IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

Steve A. McKenzie and Brenda G. Lawson,

CASE NO: 4D08-2738

Appellants,

vs.

Gerald Betts and Donna Reuter, on behalf of themselves and others similarly situated,

Appellees.
_____/

On Non-Final Appeal from the Fifteenth Judicial Circuit,
in and for Palm Beach County, Florida
Case No. 004-CA-008164 MB-AG

ANSWER BRIEF OF APPELLEES GERALD BETTS AND DONNA REUTER

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STATEMENT OF CASE AND FACTS

Appellees/Plaintiffs, Donna Reuter and Gerald Betts, brought a class action against: 1) Advance America, Cash Advance Centers, Inc. (appellant in case no. 4D08-2739), a Delaware corporation; 2) its subsidiary, Advance America, Cash Advance Centers of Florida, Inc.; and 3) individuals who acted as officers, directors, and/or employees of one or both of the corporate Defendants, namely Steve A. McKenzie and Brenda McKenzie[1] (appellants in this case), and George D. Johnson, Jr.; William Webster, IV; James W. Whatley; Monica L. Allie; Wayne W. Hall; and David Gallen (appellants in case no. 4D08-2740), in response to the Defendants' unlawful scheme of charging and collecting unconscionably usurious interest on consumer "payday" loans. (Appellants' Appendix ("A"), Tab 4). Pursuant to written agreements, Defendants advanced money to Florida consumers in exchange for checks made out in amounts greater than the cash advances with the understanding that Defendants would not cash the checks for a certain period of time, usually two weeks or until the customer's next payday. (A4 ¶¶21, 24). Defendants collected exorbitant, usurious interest on these loans,[2] ranging upward from annual percentage rates of 260%. (A4 ¶¶22, 31).

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[1] Since the filing of Plaintiffs' lawsuit, Steve and Brenda McKenzie divorced and Brenda McKenzie is now known as Brenda Lawson. (A 28, p. 8; A 29, p. 10).

[2] The Florida Supreme Court has held that such transactions, called "deferred presentment" transactions, constitute loans subject to Florida's prohibitions against

In the class action, Plaintiffs allege that by making these loans to Florida consumers, Defendants acted in violation of both Chapter 687 of the Florida Statutes, particularly the prohibition against loan sharking in section 687.071, and the Florida Deceptive and Unfair Trade Practices Act. (A4, pp. 13-15). Plaintiffs also allege that the parent Advance America corporation and the individual Defendants conspired and participated with each other to operate the subsidiary corporation, which is an illegal enterprise, in order to intentionally engage in the criminal enterprise of collecting on these unlawful debts and are all, therefore, liable under the Florida Civil Remedies for Criminal Practices Act ("civil RICO Act"). (A4, pp. 15-16).

The individual Defendants and the parent corporation moved to dismiss, *inter alia*, for lack of personal jurisdiction. (A6; A7; A15). Discovery limited to the issue of jurisdiction has revealed that each Defendant has significant contacts with Florida, sufficient to subject each Defendant to personal jurisdiction in the state.

The parent Advance America corporation was the brainchild of Defendants Webster and Johnson who decided to start a cash advance business after holding discussions in Ft. Lauderdale, Florida, where Johnson lived. (A8, p. 13; A17, pp. 7-8; A23, p. 93; A24, pp. 15-16; A27, p. 24). Both of them made a capital

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usury. *See McKenzie Check Advance of Florida, LLC v. Betts*, 928 So. 2d 1204, 1211 (Fla. 2006).

investment in the parent company, along with Defendants Steve and Brenda McKenzie, who were already engaged in the payday loan business in Florida. (A9; A10; A22, p. 24; A23, pp. 29, 56; A25, p. 24; A27, pp. 10-11, 18-19; A28, pp. 13-15, 17-18, 19, 26-27, 31, 33, 40-41, 44-45, 54, 59-60, 62-63, 67-68; A29, pp. 38, 80). Initially, Johnson invested between 3 to 3.5 million dollars, the McKenzies invested about 1.5 million dollars, and Webster invested about 1 million dollars in the parent company. (A24, pp. 67-69, 72). Their plan was to use this initial investment to create a "national footprint" and open about 200 cash advance stores in various states, including Florida. (A24, p. 70; A26, p. 9).

