150 L.E.d.2d 198 (2001)(RICO “require[s] some distinctiveness between the RICO Defendant and the enterprise.”) The plain language of “section 1962 envisions two separate entities.” United States v. Goldin Indus., Inc., 219 F.3d at 1270.

If the allegations in the Amended Complaint and the Rico Statement are accepted as true, Epstein is the enterprise as he directed his “underlings” to procure young girls for his own sexual gratification. Amended Complaint at ¶44. As such, Sarah Kellen and Nadia Marcinkova were not [e]ach. . . free to act independently and advance [their] own interests contrary to those of [Epstein’s]. . . .” United States v. Goldin Indus., Inc., 219 F.3d at 1270. Without Epstein, the RICO Defendant, the alleged “enterprise” would clearly not exist. Thus, the enterprise and

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Epstein are the same person for purposes of RICO. In fact, there is no legal principle under RICO which will sufficiently detach Epstein, the RICO Defendant, from the RICO enterprise. Kindred v. Murphy, No. 8:07-cv-1002-T-30EAJ, 2008 WL 476220, *3 (M.D.Fla. Feb.19, 2008) (dismissing RICO claim because the alleged enterprise and the defendant person were one in the same); Lockheed Martin Corp. v. Boeing co., 314 F. Supp.2d 1198, 1216-1217 (M.D. Fla. 2004)(for purpose of liability under Racketeer Influenced and Corrupt Organizations Act (RICO) and its Florida counterpart, aircraft manufacturer was not “person,” sufficiently detached from enterprise consisting of team of employees. The enterprise must be distinct from the defendant, and an association of employees acting within the scope of their employment is not considered “distinct” from their employer. Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir.1994).

Further, Plaintiff incorporates paragraphs 1-22 of the Amended Complaint into Count IV. If those allegations are accepted as true, Epstein performed the alleged acts for his own sexual gratification. Rico Statement at 5(a) and *generally*. In essence, Plaintiff is attempting to assert a RICO violation based on allegations that Epstein was a “John,” not a “pimp.” Epstein was not receiving any “proceeds” directly or indirectly. The allegations regarding Epstein are not the type of wrongdoing that the RICO acts (both Florida and Federal) were meant to target. For instance, it appears that Plaintiff is attempting to rely upon §796.03 – pertaining to procuring a person under the age of 18 for prostitution in ¶46 (a) as a predicate act. See 772.102(1)(a)17. Plaintiff’s allegations fail to allege a violation of this statute against Epstein. See Kobel v. State of Florida, 745 So.2d 979 (Fla. 4th DCA 1999)(procurement and solicitation are distinguishable; “procurement” in the context of §796.03 “connotes a pecuniary gain from the exploitation of another. ... in the context of prostitution, the word “procure” must be given its specialized

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meaning, which is “to obtain as a prostitute for another,” connoting a commercial motive.”). Here, commercial motive is lacking. Based on the allegations, Epstein was fulfilling his personal desires; not running a prostitution ring. Epstein as an individual cannot be both the actor and the enterprise. *See supra*. As such, Plaintiff has failed to allege a requisite predicate act under §796.03 and, at the very least, that predicate act should be dismissed or stricken from the Amended Complaint.

(i) **The Alleged Predicate Acts And The Enterprise**

Next, what constitutes the requisite underlying “criminal activity” or “predicate act” is specified in §772.102(1)(a)1 – 34, and (b). *See* ¶46(a)-(d) & (g) of Amended Complaint, where Plaintiff alleges that Defendant, Jeffrey Epstein, participated in this pattern of criminal activity by engaging in “. . .one or more of the following predicate acts. . .” (a) “Procuring for prostitution, or causing to be prostituted, any person who is under the age of 18 years in violation of Florida Statutes Chapter 796;” (b) “Acts of battery in violation of Florida Statutes Chapter 784;” (c) “Forcing, compelling or coercing another to become a prostitute in violation of Fla. Stat. Chapter 796.04;” (d) “knowingly recruiting, enticing, harboring, transporting, providing or otherwise by any means a person, knowing that coercion would be used to cause that person to engage in prostitution in violation of Florida Statutes Chapter 796.045;” (e) “tampering with a witness in violation of Florida Statutes Chapter 914.22;” (f) “altering, destroying, removing, or concealing records or documents or other evidence with the purpose to impair its verity or availability in violation of Florida Statutes Chapter 918.13” and (g) “maintaining a place for the purpose of lewdness or prostitution. . . all in violation of Florida Statutes Chapter 796.07.” Again, EPSTEIN cannot be both the actor and enterprise, as alleged by Plaintiff.

