IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

STATE'S RESPONSE TO DEFENDANT CHESEBRO'S GENERAL DEMURRER TO COUNT 1 (RICO) FOR FAILURE TO ALLEGE THE CONTINUITY REQUIREMENT

I. INTRODUCTION

Despite 34 years of Georgia decisions to the contrary, the fundamental premise of Chesebro's general demurrer is that "continuity," a concept first applied to the federal RICO statute by the United States Supreme Court in 1989, must be alleged in a Georgia RICO conspiracy indictment.[1] Under federal RICO, in order to prove a pattern of racketeering activity a prosecutor

[1] General Demurrer at 1 (Chesebro asks the Court to dismiss Count 1 "due to a violation of the requirement for 'continuity' in the RICO allegation.").

"must show that the racketeering predicates … amount to or pose a threat of continued criminal activity." *H.J. Inc. v. NW Bell Tel. Co.*, 492 U.S. 229, 239 (1989). But that requirement was rejected by the Court of Appeals within a week of *H.J. Inc.* being decided and it has been repeatedly rejected ever since.

Chesebro's general demurrer relies on extrinsic facts, ignores the applicable statutory text and habitually fails to cite adverse authority. It fails for at least five reasons. First, Chesebro's general demurrer is void because it asserts facts extrinsic to the indictment. Second, Chesebro ignores the fact that the indictment alleges a conspiracy to violate Georgia RICO, not a substantive violation of the statute. This is dispositive, because a pattern of racketeering activity is not an essential element of a Georgia RICO conspiracy conviction.

Third, Chesebro's argument fails because continuity is not required for *any* violation of Georgia RICO, whether substantive or conspiracy. As a hose of Georgia decisions establish, continuity is not required for a pattern of racketeering activity under Georgia RICO. Chesebro's efforts to tease ambiguity from Georgia's first rejection of the continuity requirement in *Dover v. State*, 192 Ga. App. 429 (1989) fails because no such ambiguity exists, as established by at least half a dozen subsequent Georgia appellate cases—none of which Chesebro cites—including the Supreme Court of Georgia's decision in *Dorsey v. State*, 279 Ga. 534 (2005).

Fourth, in another example of Chesebro's cavalier approach to the citation of relevant authority, he ignores the numerous federal decisions the recognize Georgia RICO does not contain a continuity requirement.

Fifth, Chesebro also ignores the decisions of four state supreme courts, each of which construed a state RICO statute with the same fundamental textual departure from the federal RICO

pattern definition as Georgia RICO, and each of which held that textual difference precludes application of a continuity requirement.

Chesebro's general demurrer should be overruled.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Defendant Chesebro's General Demurrer Is a Speaking Demurrer, Void, and Must Be Overruled as Such

Chesebro's General Demurrer includes "Proposed Findings of Fact" which are based on facts not alleged in the indictment. These include conversations with third parties, Chesebro's experience as an attorney and other extrinsic facts.[2] In addition, Chesebro attempts to controvert the allegations of the indictment by contending that the alleged conspiracy ended on January 6, 2021, rather than September 15, 2022, as set forth in the indictment.[3]

Extrinsic facts cannot be considered in connection with a general demurrer.[4] Chesebro's presentation of extraneous facts is improper and by operation of law it converts the motion to a

[2] General Demurrer at 1.

[3] Chesebro does this in an effort to support his continuity argument, attempting to show that the alleged conspiracy could not have continued past January 6, 2020. He is wrong in two respects. First, as shown below, continuity is not a requirement under Georgia RICO. Second, as alleged in the indictment at Acts 156 and 157 as late as September 17, 2021 Defendant Trump solicited Secretary of State Brad Raffensperger to violate his oath of office by unlawfully decertifying the election and made false statements and representations to Secretary Raffensperger in support of that solicitation. In addition, as alleged in Acts 158—161, at various times in 2022 Defendant Shafer made false statements (Act 158), Defendant Powell made false statements in a sworn deposition (Act 159), Defendant Latham committed perjury (Act 160) and Defendant Cheeley committed perjury (Act 161). Second, the joint responsibility of coconspirators extends to collateral acts incident to and growing out of the original purpose of the conspiracy. *Whaley v. State,* 343 Ga. App. 701, 704 (2017). Georgia RICO specifically contemplates that acts intended to conceal, cover up or obscure previous unlawful activity may form part of a pattern of racketeering activity. *See* O.C.G.A. § 16-14-3(5)(A)(xxii) (false statements and writings), (xxv) (perjury and false swearing), (xxvii) (influencing witnesses), (xxviii) (tampering with evidence), and (xxix) (intimidation or injury of grand or trial juror or court officer) and O.C.G.A. § 16-14-3(B) (any act or threat involving obstruction of justice).