The Advance America founders were undoubtedly confident that they would be able to quickly implement this plan because two members of their team, Steve and Brenda McKenzie, possessed extensive expertise in the area of payday lending. The McKenzies owned and operated a payday lending company called McKenzie Check Advance, which ran check cashing stores in various states, including Florida, and was eventually purchased by Advance America. (A28, pp. 13-15, 17-18, 19, 31, 33, 40-41, 44-45, 54, 59-60, 62-63, 67-73, 77). Brenda McKenzie managed the day to day operations and the personnel of McKenzie Check Advance and she was a managing member of McKenzie Check Advance of Florida. (A28, pp. 13, 18; A28, Ex. 1, p. 10; A29, p. 21).

This expertise was likely the reason that Defendant Johnson met with Steve McKenzie prior to deciding to enter the payday lending business. (A27, pp. 6-7). Defendants Johnson and Webster benefited from the McKenzies' expertise by observing operations at National Cash Advance, one of the McKenzies' payday lending businesses, in preparation of operating Advance America. (A17, pp. 9-10, 13; A18, pp. 82-84; A27, pp. 6-7; A28, pp. 23-24, 43). Advance America actually purchased National Cash Advance and, as a result, became indebted to Brenda McKenzie for more than ten million dollars and indebted to various McKenzie family trusts for several more million. (A31, pp. 108-109).

The plan of the Advance America founders to open payday lending stores throughout the country was quickly implemented. Advance America first opened stores in North Carolina and then Ohio. (A17, p. 13; A23, p. 59; A24, pp. 65-66). Florida stores were opened within 3 to 4 months of the creation of the parent Advance America corporation, and within a year about 60 stores were operating in Florida. (A17, p. 13; A24, pp. 65-66; A25, pp. 18-19, 43; A26, p. 8). That number increased to 96 stores by the following year. (A25, pp. 19, 43). The objective of operating these stores was to make money for the shareholders of the parent Advance America corporation. (A28, p. 78). Profits from the Florida stores were ultimately transferred to bank accounts maintained by the parent company. (A8, p. 8; A26, p. 76).

The operation and growth of Advance America's payday loan business is demonstrated by the parent company's prospectus, which states:

> With 2,290 payday cash advance centers as of September 30, 2004, we operate the largest network of payday cash advance centers in the United States. Our payday cash advance centers are marketed through local payday cash advance center marketing, supplemented by television and print advertising, direct mail marketing, yellow pages advertising and through other media. . . . We try to locate our payday cash advance centers in highly visible, accessible locations and attempt to operate during convenient hours for our customers. Normal business hours of our payday cash advance centers are from 10:00 a.m. until 6:00 p.m., Monday through Friday, and, in most states, from 10:00 a.m. until 3:00 p.m. on Saturday. We typically locate our payday cash advance centers in middle-income shopping areas with high retail activity. Other tenants in these shopping areas typically include grocery stores, discount retailers and national video rental stores. By using consistent signage and design at our payday cash advance centers, we hope to increase our brand recognition. As of September 30, 2004, we operated 2,182 payday cash advance centers under the "Advance America" brand and 108 payday cash advance centers under the "National Cash Advance" brand. We intend to rebrand the remaining 108 "National Cash Advance" brand payday cash advance centers as "Advance America" brand payday cash advance centers, although we have no specific timetable for doing so.

(A30). This prospectus demonstrates that the parent company controls the operations of its subsidiaries that run the payday lending stores throughout the country, including where those stores are located, how they are marketed, and what hours they keep. The parent company also "monitor[s] compliance by [its] payday cash advance centers with applicable federal and state laws and regulations" by conducting "unannounced audits of [its] payday cash advance centers" at least once per year. (A30). And it retained a lobbyist, which it paid between $10,000

and $15,000 a month, to work on behalf of Advance America before the Florida legislature and cabinet and with the Comptroller's office to develop rules and legislation favorable to the company's business in Florida. (A16, Plaintiffs' Exhibits 1-9). Furthermore, the parent company covered expenses for the Florida subsidiary and profits from the Florida subsidiary flowed to the parent. (A21, p. 147; A26, pp. 76, 79; A32, p. 10).

With the foregoing evidence in the record, the trial court held a one-hour hearing on Defendants' motions to dismiss at which the parties argued the relevant legal issues at length. Rather than rule from the bench, the Honorable Judge Hoy took the matter under advisement. (A35, p. 52). A little more than a month later, the trial court entered a written order denying Defendants' motions to dismiss. (A1). Thereafter, the parent Advance America corporation, Steve and Brenda McKenzie, and the remaining individual Defendants took separate non-final appeals under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i), which permits interlocutory appeals of non-final orders that determine "the jurisdiction of the person." (A2; A35; A36).

