

**American Express Travel Related Serv. Co., Inc. v
Frontline Communications Intl., Inc.**

2009 NY Slip Op 33392(U)

April 2, 2009

Sup Ct, New York County

Docket Number: 102360/05

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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AMERICAN EXPRESS TRAVEL RELATED
SERVICE COMPANY, INC.

Plaintiff, Index # 102360/05

-against-

FRONTLINE COMMUNICATIONS INTER-
NATIONAL, INC., HAL & DALE MARKETING,
INC., DAVID BERSSON, MELVIN COOPER,
DAVID COOPER, RICHARD PINO and JEROME
GOLDMAN

Defendants.

-----x

YORK, J.:

Motions 003, 004 and 005 are hereby consolidated for
disposition.

In this action which arises out of charges made to
Frontline Communication, Inc.'s (Frontline) American Express
account, ostensibly for services provided by codefendant Hal &
Dale, Inc. (Hal & Dale), Frontline, its CEO and owner, Melvin
Cooper, and its Vice President and owner, David Cooper, move for
an order (motion 003) dismissing the third (unjust enrichment)
and ninth (conversion) causes of action set forth in American
Express Travel Related Services Company, Inc.'s (American
Express) amended complaint on the ground that such claims are
barred by the 3 year statute of limitations; and the fifth
(fraud), sixth and eighth (both of which allege RICO violations)
causes of action on the ground that they fail to state a cause of
action. In addition, Frontline seeks dismissal of the tenth

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cause of action, which is asserted only against it, and alleges that it tortiously interfered with American Express's contract with Hal & Dale. Frontline also seeks an order compelling American Express to accept late service of its amended answer. Defendant Richard Pino, Frontline's CFO, moves (motion 004) for the same relief, on essentially the same grounds urged by David and Melvin Cooper. Pro se defendant Jerome Goldman, who is alleged to be Frontline's in-house counsel and an officer and director of Hal & Dale, also moves (motion 005) for the same relief sought by the Coopers. American Express opposes the motions and cross moves for a default judgment against Frontline.

Background

Frontline is a corporation, established in about 1998, that is in the wholesale telecommunications business and "engages in carrier-to-carrier sales for the international long distance market." Amended Complaint ¶ 12. In February 2005 American Express commenced this action solely against Frontline, alleging in essence that it failed to pay, pursuant to its corporate purchasing card agreement with American Express, its credit card bill in the amount of \$1,215,782.50. The complaint, which sought to recoup that amount, plus interest, costs and attorneys' fees, asserted claims for breach of contract, account stated and unjust enrichment. A summary judgment motion made in May 2005 on behalf of American Express was denied by decision dated December 6,

2005, because, inter alia, issues of fact were found to exist and, because of the early stage of the proceeding, discovery was needed.

During the pendency of the action, American Express discovered what it claims was a factoring scheme among Frontline, its executives, owners and in-house counsel, Goldman, Hal & Dale and its alleged officer and director, also Goldman. Factoring occurs when an American Express cardholder makes purchases through its own, related merchant accounts, or merchant accounts of a related entity, without there having been an actual purchase of services or goods. This has the effect of funneling money from American Express to the cardholder through the related merchant, thereby giving the cardholder the use of American Express's funds.

American Express then filed an application, on July 31, 2006, for leave to amend the complaint to assert additional causes of action and to add Melvin and David Cooper, Hal & Dale, Goldman, Pino and David Bersson, alleged to be Frontline's president, and the person for whom American Express's monthly Corporate Purchasing Cardmember Reports were prepared as reflected in the reports, as defendants. A copy of the proposed supplemental pleadings was attached to the application. That application was granted by order signed on January 14, 2008 and entered on January 22, 2008. Frontline was served with the

supplemental pleadings on February 1, 2008, and the action was commenced against the remaining movants.

According to the amended complaint, in early August 2003 American Express advised Frontline, which not only was an American Express cardholder but also had a merchant account with it, that Frontline had been engaged in improper factoring transactions at its own merchant location by making charges on its own corporate purchasing card account (No. 3787-304070-31000) (the CPC Account), which it had opened in August 2003. In addition Frontline made purchases on the CPC Account with another merchant, 21st Century Capital LLC, located at Frontline's business address. According to American Express, the agreement that Frontline had entered into with American Express when it opened the CPC Account, required Frontline to use that account solely for the bona fide purchase of goods and services. The agreement allegedly provided that American Express could establish spending limits on the card, and according to American Express, it determined that Frontline could incur no more than \$390,000 during any one billing cycle. After advising Frontline that it had improperly engaged in factoring, American Express recouped the funds improperly obtained by Frontline and warned it never to engage in such activity again.

