

1 to dismiss for lack of personal jurisdiction (Doc. 87-1); (5)
2 defendant Galanis' Motion to Dismiss plaintiff's First Amended
3 Complaint for failure to state a proper racketeering claim (Doc.
4 88-1); (6) defendant Galanis' Motion for Protective Order (Doc.
5 43-1); (7) defendant Ernst & Young Caribbean's Motion for
6 Protective Order (Doc. 98-1); (8) plaintiff's Motion to Compel
7 Ernst & Young Chartered Accountants to respond to discovery (Doc.
8 102-1); (9) plaintiff's Motion for Sanctions against Ernst &
9 Young for failure to voluntarily provide discovery (Doc. 102-2);
10 and (10) defendant Ernst & Young's Motion for Preliminary
11 Evidentiary Hearing (Doc. 110-1).

12 PROCEDURAL HISTORY

13 Plaintiff, Jack G. Larsen, filed this Complaint on
14 November 30, 2000. Plaintiff has been appointed to serve as
15 Receiver for three Arizona Trusts (Southwest Income Trust,
16 Advantage Trust, and Investors Trading Trust) and represents some
17 150 beneficiaries, principally Arizona residents, who invested in
18 these trusts.

19 Jurisdiction is based on 18 U.S.C. § 1965(a), as it is
20 alleged that defendants directly or through their agents and co-
21 conspirators transacted the affairs of the conspiracy in this
22 District. Plaintiff named Lauriel Investments, Charles Smith,
23 Standard Industrial Capital, Glen Roger Thompson, Progressive
24 Growth Management, Richard N. Kubany, Paul W. Floyd, III, James
25 Floyd, Philip C. Galanis, Paul F. Clarke, and, Ernst & Young
26 Caribbean Region Ltd as defendants.²

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28 ² Not all of the defendants have filed Motions to Dismiss.

1 An Amended Complaint was filed on April 19, 2001. It
2 alleged: Count I - violation of 18 U.S.C. § 1962(a); Count II -
3 violation of 18 U.S.C. § 1962(b); Count III - violation of 18
4 U.S.C. § 1962(c); Count IV - conspiracy to violate 18 U.S.C. §
5 1962(a) in violation of 18 U.S.C. § 1962(d); Count V - conspiracy
6 to violate 18 U.S.C. § 1962(b) in violation of 18 U.S.C. §
7 1962(d); Count VI - conspiracy to violate 18 U.S.C. § 1962(c) in
8 violation of 18 U.S.C. § 1962(d). Plaintiff claims compensatory
9 damages in the amount of \$9,951,365.00 and treble damages in an
10 amount no less than \$29,845,00.95.

11 Oral arguments took place on August 20, 2001, with respect
12 to the Floyds', Ernst & Young, Clarke and Galanis' Motions to
13 Dismiss. At that time the Court took the Motions under
14 advisement.

15 **FACTUAL BACKGROUND**³

16 During the spring and summer of 1995, defendants Paul Floyd
17 and James Floyd began promoting an investment program involving
18 "prime bank guarantees." This investment program became known as
19 Passport Club International, which was to be administered by
20 defendant Ernst & Young in the Commonwealth of the Bahamas.

21 Paul Floyd and James Floyd conducted and participated in a
22 series of meetings in Las Vegas, Nevada, and Nassau, Bahamas, at
23 which the prospective sellers of units in Passport Club
24 International were recruited, including third party Shoop.

25
26

27 ³ The facts related in this Order are construed primarily from
28 plaintiff's First Amended Complaint, which this Court must recognize as true for
the purpose of deciding the pending motions to dismiss.

1 Defendant Galanis made presentations to prospective sellers
2 at certain of these meetings on behalf of defendant Ernst &
3 Young. Plaintiff alleges that during at least one of these
4 meetings, defendant Galanis, on behalf of Ernst & Young stressed
5 the importance that all participants and prospective sellers of
6 units in the Passport Club International keep all aspects of the
7 investment confidential. The purported reason for
8 confidentiality was vital "because interference by U.S.
9 government regulatory agencies would jeopardize, if not destroy,
10 the prospects of the investment program going forward."

11 The plaintiff further alleges that defendant Clarke on
12 behalf of Ernst & Young actively participated in marketing
13 efforts for Passport Club International, including the drafting
14 and editing of a promotional brochure. This brochure was edited
15 and prepared by third party Shoop through the use of
16 telefacsimile transmissions between Shoop's Arizona offices and
17 Ernst & Young's Bahamas offices.

18 Allegedly, during the summer of 1995, third party Shoop
19 raised from a series of investors who were principally Arizona
20 residents \$3.3 million for investment in Passport Club
21 International. On or about August 7, 1995, the funds were
22 transmitted by wire transfer from bank accounts controlled by
23 Shoop at Norwest Bank in Phoenix, Arizona, to bank accounts
24 controlled by defendant Ernst & Young, in Nassau, Bahamas,
25 allegedly at the direction of Paul Floyd.

26 After the \$3.3 million was received by defendant Ernst &
27 Young, defendant Galanis canceled the Passport Club International
28 investment program by correspondence dated August 31, 1995,

1 claiming that the information regarding the program and Ernst &
2 Young's participation had been circulated prematurely in the
3 United States, threatening interference by United States
4 regulators.

5 After cancellation of the Passport Club International
6 investment program, defendants Paul Floyd, James Floyd and
7 Galanis proposed an alternative investment program for the \$3.3
8 million which had remained with Ernst & Young. The new program
9 included investment in U.S. Treasury instruments. In this
10 regard, the defendants placed third party Shoop in contact with
11 defendant Kubany.

12 In July of 1995, defendants Galanis and Kubany incorporated
13 defendant Progressive Growth Management in the Commonwealth of
14 the Bahamas. Progressive was, throughout its existence, under
15 the management and control of Ernst & Young. Progressive was
16 purportedly formed for the purpose of concealing Ernst & Young's
17 participation in the U.S. Treasury investment program.

18 In October of 1995, defendant Kubany introduced Shoop
19 to third party Marriot, a Los Angeles attorney, to assist in
20 managing the proposed investment program involving the
21 trading of U.S. Treasury instruments. The \$3.3 million in
22 funds which had been raised for the Passport Club
23 International program were then transferred from Ernst &
24 Young to Kern & Wooley, the Los Angeles law firm with which
25 Marriot was associated. The funds were then deposited into
26 the Kern & Wooley trust account. In November of 1995, the
27 \$3.3 million of funds were transmitted by wire transfer from
28 Kern & Wooley's trust account into brokerage accounts opened

1 at Cohig & Associates, a Denver Colorado, stock brokerage
2 house. The funds were transferred into accounts opened at
3 at Cohig & Associates by Marriott going by the name of
4 Ghirardello under the name of defendant Lauriel Investments.

5 Lauriel Investments was formed by Marriot
6 contemporaneously with the establishment of the Cohig
7 Investment accounts and the transference of the trust
8 beneficiaries funds from Kern & Wooley's trust account to
9 the accounts established at Cohig & Associates by Marriot.

10 In December of 1995, third party Shoop promoted the
11 formation of Southwest Income Trust in the State of Arizona
12 to administer the trading program in Treasury instruments.
13 Shoop solely owned and controlled the corporation which
14 served as trustee for Southwest Income Trust. Persons who
15 invested in the Passport Club International program were
16 offered interest in Southwest Income Trust, and most of the
17 investors who had invested funds in the Passport Club
18 International program then became investors in and
19 beneficiaries of Southwest Income Trust.