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**c. The Act of Destroying and/or Concealing Evidence and Tampering with
A Witnesses Are Not Sufficient Predicate Acts Under FCRCP**

Plaintiff alleges in paragraphs 46 (e) & (f) that Epstein “tamper[ed] with a witness in violation of Florida Statutes Chapter 914.22” and “alter[ed], destroy[ed], remov[ed], or conceal[ed] records or documents or other evidence with the purpose to impair its verity or availability in violation of Florida Statutes Chapter 918.13.” These acts of alleged concealment do not state a predicate act. In Jackson v. BellSouth Telecommunications, 372 F.3d 1250, 1268 (11th Cir. 2004), the court stated that “. . .there is little question that attempts to conceal an initial fraudulent act are not sufficient to establish open-ended continuity. In [Aldridge v. Lily-Tulip, Inc. Salary Ret. Plan Benefits Comm., 953 F.2d 587, 593 (11th Cir. 1992)], the plaintiffs alleged . . .their employer. . .used the mails for five years to conceal the “fraudulent taking” of the employee’s vacation time. We held that the defendants’ “acts after the initial wrongful taking were allegedly performed in order to conceal their wrongdoing; they did not threaten future harm or a repetition of their illegal acts, nor did they impart any new injury” upon the plaintiffs. . .We concluded that the plaintiffs’ allegations of ongoing acts aimed at concealing an initial wrongdoing did not establish open-ended continuity.” *Id*; see also *infra* for argument on open and closed-ended continuity.

Here, the alleged acts relating to witness tampering, concealment and/or destruction of evidence etc.... did not, and are not alleged to, threaten future harm (against Plaintiff or the authorities) or a repetition of any particular illegal act in the future. Further, there is no allegation that the acts relating to witness tampering, concealment or destruction of evidence etc... will result in any new injury to Jane Doe.

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Further, these predicate acts do not comply with Local Rule 12.1(4), S.D. Fla., Civil Rico Case Statement, which provides: “[I]ist the victims, and separately state when and how each victim was injured.” Id.

Moreover, to satisfy the relatedness requirement, the predicate offenses are related only if they have “the same or similar purposes, results, participants, victims or methods of commission.” HJ, Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 240 (1989). Here, the alleged act of sexual battery and the alleged acts of witness tampering, concealment and/or destruction of evidence etc... do not satisfy the “relatedness requirement.” For instance, the purposes and results are staunchly different (i.e., to batter and to tamper, conceal and/or destroy evidence), and the participants and victims are different (i.e., the battering allegedly involves the Plaintiff while the witness tampering, concealment and/or destruction of evidence etc... involve others and possibly the authorities.). Moreover, the “victims” and “methods of commission” (i.e., battering and witness tampering, destroying and concealing evidence) are as well different. Accordingly, predicate acts (e) & (f) in the Amended Complaint must be dismissed or, alternatively, stricken from the Amended Complaint.

d. Plaintiff Fails to Date Any Of the Predicate Acts In the Amended Complaint And The Amended Complaint is Devoid of Any Allegations of Repetition or the Possibility Future Criminal Activity Relative to Any of The Specific Predicate Acts Alleged Sufficient to Establish Open and Closed-Ended Continuity

Fla. Stat. 772.102(4) defines pattern of racketeering activity as: “engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred **within 5 years after** a prior incident of criminal activity.” Nowhere in the Amended Complaint or the Rico Statement does Plaintiff identify when the alleged predicate acts (a)-(g) occurred, which violates Local

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Rule 12.1(5)(b), S.D. Fla., Civil Rico Case Statement, which provides: “separately state the dates of the predicate acts/incidents of criminal activity, the participants and a description of the facts surrounding each predicate act/incident of criminal activity.” *Id.* Moreover, Plaintiff does not specifically describe or sufficiently detail how the predicate acts or the enterprise’s activities “effected interstate or foreign commerce.” Local Rule 12.1(10), S.D. Fla., Civil Rico Case Statement.