The amended complaint alleges, on information and belief, that in order to overcome that restriction, beginning on August

8, 2003, Frontline and the individual and corporate defendants constituted an enterprise and knowingly and intentionally devised a scheme to engage in factoring. The amended complaint alleges that the defendants agreed to conduct and directly and indirectly participate in the conduct of the enterprise's affairs, and that the defendants controlled both corporate defendants. It is further claimed that defendants used the device of Hal & Dale, a Florida corporation, allegedly controlled by Goldman and "under common control with Frontline" (Amended Complaint, ¶ 23), to continue to engage in factoring. It is alleged that on August 8, 2003 Hal & Dale, with the intent to engage in illegal factoring, applied to open a merchant account with American Express, misrepresenting that it was engaged in the telecommunications business. Its application was granted, and Hal & Dale allegedly agreed to the terms of an American Express agreement which barred it from processing charges for amounts that did not reflect the sale of bona fide goods or services. It is alleged that the account was obtained by false pretenses and that Hal & Dale intended to use the account to engage in illegal factoring.

It is claimed that between December 2003 and December 2004 Frontline charged more than \$3.5 million, involving about 40 charges, to its CPC Account for alleged purchases from Hal & Dale, which processed the charges for the nonexistent services using the interstate wires and/or mails for each credit card

transaction. A review of the monthly Cardmember Reports reveals that Frontline regularly made charges on the CPC Account, many close to its monthly credit limit of \$390,000, and paid them off, although not always timely. While the Cardmember Reports initially showed charges to a variety of merchants, starting in November 2003, all the charges were, according to the Cardmember Reports, for "General Service" provided by Hal & Dale.

As is relevant with respect to charges which were not paid in full, a review of the reports reveal that Frontline incurred charges of close to \$390,000 in June 2004, which were reflected in the Cardmember Report that bore a July 2, 2004 closing date. On or about July 26, 2004 that amount was paid in full by check countersigned by D. Cooper and Bersson. Other checks relating to Hal & Dale transactions were allegedly co-signed by Bersson and D. Cooper. With respect to the July 2004 check, Frontline did not have sufficient funds in its bank account to cover it. Pino allegedly advised American Express on August 6, 2004 that the check might not clear because Frontline had transferred funds out of its bank account. By August 27 American Express had presented that check twice but it was returned for insufficient funds. The next Cardmember Report, which had a closing date of August 2, 2004, reflected the payment of the July charges and indicated that new charges of about \$385,000, attributable to Hal & Dale, had been incurred in July. The next Report, which had a closing

date of September 1, 2004, reflected that the July charges had not been paid and that on August 3, 2004, a day after the closing of the previous report, Frontline had incurred charges attributable to Hal & Dale in the amount of \$387,000. That report reflected a delinquency charge of about \$11,000 plus the July and August charges. The amended complaint alleges (at ¶ 36) that Frontline's account was suspended on or about August 27, 2004. However, as reflected in a phone record of apparently October 20, 2004 American Express was still contemplating whether to set a new credit limit or completely close the account. On September 17, Frontline was rebilled for the June charges, and the Cardmember Report shows delinquency charges, as well as the charges incurred in June, July and August, for a total of close to \$1,200,000. This was reflected in the October Cardmember Report. Between August and October 2004 Frontline made two \$25,000 payments to American Express, but failed to pay the rest of the balance.

From American Express's notes of phone calls, which were appended as an exhibit to the amended complaint, it is claimed that Frontline officers in an attempt to be able to continue their sham transactions and avoid the cancellation of the accounts, represented that the reason they were having difficulty paying was that they had made overpayments to vendors, which they expected would be returned, enabling them to pay American

Express. According to the amended complaint, American Express's phone records showed multiple conversations and calls between it and Bersson and Pino relative to transactions with Hal & Dale and Frontline's delinquency in paying. For example, a phone message was left for Pino in August 20, 2004, advising that the July 26 check (relating to the June charges) had been returned, that American Express needed a commitment for the amount incurred in July and that American Express had not suspended the account due to Pino's "proactive attempt to resolve." On September 10, 2004 Pino allegedly stated that he was still attempting to get back the approximately \$850,000 paid to the other company. Also the phone record of September 22, 2004 recited that Bersson had stated that they were working to get the money from the customer. Pino, in September 2004, allegedly in attempt to hamper American Express's investigation, is claimed to have advised American Express, as reflected in the phone records, that Hal & Dale had provided marketing and telecom services and that Frontline was not affiliated with Hal & Dale.