Plaintiffs' motion to consolidate the three appeals, even just for record purposes, was denied, but the Court ordered *sua sponte* that the appeals be assigned to the same panel.

SUMMARY OF ARGUMENT

I. Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants are subject to personal jurisdiction in Florida because they have been engaged in a general course of business activity in Florida for pecuniary benefit, subjecting them to jurisdiction under Florida statute section 48.193(1)(a); they have committed a "tortious act" in Florida, subjecting them to jurisdiction under 48.193(1)(b); and they have engaged in substantial and not isolated activity within Florida, subjecting them to jurisdiction under 48.193(2).

II. Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants have engaged in substantial activity in the state of Florida, well-exceeding the minimum contacts required by due process. Subjecting the McKenzie Defendants to personal jurisdiction in Florida, therefore, comports with due process of law.

ARGUMENT

THE TRIAL COURT CORRECTLY DETERMINED THAT THE MCKENZIE DEFENDANTS ARE SUBJECT TO PERSONAL JURISDICTION IN FLORIDA.

Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants are subject to personal jurisdiction in Florida under the long-arm statute because they conducted business in Florida, subjecting them to jurisdiction under section 48.193(1)(a), Florida Statutes; committed a tortious act in Florida, subjecting them to jurisdiction under 48.193(1)(b); and engaged in substantial and not isolated activities in Florida, subjecting them to jurisdiction under 48.193(2). Each of the McKenzie Defendants also has sufficient minimum contacts with Florida to satisfy the due process clause. Thus, the Court should affirm the trial court's denial of the McKenzie Defendants' motion to dismiss for lack of personal jurisdiction.

When determining whether it has jurisdiction over a nonresident defendant, a Florida court must conduct a two-step analysis. *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989). First it must find that there are sufficient facts to bring the case within the purview of Florida's long-arm statute. *Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739, 741 (Fla. 4th DCA 2008). Then it must determine "whether there are sufficient 'minimum contacts' to satisfy due process requirements." *Id*.

"Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts." *Venetian Salami*, 554 So. 2d at 502 (citations omitted). By filing a motion to dismiss on the ground of lack of personal jurisdiction, a defendant does nothing more than raise the legal sufficiency of the pleadings. *Id*. (citing *Elmex Corp. v. Atl. Fed. Savs. & Loan Ass'n*, 325 So. 2d 58 (Fla. 4th DCA 1976)). "A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position." *Id*. Allegations not countered by evidence presented by the defendant are accepted as true. *Nida Corp. v. Nida*, 118 F. Supp. 2d 1223, 1227 (M.D. Fla. 2000) (citing *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir.1999)).

A. Plaintiffs' allegations and the record evidence demonstrate that the case against the McKenzie Defendants falls within the purview of Florida's long-arm statute.

Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants are subject to personal jurisdiction in Florida because they have been engaged in a general course of business activity in Florida for pecuniary benefit, subjecting them to jurisdiction under 48.193(1)(a); they have committed a "tortious act" in Florida, subjecting them to jurisdiction under 48.193(1)(b); and

they have engaged in substantial and not isolated activity within Florida, subjecting them to jurisdiction under 48.193(2).

1. § 48.193(1)(a), Fla. Stat.—Conducting business in Florida

One way that a nonresident defendant can be subject to personal jurisdiction in Florida is by "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." § 48.193(1)(a).[3] If the collective actions of a defendant "show a general course of business activity in the State for pecuniary benefit" the requirements of this statute are satisfied. *Dinsmore v. Martin Blumenthal Assocs.*, 314 So. 2d 561, 564 (Fla. 1975).