[4] The State does not stipulate or agree to the extrinsic facts relied upon by Chesebro.

speaking demurrer. *Bullard v. State,* 307 Ga. 482, 486 n.5 (2019). A speaking demurrer is one which "attempts to add facts not otherwise apparent on the face of the indictment by means of stipulation … . 'Such a demurrer presents no question for decision, *and should never be sustained*.' Speaking demurrers present no legal authority for quashing an indictment. *Speaking demurrers are void.*" *State v. Givens,* 211 Ga. App. 71, 72 (1993) (quoting *Walters v. State,* 90 Ga. App. 360, 365 (1954)) (emphasis added). "A demurrer may properly attack only defects which appear on the face of the indictment and a demurrer which seeks to add facts not so apparent but supply extrinsic matters must fail as a speaking demurrer." *State v. Holmes,* 142 Ga. App. 847, 848 (1977).

B. Chesebro Cannot Pursue Summary Judgment In A Criminal Case

Chesebro cannot turn his general demurrer into a summary judgment motion by presenting extrinsic facts that he believes support his claim of innocence and asking the court to adjudicate the merits of the case during the pre-trial stage. Georgia law does not recognize such a process because there "is 'no authority'" for attempting "to convert … [a] demurrer into what, in civil practice, would be termed a motion for summary judgment." *Givens,* 211 Ga. App. at 72 (citation omitted). As held in *State v. Henderson*, 283 Ga. App. 111 (2006)

> A criminal charge is generally dismissed only when there is a defect on the face of the indictment or accusation. Henderson, however, sought to have the charge at issue dismissed based on the existence of an affirmative defense, which required the consideration of facts extrinsic to the accusation. There is no basis in Georgia criminal practice for "what, in civil practice, would be termed a motion for summary judgment." Thus, the trial court had no authority to dismiss the charge against Henderson prior to trial.

Id. at 112. The reason that a general demurrer does not permit a defendant to challenge an indictment by presenting a contrary version of the facts is that when addressing a general demurrer all facts alleged in the indictment are assumed to be true. *State v. Cohen,* 302 Ga. 616, 617 (2017) (citing *Lowe v. State,* 276 Ga. 538, 539 (2003)).

C. A Pattern of Racketeering Activity Is Not an Element of a RICO Conspiracy Violation

The short answer to Chesebro's demurrer is that because a pattern of racketeering activity is not an element of a RICO conspiracy violation, and therefore cannot carry with it a continuity requirement.[5] Chesebro's contention that the RICO conspiracy claim requires an allegation that he engaged in a pattern of racketeering activity is in direct conflict with the text of O.C.G.A. § 16-14-4(c). In contrast to the substantive violations set forth in subsections (a) and (b) of O.C.G.A. § 16-14-4, each of which requires a pattern of racketeering activity, subsection (c) contains no reference to racketeering activity or a pattern of racketeering activity. Instead, subsection (c) requires that one or more of the conspirators commit "any overt act to effect the object of the conspiracy." O.C.G.A. § 16-14-4(c)(1). If the General Assembly intended to make a pattern of racketeering activity an element of a conspiracy violation it would have incorporated that term into the text of subsection (c), as it did in subsections (a) and (b). But it did not. In subsection (c), instead of requiring a pattern consisting of at least two acts of racketeering activity from each defendant, the General Assembly required just one overt act,[6] which may be committed by any coconspirator[7] and need not itself be a crime.[8]

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[5] And, as shown by the next section, unlike federal RICO, a pattern of racketeering activity under Georgia RICO does not require allegation or proof of continuity.

[6] The reference in O.C.G.A. § 16-14-4(c)(1) is to "any overt act." Use of the singular "act" establishes that no pattern is required.

[7] *Pasha v. State*, 273 Ga. App. 788, 790 (2005).

[8] Georgia and federal cases are in harmony on this point. *See, McCright v. State*, 176 Ga. App. 486, 487 (1985) ("Of course, the overt act need not be a crime in itself."); *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975)("The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53 (1942)("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.") (citation omitted); *Pierce v. United States*, 252 U.S. 239, 243-44 (1920)("[Y]et the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.") (citation omitted).