Meanwhile, American Express began to have suspicions when it realized that the only charges made to Hal & Dale's merchant account were from one customer only, Frontline, a "hallmark" of factoring schemes. American Express investigated, and obtained Hal & Dale's certificate of incorporation, which listed Goldman as an officer and director and its registered agent. When

Frontline submitted papers in opposition to the earlier summary judgment motion, there was a reference by Bersson to Goldman being Frontline's in-house counsel, thereby leading American Express to believe that a factoring scheme had occurred.

The amended complaint charges all the named defendants with carrying out the factoring scheme, asserts that they carried it out for their personal gain and benefit, and alleges that they were unjustly enriched and committed fraud, conversion and violations of RICO, pursuant to 18 U.S.C. 1962 (c) and (d), predicated on acts of mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343 and access device crimes under 18 U.S.C. § 1029. It also alleges that Frontline and Hal & Dale induced each other to breach their respective contracts with American Express. The amended complaint continues the causes of action asserted against Frontline in the original complaint, albeit with additional bases arising from the allegations related to the factoring scheme. The amended complaint further alleges that Goldman, in September¹ 2005, resigned from the Florida Bar for misusing clients' trust funds.

On February 19, 2008, 19 days after Frontline was served by mail with the amended complaint, which had appended to it as

¹ The actual date that he resigned was evidently December 22, 2005. He further resigned from the New York Bar evidently because he was unable to defend against claims that he had gambled away clients' funds.

exhibits various Cardmember Reports and American Express's records of phone conversations with Frontline's representatives, Jeffrey Blankstein was substituted in place of Frontline's former counsel, who had not answered the amended complaint. Blankstein requested an adjournment of a conference scheduled for March 5, and by stipulation of the parties was granted an adjournment to March 19. Blankstein asserts that he assumed that the adjournment would cover his time to serve an answer. At the March 19 conference American Express's counsel advised Blankstein that he was in default for failing to serve an answer, and that the default would be excused if Blankstein provided discovery (former counsel's responses to discovery requests were mostly uninformative) and an affidavit of merit; otherwise, American Express intended to move for a default judgment.

The Instant Motions

This precipitated Frontline's application for leave to serve a tardy answer. That application was supported by Blankstein's affirmation in which he stated that the delay was minimal and should be excused because there was a ~~mis~~understanding on his part that the adjournment of the conference also constituted an adjournment of Frontline's time to answer, that there was no prejudice to American Express, and that because Frontline never showed an intent to abandon the action, the delay should be excused. Blankstein asserted that Frontline has a meritorious

defense because, shortly after the action was commenced in 2005, summary judgment was denied to American Express, and because the newly asserted causes of action were inadequately pleaded against Frontline (as well as against Melvin and David Cooper) as urged in the application to dismiss the various causes of action, and, in the case of the conversion and unjust enrichment causes of action, because they were barred by the three year statute of limitations.

It is claimed that any conversion took place at the latest in December 2004, and that since this action was not commenced against the "individual defendants" ² (see Frontline memo of law, p. 9) until 2008, that claim is time-barred, and that for the same reason the unjust enrichment claim is time-barred. It is further claimed that the tortious interference with contract claim asserted against Frontline is improperly pleaded because the amended complaint fails to allege facts setting forth how Frontline procured the breach of Hal & Dale's contract with American Express. As to the fraud cause of action, Blankstein maintains that each of his client's participation in the claimed fraud is inadequately set forth. Blankstein also asserts that the two RICO causes of action are inadequately pleaded as to his

²Frontline's memo of law refers only to the commencement in 2008 of the action against the individual defendants, but the notice of motion seeks dismissal on statute of limitations grounds as to Frontline as well as to the Coopers.

clients in that neither an open-ended nor a closed-ended pattern of racketeering has been alleged, the amended complaint fails to sufficiently particularize the requisite RICO predicate acts as to each of his clients and because no fraudulent intent can be inferred from the allegations of the amended complaint.