[3] Appellants contend that Plaintiffs rely exclusively upon 481.193(1)(b) to subject the McKenzie Defendants to personal jurisdiction in Florida. *See* Initial Brief, p. 10. While Plaintiffs did not assert 481.193(1)(a) as their primary ground below, they did raise this basis at the hearing and in their memorandum in opposition to Defendants' Motions to Dismiss (A35, pp. 15-23 of transcript; A20, pp. 12-13). Nevertheless, even if Plaintiffs had not raised 481.193(1)(a) below, the Court could affirm the trial court's ruling on this basis pursuant to the tipsy coachman doctrine. *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

Plaintiffs alleged the following with regard to the McKenzie Defendants:

- "Defendant, Steve A. McKenzie, is a resident of Tennessee and was a mastermind, founder, organizer, financier, officer, director and shareholder in ADVANCE AMERICA DELEWARE and ADVANCE AMERICA FLORIDA, instrumental in and profiting from, organizing, developing, managing, controlling, promoting, expanding and directing the unlawful activities of ADVANCE AMERICA FLORIDA's loansharking operation in Palm Beach County and throughout the state of Florida." (A4, ¶11).
- "Defendant, BRENDA MCKENZIE, is a resident of Tennessee and was a mastermind, founder, organizer, financier, officer, director and shareholder in ADVANCE AMERICA DELEWARE, instrumental in and profiting from, organizing, developing, managing, controlling, promoting, expanding and directing the unlawful activities of ADVANCE AMERICA FLORIDA's loansharking operation in Palm Beach County and throughout the state of Florida." (A4, ¶12).
- The McKenzie Defendants conspired and participated with the parent Advance America corporation and the other individual Defendants "to create and operate the illegal enterprise which is Defendant, ADVANCE AMERICA FLORIDA, through imposing and collecting

illegal and usurious interest, many times the allowable rate under Florida law, from Plaintiffs and members of the class." (A4, ¶20).

The McKenzie Defendants did not present affidavits to refute these allegations. The record evidence supports Plaintiffs allegations and demonstrates that both Steve and Brenda McKenzie were initial shareholders of both the parent and subsidiary corporations. (A24, pp. 131-132; A25, p. 24; A28, pp. 26-27). Their initial investment was substantial in that they invested about 1.5 million dollars in the parent company. (A24, pp. 67-69, 72). Brenda McKenzie continues to own 4,465,335 shares, or 5.3%, of the parent company, which is also indebted to her for more than ten million dollars. (Appellees' Appendix, p. 6; A31, pp. 108-109). She also ran the daily operations and managed the personnel of McKenzie Check Advance (and was a managing member of McKenzie Check Advance of Florida), which was acquired by the parent Advance America corporation, thereby making Defendants liable to at least those class members "who obtained and/or held loans from McKenzie Check Advance of Florida . . . after the effective date of the purchase." (A4, ¶10; A28, pp. 13, 18, Ex. 1, p. 10; A29, p. 21). And both Steve and Brenda McKenzie served on the board of directors of the parent Advance America company. (A28, pp. 28-29, 34).

As a result of their involvement with Advance America and McKenzie Check Advance, the McKenzie Defendants engaged in a general course of business

activity in Florida for pecuniary benefit by operating, conducting, engaging in, or carrying on a business or business venture in this state. *See Wm. E. Strasser Const. Corp. v. Linn*, 97 So. 2d 458, 459-60 (Fla. 1957) (finding defendants were subject to personal jurisdiction in Florida because their acts of acquiring land in Florida and entering into a contract for the construction of an apartment building amounted to defendants engaging in a business venture in state of Florida).

Appellants argue that the Court cannot consider the McKenzie Defendants' actions to be their own for purposes of personal jurisdiction analysis because the Defendants were not alleged to have acted personally; rather they were acting as shareholders, directors, or officers of the parent and subsidiary corporations. That argument is inapposite here, however, when it is the very act of establishing, operating, and engaging in this payday loan business in Florida that Plaintiffs allege is a violation of the civil RICO Act. *See Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368, 372 (Fla. 4th DCA 2007) (holding corporate shield doctrine did not apply because corporate officer was "alleged to have committed intentional torts expressly aimed at Florida"); *Thorpe v. Gelbwaks*, 953 So. 2d 606, 611-12 (Fla. 5th DCA 2007) (holding corporate shield doctrine did not apply because corporate officer was alleged to have committed fraudulent or intentional misconduct); *Molenda v. Hoechst Celanese Corp.*, 60 F. Supp. 2d 1294, 1300

(S.D. Fla. 1999) (noting corporate veil is pierced when corporation is formed for illegal purpose).