As it should, the caselaw reflects the text. In contrast to subsections (a) and (b), where a pattern of racketeering activity is part of the gravamen of the violation, under subsection (c) "a person may be found guilty of a RICO conspiracy 'if they knowingly and willfully join a conspiracy which itself contains a common plan or purpose to commit two or more predicate acts.'" *Cotman v. State*, 342 Ga. 569, 585 (2017) (citation omitted).[9] Or, as the Eleventh Circuit put it, the "touchstone of liability is an agreement to participate in a RICO conspiracy … ." *United States v. Browne*, 505 F.3d 1229, 1264 (11th Cir. 2007).

Contrary to Chesebro's argument, Georgia courts have repeatedly held that a defendant need not engage in a pattern of racketeering activity as a prerequisite to RICO conspiracy liability. For example, *Faillace v. Columbus Bank & Trust Co.,* 269 Ga. App. 866 (2004), rejected the defendants' contention that "each of them must have committed at least two predicate acts in order to have the requisite intent for RICO conspiracy." *Id.* at 870. In reaching that holding, *Faillace* quoted the United States Supreme Court's ruling in *Salinas v. United States,* 522 U.S. 52, 65 (1997):

> The interplay between [federal RICO enterprise liability] and [federal RICO conspiracy liability] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

269 Ga. App. at 870 (brackets added by *Faillace*).[10]

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[9] Georgia courts have consistently used this formulation in RICO conspiracy cases. *See, e.g., McArthur v. Beech Haven Baptist Church of Athens,* 368 Ga. App. 525, 532 (2023); *Z-Space, Inc. v. Dantanna's CNN Center, LLC,* 349 Ga. App. 248, 253 (2019); *Wylie v. Denton,* 323 Ga. App. 161, 165 (2013). Federal courts have also used this formulation in analyzing Georgia RICO conspiracy cases, *see Rosen v. Protective Life Ins. Co.,* 817 F.Supp.2d 1357, 1382 (N.D. Ga. 2011), and federal RICO conspiracy cases. *Southern Intermodal Logistics v. D.J. Powers Co.,* 10 F.Supp.2d 1337, 1361 (S.D. Ga. 1998) (analyzing federal RICO and citing *Salinas v. United States,* 522 U.S. 52 (1997)).

[10] Chesebro does not cite *Faillace* or *Salinas*.

Faillace's adoption of *Salinas* is instructive. In *Salinas* the petitioner challenged his federal RICO conspiracy conviction because the jury was not instructed that it had to find he committed or agreed personally to commit two predicate acts. 522 U.S. at 63. In discussing general principles of conspiracy law, the Court noted that "[i]t is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 65.

Salinas also relied on another foundational principle of conspiracy law:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

522 U.S. at 63-64 (citations omitted). *Salinas* then rejected the proposition that each conspirator must himself commit or agree to commit two or more predicate acts, holding that it "cannot be sustained as a definition of the conspiracy offense, for it is contrary to the principles we have discussed." *Id.* at 66.[11] Of course this is correct, because the State to prove a pattern of racketeering activity in a conspiracy case would subsume RICO's conspiracy provision into its substantive provisions. In an analysis equally applicable to Georgia RICO, federal courts have recognized that this would be inappropriate.

> If the government were required to identify, in indictments charging violation only of section 1962(d), specific predicate acts in which the defendant was involved, then a 1962(d) charge would have all of the elements necessary for a substantive

[11] Despite *Salinas*, defendants in federal RICO cases still sometimes argue, as Chesebro does here, that they cannot be convicted of a RICO conspiracy charge if the government does not introduce evidence sufficient to support a substantive RICO offense. This argument should receive the same short shrift here as it has been given in the federal courts. *See*, *e.g.*, *United States v. Fowler*, 535 F.3d 408, 420-21 (6th Cir. 2008) ("This argument misstates the law because the elements of the two offenses are plainly different. Unlike a substantive RICO charge, a RICO conspiracy charge does not require proof that the defendant committed any predicate acts.").

> RICO charge. Section 1962(d) would thus become a nullity, as it would criminalize no conduct not already covered by sections 1962(a) through (c). Such a result, quite obviously, would violate the statutory scheme in which conspiracy to engage in the conduct described in sections 1962(a) through (c) is itself a separate crime."

United States v. Glecier, 923 F.2d 496, 501 (7th Cir. 1991).

