No. 13-16917

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UTHE TECHNOLOGY CORPORATION,

Plaintiff-Appellant,

v.

AETRIUM, INC.
AND HARRY ALLEN,

Defendants-Respondents.

On Appeal from the United States District Court for the Northern District of California, No. 3:95-CV-02377 (Honorable William H. Alsup, District Judge)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. INTRODUCTION

Regarding the single satisfaction rule, Respondents' Brief ("RB") tries to distinguish our authorities on grounds that overlook the policy underlying the single satisfaction rule: to prevent double recovery. Allowing Uthe to seek RICO trebling against Respondents would not conflict with this policy, because in the Singapore arbitration, RICO trebling was not allowed, not sought, and not awarded against the other conspirators.

Alternatively, Respondents argue that the summary judgment should be affirmed because there was no triable issue of fact regarding RICO's "continuity" requirement. Because the district court did not rule on this claim, this Court should not consider it on appeal. If the Court does consider continuity, the Court should affirm. Uthe's evidence showed a triable issue of fact regarding "open-ended" racketeering, because co-conspirator Yip testified that the "planned partnership with Aetrium, including the servicing of Uthe Singapore clients, was intended to continue indefinitely into the future." ER 130, lines 10-11. And Uthe's evidence also showed a triable issue of fact regarding "closed-ended" conspiracy because Respondents were involved for more than a year. While Aetrium joined the conspiracy in July of 1992, Yip testified, "The conspiracy, including the agreement between Uthe Singapore and Aetrium to keep everything that we had done hidden from Uthe USA and

Mr. Goodson, was exposed sometime in the summer of 1993, when Aetrium, Mr. Allen, myself and the other Uthe Singapore officers were sued in the United States by Uthe USA. Mr. Goodson's discovery of the conspiracy and the lawsuit [filed in August of 1993] is what brought it to an end . . . ." ER 131, lines 11-15.

II. ARGUMENT

A. THE SINGLE SATISFACTION RULE DOES NOT BAR UTHE'S RICO CLAIM AGAINST AETRIUM AND ALLEN.

At RB 4, Respondents say that after the Singapore arbitration, Uthe tried to "pursue new legal theories (treble damages under RICO) against the secondary tortfeasors (the Aetrium defendants)." But there was nothing "new" about this claim. Uthe's RICO claim against Respondents was included in their original complaint (ER 868, Docket Nos. 1 & 7; ER 838), which was filed long before the Singapore arbitration even began. Uthe's claim against Respondents for treble damages under RICO was no afterthought, as Respondents suggest, but was a key part of Uthe's case from the beginning. Because Uthe was unable to pursue this claim against the Respondents in the Singapore arbitration, Uthe seeks to pursue it now.

At RB 31, Respondents say that Uthe's "damages relating to its injury were adjudicated on the merits and fully satisfied." This factual assertion underlies all of Respondents' "single satisfaction" arguments. But it is mistaken. Uthe's RICO trebling claim was never raised, never adjudicated, and never paid in the Singapore arbitration.

1. Respondents' Position Does Not Serve The Policy Underlying the Single Satisfaction Doctrine: The Prevention of Double Recovery.

At RB 4, Respondents make the following claim:

> Uthe USA could have left the Singapore Arbitration award unsatisfied, pursued its claim against the Aetrium Defendants and . . . elected to enforce that award *or* enforce the Singapore award against the Singapore Defendants. But Uthe USA did not follow that course of action.
>
> Uthe USA instead elected to accept full satisfaction of the fully adjudicated Singapore Arbitration award. Once Uthe USA made that election, its cause of action against any and all tortfeasors for that injury was extinguished.

In other words, if one defendant offers to pay plaintiff only a part of plaintiff's claim, plaintiff cannot simply accept the payment and then seek the balance of the claim from other defendants. No, plaintiff must "elect" either to take the money while he can, or reject the money and seek the entire claim from the other defendants. And if plaintiff "elects" to take the money, he forfeits his right to seek the balance of the claim from other defendants.

It would be surprising if the law supported such an extraordinary proposition. But Respondents cite no case or treatise that says what Respondents propose, and we are aware of none.