20 In early 1996, Shoop caused the formation of Advantage
21 Income Trust and Investors Trading Trust in the State of
22 Arizona to administer additional investments in the U.S.
23 Treasury instrument trading program. Plaintiff contends
24 that Shoop promoted the formation of Advantage Income Trust
25 and Investors Trading Trust through straw man trustees, and
26 throughout their existence managed and controlled the
27 affairs of all three trusts.

28

1 Plaintiff further claims that in addition to the \$3.3
2 million raised by Shoop for investment in the Passport Club
3 International program, Shoop, both individually and through
4 "finders" raised an additional \$6,651,365.00 through
5 utilizing private offering memoranda prepared for investment
6 in Southwest Income Trust, Advantage Income Trust and
7 Investors Trading Trust. Plaintiff asserts that
8 \$9,951,365.00 in total, was raised beginning in the fall of
9 1995 and ending in July 1996.

10 On dates including January 9, 1996, the three Trusts
11 entered into agreements with defendant Lauriel Investments,
12 acting through its president, Marriot with the knowledge and
13 acquiescence of defendant Progressive Growth Management,
14 Kubany, Galanis, and Ernst & Young. Under these agreements
15 Lauriel Investments agreed to direct and account for trading
16 of investments on behalf of the three trusts.

17 On November 13, 1995, and January 18, 1996, defendant
18 Lauriel Investments entered into written joint venture
19 agreements with defendant Standard Industrial Capital, which
20 acted through its president, defendant Thompson. Pursuant
21 to the joint venture agreements, Standard Industrial Capital
22 agreed to conduct the trading of investment accounts on
23 behalf of the three Trusts. The joint venture agreements
24 recited that substantial payments, described as brokerage
25 fees, would be paid to defendant Progressive Growth
26 Management from profits generated by trading of the Trusts'
27 investment accounts in accordance with the terms of the
28 joint venture agreements.

1 A pro forma was attached to the joint venture
2 agreements between defendant Lauriel Investments and
3 defendant Standard Industrial Capital. The pro forma
4 described "highly speculative trading transactions including
5 the leveraged purchase of options on U.S. Treasury
6 instruments which could not realistically be consummated in
7 the securities marketplace during 1995 and 1996."

8 Beginning in November of 1995 and ending in December of
9 1996, defendants Lauriel Investments, Standard Industrial
10 Capital, and Thompson directed trading in the Lauriel
11 Investments accounts maintained for the Trusts' benefit.
12 According to the First Amended Complaint, this trading
13 resulted in losses of principal sums invested in the Trusts
14 by their beneficiaries in an amount not less than
15 \$3,649,483.59. Plaintiff contends that the losses were
16 comprised of trading losses, commissions and interest
17 charges and that the trading utilized in the accounts
18 violated the authorization of the private offering memoranda
19 for the three Trusts.

20 Moreover, beginning in summer of 1995 and ending in
21 December of 1996, the defendants transferred an amount no
22 less than \$3,304,504.00 million of the principal sums
23 invested by the Trusts' beneficiaries from brokerage
24 accounts maintained for the benefit of the trusts to bank
25 accounts in the Bahamas maintained by defendant Progressive
26 Growth Management. Plaintiff alleges that defendant
27 Progressive Growth Management, acting under the direction
28 and control of defendants Kubany, Galanis, Clarke, and Ernst

1 & Young, in turn transferred these funds to a number of bank
2 accounts in the United States, the United Kingdom and the
3 Bahamas for the benefit of all defendants.

4 Plaintiff contends that all such transfers of the funds
5 were in express violation of the Trusts' terms of the
6 private offering memoranda for the three Trusts, which
7 required, among other things, that principal sums
8 contributed by the beneficiaries be invested exclusively in
9 U.S. Treasury instruments. The fund transfers further
10 violated the terms of the contract which defendant Lauriel
11 Investments and defendant Standard Industrial Capital had
12 entered into for the benefit of the Trusts.

13 The defendants then transmitted monthly payments to the
14 Trust beneficiaries which were denominated as interest
15 payments from profits generated on trading of U.S. Treasury
16 instruments when, plaintiff asserts, such payments were in
17 fact generated by invading the principal sums which had been
18 invested by the beneficiaries. Additionally, the plaintiff
19 maintains that the payments were made with the "intent to
20 conceal persistent and substantial losses" of the principal
21 sums which had been invested by the Trust beneficiaries and
22 to allow defendants to continue to transfer funds from the
23 Trusts' brokerage accounts to bank accounts maintained for
24 the benefit of all the defendants.

25 Plaintiff argues that defendants deposited
26 correspondence and checks in the United States Postal
27 Service, used wire communications in interstate and foreign
28 commerce for the purpose of executing "their scheme and

1 artifice to defraud the Trusts and their beneficiaries," and
2 transferred funds from the United States to bank accounts
3 maintained by defendant Progressive Growth Management in the
4 Bahamas with "an intent to promote mail fraud."

5 **DISCUSSION**

6 **Motions to Dismiss - failure to state claim**

7 **A. Standard of review**

8 In analyzing a motion to dismiss for failure to state a
9 claim upon which relief may be granted, all allegations of
10 material fact in the plaintiff's complaint are taken as true
11 and construed in the light most favorable to the nonmoving
12 party. See *National Wildlife Federation v. Epsy*, 45 F.3d
13 1337, 1340 (9th Cir. 1995); see also *Levine v. Diamantheset,*
14 *Inc.* 950 F.2d 1478, 1482 (9th Cir. 1991).

15 Dismissal of an action pursuant to Rule 12(b)(6) of the
16 Federal Rules of Civil Procedure is "proper only where it
17 appears beyond doubt that plaintiff can prove no set of
18 facts in support of his claim which would entitle him to
19 relief." *Conley v. Gibson*, 355 U.S. 41 (1957).

20 **B. Failure to state a claim under RICO**

21 The Plaintiff charges that the defendants have violated
22 the Racketeer Influenced and Corrupt Organizations Act
23 (RICO). 18 U.S.C. § 1962(a)-(d). Section 1962 states in
24 pertinent part:

25 (a) It shall be unlawful for any person
26 who has received any income derived,
27 directly or indirectly, from a pattern
28 of racketeering activity or through
collection of an unlawful debt in which
such person has participated as a
principal...to use or invest, directly

1 or indirectly, any part of such income,
2 or the proceeds of such income, in
3 acquisition of any interest in, or the
4 establishment or operation of, any
5 enterprise which is engaged in, or the
6 activities of which affect, interstate
7 or foreign commerce....

8 (b) It shall be unlawful for any person
9 through a pattern of racketeering
10 activity or through collection of an
11 unlawful debt to acquire or maintain,
12 directly or indirectly, any interest in
13 or control of any enterprise which is
14 engaged in, or the activities of which
15 affect, interstate or foreign commerce.

16 (c) It shall be unlawful for any person
17 employed by or associated with any
18 enterprise engaged in, or the activities
19 of which affect, interstate or foreign
20 commerce, to conduct or participate,
21 directly or indirectly, in the conduct
22 of such enterprise's affairs through a
23 pattern of racketeering activity or
24 collection of unlawful debt.