Plaintiffs allege in the complaint that the subsidiary corporation is an illegal "enterprise" under the civil RICO Act, (A4, ¶66 (citing § 772.103, Fla. Stat.)), and that the parent company and the individual Defendants knowingly operated this enterprise in order to collect unlawful debt in violation of section 772.103(2). (A4, ¶¶ 67-68). Plaintiffs further allege that the parent company and the individual Defendants, including the McKenzies, have conspired and endeavored to engage in this unlawful behavior and directly or indirectly participated in or conducted this illegal enterprise in violation of the civil RICO Act. (A4, ¶¶ 69-70). The corporate shield doctrine cannot be used to insulate the McKenzie Defendants from their own improper actions and behavior, which is the very subject of Plaintiffs' RICO claim, just because they were acting under the guise of being corporate directors or shareholders. *See Edelstein*, 961 So. 2d at 372; *Thorpe*, 953 So. 2d at 611-12; *Molenda* 60 F. Supp. 2d at 1300; *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. 3d DCA 2000) (noting corporate veil will be pierced when corporation was formed for improper purpose); *Dade Roofing & Insulation Corp. v. Torres*, 369 So. 2d 98, 99 (Fla. 3d DCA 1979) (noting officers and directors of corporation are not protected by corporate status from acts that they are personally liable for).

2. § 48.193(1)(b), Fla. Stat.—Committing a tortious act in Florida

Another way that a nonresident defendant can be subject to personal jurisdiction in Florida is by committing a tortious act within the state. § 48.193(1)(b). This section of Florida's long-arm statute is broadly construed. *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1558 (S.D. Fla. 1996).

Appellants argue that it is impossible for the McKenzie Defendants to be subject to jurisdiction under this subsection of the long-arm statute because the civil RICO Act is not a "tort" and, therefore, Defendants' violation of this act cannot amount to "committing a tortious act." The McKenzie Defendants, however, have failed to preserve this argument for appellate review because they never raised the argument before the trial court.[4]

Even if the Court decides to consider Appellants' argument on the merits, the argument still fails because a violation of the civil RICO Act constitutes a "tortious act" under the Florida Supreme Court's broad construction of the term. In *Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582,

[4] "For an issue to be preserved by a defendant in a case involving co-defendants, that defendant must object or that defendant must join in the objection of the other defendant." *Eagleman v. Korzeniowski*, 924 So. 2d 855, 859 (Fla. 4th DCA 2006). Because the parent Advance America corporation was the only party to raise below the argument that violation of the civil RICO Act does not constitute the commission of a "tortious act" under 48.193(1)(b), (A34, p. 44), and the McKenzie Defendants failed to join in the argument, this argument cannot be raised by the McKenzie Defendants on appeal.

585 (Fla. 2000), the Florida Supreme Court found that allegations that defendants "deliberately conspired to fix the wholesale price of their product throughout the United States, including Florida[, in] violation of the Florida Deceptive and Unfair Trade Practices Act" alleged a "tortious act" under 48.193(1)(b). It explained that, "'Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.'" *Id.* at 585 n.8 (quoting Prosser and Keeton on The Law of Torts 2 (W. Page Keeton, general ed., 5th ed. 1984)).[5] Because the civil RICO Act provides for the remedy of damages, *see* § 772.104(1), Fla. Stat.,[6] by alleging that the McKenzie

[5] Several other courts have found that allegations of a statutory violation can satisfy the "tortious act" requirement of 48.193(1)(b). *See Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856-57 (11th Cir. 1990) (finding violations of federal copyright and communications laws to be sufficient to trigger jurisdiction under 48.193(1)(b)); *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988) (finding violations of federal antitrust laws to be sufficient to trigger jurisdiction under 48.193(1)(b)); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1146 (N.D. Fla. 1994) (finding violation of Comprehensive Environmental, Response, Compensation and Liability Act constitutes a "tortious act" under 48.193(1)(b)). The case relied on by Appellants, *Brown v. Nova Info. Sys., Inc.*, 903 So. 2d 968 (Fla. 5th DCA 2005), is distinguishable because there the court found that a statutory claim of fraudulent conveyance under Florida's Uniform Fraudulent Transfer Act does not amount to a tort because that statute, unlike the civil RICO Act, does not provide for the remedy of damages. *Id.* at 969 (citing *Beta Real Corp. v. Graham*, 839 So. 2d 890 (Fla. 3d DCA 2003); *Freeman v. First Union Nat'l Bank*, 865 So. 2d 1272 (Fla. 2004)).

[6] "Any person who proves . . . that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of $200. . . ." § 772.104(1), Fla. Stat.