In response to Frontline and the Coopers' motion, Pino moved for dismissal of the same causes of action asserted against him as were asserted against the Coopers on essentially the same grounds sought by the Coopers. American Express opposed both motions and cross moved for a default judgment against Frontline, asserting that Blankstein's excuse for not timely serving an answer was unreasonable and that merely baldly alleging that a summary judgment motion had been denied is inadequate to establish a meritorious defense in the face of an amended complaint with new allegations. American Express also asserted that the fraud cause of action was adequately pleaded, that it is unnecessary at this stage of the proceedings in a case such as this to specify the precise role of each corporate officer and that the pleading sufficiently apprises the defendants of the substance of American Express's claims. American Express further maintained that the amended complaint's tortious interference claim adequately pleaded how Frontline procured the breach of contract, here where the amended complaint alleges that the defendants entered into a factoring scheme just after

Frontline was specifically warned not to do so with respect to its own account and another one located at its address, that Hal & Dale entered into its agreement with American Express to participate in that scheme, that defendants knew or should have known that it was a violation of Hal & Dale's agreement to accept charges that were not for the bona fide sale of goods or services, and that Frontline "encouraged and induced Hal & Dale to breach its contract with American Express" (Amended Complaint at ¶ 112). American Express further asserted that its conversion and unjust enrichment claims are not barred by the three year statute of limitations because, inter alia, while the movants alleged in their papers that these two causes of action accrued somewhere between August and December 2004 (see Blankstein aff. at ¶ 8; Lawler aff. at ¶ 5), the statute of limitations was tolled for approximately 18 months between the time American Express filed, on July 31, 2006, its application to amend the complaint to add parties and additional causes of actions, and the entry of the order on January 22, 2008, granting that application, thereby rendering these causes of action timely. American Express, while not denying movants' claim that it has inadequately pleaded a closed-ended RICO conspiracy (see American Express memo of law of 6/10/08), asserted that it has sufficiently pleaded an open-ended conspiracy.

In reply, Frontline and the Coopers, who effectively

conceded that group pleadings are permissible with respect to the fraud cause of action, added a new ground for dismissal of the fraud claim, namely that a breach of contract claim cannot be converted into a fraud claim by the mere allegation that Frontline did not intend to perform its agreement with American Express (see Frontline reply memo). In reply to American Express's cross motion, Frontline also provided the "affirmation" of Mel Cooper who urged that the earlier denial of summary judgment collaterally estopped American Express from arguing that Frontline lacked a meritorious defense. Cooper maintained that on the earlier motion it was urged that there was a legitimate dispute over what was owed. Cooper further asserted that American Express "may" have been partly at fault for permitting Frontline to exceed its credit limit. See M. Cooper aff. at ¶ 3. Cooper alleged, as to the new causes of action, that he had no knowledge of any wrongdoings, of Goldman's alleged wrongdoings or of Hal & Dale's alleged wrongdoings, and that Hal & Dale was a company separate and apart from Frontline. He further asserted that he was surprised by the allegedly fraudulent charges submitted by Hal & Dale and that "if" Hal & Dale's bills "were fraudulent, Frontline was as in the dark as American Express." *Id.* at ¶ 5. Cooper also asserted that American Express's complaints about Frontline's failure to provide discovery regarding its transactions with Hal & Dale are without merit

because American Express's receipts show that they were for marketing services, "which by their nature [are] intangible." *Id.* at ¶ 6. Finally Cooper claimed that Frontline was unaware of any contract between Hal & Dale and American Express. *Ibid.* Neither Frontline, the Coopers, nor Pino in their reply papers denied American Express's claim that the conversion and unjust enrichment causes of action are timely because of the toll provided between the filing of the application to amend and the entry of the order granting that application.

Following the submission of the foregoing papers Goldman moved to dismiss the claims asserted against him "for basically the same reasons" cited by his codefendants, and added that no acts are alleged against him in the pleadings which would support the claims asserted against him. He also maintained that there are no claims that he made any misrepresentation to American Express, that he sent checks to it or that he performed acts related to the RICO claims. He also stated that, as Frontline's in-house counsel, he was an independent contractor, and that he was not an officer or director of Hal & Dale when the alleged acts "took place" (Goldman aff. at ¶ 4). Goldman then noted that the amended complaint alleges that he controlled Hal & Dale, but Goldman did not specifically deny or comment on that allegation, other than to assert that he was not an officer or director at the relevant time.