25 (d) It shall be unlawful for any person
26 to conspire to violate any of the
27 provisions of subsections (a), (b) or (c)
28 of this section.

Defendants Ernst & Young, Paul Clarke, Philip Galanis,
Paul Floyd, James Floyd and, Glen Thompson all essentially
argue that plaintiff has failed to state claim under RICO
for the following reasons: (1) RICO requires multiple
schemes to plead a "pattern" and this litigation is an
isolated event; (2) these defendants did not commit
predicate acts; (3) the First Amended Complaint fails to
adequately allege continuity of the predicate acts; (4) the
First Amended Complaint fails to adequately plead a RICO
"enterprise"; (5) that these defendants did not have the
requisite control over the enterprise; (6) these defendants'
acts did not cause any injury to the plaintiff; (7)

1 plaintiff lacks standing to bring this action; and (8) the
2 conspiracy causes of action necessarily fail because of
3 plaintiff's failure to adequately plead the RICO claim.
4 Each of these issues will be addressed separately below.⁴

5 **(1) The "pattern" requirement**

6 The statutes "definition" of "pattern of racketeering
7 activity" contained in 18 U.S.C. § 1961(5), unfortunately
8 provides little guidance to this Court. It provides that a
9 "pattern of racketeering activity requires at least two acts
10 of racketeering activity, one which occurred after the
11 effective date of this chapter and the last one of which
12 occurred within ten years (excluding any period of
13 imprisonment) after the commission of a prior act of
14 racketeering activity."

15 The key word is "requires." Section 1961(5) does not
16 define the term "pattern"; it merely states the necessary
17 but not sufficient elements of a pattern: (1) two acts of
18 racketeering activity, (2) occurring within ten years of
19 each other.

20 Accordingly, the Supreme Court, when it addressed the
21 pattern question in dicta in *Sedima, S.P.R.L. v. Imex Co.*,
22 stated,

23 [T]he definition of a "pattern of
24 racketeering activity" differs from the
25 other provisions in §1961 in that it
26 states that a pattern 'requires at least

26 ⁴ This Court recognizes that some of the defendants have raised two or
27 three of the aforementioned issues while other have raised all of them, in their
28 Motions to Dismiss. However, in the interest of judicial economy and because
many of the issues overlap, each defendant's arguments will be separately
addressed only as needed.

1 two acts of racketeering
2 activity, '...not that it 'means' two
3 such acts. The implication is that
4 while two acts are necessary, they may
5 not be sufficient. Indeed, in common
6 parlance two of anything do not
7 generally form a 'pattern.'

8 Likewise, when the Court revisited the issue in *H.J.*
9 *Inc v. Northwestern Bell Telephone Co.*, it found that
10 § 1961(5) concerns only the minimum number of predicates
11 necessary to establish a pattern; and it assumes that there
12 is something to a RICO pattern *beyond* simply the number of
13 predicate acts involved." 492 U.S. 22, 23 (1989) (emphasis
14 in original).

15 In this case, plaintiff alleges mail and wire fraud as
16 the defendants' predicate acts. The Supreme Court has
17 explained that the "pattern" requirement can be met by
18 showing (1) "that the racketeering predicates are related,"
19 and (2) that the predicates "amount to or pose a threat of
20 continued activity." *H.J. Inc.*, 492 U.S. at 239.

21 Early on, the Ninth Circuit recognized that the
22 Circuits were in conflict over what constituted a pattern.
23 One group of courts, including the Eighth Circuit, has held
24 that a series of predicate acts related to one fraudulent
25 scheme or criminal episode does not constitute a pattern.
26 *See Fulmer*, 785 F.2d at 257 (emphasis added). Another
27 group, including the Seventh and Eleventh Circuits, has held
28 that a series of predicate acts related to one fraudulent
29 scheme or criminal episode can constitute a pattern as long
30 as the predicate acts are "continuous." *See Bank of America*
31 *v. Touche Ross*, 782 F.2d at 971. In addressing these

1 conflicting positions, the Ninth Circuit agreed with the
2 Seventh and Eleventh Circuits that it was not necessary to
3 show more than one fraudulent scheme or criminal episode to
4 establish a pattern under *Sedima*. See *Sun Savings & Loan v.*
5 *Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987). The Court
6 further reasoned that "[w]e see no sound basis for the view
7 taken by some courts that a pattern requires more than one
8 'fraudulent scheme' or 'criminal episode'." See *id.*

9 Subsequently, in *Durning v. Citibank*, the district
10 court determined that the defendants had performed numerous
11 predicate acts of mail and wire fraud in connection with
12 their initial dissemination of an Official Statement, but
13 the acts did not establish a pattern. 990 F.2d 1133, 1139
14 (9th Cir. 1993). The Ninth Circuit affirmed the district
15 Court holding, "[w]hile defendants may have committed
16 numerous related predicate acts, all of those acts arose
17 from a single isolated event: the distribution of the
18 misleading Official Statement." *Id.*

19 *Durning* is distinguishable from this case. In *Durning*,
20 the purchaser of municipal bonds argued the pattern
21 requirement was satisfied because numerous copies of one
22 particular bond prospectus had been mailed to various
23 investors. Plaintiff argued that each mailing of the same
24 bond prospectus represented repeated acts of mail fraud.
25 The *Durning* Court never held that the pattern requirement
26 could only be satisfied by proof of multiple criminal
27 schemes. Instead the Court determined that the particular
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1 facts presented were insufficient to fulfill the pattern
2 requirement.

3 Nonetheless, the 1989 Supreme Court holding in *H.J. Inc*
4 *v. Northwestern Bell Tel Co.*, rejected the requirement that
5 multiple schemes be demonstrated to prove a pattern of
6 racketeering activity.

7 But although proof that a RICO defendant
8 has been involved in multiple criminal
9 schemes would certainly be highly
10 relevant to the inquiry into the
11 continuity of the defendant's
12 racketeering activity, it is impossible
13 to suppose that Congress thought
14 continuity might be shown only by proof
15 of multiple schemes.

16 492 U.S. at 239. (emphasis added).

17 In the matter before this Court, the defendants
18 generally argue that the First Amended Complaint describes a
19 single fraud scheme, through evolving means, but at all
20 times with the limited purpose of benefitting a few
21 individuals. Defendants contend that a RICO pattern must
22 entail "a series of multiple frauds tied together by related
23 endeavors, perpetrators, controlling parties and victims -
24 all connected in such a way that the enterprise poses a
25 threat to continue its criminal activity."

26 Paul Floyd and James Floyd argue that plaintiff's RICO
27 claims against the Floyds are limited to thirteen alleged
28 acts of mail and wire fraud occurring between June 14, and
September 1, 1995.

Similarly, defendant Clarke argues that his involvement
in several dozen mails or wires listed in the First Amended
Complaint was minimal. Clarke acknowledges two letters to

1 Shoop, dated June 15, 1995 and August 9, 1995, and one
2 facsimile to a Lennox Patton on October 2, 1996. The Ernst
3 & Young transmissions took place in July of 1995 in a letter
4 to defendant Kubany and Progressive Growth Management, one
5 facsimile to Shoop in January of 1996, three letters to
6 Marriot in August, September, and October 1996 and one
7 October 1996 letter to a Bill Godly.