The cases we cite at Appellant's Opening Brief ("AOB") 27 establish the purpose of the single satisfaction rule: to prevent double recovery. By seeking from Respondents the trebling provided by RICO, Uthe is not seeking double recovery—for the simple reason that the Singapore defendants never paid Uthe the RICO trebling damages. Indeed, RICO trebling was not allowed, not sought, and not awarded in the Singapore arbitration.

As stated in the RESTATEMENT (SECOND) OF JUDGMENTS §50, illus. 2 (1982): "If the losses recoverable against two obligors are not the same, the payment from the first does not discharge the obligation of the other . . . ." Comment D to this section states: "When the losses established in the first judgment do not include all those that may be recovered in the second, the first judgment does not preclude recovery of the additional losses from a second obligor."

This rule is echoed in the RESTATEMENT (THIRD) OF TORTS §25, comment b (2000):

> In some instances, the injuries for which the plaintiff brings a second suit may not be entirely congruent with the injuries for which the plaintiff recovered in the first suit. Similarly, in some instances, the remedies available for the claims made by the plaintiff in a second suit may be broader than the remedies available for the claims asserted in the first suit. Satisfaction of a claim cannot occur unless the injuries sued upon are identical and the remedies available for the claims are the same.

Illustration 2 of that Restatement section elaborates this rule with an example very similar to the present case:

> A sues B for property damage that occurred when a free sample of shampoo manufactured by B dissolved the plumbing fittings in A's bathroom. A recovers a judgment against B, which is satisfied. A brings suit against C, the retailer who provided the free sample pursuant to the state consumer-protection act for deceptive trade practices. The consumer-protection act provides for recovery of three times the actual damages suffered due to a violation of the act, along with attorney's fees. Discharge of A's judgment against B is not a satisfaction of A's claim against C. *Id.*, illus. 2.

Here, likewise, RICO "provides for recovery of three times the actual damages suffered due to a violation of the act, along with attorney's fees." And "Discharge of [Uthe's] judgment against [the Singapore defendants] is not a satisfaction of [Uthe's] claim against [Respondents]." *Id.*

The single satisfaction rule was applied in *Greenleaf v. Garlock, Inc*., 174 F.3d 352, 357 (3d Cir. 1999), where the court held that "the 'one satisfaction' rule bars a subsequent suit against another tortfeasor only where the prior proceedings can reasonably be construed to have resulted in full satisfaction of the plaintiff's claim." Respondents assert that Uthe's claim was "fully satisfied" by the Singapore defendants' payment of the Singapore award. That award was satisfied, but that award did not include Uthe's claim for RICO trebling. This claim was not awarded or satisfied—and that is what Uthe now seeks from Respondents.

At RB 29, Respondents cite cases holding that a fully satisfied judgment extinguishes a cause of action even if the plaintiff pleads "new legal theories." But Uthe's RICO trebling claim is not a legal theory supporting a claim already recovered. It is the claim itself.

2. Respondents' Distinction Is Not Supported By Case Law.

At RB 34, Respondents assert, "All of Uthe USA's authority relates only to partial satisfaction or settlement." If this were true, it would not matter,

because Respondents fail to explain why this should make a difference. So long as a plaintiff has been paid less than the full amount of his claim, allowing him to seek the balance from other defendants would not result in any double recovery and would not be inconsistent with the purpose of the single satisfaction rule. It does not matter whether the partial payment resulted from execution of judgment, settlement, or voluntary payment. A distinction based on the form of payment would be no more logical than a distinction based on the names of the parties. With equal "logic," Respondents might as well say, "All of Uthe USA's authority relates only to parties who were not named Uthe or Aetrium."

Indeed, none of the cases cited by either party say that the form of payment matters. No case holds, as Respondents propose, that one defendant's voluntary payment of part of plaintiff's claim bars recovery of the balance of the claim from another defendant. In fact, at AOB 40, we cited *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), where the court held that defendant's returning to the plaintiff some property defendant had wrongfully obtained had no effect on plaintiff's claim for treble damages under RICO.