As Georgia decisions subsequent to *Faillace* confirm, a defendant's personal commission of two or more acts of racketeering activity is not an element of a Georgia RICO conspiracy violation:

> Furthermore, while Pasha argues that he was not adequately charged with the predicate offenses, he misapprehends what is central to conspiracy, namely, that each actor in a conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy … .Thus, Pasha's argument is unavailing, since *there is no requirement in a conspiracy case that the State prove that Pasha personally committed the underlying predicate offenses*.

Pasha, 273 Ga. App. at 790 (citation omitted; emphasis added). As *Pasha* holds—and subsequent cases confirm—a Georgia RICO conspiracy defendant's liability may and often will rest upon the acts of other conspirators. *Whaley,* 343 Ga. App. at 704 (any act by any conspirator is the act of every conspirator and they are all responsible for that act); *Overton v. State,* 295 Ga. App. 223, 230 (2008) ("The evidence was also sufficient for a reasonable trier of fact to have found Kendric Dudley guilty beyond a reasonable doubt of the RICO violation, as it showed Dudley was involved in planning the murders of Arroyo and Singh and that he participated in the groups' other crimes alleged in the RICO indictment."), *id.* at 230-31 ("The evidence showed that Overton was present and was involved in the planning of the murders of Arroyo and Singh.").[12] In reaching this conclusion, both *Pasha* and *Whaley* followed a fundamental principles of Georgia conspiracy law:

> If two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint

[12] Chesebro does not cite *Pasha, Whaley* or *Overton*.

> responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose, so long as they are a natural and probable consequence of the conspiracy.

Whaley, 343 Ga. App. at 704, quoting *Hicks v. State*, 295 Ga. 268, 272 (2014) (omitting citations, punctuation and emphasis from *Hicks*). *See Salinas*, 522 U.S. at 63-64 (once persons become partners in a criminal plan "each is responsible for the acts of each other.").

D. Continuity Is Not A Requirement For A Pattern of Racketeering Activity Under Georgia RICO

As set forth above, a pattern of racketeering activity is not an element of a Georgia RICO conspiracy violation. But even if it was, Chesebro's general demurrer fails because continuity is not a requirement for a pattern of racketeering activity under *any* provision of Georgia RICO.

1. For at least 34 years Georgia courts have consistently held that two acts of racketeering activity constitute a pattern.

Federal RICO's definition states that a pattern of racketeering activity "*requires* at least two acts of racketeering activity … ."[13] Georgia's definition is different: it states that a pattern of racketeering activity "*means*: (A) Engaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions … ."[14] The General Assembly's decision to use the word "means" in Georgia's pattern definition is significant. As the United States Supreme Court noted in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), 18 U.S.C. § 1961(5) "states that a pattern '*requires* at least two acts of racketeering activity,' . . . not that it 'means' two such acts." (emphasis in original). Then, in *H.J. Inc. v. NW. Bell Tel. Co.,* 492 U.S. 229, 237 (1989), the Court recognized that this means 18 U.S.C. §1961(5) "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern." This is important

[13] 18 U.S.C. § 1961(5) (emphasis added).

[14] O.C.G.A. § 16-14-3(4)(A) (emphasis added).

because the General Assembly took the approach that *Sedima* and *H.J. Inc*. recognized Congress did not: by using the word "means" it enacted a definition that is complete and self-contained.[15] Consequently, under Georgia RICO, proof of two related predicate acts satisfies the pattern element.

To the extent that Chesebro implies that in spite of the material differences in text between the federal and Georgia statute, the Georgia provisions must still mean the same thing as their federal counterparts, he is wrong. Federal RICO was enacted in 1970.[16] Georgia RICO was enacted in 1980,[17] and *H.J. Inc.* did not adopt the continuity requirement for federal RICO until 1989. At the time Georgia RICO was enacted, no decision of the former Fifth Circuit, the Eleventh Circuit, or any other federal circuit had adopted a continuity requirement. As a result, there is no possibility that the General Assembly intended Georgia RICO's pattern definition to codify a continuity requirement that no federal court had adopted prior to Georgia RICO's enactment. And while it is true that when the General Assembly selects statutory language not from a Georgia statute that has previously been interpreted by Georgia courts, but instead from a statute of another jurisdiction, "the construction placed upon such statute by the highest court of that jurisdiction will be given such statute by the courts of this State," *Haley v. State*, 289 Ga. 515, 523 (2011), quoting *Wilson v. Pollard*, 190 Ga. 74, 80 (1940), this canon of construction does not apply here for three reasons. First, the highest court of the relevant jurisdictions—the United States Supreme Court—