8 Defendant Galanis served as an officer of Progressive
9 Growth Management, its President, while still employed at
10 Ernst & Young. On July 25, 1995, he signed a written
11 management agreement on behalf of Ernst & Young in which
12 Ernst & Young agreed to conduct all business affairs of
13 Progressive Growth Management, including management of its
14 bank accounts.

15 Accordingly, *H.J. Enterprises* allows this Court to
16 consider the one "scheme" with multiple criminal offenses as
17 sufficient to establish a pattern.

18 **(2) Predicate Acts**

19 Mail fraud, along with its companion wire fraud
20 statute, are widely used RICO predicate offenses. Section
21 1961(1) of the RICO statute states that "racketeering
22 activity" includes "any act which is indictable under any of
23 the following provisions of Title 18, United States
24 Code:..section 1341 (relating to mail fraud) and section
25 1343 (relating to wire fraud....)" 18 U.S.C. § 1961(1).
26 Violations of the mail fraud and wire fraud statutes may
27 form the basis for RICO predicate acts under §§ 1962(a)-(d).

28

1 Courts often speak of 18 U.S.C. § 1341 mail fraud as
2 requiring two elements, (1) a scheme or artifice to defraud;
3 and (2) use of the United States mail in furtherance of the
4 scheme. See *United States v. Green*, 745 F.2d 1205, 1207-08
5 (9th Cir. 1984). In realty, a third element must also be
6 proven, (3) that the defendant acted with the specific
7 intent to defraud. See *United States v. Bonanno*, 852 F.2d
8 434, 440 (9th Cir. 1988).

9 The same elements that must be proved under the wire
10 fraud statute are virtually identical to the elements of
11 mail fraud. See *Carpenter v. United States*, 484 U.S. 19, 25
12 n.6 (1987) (the mail and wire fraud statutes share the same
13 language in relevant part, and accordingly the Court applies
14 the same analysis to both sets of offenses).

15 The plaintiff need not show that each individual
16 defendant personally used the mail or wire services, but
17 only that he caused the mail or wire service to be used by
18 acting with the knowledge that their use would "follow in
19 the ordinary course of business, or where such use could
20 reasonably be foreseen." *American Automotive Accessories v.*
21 *Fishman*, 175 F.3d 534, 542 (9th Cir. 1998).

22 The crux of the defendants' argument is that
23 allegations of mail and wire fraud are inadequate because
24 Clarke used the mail only a few times. Thus, Ernst & Young
25 focuses on the personal mailings of Clarke, but ignores the
26 precedent set forth above. Namely, that each individual
27 defendant need not use the mail for the fraud, but rather

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1 that each defendant could reasonably foresee that the mail
2 or wires be used to further the activities alleged.

3 They also argue that plaintiff did not adequately
4 demonstrate, in the First Amended Complaint, that the
5 defendants had the requisite intent to defraud. The First
6 Amended Complaint does make an adequate *prima facie*
7 allegation of such intent. Whether or not the defendants
8 intent was actually formed is a question of fact for the
9 jury. This Court is merely concerned with whether the First
10 Amended Complaint make a *prima facie* showing.

11 In this case, Clarke, Galanis, Ernst & Young and
12 Progressive Growth Management used the mail and interstate
13 wires repeatedly in furtherance of the activities described
14 in the First Amended Complaint. The First Amended Complaint
15 identifies approximately seventy instances where the
16 aforementioned defendants sent, received letters, telefaxes
17 or wire transfers. This Court recognizes that the majority
18 of the instances, do not involve Ernst & Young. However,
19 the number of time the mail or wires are used by any
20 particular defendant is irrelevant to this Court's analysis.
21 All that need be pled is that the defendants (not any one
22 defendant in particular) knew or should have reasonably
23 known that the activities complained of would use the mail
24 or wires in furtherance of the activity.

25 Moreover, Ernst & Young fail to acknowledge that they
26 are legally responsible for the conduct of its employees
27 under the legal theory of *respondeat superior*. The Ninth
28 Circuit has recognized that an employer that is benefitted

1 by its employee or agent's violations of § 1962(c) may be
2 held liable under the doctrines of *respondeat superior* and
3 agency when the employer is distinct from the enterprise.
4 *See Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-
5 55(9th Cir. 1992).

6 With respect to the Floyds, they claim that the
7 thirteen acts of alleged mail and wire fraud should not be
8 considered predicate acts for RICO purposes because they
9 were too close in time to constitute long-term criminal
10 activity. The Floyds further argue that seven of the wire
11 transfers of funds between December of 1995 and August of
12 1996 cannot be taken into account as predicate acts because
13 they are unrelated to the alleged acts of mail and wire
14 fraud.

15 The First Amended Complaint alleges that the Floyds
16 fraudulently induced investors to commit \$3.3 million to the
17 Passport Club International prime bank guarantee program
18 through a series of mail and wire communications in 1995,
19 then re-channeled the funds into U.S. Treasury instruments.
20 In conducting these activities, the Floyds were paid
21 approximately \$412,000.00 of the proceeds for their
22 participation. Clearly, these acts were all related and
23 plaintiff has sufficiently alleged in the First Amended
24 Complaint that the acts relate to the same participants,
25 same victims, and the same "scheme."

26 Defendant Thompson also seeks dismissal on this basis.
27 The First Amended Complaint sufficiently alleges that
28 Thompson engaged in trading which was expressly prohibited

1 by the joint venture agreement retaining Thompson's
2 services. Nonetheless, despite substantial sums of money
3 lost, sums of money were transferred to Progressive Growth
4 Management accounts in the Bahamas, although the joint
5 venture agreement only allowed for payment to Progressive to
6 be made on profits. Standard Industrial Capital, run by
7 Thompson, was the direct beneficiary of the money diverted
8 to Progressive Growth Management.

9 **(3) Continuity of the acts**

10 In *H.J. Inc. v. North Western Bell Tele Co.*, the
11 Supreme Court announced the "relationship and continuity"
12 test with regard to proof of a pattern of racketeering
13 activity. "RICO's legislative history reveals Congress'
14 intent that to prove a pattern of racketeering activity a
15 plaintiff or prosecutor must show that the racketeering
16 predicates are related, and that they amount to or pose a
17 threat of *continued criminal activity*." 492 U.S. at 239
18 (emphasis added).

19 The Court further discussed that "continuity" is both a
20 closed-ended and an open-ended concept, referring either to
21 a specific period of repeated conduct or to past conduct
22 which threatens repetition in the future. See *id.* at 241-
23 242. Closed-ended continuity may be demonstrated by
24 "proving a series of related predicates extending over a
25 substantial period of time." See *id.* at 242. On the other
26 hand, open-ended continuity may be established "if the
27 related predicates themselves involve a distinct threat of

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1 long-term racketeering activity, either implicit or
2 explicit." *Id.*

3 All of the moving defendants allege that the time span
4 of the "scheme" was too short to constitute threatened
5 continued behavior. This argument is not well founded.

6 The Ninth Circuit has held that predicate acts
7 extending over a short duration may satisfy the continuity
8 requirement where there is a threat of continued activity.
9 See *Ikuno v. Yip*, 912 F.2d at 308 (open-ended continuity
10 requirements satisfied by two false annual reports in a 12
11 month span); see also *Sun Saving & Loan*, 825 F.2d at 194
12 (four predicate acts over a two-month period satisfied the
13 continuity requirement based on the threat of continued
14 activity). In fact, the Ninth Circuit has held that a
15 "bright line, one-year rule undermines *H.J. Inc's* principle
16 that flexibility rather than rigidity should govern the
17 application of RICO." *Allwaste, Inc. v. Hecht*, 65 F.3d at
18 1528 (complaint alleging predicate acts over a
19 thirteen-month period satisfied the continuity requirement).