In response to Goldman's motion, American Express asserts that the complaint is adequately pleaded and sufficiently puts him on notice of the claims asserted against him, that defendants have exclusive knowledge of the details of the alleged fraud so as to prevent American Express at this stage of the action, where discovery has not been provided, from setting forth more specific allegations, and that for purposes of RICO it is unnecessary to allege that each defendant personally participated in the predicate acts.

Discussion

The branch of Frontline's motion which seeks leave to serve a late answer is denied. While Blankstein's reason for not serving a timely answer arguably amounts to excusable law office failure, the showing of merit is inadequate. That summary judgment was denied at an early stage of the action when Frontline had not been given discovery that it claimed it needed, does not avail Frontline now, years after that motion was decided, since there is an absence of an assertion by Frontline that it still has not received the necessary documentation. Also, Bersson in opposing the earlier summary judgment motion alleged that Frontline could not fathom the charges billed by American Express in October 2004. However it is readily apparent from the amended complaint and the exhibits attached thereto that those charges were comprised of those incurred in June 2004,

which Frontline in fact tried to pay by a check which was ultimately dishonored, and the July and August charges, each of which did not exceed the amount Frontline was permitted to incur each month. Thus the fact that summary judgement was previously denied does not establish a potentially meritorious defense.

More importantly, the amended complaint contains new allegations, which have not been adequately addressed by Frontline or by the "affirmation" of Mel Cooper. That Cooper personally claims not to have been aware of the alleged misdeeds, does not mean that Frontline, through its other officers and owner, did not engage in them. No affidavit is provided by its president, Bersson, who allegedly cosigned the checks sent to American Express for charges incurred from Hal & Dale, and who according to the phone records, attached as part of the amended complaint was allegedly in communication with American Express about payments owed. No affidavit is provided from David Cooper, its owner and vice-president, who is also alleged to have cosigned the checks sent to pay the Hal & Dale charges. No affidavit is provided from Pino, Frontline's CFO, who according to the complaint and phone call records attached to the complaint, was involved in numerous discussions with American Express over the outstanding bills, the nature of the services Hal & Dale allegedly provided to Frontline, which he allegedly advised were "marketing and telecom services" (Amended Complaint,

exh 2) and the nature of Frontline's relationship to Hal & Dale. There is no explanation as to why Frontline, after the numerous discussions, provided two additional \$25,000 payments to American Express between August and October 2004. A phone record appended to the complaint indicates that Bersson informed American Express that he was sending a \$25,000 payment. Further, there is no explanation as to why, as alleged in the amended complaint, Frontline represented to American Express that Frontline's delay in paying the outstanding bill was due to an overpayment to one of Frontline's vendors, and that once that overpayment was recouped Frontline would be able to pay the balance owed to American Express. This allegation is supported in part by a phone record attached to the amended complaint, documenting a conference call among American Express, Bersson and Pino. Frontline does not claim that it attempted to obtain the affidavits of David Cooper, Pino and Bersson, but that such attempt was futile. Further, for the reasons stated hereinafter, Frontline's claim that a potentially meritorious defense has been shown, in that various causes of action are insufficiently pleaded against it or are time-barred, is without merit. In light of the foregoing Frontline's application for leave to serve a late answer is denied.

The branch of the cross motion, which seeks a default judgment against Frontline, is denied without prejudice to

renewal on appropriate papers. The amended complaint is not verified, and is to a large extent made on information and belief, and, the cross motion is not supported by an affidavit by one with personal knowledge of the facts establishing the merit of American Express's claims and the amounts due thereon. See CPLR 3215 (f); *Saks v New York City Health and Hospitals Corporation*, 302 AD2d 213 (1st Dept 2003); *Grainger v Wright*, 274 AD2d 549 (2d Dept 2000); *Zelnick v Bidermann Industries U.S.A., Inc.*, 242 AD2d 227 (1st Dept 1997).

As previously discussed, Frontline is still in default and its application for leave to serve a late answer has been denied. Thus, the branches of its application which seeks to dismiss various causes of action as to it will not be entertained except to note that a potentially meritorious defense has not been established.