As did the district court, Respondents rely on *Fletcher v. California Portland Cement Co.*, 99 Cal. App. 3d 97 (1979). *See* RB 25, 30, 43. But in *Milicevich v. Sacramento Med. Ctr.*, 155 Cal. App. 3d 997 (1984), the Court

refused to apply the single satisfaction rule to bar plaintiff's claim against one tortfeasor merely because plaintiff been paid a settlement by another tortfeasor. The court distinguished *Fletcher*:

> The single satisfaction rule is not based upon the effect of the judgment itself, which, in any event, does not preclude pursuit of joint or concurrent tortfeasors. Rather, the rule in *Fletcher* is 'designed to prevent double recovery . . . .' Whether there is in fact a double recovery cannot be determined unless the damages which measure the *full* recovery for the injury have been litigated on their merits. In *Fletcher* and the authority upon which it relies, the judgments were predicated upon litigation which adjudicated the full amount of plaintiff's damages. When the judgment which has been satisfied is predicated upon such an adjudication the logic of discharge is clear. Plaintiff is only entitled to a single recovery of full compensatory damages for a single injury. But this reasoning loses its force if the magnitude of damage has not been established in the antecedent litigation. *Id.* at 1002-03 (internal citations and footnotes omitted).

At RB 24, Respondents argue that Uthe "fails to cite any cases where courts have permitted a treble damage RICO claim for an injury after, as here, a party has accepted *full* satisfaction of an *adjudicated* damage award for the same injury." However, at AOB 39, we cited *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985), where defendant was a state senator who put "ghost workers" on the state payroll. The state recovered the loss by deducting it from defendant's retirement account. Then the state sued defendant for treble damages under RICO. Defendant made the same arguments that Respondents present in their brief. The court rejected them:

> Cianfrani's interpretation would enable any person guilty of violating §1962 to avoid the imposition of treble damages by the simple device of making restitution before the injured person brings suit. To adopt such a restrictive reading of §1964(c) would contravene Congress' mandate that the RICO statute be construed liberally to effectuate its remedial purposes. *Id.* at 1367.

The court also held that the state's deduction from defendant's retirement account "left open the possibility that federal law would provide a remedy greater than was available under state law." *Id*. at 1368. Here, likewise, Uthe's acceptance of payment of the limited Singapore award from one set of defendants left open the possibility that United States law would provide a remedy against another set of defendants greater than was available under Singapore law.

And, of course, we cited (at AOB 29) Judge Tashima's decision in *In re Nat'l Mortg. Equity Corp. Mortg. Pool*, 636 F. Supp. 1138 (C.D. Cal. 1986), where he ruled:

> [H]ere, the Investor Institutions' actual damages were completely, rather than only partially, satisfied. However, that factual distinction does not alter the analysis, because the critical factor is that the "full satisfaction" to which treble damage claimants are entitled is "three times the proven actual damages"—any award less than that amount constitutes an incomplete recovery. *Id*. at 1152 (emphasis added).

3. Respondents' Distinction Is Inconsistent With The Policies Underlying RICO's Treble Damage Remedy.

At AOB 31-37, we noted that cases recognize three purposes behind RICO's treble damage remedy: to deter racketeering, to supplement the

Attorney General's enforcement efforts, and to compensate plaintiffs for damages that are difficult to prove. We then demonstrated that the district court's novel approach would undermine all three of these purposes.

Respondents supply no response to these points—apparently because there is none.

B. THERE IS A TRIABLE ISSUE OF FACT ON THE CONTINUITY ISSUE.

At RB 45, Respondents argue that the summary judgment should be affirmed because the evidence failed to meet RICO's "continuity" requirement.

The trial court found it unnecessary to rule on this claim, because the court granted summary judgment on Respondents' single satisfaction argument. Therefore, this Court should not affirm on this basis. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). *See also New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1092 n.1 (9th Cir. 2011).

If this Court does choose to rule on this issue, it should reject Respondents' claim because there is a triable issue of fact as to continuity.

1. The Law.

18 U.S.C. §1962, subsection c (2014), provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1961, subsection 5 (2014), provides that "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . ."

There must be a relationship between the acts. "[A] relationship exists among acts that have 'the same or similar purposes, results, participants, victims, or methods of commission . . . .'" *Sun Sav. and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 192 (9th Cir. 1987). Respondents' acts have the same purpose (to steal Uthe's business) and the same participants. But Respondents contend that there was no "pattern" here.