[15] Several state supreme courts have recognized that a definition using the word "means" is "complete and self-contained." *See Jackson v. State*, 50 N.E.3d 767, 774 (Ind. 2016) (use of "means" renders definition complete); *People v. Chaussee*, 880 P.2d 749, 757 (Colo. 1994) (because of the use of the word "means," Colorado's definition of pattern is "complete and self-contained."); *Computer Concepts, Inc. v. Brandt*, 801 P.2d 800, 807 (Ore. 1990) ("The use of the word 'means' implies that the legislature intended the definition to be complete and self-contained.").

[16] Pub. L. No. 91-452, 84 Stat. 922 (1970), codified at 18 U.S.C. §§ 1961-68.

[17] Ga. L. 1980, p. 405, § 1.

had not adopted a continuity requirement prior to Georgia RICO's enactment.[18] Second, the General Assembly did not adopt the federal language, it changed it in a material way. And third, "federal court interpretations of a federal statute do not, in the end, bind this Court's interpretation of a Georgia statute." *Haley*. 289 Ga. at 527.[19]

Georgia courts have consistently rejected arguments that a Georgia RICO pattern of racketeering activity requires more than two acts. This steady stream of rulings started with *Dover v. State*, 192 Ga. App. 429, 431-32 (1989). In *Dover*, the defendant pointed to *Sedima* and argued that Georgia RICO should be read to contain a continuity requirement. 192 Ga. App. at 431. After reviewing federal case law, including *Sedima* and *H.J. Inc.,* and noting the differences between the Georgia and federal statutes, *Dover* concluded that "our legislature intended to and did, by virtue of O.C.G.A. §§ 16-14-4(a) and 16-14-3(2),[20] subject to the coverage of our RICO statute two crimes, included in the statute as designated predicate acts, which are part of the same scheme, *without the*

[18] Other courts analyzing state RICO pattern definitions have recognized that "the continuity element did not become firmly established [for purposes of federal RICO] until the Supreme Court of the United States' 1989 decision in [*H.J. Inc.*] *Northwestern Bell* [*Tel. Co.*, 492 U.S. 229 (1989)]" and therefore could not have influenced state statutes enacted before then. *Philadelphia Reserve Supply Co. v. Nowalk & Assocs., Inc.*, 864 F. Supp. 1456, 1465 (E.D. Pa. 1994). *See also*, *Computer Concepts*, 801 P.2d at 808 ("[W]e have found no decision, from any jurisdiction, predating the enactment of [Oregon] RICO [in 1981] that required a plaintiff to establish 'continuity' in the sense that defendants use the term: predicate acts over an extended period or a threat of future racketeering activity.").

[19] It is also worth noting that both *H.J. Inc.* and *Sedima* were heavily influenced by federal legislative history. *See, e.g., H.J. Inc.,* 492 U.S. at 239 (citing legislative history, including Senate report and Congressional record); *Sedima*, 473 U.S. at 496 n.14 (citing Senate Report and Congressional Record). Georgia courts do not presume that the Georgia legislature "is aware of, much less [that it] relies on, the legislative history or the 'purpose' of other sovereigns' statutes that it uses as a model." *Haley,* 289 Ga. at 526.

[20] At the time *Dover* was decided, Georgia RICO's pattern definition was found at O.C.G.A. § 16-14-3(2). It is now at O.C.G.A. § 16-14-3(4).

added burden of showing that defendant would continue the conduct or had been guilty of like conduct before the incidents charged as a RICO violation." *Id.* at 432 (emphasis added).[21]

Chesebro's suggestion that there is uncertainty about whether the *Dover* court "even considered a continuity or length-of-time requirement for proof of a RICO 'pattern,'" ignores the uninterrupted chain of cases subsequent to *Dover* confirming that there is no continuity requirement under Georgia RICO. General Demurrer at 6. For example, two years after *Dover*, *Bethune v. State*, 198 Ga. App. 490 (1991) held that "[t]he State is not required in the first place to prove all the predicate offenses alleged in the indictment, *but is required to prove only two beyond a reasonable doubt*." *Id*. at 491 (citation omitted; emphasis added).