The branch of the motions which seek dismissal of the conversion and unjust enrichment causes of action on statute of limitations grounds lacks merit as to all movants and is denied as to Goldman, Pino, David Cooper and Melvin Cooper. As previously noted, Frontline was served with the amended pleadings on February 1, 2008, and a review of the County Clerk's file in this action reveals that the newly added moving defendants were served with process during the first week of March 2008, after the amended pleadings were filed. Further, defendants do not

deny that the statute of limitations was tolled for about 18 months between the filing of the application to add causes of action and defendants and the entry of the order granting that application, and that therefore the conversion and unjust enrichment claims were thereafter timely brought. See *Perez v Paramount*, 92 NY2d 749 (1999).

The branch of Frontline's motion which seeks dismissal of the cause of action asserting that it tortiously interfered with Hal & Dale's contract with American Express on the sole ground that American Express failed to adequately allege how Frontline procured the breach of Hal & Dale's contract is without merit and does not establish a potentially meritorious defense. The amended complaint amply sets forth, at this stage of the action, how and why the alleged breach was procured and provides adequate details for one to infer that Frontline knew that Hal & Dale was not permitted to engage in factoring and could not accept charges other than for the bona fide purchases of goods or services, yet conspired with the codefendants to circumvent that restriction.

The branch of the motions which seek dismissal of the fraud cause of action as to Melvin and David Cooper, Pino and Goldman is denied. At this stage of the action, where the details of the alleged fraud are peculiarly within defendants' knowledge, Frontline had provided virtually no discovery before the complaint was amended and where there has been no opportunity to

obtain discovery from the newly added defendants, the allegations of the amended complaint are adequate and put the defendants, including Frontline, on sufficient notice of the fraud claims asserted against them, in light on the individual defendants' positions in their companies, Goldman's relationship to both entities, and by the nature of the alleged scheme, which did not consist of an isolated incident, but of a planned pattern of activity carried on as a means of extracting significant sums of money monthly from American Express, allegedly without there having been any bona fide purchases. *See Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486 (2008).

To the extent that Melvin and David Cooper (and Frontline) assert a new ground for dismissal of the fraud cause of action in their reply papers, that ground is unavailing. *See Dannasch v Bifulco*, 184 AD2d 415 (1st Dept 1992). In any event, this is not simply a case where the plaintiff is alleging that a defendant entered into a contract, never intending to perform. Rather, it is alleged that the defendants participated in a scheme to have Hal & Dale misrepresent that it was in the telecommunications business, then effectively misrepresented each month that goods and services had been procured so as to extract payment from American Express, which would then be funneled to Frontline.

The moving defendants assert that the RICO causes of action are inadequately pleaded because 1) the continuity required to

show an open-ended pattern of racketeering does not exist in that the alleged activity was stopped when American Express closed the defendants' accounts, 2) the predicate acts are insufficiently alleged with the specificity required with respect to each moving defendant and 3) because fraudulent intent cannot be inferred from the allegations of the amended complaint. I find that continuity is adequately pleaded here where it is claimed that the scheme, commenced in August 2003, involved monthly fraudulent charges, over forty charges in total, starting in November 2003 through August 2004, with no apparent end in sight until Frontline failed to pay its balances and American Express, suspecting a factoring scheme, closed the defendants' accounts. American Express has sufficiently pleaded that the numerous predicate acts are related and that they presented "the threat of continued unlawful conduct." *Cosmos Forms Ltd. v Guardian Life Insurance Company*, 113 F3d 308, 310 (2d Cir 1997). That American Express shut the accounts does not preclude a finding of continuity. *Id.*

Defendants' claim that the predicate acts have not been pleaded as to each of them with the requisite particularity is without merit. The amended complaint sufficiently pleads the predicate acts of access device fraud under 18 U.S.C. § 1029 here, where it is claimed that the defendants engaged in and carried out a scheme to use an unauthorized access device to fraudulently obtain funds from American Express. An unauthorized

access device includes one that is "obtained with intent to defraud" (18 U.S.C. § 1029 (d) 3), as is claimed with respect to the alleged enterprise's obtaining the access device on behalf of Hal & Dale. Appended to the amended complaint are credit card statements that set forth the dates and nature of various acts of alleged access device fraud in furtherance of the defendants' alleged RICO violations.