20 In this matter, the First Amended Complaint alleges
21 numerous predicate acts which extended for nearly two years
22 and involved approximately fifteen participants. There were
23 about 150 people who invested in three separate trusts and
24 the participants used the mail and wires to facilitate their
25 actions.

26 Moreover, the First Amended Complaint alleges that the
27 defendants wrongdoing only terminated when the Securities
28 Exchange Commission (SEC) froze the brokerage accounts that

1 were funding the activity. "The lack of a threat of
2 continuity of racketeering activity cannot be asserted
3 merely by showing a fortuitous interruption of that activity
4 such as by an arrest, indictment or guilty verdict." U.S.
5 v. *Busacca*, 936 F.2d 232, 238 (6th Cir. 1991). Here, the SEC
6 closed down the ongoing activity which, could have continued
7 into the future.

8 (4) **Pleading a RICO "enterprise"/ Control of**
9 **enterprise**

10 RICO's prohibitions involve the use of a pattern of
11 racketeering activity in specified ways to affect an
12 enterprise. As with the term "pattern of racketeering
13 activity" the term "enterprise" is never actually defined in
14 the statute. Instead, § 1961(4) provides a range of
15 examples included within the concept:

16 "Enterprise" includes any individual,
17 partnership, corporation, association,
18 or other legal entity, and any union or
19 group of individuals associated in fact
20 although not a legal entity.

21 The key word is "includes." It means that the
22 "definition" is exemplary, not limiting. The definition of
23 enterprise is extremely broad, and the Supreme Court has on
24 at least two occasion commented on its broad scope. See
25 *Rusello v. United States*, 464 U.S. 16, 21-22 (1983); see
26 also *United State v. Turkett*, 452 U.S. 576, 580 (1981).

27 In 1996, the Ninth Circuit held that a racketeering
28 enterprise must exhibit "some sort of structure...for the
making of decisions, whether it be hierarchal or consensual,
and that the structure should provide "some sort of

1 mechanism for controlling and directing the affairs of the
2 group on an ongoing rather than ad hoc basis." *Chang v.*
3 *Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996).

4 Galanis, Ernst & Young, Clarke and the Floyds
5 unpersuasively argue that neither of them had "control" of
6 the alleged enterprise. This argument is without merit as
7 it is not necessary for each individual to show control over
8 the enterprise, but rather that the defendants participated
9 in the operation or the management of the enterprise itself.
10 *See Reves v. Ernst & Young*, 507 U.S. 170 (1993).

11 The First Amended Complaint in this matter identifies
12 four entities that formed this enterprise; three
13 corporations and one partnership.⁵ In fact, the three
14 corporations, Lauriel Investments, Standard Industrial
15 Capital, and Progressive Growth Management were incorporated
16 for the sole purpose of participating in the activities
17 alleged in the First Amended Complaint. These entities were
18 intricately intertwined and the outstanding stock in Lauriel
19 Investments was owned equally by Standard Industrial Capital
20 and Progressive Growth Management while being managed by
21 Ernst & Young. Moreover, Lauriel Investments entered into
22 written joint venture agreements with Standard Industrial
23 Capital to manage the trading of the Trusts' brokerage
24 accounts. These agreements included provisions requiring
25 the payment of brokerage fees to Progressive Growth

26

27 ⁵ The three corporations are Lauriel Investments, Standard Capital
28 Investments and Progressive Growth Management. Ernst & Young is a Bahamian
partnership.

1 Management. Ernst & Young had a written contract to conduct
2 all of the business affairs of Progressive Growth
3 Management. All of the individual defendants, with the
4 exception of the Floyds, presently moving for dismissal were
5 officers acting on behalf of the aforementioned entities.

6 With respect to the Floyds, it is alleged that they
7 were instrumental in organizing and maintaining the
8 fund-raising in Arizona.

9 Clearly, based on the allegations set forth in the
10 plaintiff's First Amended Complaint, coupled with the broad
11 interpretation this Court must give to the term
12 "enterprise", neither the individual defendants nor Ernst &
13 Young can be dismissed on this basis.

14 **(5) Causation**

15 In order to recover damages under RICO, plaintiff is
16 required to establish that the defendants' racketeering
17 violations proximately caused injury to plaintiff. See
18 *Holmes v. Securities Investors Corp.*, 503 U.S. 258 (1992).

19 Defendant Ernst & Young argues that it caused no damage
20 to the Trusts based on their withdrawal after the Passport
21 Club International failed. This claim is inconsistent with
22 the allegations set forth in the First Amended Complaint.
23 It is alleged that Ernst & Young participated in the
24 Treasury investment in that they assisted in the formation
25 and management of Progressive Growth Management. In fact,
26 Galanis, a partner with Ernst & Young, acted as president of
27 Progressive Growth Management. The fact that Ernst & Young
28 argues facts to the contrary solidifies this Court's

1 position that the defendants are asking this Court to weigh
2 conflicting evidence and make a determination of fact. That
3 is an inappropriate undertaking for this Court on a motion
4 to dismiss.

5 Similarly, defendants Paul Floyd and James Floyd allege
6 their activities did not proximately cause any injuries to
7 the beneficiaries. This argument is also without merit.
8 The First Amended Complaint makes a *prima facie* showing that
9 the Floyds were instrumental in raising the initial \$3.3
10 million in conjunction with the initial Passport Club
11 International prime bank guarantee and, when that failed,
12 they participated in arranging for the funds to be invested
13 in the Treasury instrument investment. Clearly, this
14 conduct was instrumental in proximately causing injury to
15 plaintiff.

16 (6) *Standing*

17 Section 1962(a) focuses on the use or investment of
18 income derived from a pattern of racketeering activity in an
19 enterprise. 18 U.S.C. § 1962(a). On the other hand,
20 § 1962(b) focuses on the acquisition or maintenance of an
21 interest in an enterprise through a pattern of racketeering
22 activity. Each of these sections, then, renders
23 racketeering activity in violation of the statute only if
24 the consequences of the racketeering activity are specified.

25 Specifically, § 1962(a) by its terms prohibit the
26 investment of racketeering income in an enterprise to
27 acquire an interest in the enterprise, to establish the
28 enterprise, or to operate the enterprise. (Emphasis added).

1 The Ninth Circuit has ruled that "a plaintiff seeking civil
2 damages for a violation of § 1962(a) must allege facts
3 tending to show that he or she was injured by the use or
4 investment of racketeering income." *Nugget HydroElectric v.*
5 *Pacific Gas and Electric Co.*, 981 F.2d 429, 437 (9th Cir.
6 1992); *see also Simon v. Value Behavioral Health*, 208 F.3d
7 at 1083.

8 All of the moving defendants challenge plaintiff's
9 standing to prosecute claims under 18 U.S.C. § 1962(a) and
10 (b) on the grounds that the requisite damages specific to
11 these claims have not been pled.

12 Plaintiff persuasively argues that the First Amended
13 Complaint makes the *prima facie* showing of investment and
14 acquisition injury sufficient to maintain these claims. The
15 First Amended Complaint alleges proceeds of the racketeering
16 activity were used by the defendants to sustain their
17 conduct until the SEC froze the brokerage accounts.