The purpose of the pattern requirement is "to prevent the application of RICO to the perpetrators of 'isolated' or 'sporadic' criminal acts." *Id.* at 192. But "it is not necessary to show more than one fraudulent scheme or criminal episode to establish a pattern . . . . [C]ontinuity exists if the predicate acts are not isolated, *i.e.*, if the predicate acts posed a threat of continuing activity." *Id.* at 193 (internal citations omitted).

The required continuity might be either "open-ended" or "closed-ended". In *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995), this Court explained:

> To prevail under RICO, plaintiffs must establish that the predicate acts were continuous. This can be done either by pleading "closed-ended continuity" or by pleading "open-ended continuity." Closed-ended continuity refers to a closed period of repeated conduct. It is established by showing that the predicate acts occurred over a substantial period of time. If closed-ended continuity cannot be established, plaintiffs may plead open-ended continuity. Open-ended continuity refers to past conduct that by its nature indicates a threat of future criminal conduct. It

> is established by showing either that the predicate acts specifically threaten repetition or that they were an ongoing entity's regular way of doing business. *Id*. at 1526.

In the present case, because this issue arises in the context of summary judgment, the evidence must be viewed "in the light most favorable to the non-moving party." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). And because "RICO is to be read broadly" (*Sedima S.P.R.L. v. Imrex Co*., 473 U.S. 479, 497 (1985); *Sun Savings*, *supra*, 825 F.2d at 191), any doubts should be resolved against summary judgment. And finally, the continuity requirement is generally considered an issue of fact for the jury. *U.S. v. Pelullo*, 964 F.2d 193, 210 (3rd Cir. 1992) ("Ultimately, of course, continuity is a factual issue for the jury"); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 769 (8th Cir. 1992) ("Ultimately, the existence of a pattern is a question of fact").

2. Respondents Committed At Least Two Predicate Acts.

At least two predicate acts plus "the threat of continuity" are sufficient to meet the continuity requirement. *Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990).

The evidence shows that Respondents committed more than two acts of racketeering activity. In the July 1992 phone call, Aetrium agreed with the Singapore conspirators to commit four acts:

> (1) that Aetrium would withhold commissions that were earned by and payable to Uthe Singapore on the sale of Aetrium products so that they would not show up on Uthe Singapore's books; (2) to secretly alter the terms of Aetrium's distribution contract with Uthe Singapore so that it could be quickly terminated and switched over to a new shell company if necessary; (3) divert orders from customers away from Uthe Singapore; (4) conceal everything from Uthe USA and Mr. Goodson.
> ER 129-130.

And Respondents delivered on these promises. Aetrium executive Daniel Koch admitted that the exclusive dealership agreement between Aetrium and Uthe Singapore (which could be terminated only for breach) "was replaced by a contract in 1992" that could be terminated for any reason with only 30 days notice. ER 119-120. And Mr. Koch also admitted that, in 1992, Aetrium took orders directly from customers in Asia, bypassing Uthe Singapore:

> Q: So there were times when the customer would pay Aetrium directly?
>
> A: There may have been, yes.
>
> Q: Do you recall that there were situations like that?
>
> A: Yes, I do. Obviously in 1992 there were times when Aetrium was paid directly by the customer. ER 114-115.

And Aetrium fulfilled its promise to conceal the scheme from Mr. Goodson, who did not learn of it until he received an anonymous letter telling him about it. ER 357.

3. There Is A Triable Issue of Fact Regarding Whether Respondents Committed Open-Ended Racketeering.

Uthe's evidence showed that Respondents and their co-conspirators intended their scheme to operate well into the future: stealing business, purchase orders, and payments from Uthe's Asian customers for years to come. Concealing the plan from Uthe was essential, but Uthe eventually found out and filed this lawsuit. But for Uthe's discovery of the conspiracy, Aetrium and the Singapore conspirators would have continued to divert orders and customers. This was a classic open-ended racketeering conspiracy.

(a) Uthe Did Not Waive This Issue.

At RB 16, Respondents imply that Uthe waived this claim by failing to allege it in their Second Amended Complaint ("SAC"). Respondents state, "The court found that Uthe USA had not pleaded open-ended continuity because the Second Amended Complaint clearly alleged a single-goal conspiracy that was fully accomplished when Uthe USA was forced to sell Uthe Singapore in October 1992."