Defendants conspired with and participated with each other and the other Defendants in order to create and operate the illegal enterprise/subsidiary Advance America corporation in Florida in violation of 772.103 of the civil RICO Act, Plaintiffs have alleged that both of the McKenzie Defendants committed a "tortious act" in Florida. The McKenzie Defendants are, therefore, subject to personal jurisdiction in Florida pursuant to section 48.193(1)(b) of the long-arm statute.

Appellants also contend that Plaintiffs failed to properly plead a count for civil RICO because they have failed to properly allege injury, participation, conspiracy, and distinctness. These issues, however, are not reviewable in this non-final appeal. Here, the Court's jurisdiction is limited by Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) to a review of non-final orders that determine "the jurisdiction of the person." *See Kountze v. Kountze*, 2008 WL 5191571, *3 (Fla. 2d DCA Dec. 12, 2008) (noting there is "no rule permitting review of nonfinal orders that determine whether a complaint states a cause of action"). Review of the trial court's denial of the McKenzie Defendants' motion to dismiss for failure to state a claim is not proper until plenary appeal.

Nevertheless, a review of the complaint demonstrates that Plaintiffs have pled cognizable causes of action against the McKenzie Defendants for violation of the civil RICO Act, and that such allegations satisfy the requirements of

48.193(1)(b). The civil RICO Act, like its federal counterpart (the Racketeer Influenced and Corrupt Organizations Act), permits civil causes of action against individuals that establish or operate a criminal enterprise, thereby making the individuals, rather than the enterprise, the liable party. Under the civil RICO Act, liability attaches to those persons who: 1) derive proceeds from a pattern of criminal activity or the collection of an unlawful debt and who use or invest those proceeds in the establishment or operation of an enterprise, § 772.103(1), Fla. Stat.; 2) through a pattern of criminal activity or the collection of an unlawful debt acquire or maintain any interest or control in an enterprise, § 772.103(2); 3) are employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt, § 772.103(3); or 4) conspire or endeavor to violate any of the above provisions. § 772.103(4).

Plaintiffs allege in their complaint that the Florida subsidiary is the "enterprise" for purposes of the civil RICO claim. (A4 ¶ 66). As demonstrated by the depositions and other record evidence, each of the individual Defendants, including the McKenzies, as well as the parent Advance America corporation, was not only associated with the subsidiary/enterprise, but was also involved in the establishment and operations of the subsidiary's payday loan activities in Florida. Thus, not only did Plaintiffs sufficiently allege that the individual Defendants and

parent corporation were "associated with" the enterprise, and were all, either by establishing and/or operating the enterprise, "employed by" or "participa[nts] in" the operation of the enterprise, making their claims under the civil RICO Act viable, but the undisputed record evidence supports these allegations. As Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants acted in violation of the civil RICO Act, and thereby committed a tortious act in Florida, they are subject to personal jurisdiction under 48.193(1)(b). *See Renaissance Health Pub., LLC v. Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. 4th DCA 2008) (holding allegations that president wrote article disparaging plaintiff's product, which was published on defendant company's website, amounted to allegations that president committed a tortious act subjecting the president to personal jurisdiction in Florida); *Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368 (Fla. 4th DCA 2007) (finding allegations that New York accountant failed to follow regulations and failed to pay plaintiff monies due in sale of Florida venture were sufficient to subject accountant to jurisdiction in Florida for the commission of a tortious act); *Thorpe v. Gelbwaks*, 953 So. 2d 606 (Fla. 5th DCA 2007) (holding allegations that defendant stockholder misrepresented financial condition and expected sales and profits of Florida franchise in order to induce its sale amounted to allegations that stockholder committed a tortious act in Florida).

3. §48.193(2), Fla. Stat.—Substantial activities within Florida

Nonresident defendants are also subject to personal jurisdiction in Florida if they engage in "substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, [and] whether or not the claim arises from that activity." §48.193(2), Fla. Stat.[7] By operating Advance America and McKenzie Check Advance in Florida, the McKenzie Defendants engaged in substantial and not isolated activity within Florida sufficient to subject them to personal jurisdiction in Florida, particularly Brenda McKenzie who oversaw the McKenzie Check Advance's daily operations and managed the company's personnel. *See Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1557-58 (S.D. Fla. 1996) (finding corporation and its president were subject to personal jurisdiction in Florida under § 48.193(2) where, over course of a year, president and other members of corporation met in Miami with representatives of Florida company in "furtherance of their existing business relationship and in order to procure additional business"); *Noury v. Vitek Mfg. Co., Inc.*, 730 F.Supp. 1573, 1574 (S.D. Fla. 1990) (concluding that § 48.193(2) was satisfied where defendant engaged in sales activity for a period of several years by taking telephone orders

[7] Although Plaintiffs did not raise this argument below, the Court can affirm the trial court's ruling on this basis pursuant to the tipsy coachman doctrine. *See Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.").

from Florida and shipping directly to Florida, advertised in national publications reaching Florida, and attended professional conference in Florida).