18 Defendants argue that § 1962(a) prohibits taking
19 proceeds obtained through a pattern of racketeering to
20 *invest those proceeds in an enterprise*. They further
21 contend the Supreme Court in *Reeves* interpreted RICO's
22 "subsections (a) and (b) as prohibiting the acquisition of
23 an enterprise" as opposed to the "operation" of an
24 enterprise." *Reeves*, 507 U.S. at 182.

25 Plaintiff's First Amended Complaint details the complex
26 series of corporations and the partnership which served as
27 the enterprise; that funds were converted from the Trusts'
28 brokerage accounts periodically and were transferred

1 offshore to Progressive Growth Management. Progressive
2 Growth Management then in turn used some of these funds, in
3 part, to pay the defendants for services rendered in
4 conjunction with the operation of this enterprise, and to
5 facilitate the continued operation of the enterprise.

6 The allegation set forth in the First Amended Complaint
7 make the prima facie showing that the payment of operating
8 expenses allowed the continued use of the defendants
9 services to perpetuate the complained of activities.

10 (7) **Conspiracy**

11 The RICO statute provides "[i]t shall be unlawful for
12 any person to conspire to violate any of the provisions of
13 subsections (a), (b) or (c) of this section." 18 U.S.C.
14 § 1962(d). Liability under § 1962(d) does not require proof
15 that each of the defendants were personally involved in the
16 commission of predicate acts, "if the conspirators have a
17 plan which calls for some conspirators to perpetuate the
18 crime and others to provide support, the supporters are as
19 guilty as the perpetrators." *Salinas v. United States*, 522
20 U.S. 52, 64 (1997).

21 The defendants claim that the conspiracy allegations
22 set forth in the First Amended Complaint necessarily fail
23 because the plaintiff failed to state a claim under RICO.
24 This argument is without merit. For the numerous reasons
25 set forth above, the plaintiff has, in fact, established a
26 prima facie RICO claim against all moving defendants. Thus,
27 the conspiracy claim survives.

28

1 Ernst & Young and Clarke's Motion for Evidentiary
2 Hearing⁶

3 In making its determination with respect to the
4 existence of personal jurisdiction, the court has discretion
5 to rely on written submissions or to hold a full evidentiary
6 hearing. See *Data Disc. Inc. v. Systems Technology*, 557
7 F.2d 1280, 1285 (9th Cir. 1977).

8 If the court chooses not to hear evidence, the party
9 need make only a *prima facie* showing that personal
10 jurisdiction exists. See *Rano v. Sipa Press, Inc*, 987 F.2d
11 580, 587 n.3 (9th Cir. 1993) ("well established that where the
12 district court relies solely on affidavits and discovery
13 materials, the plaintiff need only establish a *prima facie*
14 case of jurisdiction"). As with challenges to subject
15 matter jurisdiction, the court will accept plaintiff's
16 jurisdictional allegations as true and will resolve any
17 factual dispute in the plaintiff's favor. 3 *Moore's Federal*
18 *Practice* 3d. §12.31[5] (2000).

19 If the court denies the motion to dismiss, the party
20 may proceed to trial on the merits without waiving the
21 jurisdictional challenge. See *Stewart v. Ragland*, 934 F.2d
22 1033, 1036 n.5 (9th Cir. 1991) (party may proceed to trial on
23 the merits without waiving jurisdictional challenge). If
24 the court holds an evidentiary hearing, or if the issue is
25 litigated at trial, the party asserting jurisdiction must
26 demonstrate its existence by a preponderance of the

27
28 ⁶ Only defendants Ernst & Young and Clarke filed the Motion for
Evidentiary Hearing.

1 evidence. 3 *Moore's Federal Practice* § 12.31[5]. In other
2 words, the facts must show by a preponderance of the
3 evidence that the *prima facie* case for personal jurisdiction
4 has been made. See *Data Disc.*, 557 F.2d at 1285; see also
5 *Metropolitan v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2nd
6 Cir. 1996).

7 Plaintiff, Ernst & Young and, Clarke essentially
8 disagree as to whether or not this Court should undertake an
9 evidentiary hearing resulting from conflicting affidavits
10 provided by Shoop and Marriot as compared to defendants
11 Galanis and Clarke.

12 Ernst & Young and Clarke claim that the affidavits of
13 Shoop and Marriot contradict defendants Galanis and Clarke's
14 affidavits relating to the "effects test" or whether the
15 defendants were aware that their "intentionally tortious
16 activity" would have a substantial impact in Arizona.

17 Plaintiff claims that "if reviewed fairly, the
18 affidavits of Galanis and Clarke do not contradict Shoop and
19 Marriot's affidavits on issues critical to the determination
20 of personal jurisdiction."

21 The disputed fact centers on whether Galanis was
22 informed of and knew that Shoop was raising monies from
23 Arizona investors. Plaintiff argues that the defendants do
24 not dispute knowing Shoop was an Arizona accountant, but
25 that Galanis was never informed that the monies originated
26 from Arizona investors. Plaintiff claims that, for
27 jurisdictional purposes, it makes no difference whether
28 Galanis intended to defraud numerous Arizona investors or

1 one Arizona investor, as long as he knew that his actions
2 would impact at least one Arizona resident.

3 Similarly, Clarke states that he "has no specific
4 recollection whatsoever of Mr. Shoop ever telling me that
5 the Passport Club International funds were raised from
6 Arizona." The plaintiff contends that Shoop does have
7 specific recollections that such a conversation took place,
8 and the fact that Clarke does not recall whether or not a
9 conversation took place does not create an issue of fact
10 requiring an evidentiary hearing or discovery.

11 Additionally, plaintiff also argues that the defendants
12 are trying to attack the credibility of Shoop and Marriot.
13 Plaintiff persuasively points out, that the credibility
14 issue is an insufficient basis on which to order two rounds
15 of discovery and further delay this matter.

16 It appears to this Court that the moving defendants
17 acknowledge that plaintiff makes the requisite *prima facie*
18 case to withstand a Motion to Dismiss and they seek to undue
19 that showing or raise plaintiff's burden to preponderance of
20 the evidence by requesting an evidentiary hearing. If the
21 alleged factual dispute were more related areas that were
22 unknown to the Court (for example, whether or when Galanis
23 or Clarke lived in Arizona), then such a hearing may be
24 relevant. However, this request seems to center on a
25 credibility issue between Shoop and Marriot and Clarke and
26 Galanis. A hearing to determine credibility is neither
27 necessary nor appropriate under these circumstances.

28

1 **Motions to Dismiss - lack of personal jurisdiction**

2 **A. Standard of review**

3 The party asserting personal jurisdiction has the
4 burden of proving its existence if challenged. See
5 *Butcher's Union Local no. 498 v. SDC Inv. Inc.*, 788 F.2d
6 535, 538 (9th Cir. 1986). However, this burden is minimal.
7 Plaintiff need only make a *prima facie* showing of
8 jurisdictional facts to overcome a motion to dismiss based
9 on personal jurisdiction. See *Fields v. Sedgewick*
10 *Associated Risks*, 796 F.2d 299, 301 (9th Cir. 1986).