But an examination of the District Court's ruling shows that it held nothing of the kind.[1]

[1] Here, in its entirety, is the District Court ruling on the RICO issue:

> Defendants argue that plaintiff cannot meet RICO's pattern or enterprise continuity requirement. The Supreme Court has held that continuity can be demonstrated by proving either "a series of related predicates

In fact, the SAC alleged that "AETRIUM and ALLEN worked with the UTHE SINGAPORE PRINCIPALS to create a secret Singapore corporation, destroy UTHE's Singapore subsidiary and divert UTHE's Singapore clients and revenue to the new corporation, and conceal everything from UTHE." ER 585, lines 14-17.

This broad allegation includes both closed-end racketeering ("create a secret Singapore corporation") and open-ended racketeering ("divert UTHE's Singapore clients and revenue to the new corporation, and conceal everything from UTHE").

> extending over a substantial period of time" or "past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc. v. NW Bell Telephone Co.*, 492 U.S. 229, 241–242 (1989).
>
> Since the plaintiff has alleged that the defendants' goal was to destroy plaintiff's subsidiary, based on the pleadings, there was no threat of activity continuing beyond the conclusion of plaintiff's sale of stock in its subsidiary. At issue is whether defendants' actions extended over a substantial period of time. Defendants argue that plaintiff alleged that the scheme lasted six months which, they say, cannot be considered a "substantial period" of time. The Supreme Court has held that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this [continuity] requirement." *Id.* at 242. Our court of appeals, however, has not adopted a bright-line rule as to what constitutes a "substantial period." *Allwaste, Inc. v.* [*Hecht*], 65 F.3d 1523, 1528 (9th Cir. 1995). Accordingly, it cannot be determined at the pleading stage, as a matter of law, that a six-month period does or does not constitute a "substantial period" of time. Defendants' motion to dismiss claim six is DENIED.
> ER 574-575.

(b) Uthe's Evidence Shows That Respondents Engaged in Open-Ended Racketeering.

There was evidence that Respondents and their co-conspirators intended their scheme to operate into the future, which is enough to show open-ended continuity under this Court's precedents. Also, there was evidence that the scheme did in fact operate into the future, and that the scheme ended only because the schemers were caught.

(i) A Reasonable Jury Could Find That The Co-Conspirators *Intended* Their Scheme To Operate Into The Future.

Open-ended continuity is established by "a specific threat of repetition extending indefinitely into the future." *Allwaste, Inc., supra*, 65 F.3d at 1527. That is exactly what happened here.

At RB 53-54, Respondents assert that "the alleged *goal* of this conspiracy was singular—destroy Uthe USA's Singapore subsidiary." There was evidence, however, of a larger and longer goal. Katherine Yip testified that the conspirators hoped execution of their plan would force Mr. Goodson to sell the USTPL stock to them, but if that didn't work, they had further ambitions. "That is why we set up a secret shell corporation in 1992—to divert Uthe Singapore orders to and continue the business of distributing products to Uthe Singapore customers in the event that Uthe Singapore remained under the control of Uthe USA. Taking over Uthe Singapore was never the end goal of the conspiracy, it

was simply a step in the plan to profit by keeping all of the business and profits from that company for ourselves." ER 131, lines 4-7. Either way, "The planned partnership with Aetrium, including the servicing of Uthe Singapore clients, was intended *to continue indefinitely into the future*." ER 130, lines 10-11 (emphasis added).

The fact that the conspirators succeeded in gaining control of USTPL does not matter. In *U.S. v. Walker*, 653 F.2d 1343, 1350 (9th Cir. 1981), this Court held: "But the fact that the 'central objective' of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy. Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such an agreement may reasonably be inferred, the conspiracy may be found to continue."

The conspirators did not care whether they stole Uthe's business by destroying USTPL, by acquiring USTPL, or by side-stepping USTPL. They cared about the *result*: to make new, multiple deals in the future with Uthe's many Asian customers.

Aetrium facilitated those overseas deals from the United States through a pattern of fraudulent conduct and communications amounting to repeated acts of mail and wire fraud, as alleged in the Complaint and described in the

Opposition to the Motion for Summary Judgment. Aetrium's fraudulent acts to facilitate the diversion of UTHE customers would have continued, but for the fortuitous sale of USTPL, and therefore help establish the requisite open-ended continuity.