B. The McKenzie Defendants have sufficient minimum contacts with Florida to satisfy due process requirements.

Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants engaged in substantial activity in the state of Florida, well-exceeding the minimum contacts required by due process. Subjecting the McKenzie Defendants to personal jurisdiction in Florida, therefore, comports with due process of law.

"Due process requires that a nonresident has sufficient minimum contacts with the forum state such that the maintenance of a suit does not offend 'traditional notions of fair play and substantial justice.'" *Carib-USA Ship Lines Bahamas Ltd. v. Dorsett*, 935 So. 2d 1272, 1275 (Fla. 4th DCA 2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). "In analyzing whether a nonresident has the requisite minimum contacts with a forum state to justify personal jurisdiction, courts should determine whether the nonresident's 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). In order for a nonresident defendant to anticipate being haled into a Florida court, it is essential that there be some act by which the defendant

purposefully avails itself of the privilege of conducting activities within Florida, thus invoking the benefits and protections of its laws. *Id*. (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)). If a defendant is subject to personal jurisdiction in Florida under section 48.193(2) of the Florida Statutes, then the constitutional due process burden is necessarily satisfied. *Id*. as 1275-76 (citing *Woods v. Nova Cos. Belize Ltd.*, 739 So. 2d 617, 620 (Fla. 4th DCA 1999)).

For purposes of this due process analysis, a defendant's contacts with the forum state are "assessed over a period of years prior to the filing of the complaint." *Id*. at 1276 (citing *Woods*, 739 So. 2d at 621). And an "individual's activities as an employee on behalf of a corporation" are included in the analysis, particularly where, as here, the corporate shield doctrine cannot be properly invoked due to the intentional misconduct of the defendant. *See Edelstein v. Marlene D'Arcy, Inc.*, 961 So. 2d 368, 372 (Fla. 4th DCA 2007) (finding due process was met where defendant who was treasurer and accountant of business venture had ongoing relationship with venture, prepared its tax returns and performed bookkeeping services, and provided advice that resulted in alleged conversion of millions of dollars); *May v. Needham*, 820 So. 2d 430, 431 (Fla. 4th DCA 2002) (finding it "clear that general jurisdiction [and, consequently, minimum contacts] over an individual may be based on that individual's activities as an employee on behalf of a corporation") (citing *Achievers Unlimited, Inc. v.*

Nutri Herb, Inc., 710 So. 2d 716 (Fla. 4th DCA 1998)); *Thorpe v. Gelbwaks*, 953 So. 2d 606, 611 (Fla. 5th DCA 2007) (finding defendant had sufficient minimum contacts with Florida to satisfy due process requirements because he regularly worked in Florida for five month period and was involved in the development of financial spreadsheets and documents related to sale of franchise located in Florida); *but see Radcliffe v. Gyves*, 902 So. 2d 968, 973 (Fla. 4th DCA 2005).

The McKenzie Defendants both have sufficient minimum contacts with Florida such that their right to due process will not be violated by requiring them to appear in Florida to defend Plaintiffs' lawsuit because they had substantial contacts with the state in relation to the establishment and operation of McKenzie Check Advance in Florida. For instance, Brenda McKenzie actually managed the day to day operations and the personnel of McKenzie Check Advance and she was a managing member of McKenzie Check Advance of Florida. (A28, pp. 13, 18; A28, Ex. 1, p. 10; A29, p. 21). These contacts are sufficient to satisfy due process because the McKenzie Defendants should have reasonably anticipated being haled into a Florida court based on the establishment and operation of Advance America in Florida, as well as the establishment and operation of McKenzie Check Advance in Florida. *See Siegel v. Marcus*, 980 So. 2d 1272, 1275 (Fla. 4th DCA 2008) (finding nonresident limited partner in Florida partnership that owned an apartment complex in Florida had sufficient minimum contacts with Florida because he