11 In essence, the defendants claim that personal
12 jurisdiction does not exist for two primary reasons. First,
13 plaintiff did not plead jurisdiction under the Arizona long-
14 arm statute in the Complaint, and is thus precluded from
15 arguing it now. Second, plaintiff's only basis for personal
16 jurisdiction over these defendants is under the RICO
17 statutes, § 1965(b) - which only allows for nationwide
18 service, not foreign service.

19 **B. Motion to Dismiss**

20 To challenge the existence of jurisdiction over his or
21 her person, a defendant may move for dismissal under
22 Fed.R.Civ.P. 12(b)(2). Rule 12(b)(2) challenges the basis
23 for jurisdiction over the person, rather than the method by
24 which jurisdiction was obtained through service of process.
25 Fed.R.Civ.P. 12(b)(2). Although Rule 12(b)(2) provides the
26 vehicle for challenging personal jurisdiction, its existence
27 will be determined on constitutional, statutory, and other
28

1 substantive authority. 2 *Moore's Federal Practice* 3ed §
2 12.31[1].⁷

3 **1. Arizona long-arm statute**

4 In this matter, plaintiff claims that this Court has
5 personal jurisdiction over the defendants based on the
6 Arizona long-arm statute. Arizona permits the "exercise
7 [of] personal jurisdiction over the parties, whether found
8 inside or outside the state, to the maximum extent permitted
9 by the Constitution of this State and the Constitution of
10 the United States..." Ariz.R.Civ.P. 4.2(a).

11 The parties agree that personal jurisdiction over a
12 defendant under the Arizona long-arm statute exists when:
13 (1) the non-resident defendants purposefully directed their
14 activities toward Arizona thereby availing themselves of the
15 privilege of conducting activities in Arizona, also known as
16 the minimum contacts test; (2) the claim arises out of or
17 relates to the defendant's forum related activities; and (3)
18 the exercise of jurisdiction comports with traditional
19 notions of fair play. See *Lake v. Lake*, 817 F.2d 1416 (9th
20 Cir. 1987).

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22
23
24 ⁷ The Court notes that defendants Ernst & Young, Clarke and Galanis, have
25 filed as "specially" appearing defendants. Formerly, the failure to appear
26 "specially" for the purpose of objecting to personal jurisdiction waived the
27 right to be sued in the proper federal court. See *Harrison v. Prather*, 404 F.2d
28 267, 272 (5th Cir. 1968). The Federal Rules of Civil Procedure abolished the
technical distinction between general and special appearances. See *SEC v.
Wencke*, 783 F.2d 829, 832 n. 3 (9th Cir. 1986). Now, in all federal courts,
including those exercising diversity jurisdiction, the principal method for
attacking the court's jurisdiction over the person of a defendant is Rule
12(b)(2).

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(a) Purposeful Availment

To determine purposeful availment, a court must "determine whether sufficient minimum contacts exist; it is not the number of contacts, but the importance of the particular activities, which is persuasive." *Meyers v. Hamilton Corp.*, 143 Ariz. 249 (Ariz. 1984). "So long as it creates a 'substantial connection' with the forum, even a single act can support, jurisdiction." *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 475 n. 18.

Defendants Clarke and Galanis were instrumental in organizing the operation of this enterprise. The First Amended Complaint alleges that they worked closely with Shoop to set up and market the program. They corresponded with Shoop, in Arizona several times. They provided Shoop with the Agency Agreement Ernst & Young was entering into with Shoop's Arizona Corporation, Passport Club International and Progressive Growth Management.

Moreover, Ernst & Young was actively doing business in Arizona through its agreement to manage the funds of an Arizona Corporation, and by entering into a contract with an Arizona Corporation to provide management services. The parties supply conflicting affidavits in support of their Motions to Dismiss for lack of personal jurisdiction. Defendants provide affidavits from Galanis and Clarke which state that they had no knowledge that the monies came from Arizona residents. On the other hand, plaintiff supplies affidavits from Shoop and Marriot which indicate otherwise.

Specifically, Shoop's affidavit states, "Both Galanis

1 and Clarke encouraged me to raise monies from Arizona
2 residents for investment with Ernst & Young." (Shoop
3 Affidavit p.3 ¶ 8). Galanis and Clarke generally deny any
4 such knowledge and do not recall having conversations about
5 raising money from Arizona residents. This Court cannot
6 under take a factual determination as to which affiant
7 provides more credibility to their respective parties
8 position, and as stated above, an evidentiary hearing to
9 determine credibility is not appropriate. Credibility is a
10 factual undertaking for the jury. Moreover, matters of
11 personal jurisdiction may be reserved for trial.

12 (b) *Forum related activities*

13 In addition, plaintiff must show that the litigation
14 arises out of or is related to the defendants forum related
15 activities. *Lake*, 817 F.2d at 421.

16 Defendant Clarke argues that his contacts with Passport
17 Club are not related to the alleged conspiracy because he
18 withdrew before the investors were defrauded. However, the
19 Passport Club International was only the first step. The
20 money used to fund the Passport Club International was
21 rolled over into a U.S. treasury trading program, which was
22 managed by Progressive Growth Management, and its manager
23 Ernst & Young through Clarke and Galanis.

24 (c) *Reasonableness*

25 Reasonableness must also be considered in determining
26 personal jurisdiction. *Lake*, 817 F.2d at 1422.

27 Plaintiff alleges that most of the 150 victims are
28 located in Arizona, thus, Arizona has a considerable

1 interest in providing a remedy and hearing this action.
2 Moreover, while the Bahamas may provide for an alternative
3 jurisdiction for Clarke, Ernst & Young and Galanis, there
4 are numerous other defendants that are not subject to
5 jurisdiction in the Bahamas.

6 (d) *Effects test*

7 In addition to the traditional contacts analysis, a
8 defendant will be subject to personal jurisdiction, when the
9 defendant commits an intentional tort, where the defendant
10 knew or had reason to know that the conduct will have a
11 significant effect in the forum. See *Calder v. Jones*, 465
12 U.S. 783 (1984).

13 Defendants rely heavily on this Court's decision in
14 *Karsten Manufacturing v. United States Golf Ass'n* for the
15 proposition that plaintiff's allegations do not survive the
16 effects test. See 728 F.Supp. 1429. In *Karsten*, this Court
17 distinguished between intentional activity targeted at the
18 forum state, and intentional activity that merely causes
19 injury in the forum state. See *Karsten*, 728 F.Supp at 1433.

20 Again, the defendants are asking this Court to make an
21 improper determination of fact. As this Court has
22 repeatedly discussed above, the plaintiff has made a *prima*
23 *facie* showing that the defendants knew they were defrauding
24 Arizona residents. Whether they actually intended to or
25 not, is not for this Court to decide. That is a question
26 for the jury. This Court need only concern itself with
27 whether plaintiff has made a *prima facie* showing that the
28 intent was present, and plaintiff has done so.

1 The affidavits provided by Shoop and Marriot clearly
2 indicate that the defendants knew or should have known their
3 actions would have an effect on Arizona residents. Shoop
4 indicates that both Galanis, and Clarke (both who were
5 employees of Ernst & Young) had discussions regarding where
6 and how the money was to be raised. This Court readily
7 acknowledges the credibility issues related to the
8 affidavits of Shoop and Marriot. However, it is this
9 Court's obligation to construe matters in a light most
10 favorable to the non-moving party. Where the affidavits
11 conflict, this Court must exercise caution and construe the
12 evidence in favor of the plaintiff. Moreover, as also
13 indicated above, construing any evidence in this matter -
14 determining credibility - is a fact question for a jury, not
15 this Court.