Aetrium knew about and facilitated this planned diversion of business through predicate acts of mail and wire fraud:

> As part of this plan, in early July 1992, I [Yip] participated in a phone call with the Uthe Singapore officers and Aetrium President Joseph Levesque, and other executives from Aetrium. * * * * [T]he Aetrium persons on the call, including Mr. Levesque, specifically and verbally agreed: (1) that Aetrium would withhold commissions that were earned by and payable to Uthe Singapore on the sale of Aetrium products so that they would not show up on Uthe Singapore's books; (2) to secretly alter the terms of Aetrium's distribution contract with Uthe Singapore so that it could be quickly terminated and switched over to a new shell company if necessary; (3) divert orders from customers away from Uthe Singapore; (4) conceal everything from Uthe USA and Mr. Goodson. ER 129-130 (Yip Decl. ¶5).

Aetrium's involvement in the plan was confirmed by Uthe CEO Michael Goodson, who phoned Harry Allen in August of 1992:

> I point blank asked Mr. Allen if he knew anything about it and he said he was not aware of any effort by UTHE Singapore's officers to create any secret corporation. I subsequently learned, through the testimony of one of Aetrium's co-conspirators in the Singapore arbitration, that Mr. Allen's statement was false. Not only was he aware of the effort to create the secret corporation, he and other executives of Aetrium had participated in the effort from the beginning of the conspiracy. ER 357, lines 12-17.

Where "the object of a conspiracy is economic, the conspiracy generally 'continues until the conspirators receive the anticipated economic benefits.'" *U.S. v. La Spina*, 299 F.3d 165, 175 (2d Cir. 2002).[2] In the present case, the "anticipated economic benefits" would last far into the future, as long as the co-conspirators could continue to steal business from Uthe's Asian customers, a conspiracy that Aetrium facilitated and encouraged from the United States.

(ii) A Reasonable Jury Could Find That The Scheme *Did In Fact* Operate Into The Future.

Co-conspirator Katherine Yip testified: "In July 1992, with the knowledge, approval and assistance of Aetrium and Mr. Allen, I began the process of diverting business away from Uthe Singapore." ER 130, lines 12-13.

And after Yip and her colleagues bought USTPL from Goodson at a steep discount, the conspirators continued to service Aetrium customers and accept payments that would have gone to Uthe. The scheme did not culminate until the summer of 1993, when Goodson learned of it and filed suit. ER 131 (Yip Decl. ¶9).

[2] And a conspiracy to commit theft is not ended on completion of crime if fruits are still to be divided. *U.S. v. Walker, supra*, 653 F.2d at 1350.

(iii) A Reasonable Jury Could Find That The Scheme *Ended Only Because The Schemers Were Caught.*

In *Allwaste, Inc., supra,* this Court endorsed the position taken by the Sixth Circuit:

> In *United States v. Busacca,* 936 F.2d 232, 238 (6th Cir. 1991), the Sixth Circuit held that fortuitous interruption of criminal acts does not preclude a finding of open-ended continuity. Long-term criminal conduct may be interrupted, *inter alia,* by termination, the commencement of the RICO action, arrest, indictment, or guilty verdict. *Id.*
> * * * *
> Similarly, in the instant case, Defendant Hecht's and Defendant Henebury's willingness to participate in the kickback scheme and their affirmative misrepresentations regarding transportation costs demonstrate that if they had not been fortuitously interrupted by termination, the predicate acts could have recurred indefinitely. Therefore, Allwaste's allegations as to Hecht and Henebury satisfy the open-ended continuity requirement. 65 F.3d at 1529-30.[3]

The same thing happened here. Katherine Yip testified: "If Mr. Goodson had not discovered the conspiracy to divert orders and contracts away from

[3] *See also Allwaste, Inc., supra* (kickbacks would have continued occurring *but for* the firing of the perpetrator); *Ikuno v. Yip, supra,* 912 F.2d 306 (filing two false reports sufficient for open-ended continuity where there was no evidence that the wrongful behavior would have ceased but for the closure of the fraudulent business); *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989) (signing of settlement agreement between all parties did not eliminate possibility of open-ended continuity); *Sun Savings, supra*, 825 F.2d at 194 n.5 (threat of continuing activity even though "the last of a series of predicate acts may have completed the criminal scheme").