deliberately affiliated himself with the state); *Edelstein*, 961 So. 2d at 371-72 (nonresident defendant that was officer of Florida company and provided the company with accounting services was subject to personal jurisdiction in Florida); *Aspsoft, Inc. v. WebClay*, 983 So. 2d 761, 767 (Fla. 5th DCA 2008) (finding corporation had sufficient minimum contacts with Florida because it entered into computer consulting agreement that required payment be made in Florida and its employees communicated telephonically with plaintiff's employees in Florida for the purpose of receiving the consulting services); *Future Tech Intern., Inc. v. Tae Il Media, Ltd.*, 944 F. Supp. 1538, 1559 (S.D. Fla. 1996) (finding due process requirements satisfied by continuous and systematic contacts that corporation and its president had with Florida where, over course of a year, president and other members of corporation met in Miami with representatives of Florida company in "furtherance of their existing business relationship and in order to procure additional business"); *Nordmark Presentations, Inc. v. Harman*, 557 So. 2d 649, 651 (Fla. 2d DCA 1990) (finding due process satisfied where employee attended three business meetings in Florida and received support and directions from employer's Florida office).

Even if, as Appellants claim, the corporate shield doctrine would normally limit consideration of actions taken by the McKenzie Defendants in their capacities as officers, directors, and shareholders of the parent corporation, the doctrine

would not apply here because Plaintiffs allege that the McKenzie Defendants intentionally conspired to harm Florida consumers, thereby directing their unlawful actions at Florida. *See Edelstein*, 961 So. 2d at 372 (holding corporate shield doctrine did not apply because plaintiff alleged the corporate officer committed intentional torts (conspiracy, conversion, malpractice) expressly aimed at Florida); *Allerton v. State Dep't of Ins.*, 635 So. 2d 36, 40 (Fla. 1st DCA 1994) (finding a "Florida plaintiff, injured by the intentional misconduct of a nonresident corporate employee expressly aimed at him, [has] the right to obtain personal jurisdiction over that employee in a Florida court"); *Odell v. Signer*, 169 So. 2d 851, 853-54 (3d DCA 1964) (finding "individual officers, as agents of the corporation would be personally liable to any third person they injured by virtue of their tortious activity even if such act were performed within the scope of their employment as corporate officers").

Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants engaged in substantial activity in the state of Florida, well-exceeding the minimum contacts required by due process. Subjecting them to personal jurisdiction in Florida, therefore, comports with due process of law. To hold otherwise would be to hold that Florida consumers injured within Florida by the intentional misconduct of the McKenzie Defendants in charging usurious interest on payday loans made through an illegal enterprise that they established

and operated in Florida just as they did with McKenzie Check Advance, another payday loan company that charged Florida consumers usurious rates of interest,[8] must travel to the Defendants' states of residence to obtain a remedy. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1288 (11th Cir. 2008) (holding that "Florida plaintiff, injured by the intentional misconduct of a nonresident [in the unauthorized use of a trademark on a website accessible in Florida] expressly aimed at the Florida plaintiff, is not required to travel to the nonresident's state of residence to obtain a remedy").

[8] Plaintiffs have a similar lawsuit pending against the McKenzie Defendants and others for the charging of usurious rates of interest to Florida consumers who received payday loans from McKenzie Check Advance, which is presently before this Court on a non-final appeal in case 4D08-493. Whether the McKenzie Defendants are subject to personal jurisdiction is not an issue in this non-final appeal, which the Court is presently considering dismissing for lack of jurisdiction after ordering *sua sponte* that the McKenzie Defendants and other appellants show cause why the appeal should not be dismissed.

CONCLUSION

Plaintiffs' allegations and the record evidence demonstrate that the McKenzie Defendants are subject to personal jurisdiction in Florida under the long-arm statute because they conducted business in Florida under 48.193(1)(a), committed a tortious act in Florida under 48.193(1)(b), and engaged in substantial and not isolated activities in Florida under 48.193(2). Furthermore, the McKenzie Defendants have sufficient minimum contacts with Florida to satisfy the due process clause. Thus, the Court should affirm the trial court's denial of the McKenzie Defendants' motion to dismiss for lack of personal jurisdiction.

Respectfully submitted this 31st day of December, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellees' Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that the Answer Brief being submitted is in Times New Roman 14-point font.

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