16 Accordingly, for the purpose of evaluating the
17 defendants knowledge of the effects of their actions on
18 Arizona, this Court is persuaded by the allegations in the
19 First Amended Complaint and affidavits of Shoop and Marriot
20 that the defendants knew or reasonably should have known
21 that their actions would have had an effect on Arizona
22 residents. Based on the allegations set forth in the
23 First Amended Complaint and the relevant motions before this
24 Court, this Court determines that the elements of Arizona's
25 long-arm statute have been satisfied.

26 **2. RICO Personal jurisdiction**

27 Plaintiff relies on 18 U.S.C. § 1965(b) and
28 Fed.R.Civ.P. 4(k) (2) for personal jurisdiction. Section

1 1965(b) provides for nationwide service of process: "[i]n
2 any action under section 1964...in any district Court of the
3 United States in which it is shown that the ends of justice
4 require that to the parties residing in any other district
5 be brought before the court, the court may cause such
6 parties to be summoned, and process for that purpose may be
7 served in any judicial district in the United States...."

8 Federal Rule of Civil Procedure provides 4(k)(2) as an
9 "alternative basis for the assertion of personal
10 jurisdiction"

11 Rule 4(k)(2) provides:

12 If the exercise of jurisdiction is
13 consistent with the Constitution and
14 laws of the United States, serving a
15 summons or filing a waiver of service is
16 also effective with respect to claims
17 arising under federal law, to establish
18 personal jurisdiction over the person of
19 any defendant who is not the subject to
20 the jurisdiction of the courts of
21 general jurisdiction of any state.

22 There are four necessary requirements for application
23 of Rule 4(k)(2). They are: (1) the plaintiff's claims must
24 be based on federal law; (2) no state court could exercise
25 jurisdiction over the defendant; (3) the exercise of
26 jurisdiction must be consistent with the laws of the United
27 States; and (4) the exercise of jurisdiction must be
28 consistent with the Constitution.

Clearly, the detailed allegations in the First Amended
Complaint satisfy the elements of 4(k)(2) jurisdiction.
First, there is no dispute that the RICO claims alleged by
plaintiff are based on federal law. Second, the defendants

1 who assert this argument, lack of personal jurisdiction, are
2 residents of the Bahamas or, in the case of Ernst & Young, a
3 Bahamian partnership. Therefore they are not subject to
4 jurisdiction in another state. Also, the exercise of
5 jurisdiction must be consistent with the laws of the United
6 States and the Constitution. See *Central State*, 230 F.3d at
7 941. These last elements require that, in exercising
8 jurisdiction this Court must comply with notions of
9 fundamental fairness in keeping with the Constitution. This
10 Order already details the defendants contact with the State
11 of Arizona and other states in the United States which
12 permits this Court to exercise jurisdiction in keeping with
13 the notions of due process.

14 **Venue**

15 Section 1965(b) requires the district court to
16 "exercise its discretion and bring parties before the Court
17 that would not otherwise be subject to venue in the
18 district." Additionally, § 1965(b) allows for nationwide
19 service of process in a RICO claim.

20 Defendant Thompson claims Arizona is an improper venue
21 for this litigation, and thus the matter should be
22 dismissed. He is the only defendant, thus far, to make such
23 a claim.

24 Thompson argues that he has never been in Arizona, he
25 is a resident of North Carolina, charged with being a
26 principal in a Colorado Corporation (Standard Industrial
27 Capital) and is charged with becoming involved in matter
28 with Lauriel Investments (a Nevada Corporation).

1 However, plaintiff correctly argues that venue is
2 proper under § 1965(b) because it permits nationwide service
3 on such claims. Moreover, a significant portion of the
4 activity making up the claims alleged in the Complaint arose
5 in Arizona. Most of the money was allegedly taken from
6 Arizona residents and the "profit distributions" were mailed
7 or wired from Arizona.

8 **Galanis, Ernst & Young's, and Clarke's Motion for**
9 **Protective Orders; Plaintiff's Motion to Compel**

10 On March 21, 2001, Galanis, Ernst & Young, and Clarke
11 filed Motions for Protective Orders asserting that they
12 should not be required to respond to Request for Admissions
13 and Non-Uniform Interrogatories served by the plaintiff.
14 They requested that this Court issue an Order of Protection
15 until the pending Motions to Dismiss, based on lack of
16 personal jurisdiction, were decided. Plaintiff opposed the
17 motions and requested this Court to compel the requested
18 discovery and issue sanctions.

19 Obviously, this Order details the reasons that this
20 Court has determined personal jurisdiction over the moving
21 defendants exists. Accordingly, the requested Orders of
22 Protection are moot.

23 Similarly, the parties stipulation of July 5, 2001,
24 agreeing to limited discovery on the issue of personal
25 jurisdiction appears to moot the Motion to Compel.

26 With the nature and extent of the issues alleged,
27 coupled with witnesses and defendants scattered far and
28 wide, this Court anticipates that discovery disputes will

1 continue to arise. In this light, please take note of this
2 Court's policy governing discovery disputes. The parties
3 are instructed to contact the Court when a discovery dispute
4 arises, whether it be written discovery or a deposition. If
5 the Court is available, it will take the call and attempt to
6 informally resolve the matter without the need to file
7 written motions. Written motions clearly delay the
8 resolution of the dispute and the litigation as a whole.
9 Essentially, this Court asks that the parties "pick up the
10 phone before they pick up the Dictaphone." If the matter
11 needs further briefing or the Court is otherwise unable to
12 resolve the matter, then written motions may be appropriate.

13 Based on the foregoing,

14 IT IS ORDERED that defendant Paul Floyd and James
15 Floyd's Motion to Dismiss (Doc. 18-1) is DENIED.

16 IT IS FURTHER ORDERED that defendant Galanis's Motion
17 for Protective Order (Doc. 43-1) is DENIED as moot.

18 IT IS FURTHER ORDERED that defendant Thompson's Motion
19 to Dismiss (Doc. 61-1) is DENIED.

20 IT IS FURTHER ORDERED that defendants Ernst & Young and
21 Clarke's Motion to Dismiss for lack of personal jurisdiction
22 (Doc. 83-1) is DENIED.

23 IT IS FURTHER ORDERED that defendant Ernst & Young and
24 Clarke's Motion to Dismiss for failure to state a claim
25 (Doc. 84-1) is DENIED.

26 IT IS FURTHER ORDERED that Galanis' Motion to Dismiss
27 for lack of personal jurisdiction (Doc. 87-1) is DENIED.

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1 IT IS FURTHER ORDERED that Galanis' Motion to Dismiss
2 for failure to state a claim (Doc. 88-1) is DENIED.

3 IT IS FURTHER ORDERED that defendants Ernst & Young and
4 Clarke's Motion for Protective Order (Doc. 98-1) is DENIED
5 as moot.

6 IT IS FURTHER ORDERED that plaintiff's Motion to Compel
7 and request for Sanctions (Doc. 102-1 & 102-2) are DENIED as
8 moot.

9 IT IS FURTHER ORDERED that defendant Ernst & Young and
10 Clarke's Motion for Evidentiary Hearing (Doc. 110) is
11 DENIED.

12 DATED this 5th day of SEP., 2001.

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15 Paul G. Rosenblatt
16 United States District Judge
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