Continuity is both a close and open ended concept referring to either a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition. HJ, Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229 (1989), Comcast of South Florida II, Inc. v. Best Cable Supply, 2008 U.S. Dist. Lexis 4258 (S.D. Fla. 2008). To successfully allege a pattern of racketeering activity, Plaintiff’s must charge that (1) Defendants committed two or more predicate acts within a five year time span, (2) the predicate acts were related to one another, and (3) the predicate acts demonstrate criminal conduct of a continuing nature. HJ, Inc. v. Northwestern Bell Telephone Company, 492 U.S. at 1236-1239; Jackson v. Bellsouth Telecommunications, 372 F. 3d at 1265-1266, 1268 (not allowing for conclusory allegations).

Here, Defendant is left to guess whether Plaintiff’s alleged predicate acts satisfy the “open-ended continuity” requirement under RICO. Aside from the wholly conclusory allegations contained in the Amended Complaint and the Rico Statement, Plaintiff makes no claim and offers no support that the specific conduct in predicate acts (a)-(g) (paragraph 46 of the Amended Complaint) occurred within the five-year time span, are related to each other, and suggest a threat of criminal conduct continuing into the future. As such, open-ended continuity is not pled and thus cannot be established one way or the other.

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Defendant is also left to guess whether the alleged predicate acts satisfy the “closed-ended continuity” requirement necessary under RICO (i.e., a closed period of repeated conduct). HJ, Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 241-242 (1989). Absent the applicable time periods for each predicate act, closed-ended continuity cannot be determined and is thus not established or pled by Plaintiff. Other circuits have agreed that the *substantial* period of time requirement for establishing closed-ended continuity cannot be met with allegations of schemes lasting less than a year. *See, e.g., Efron v. Embassy Suites (P. R.), Inc.*, 223 F.3d 12 (1st Cir.2000) (finding no closed-ended continuity where 17 predicate acts of wire and mail fraud occurred over 21-month period); Cofacredit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir.1999) (stating that the Second Circuit “has never held a period of less than two years to constitute a ‘substantial period of time’ ”); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 611 (3d Cir.1991) (“[T]welve months is not a substantial period of time.”); Vemco, Inc. v. Camardella, 23 F.3d 129, 134 (6th Cir.1994) (finding seventeen month period insufficient to show continuity); Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir.1992)(“We have found no case in which a court [of appeals] has held the [continuity] requirement to be satisfied by a pattern of activity lasting less than a year.”). Again, Epstein cannot even determine the closed-ended continuity requirement absent sufficient dates for the alleged predicate acts. Plaintiff only claims that the alleged “criminal acts” occurred “over a substantial period of time”. Amended Complaint at ¶47. No allegation is made and no support given relating to when the alleged “predicate acts” occurred. Moreover, aside from the conclusory allegations in the Rico Statement that certain acts occurred between June 2002 and November 2005, no allegations exist in the Amended Complaint regarding whether the particular predicate acts occurred within the 5-year time period as each pertain to Plaintiff, whether the

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specific predicate acts are related, and whether the specific predicate acts demonstrate criminal conduct that may continue into the future. HJ, Inc. v. Northwestern Bell Telephone Company, 492 U.S. at 1236-1239; Jackson v. Bellsouth Telecommunications, 372 F. 3d at 1265-1266, 1268 (not allowing for conclusory allegations).

Accordingly, the Amended Complaint does not satisfy the pleading requirements set out in Iqbal and Twombly, *supra*, or under the applicable RICO standards set out above. Thus, the Amended Complaint must be dismissed or, alternatively, a more definite statement must be provided consistent with the law set out above.

- e. **Plaintiff Lacks Standing To Bring The Claims Asserted In Count IV As To Predicate Acts 46(a)-(g) Because Plaintiff Has Not Alleged A Direct Injury As A Result Of The Predicate Acts And, to the Extent Plaintiff Infers Injury As A Result Of Any Predicate Acts Involving Other Third Parties, Same Fails As a Matter of Law**

Count IV attempts to allege 6 predicate acts that are not identified by date. The acts involve, in relevant part, alleged sexual misdeeds, prostitution, battery, procuring “person[s]” for prostitution, tampering with unidentified witnesses, destroying and/or concealing evidence, and maintaining a place for purposes of lewdness and prostitution. Amended Complaint at ¶46 (a)-(g).