Three years after *Dover,* the Court of Appeals decided *InterAgency, Inc. v. Danco Fin. Corp.*, 203 Ga. App. 418 (1992). In *InterAgency* the defendant complained that the plaintiff introduced evidence of acts of racketeering activity committed against third party victims, including acts committed after the filing of the complaint. The Court of Appeals rejected this argument holding that "the Georgia RICO statute allows for the introduction of after conduct as predicate acts by not imposing the added burden on plaintiff of showing like conduct before the incidents charged as a RICO violation." *Id*. at 423-24, citing *Dover*. *InterAgency* made it clear that two acts are sufficient to form a pattern, holding that proof of one act committed against the plaintiff, together with a second act committed against another victim, was sufficient to establish a pattern ("Only one of the third party transactions was needed as the second predicate act.").[22] Additional decisions further

[21] Importantly, *Dover* was decided *after H.J. Inc.*, as shown by the fact that *H.J. Inc.* is cited in *Dover*. 192 Ga. App. at 431-32.

[22] This does not mean, however, that additional acts are not relevant: "[a] third similar incident transpiring after filing of the action on trial, even if not qualifying as a predicate act, would be admissible as relevant to confirm and amplify the pattern of the alleged racketeering activity and to show its intentional continuation beyond the time the defendants knew of the allegations." *InterAgency*, 203 Ga. App. at 424.

confirmed that no more than two acts of racketeering activity are required to establish a RICO pattern.[23] And if any possible doubt remained, it was conclusively removed by the Supreme Court's decision in *Dorsey v. State*, 279 Ga. 534 (2005), which held that "proof of two but separate related acts is sufficient to establish a pattern of racketeering activity." *id.* at 541 (citing *Bethune*). Of course, subsequent decisions have adhered to *Dorsey* and the cases it approved[24] and federal district courts in Georgia have repeatedly recognized that Georgia RICO does not require allegations of proof of continuity.[25] No one other than Chesebro claims any doubt about the answer to this question.[26]

2. Every state court of last resort to address the question has concluded that the use of the word "means" in a RICO statutes' pattern definition leaves no room for the imposition of an extratextual continuity requirement.

Additional authority further confirms that *Dover* and the many other cases Chesebro fails to cite are correct. Several other state RICO statutes also use the word "means" in their pattern

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[23] *See*, *e.g.*, *Jones v. State*, 252 Ga. App. 332, 333 (2001) ("Evidence of two predicate acts will sustain the RICO conviction."); *Davitte v. State*, 238 Ga. App. 720, 724 (1999) ("Accordingly, the evidence was sufficient to support the trial court's conclusion that Davitte committed at least two of the predicate acts charged against him, thereby establishing Davitte's RICO violation.").

[24] *See e.g., Overton v. State*, 295 Ga. App. 223, 232 (2008) (citing both *Dorsey and Bethune*); *Carr v. State*, 350 Ga. App. 461, 466 (2019) (citing *Bethune*).

[25] *See, e.g., Turk v. Morris, Manning & Martin, LLP*, 593 F. Supp. 3d 1258, 1300 (N.D. Ga. 2022); *Chesapeake Employers' Ins. Co. v. Eades*, 77 F. Supp. 3d 1241, 1256 (N.D. Ga. 2015); *Marshall v. City of Atlanta*, 195 B.R. 156, 171 (N.D. Ga. 1996). Given that Chesebro cites federal decisions from the First, Second, Sixth, Seventh and Eleventh circuits, as well as a blog and a case from the Southern District of Florida, it is impossible to believe that he somehow missed all of these decisions construing Georgia RICO contrary to his position.

[26] On page 9 of his general demurrer, Chesebro makes a perfunctory argument that a single scheme with a discreet goal cannot establish continuity. This argument fails for three reasons. First, as noted above, Georgia RICO conspiracy violation does not require proof of a pattern of racketeering activity. Second, continuity is not a requirement of a pattern under Georgia RICO. Third, even if a pattern was required, it can be satisfied by a single scheme, as here again the language of Georgia RICO differs from that of the federal statute. *Mbigi v. Wells Fargo Home Mortg.*, 336 Ga. App. 316, 323 (2016). True to form, Chesebro fails to cite *Mbigi*.

definitions and each of the four state supreme courts to address the question has concluded that the use of the word "means" renders the definition complete and self-contained, leaving no room for the imposition of an extratextual continuity requirement.[27] These decisions are based upon multiple points of analysis that apply with equal force to Georgia RICO.