Uthe Singapore, we would have kept it secret from him to this day and continued to service customers and withhold payments." ER 131, lines 16-19.

4. There Is a Triable Issue of Fact Regarding Whether Respondents Committed Closed-Ended Racketeering.

"Closed-ended continuity refers to a closed period of repeated conduct. It is established by showing that the predicate acts occurred over a substantial period of time." *Allwaste, Inc., supra*, 65 F.3d at 1526.

At RB 57, Respondents argue that Aetrium participated in the scheme for only four months until the conspirators took over USTPL, and that this is not "a substantial period of time." Respondents' four months argument is based on the assumption that Aetrium's participation began with its July 1992 phone call with the Singapore conspirators,[4] and ended when the conspirators acquired USTPL in October of 1992.

[4] Arguably, the beginning date might be April 1992, when the Singapore conspirators had hatched their scheme. Katherine Yip testified: "The plan began in about April 1992, when myself and the other principals of Uthe Singapore, including Kwan Seik Cheong, Chow Yoke Keng and Chua Chow Tien (collectively, the 'Uthe Singapore officers'), began discussing a plan to take over Uthe Singapore's business and cut out Uthe USA and its principal, Mr. Michael Goodson." ER 129, lines 17-21. One who joins an ongoing conspiracy becomes responsible for that conspiracy from its inception. *See, e.g., Skelly v. U.S.*, 76 F.2d 483, 489 (10th Cir. 1935) ("We conclude that when Berman and Skelly, with knowledge of the conspiracy and its unlawful purpose, agreed to join it and commit such acts as accessories after the fact, they thereby became parties to the conspiracy with the same effect as if they had joined in at its inception"). There is, however, authority indicating that under RICO, each

But the ending date is not October of 1992, but August of 1993, when Uthe filed suit and Aetrium removed to Federal Court. ER 868 (Docket No. 1). Yip testified that "The conspiracy, including the agreement between Uthe Singapore and Aetrium to keep everything that we had done hidden from Uthe USA and Mr. Goodson, was exposed sometime in the summer of 1993, when Aetrium, Mr. Allen, myself and the other Uthe Singapore officers were sued in the United States by Uthe USA. Mr. Goodson's discovery of the conspiracy and the lawsuit is what brought it to an end . . . ." ER 131, lines 11-15.

Thus, the racketeering lasted for more than a year. This is sufficient to permit a jury to find that the "substantial period of time" requirement of a closed-end conspiracy was satisfied. In *Allwaste*, this Court rejected an argument that a minimum of one year was required. "[A] bright line, one-year rule undermines *H.J. Inc.'s* principle that flexibility rather than rigidity should govern the application of RICO." 65 F.3d at 1528. And the Court went on to find that the evidence supported a finding that the racketeering lasted for thirteen months, and such a showing "would have demonstrated that the criminal activity spanned a 'substantial period of time' and, therefore would

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defendant's participation is measured only from the time he joins. *See De Falco v. Bernas*, 244 F. 3d 286, 322 n.22 (2d Cir. 2001).

have satisfied the continuity requirement." *Ibid*. *See also Swistock, supra*, 884 F.2d at 759 (fourteen months sufficient for closed-end continuity).

III. CONCLUSION

Uthe has not yet had the opportunity to seek the remedy that Congress deemed important when it enacted RICO: treble damages. The case should be allowed to proceed to trial. The summary judgment should be reversed.

Dated: June 4, 2014

Respectfully Submitted,

/s/ Myron Moskovitz

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ELECTRONIC FILING ATTESTATION

I, Joshua R. Benson, am the ECF user whose ID and password are being used to file the foregoing Reply Brief for Plaintiff-Appellant. I hereby attest that Myron Moskovitz has concurred in this filing.

/s/ Joshua R. Benson

JOSHUA R. BENSON

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Circuit Rule 32-1, the undersigned hereby certifies that this Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the Reply Brief contains 5,335 words.

2. The Reply Brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Joshua R. Benson

JOSHUA R. BENSON