Plaintiff states that she “was so injured by reason of [Epstein’s] violations of the provisions of [Fla. Stat.] 772.104,” but makes no reference whatsoever to any direct injury sustained pursuant to the alleged predicate acts brought under Fla. Stat 772.102 – in particular predicate acts (a)-(g). See Amended Complaint at ¶¶49 and 46, respectively in that order. Plaintiff also makes references to certain allegations involving other third-party persons or agencies in predicate acts (a)-(g). However, Plaintiff cannot sustain a RICO claim by virtue of acts visited upon third-parties. See infra. Plaintiff’s failure to allege a direct injury is inconsistent with Local Rule 12.1(16), S.D. Fla. Civil Rico Case Statement, which provides:

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“Describe the nature and extent of the relationship between the injury and each separate Rico violation.” *Id.* As set forth in detail below, Plaintiff has failed to allege any specific and direct injury as a result of the predicate acts alleged in paragraph 46(a)-(g) of the Amended Complaint. Further, these predicate acts do not comply with Local Rule 12.1(4), S.D. Fla., which provides: “[I]ist the victims, and separately state when and how each victim was injured.” *Id.*

(i) **Plaintiff's Alleged Injury As a Result of Predicate Acts (a)-(d) in the Amended Complaint Are Insufficient**

As to predicate acts (a)-(d), ¶46 of the Amended Complaint, Plaintiff attempts to rehabilitate her pleading deficiencies as to her alleged injury by stating she “. . .was so injured by reason of [Epstein's] violations of the provisions of 772.104, Plaintiff. . .was called on the telephone by. . .Epstein and other employees. . ., and transported to. . .Epstein's residence, where she was. . .enticed to commit prostitution, and had acts of sexual battery and sexual exploitation committed against her.” Amended Complaint at ¶49. However, Plaintiff fails to cite any direct injury as a result of the specific predicate acts alleged under 772.102 in paragraph 46 of the Amended Complaint, which are brought pursuant to specific statutes. Instead, Plaintiff blindly references violations of the provisions of 772.104, not the predicate acts alleged under 772.102. The Rico Statement does not cure this deficiency. Plaintiff is required to allege a direct injury as a result of the predicate acts to meet the strict pleading requirements under RICO and Iqbal and Twombly, *supra*. Plaintiff fails to meet this standard. Therefore, predicate acts (a)-(d) must be dismissed or stricken from the Amended Complaint or, alternatively, a more definite statement must be provided.

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(ii) **Plaintiff Does Not And Cannot Allege A Direct Injury As a Result of Predicate Acts (a)-(g) in the Amended Complaint Involving Other Third Parties**

Next, predicate acts (a)-(g), as alleged, pertain to other third-parties. Plaintiff fails to allege in the Amended Complaint or in the Rico Statement any direct injury resulting from any of the alleged predicate acts visited upon those individuals or agencies. Moreover, predicate acts (e)-(g) are devoid of any allegations even remotely involving Plaintiff. For instance, Plaintiff does not and cannot allege she sustained a direct injury as a result of Epstein: (e) tampering with a witness, (f) destroying or concealing evidence and (g) maintaining a place for purposes of lewdness and prostitution. In O'Malley, appellants sued in State Court under Florida RICO alleging they were terminated because they refused to participate in alleged RICO violations. O'Malley v. St., Thomas Univ., Inc., 599 So.2d at 1000. The Court adopted the 11th Circuit's reasoning, and stated that any injuries sustained (e.g., by virtue of being terminated) were not as a direct result of the predicate acts (e.g, the alleged RICO violations the employees refused to participate in) and are not recoverable under Florida RICO. Id. The Court stated that "RICO does not provide a remedy for every injury that may be traced to a predicate act." Id. In Palmas, Plaintiff brought suit against E.I. DuPont for a defect in its fungicide, and sought treble damages under Fla. Stat. 772.104 under the theory that they relied on various letters and information (the predicate acts) sent to them covering up the defects in the fungicide. Palmus Y Bambu, S.A. v. E.I. Dupont De Nemours & Company, 881 So.2d at 568. The Palmas Court, *citing* to Sedima v. Imrex Co., Inc., 472 U.S. 479, 105 S.Ct. 3275, 87 L.E.d 2d 346 (1985), reasoned that "[a] plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business and property by the conduct constituting the violation. . . and the Plaintiff's damages must flow from the commission of the predicate acts." Id. at 570. In light of the holding in O'Malley establishing that direct injury must be proved and not just any injury traced to a

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predicate act, the Palmas Court rejected the nurseries' argument that they relied on certain letters and that the letters/communications proximately caused their damages. Id. at 573-574. The Palmas Court, *citing* to Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 906, 908 (11th Cir. 1998), further reasoned that "a party whose injuries result 'merely from the misfortunes visited upon a third person by defendant's acts' lacks standing to pursue a claim under RICO. . . . *[T]he test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable.*" See also Petrol, LTD. v. Radulovic, 764 So.2d at 880-881.

A cause of action under FCRCF 772.104 requires a showing of *direct injury*. Palmas y Bambu, S.A. v. E.I. Dupont, 881 So. 2d at, 573. Even assuming, for the sake of argument, that the Plaintiff can establish that Epstein engaged in a "pattern of criminal activity," she cannot establish that she was directly injured by predicate acts (a)-(g) as they relate to other third-party persons or agencies referenced and/or inferred to be victims of said predicate acts. Moreover, Plaintiff fails to plead which predicate acts under 772.102 directly injured Plaintiff. The allegations pertaining to other persons and/or agencies do not add up to a Civil Rico claim because there is no proximate cause between the purported "pattern of criminal activity" (i.e., the predicate acts involving the other Jane Does, persons or agencies) and the Plaintiff's alleged injuries. See Baisch v. Gallina, 346 F.3d 366, 373 (2d Cir. 2003) ("[A] plaintiff does not have standing if he suffered an injury that was indirectly (and hence not proximately) caused by the racketeering activity or RICO predicate acts, even though the injury was proximately caused by some non-RICO violations committed by the defendant."). Here, Plaintiff is simply trying to trace certain predicate acts allegedly visited upon other third parties for purposes of attempting to allege RICO claims. This is simply not permissible under Florida and Federal law.

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Based upon the foregoing, Count IV should be dismissed with prejudice for failure to plead a direct injury or, alternatively, Plaintiff should be required to provide a more definite statement as to which predicate acts injured her, individually.

V. References To Plea Agreement Are Also Required To Be Stricken

2. In ¶22 of the Amended Complaint, Plaintiff makes reference to Defendant's plea agreement. Plaintiff's counsel is well aware that the agreement is to remain confidential and not be to made part of any public record. In fact, counsel for Plaintiff previously filed *Victim's Motion To Unseal Non-Prosecution Agreement*, dated September 25, 2008, in the case styled *Jane Doe #1 And Jane Doe #2 v. United States of America*, United States Southern District Court, Florida, Case No. 08-80736-CIV-MARRA/JOHNSON and, has since thereafter, filed an additional motion seeking to unseal same in the related State Court criminal action in front of the Honorable Judge Colbath, 15th Judicial Circuit. Accordingly, ¶22 is required to be stricken as impertinent. Rule 1.140(f).

WHEREFORE Defendant respectfully requests that this Court grant the motion to dismiss, for more definite statement, and to strike directed to the Amended Complaint, and for such other relief this Court deems proper.

VI. Conclusion

Pursuant to applicable law, Defendant is entitled to dismissal of Counts II and IV for failure to state a claim upon which relief can be granted. Rule 12(b)(6), (e) and (f); Rules 8 and 10; *Twombly*, supra. In the alternative, Defendant is entitled to more definite statement of Counts II and IV.

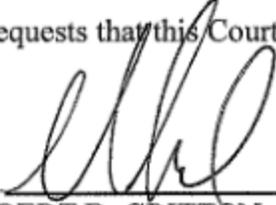
As to Count IV, it is Defendant's position that Plaintiff: (1) does not have standing under RICO to maintain a claim seeking personal injury damages; (2) cannot allege the distinctiveness

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requirement of the enterprise element in order to state a RICO claim; (3) fails to allege predicate acts under FCRCP sufficient to establish open and closed-ended continuity; and (4) lacks standing to bring the claims asserted in Count IV as to predicate acts 46(a)-(g) because plaintiff has not alleged a direct injury from those predicate acts and cannot sustain a direct injury because the predicate acts, as pled, involve other third-party persons and/or entities. Alternatively, if Plaintiff wishes to attempt to sustain those claims relating to the particular predicate acts, Defendant is entitled to a more definite statement as well.

Finally, Defendant is entitled to the striking of the immaterial or impertinent references to criminal statutes and the "plea agreement" as more fully described herein.

WHEREFORE, Defendant respectfully requests that this Court grants his motion directed to Plaintiff's Amended Complaint.

By: 
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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following service list in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF on this 12 day of June, 2009:

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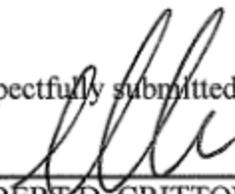
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