The amended complaint also adequately alleges wire and mail fraud, namely the existence of a scheme to defraud which involves money and the use of the wires or mails to further that scheme. See 18 U.S.C. §§ 1341, 1343. Where mail and wire fraud is in furtherance of a larger plan to defraud, it is unnecessary that the communications themselves contain false or misleading information. *Matter of Sumitomo Copper Litigation*, 995 F Supp 451, 456 (SD NY 1998). Here the amended complaint alleges that each fraudulent credit card transaction involved the use of interstate wires, and sets forth specific telephonic communications (incorporated by reference to the phone records attached to the amended complaint) between American Express and Frontline's officers, which conversations were allegedly in furtherance of the scheme and sought to prolong it by seeking to avoid the cancellation of the accounts. Also, as alleged in the amended complaint, numerous checks to cover amounts charged were signed on specific dates by Bersson and David Cooper, who

reasonably could have foreseen the use of the mails to send those checks interstate to American Express in furtherance of the overall scheme. Clearly the complaint adequately sets forth the predicate acts as to Frontline, one of the two corporate members of the alleged enterprise. The factual allegations of the amended complaint, particularly the assertions that Frontline had been warned not to engage in factoring, coupled with the timing of Hal & Dale's obtaining a merchant account, the relationship of Goldman to both corporate entities, and the fact that Hal & Dale only received charges from Frontline are sufficient to circumstantially support the alleged RICO violations against Frontline. Accordingly it has not shown that it has a meritorious defense to the action in regard to the RICO claims.

While Goldman asserts that the RICO claims have been inadequately pleaded as to him, because no specific predicate acts have been alleged against him, in view of the allegations regarding the circumstances of the fraud and about his involvement in and positions with both corporate defendants and the allegation that he controlled Hal & Dale, the vehicle allegedly used by defendants to carry out the scheme, at this early stage of the action, where the details of the alleged fraud would be peculiarly within his and the remaining individual defendants' knowledge, the allegations are sufficient, where the defendants are alleged to have "formed, funded, maintained, and

operated [the] enterprise that was continuously engaged in a pattern of [RICO] racketeering activity," knowingly conducted and participated both directly and indirectly in the enterprise's management, control and operation and agreed that Frontline would make the fraudulent charges through Hal & Dale and that Hal & Dale would submit the fraudulent charges to American Express for payment. Amended Complaint ¶ ¶ 2,78, 82. It is unnecessary that each individual personally carry out the predicate acts, where it is claimed that the defendants not only committed, but conspired to commit the fraudulent scheme, controlled the corporate defendants and controlled, operated and managed the enterprise, and thus could have foreseen the use of the mails and wires and the fraudulent use of an unauthorized access device as "incidental to an essential part of the scheme." *Matter of Sumitomo Copper Litigation*, 995 F Supp 451, 457 (SD NY 1995). The facts alleged in the amended complaint support the inference that Goldman conducted or participated directly or indirectly in the conduct of the enterprise' affairs through a pattern of racketeering activities. Thus his application to dismiss the RICO causes of action is denied.

Similarly the applications of Pino and David Cooper and Melvin Cooper which seek to dismiss the RICO claims are denied. Pino, Frontline's CFO was, according to the complaint and the phone records attached thereto, extensively involved in

discussions with American Express over the charges, and David Cooper, Frontline's owner and vice-president, signed numerous checks to pay for non-existent services. As previously noted, Melvin Cooper was Frontline's CEO and owner. In light of the fact that knowledge of the predicate acts of fraud underlying the RICO claims are peculiarly within the defendants knowledge, and in view of their positions with their corporations, and the alleged pervasive pattern of fraudulent charges, at this stage of the proceeding, the RICO claims are adequately pleaded as to the moving defendants. See *Pludeman*, 10 NY3d 486 (2008); *Riverbay Corp. v Steiner*, 144 Misc 2d 530 (Sup Ct, NY Co, 1989) (applying CPLR 3016(b) to assess the sufficiency of RICO claims). Movants' contention that fraudulent intent cannot be inferred from the amended complaint's allegations is patently without merit. Accordingly the applications of Goldman, Pino, and David and Melvin Cooper to dismiss the RICO claims is denied.

Accordingly, it is

ORDERED that Frontline's application for leave to serve a late answer is denied and therefore its application to dismiss is not entertained; and it is further


ORDERED that American Express's cross motion for a default judgment against Frontline is denied without prejudice to renew on proper papers; and it is further

ORDERED that the applications of defendants Pino, Goldman,

Melvin Cooper and David Cooper to dismiss the unjust enrichment, conversion, RICO, and fraud causes of action are denied.

This constitutes the decision and order of the court.

Dated: 4/2/09



J. S. C.

**LOUIS B. YORK
J.S.C.**

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