These courts agree that a state statute's use of the word "means" is a "critical linguistic distinction" from federal RICO's use of "requires." *Siragusa*, 971 P.2d at 810. As the Colorado Supreme Court put it in *People v. Chaussee*,

> We agree with the prosecution that the COCCA definition of "pattern of racketeering activity" is complete and self-contained. The legislature has specifically stated what the term *means*, rejecting the use of the word *requires* as found in the parallel definitional section of RICO, the statute after which COCCA was patterned. We must assume that the legislature departed from the RICO language advisedly and are persuaded by the United States Supreme Court's analysis in *H.J. Inc.* that this choice of words is highly relevant in the construction of the language defining "pattern of racketeering activity."

880 P.2d at 757 (emphasis in original). The Supreme Court of Oregon used the same analysis to reach the same conclusion. *Computer Concepts*, 801 P.2d at 807-808 ("The use of the word 'means' implies that the legislature intended the definition to be complete and self-contained. That is, a plaintiff whose allegations track the express requirements of the definition, without doing more, would sufficiently allege a pattern of racketeering activity.").

The Supreme Court of Indiana agreed:

> We agree with both the United States Supreme Court and other jurisdictions that have noted the clear and significant distinction between "means" and "requires" - that the former renders a definition complete, whereas the latter simply states a minimum necessary condition. The Indiana General Assembly's choice in using "means" in the Indiana RICO Act's definition of "pattern of activity" was an effective departure from the language used in the federal statute. In other words,

[27] *See Jackson v. State*, 50 N.E.3d 767, 774-775 (Ind. 2016); *Siragusa v. Browne*, 971 P.2d 801, 810-811 (Nev. 1998); *People v. Chaussee*, 880 P.2d 749, 756-759 (Colo. 1994); *Computer Concepts, Inc. v. Brandt*, 801 P.2d 800, 807-809 (Ore. 1990). Chesebro failed to cite any of these cases.

> while the legislature could have expressly adopted the Federal RICO Act's "requires" language, it did not.

Jackson, 50 N.E.3d at 774.

As did the Supreme Court of Nevada:

> In light of the clear distinction between "means" and "requires" noted by both the Supreme Court and other jurisdictions, the district court was incorrect in its assertion that "although Nevada's RICO statute does not use the word 'pattern', the language of 18 U.S.C. § 1961(5) is functionally no different than our requirement." Had the state legislature intended Nevada's RICO provisions to mirror the federal statute in this area, it would have expressly adopted the "requires" language of the federal statute.

Siragusa, 971 P.2d at 810-811.[28]

While these decisions are not binding upon this Court, their analysis is persuasive because they are based upon state RICO statutes that, like Georgia, use the word "means" rather than the word "requires" in their pattern definitions. In other words, Georgia RICO is more similar to those statutes than it is to the federal statute and the conclusion of these state supreme courts that self-contained, complete definitions leave no room for an extratextual continuity requirement is consistent with and supports the Georgia decisions cited above.

III. CONCLUSION

For the reasons set forth above, Chesebro's general demurrer should be overruled.

Respectfully submitted this 9th day of October 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John E. Floyd
John E. Floyd
Georgia Bar No. 266413
Special Assistant District Attorney
Fulton County District Attorney's Office

[28] The Superior Court of the Virgin Islands also followed this analysis. *People v. McKenzie*, 2017 WL 455737, at *8 (V.I. Super. Jan. 30, 2017).

136 Pryor Street SW, Third Floor
Atlanta, Georgia 30303
floyd@bmelaw.com

/s/ F. McDonald Wakeford
F. McDonald Wakeford
Georgia Bar No. 414898
Chief Senior Assistant District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, Third Floor
Atlanta, Georgia 30303
fmcdonald.wakeford@fultoncountyga.gov

/s/ John W. "Will" Wooten
John W. "Will" Wooten
Georgia Bar No. 410684
Assistant District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, Third Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov

/s/ Alex Bernick
Alex Bernick
Georgia Bar No. 730234
Assistant District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, Third Floor
Atlanta, Georgia 30303
Alex.bernick@fultoncountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE TO DEFENDANT CHESEBRO'S GENERAL DEMURRER TO COUNT 1 (RICO) FOR FAILURE TO ALLEGE THE CONTINUITY REQUIREMENT upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 9th day of October 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John W. "Will" Wooten

John W. "Will" Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov