

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 Joseph Orlosky,  
12 Plaintiff,

Case No.: 3:17-cv-01701-BTM-  
WVG

13 v.

14 William E. Merrill, Transformed  
15 Service Inc., DOES 1 through 50,  
16 Defendants.

**ORDER GRANTING MOTION TO  
PROCEED IN FORMA  
PAUPERIS; DISMISSING  
COMPLAINT FOR FAILURE TO  
STATE A CLAIM; AND  
DENYING REQUEST FOR  
APPOINTMENT OF COUNSEL**

17  
18  
19 On August 23, 2017, Plaintiff filed a Complaint in addition to a Motion to  
20 Proceed In Forma Pauperis (“IFP Motion”) and a Request for Appointment of  
21 Counsel. For the reasons discussed below, the IFP Motion is granted, the  
22 Complaint is dismissed with leave to amend, and the Request for Appointment of  
23 Counsel is denied without prejudice.

24 **Discussion**

25 **I. Motion to Proceed IFP**

26 Upon review of Plaintiff’s affidavit in support of his IFP Motion, the Court  
27 finds that Plaintiff has made a sufficient showing of inability to pay the filing fees  
28 required to prosecute this action. Accordingly, Plaintiff’s IFP Motion is

1 **GRANTED.**

2 **II. Failure to State a Claim**

3 Although the Court will allow Plaintiff to proceed IFP, Plaintiff's Complaint  
4 must be dismissed for failure to state a claim. The Court is under a continuing  
5 duty to dismiss an IFP case whenever the Court determines that the action "fails  
6 to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).  
7 Here, the Complaint must be dismissed because it does not plead facts that  
8 demonstrate the existence of an element of a violation of the Racketeer  
9 Influenced and Corrupt Organizations Act ("RICO"): a pattern of racketeering  
10 activity.

11 Plaintiff's Complaint alleges that Defendants violated § 1962 of RICO when  
12 they "engaged in a racketeering conspiracy to defraud and extort funds from  
13 plaintiff by engaging in practices and dishonest conduct designed to entrap  
14 plaintiff, threaten the property of the plaintiff and threaten litigation in Kansas if  
15 plaintiff did not pay Defendant immediately as demanded." Specifically, Plaintiff  
16 alleges that upon receiving Plaintiff's property for interstate shipping, Defendants'  
17 altered and misrepresented the condition of the property, demanded fraudulent  
18 fees related to shipping the property, and ultimately stole the property. Because  
19 Plaintiff is proceeding pro se, his pleadings are "held to less rigorous standards  
20 than those drafted by attorneys." *Cripps v. Life Ins. Co. of North America*, 980  
21 F.2d 1261, 1268 (9th Cir. 1992).

22 Even so, Plaintiff has not yet succeeded in stating a claim on which relief  
23 can be granted because his Complaint does not allege a pattern of racketeering  
24 activity. To state a claim under § 1962 of RICO, a plaintiff must allege the "(1)  
25 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity  
26 (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.'"  
27 *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th  
28 Cir. 2005). At a minimum, a "pattern" requires that the predicate acts be "related"

1 and “continuous.” *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1527 (9th Cir. 1995). To  
2 establish that predicate acts are “continuous,” a plaintiff may plead “closed-ended  
3 continuity” or “open-ended continuity.” *Id.* at 1526. “Closed-ended continuity  
4 refers to a closed period of repeated conduct. It is established by showing that  
5 the predicate acts occurred over a substantial period of time. If closed-ended  
6 continuity cannot be established, plaintiffs may plead open-ended continuity.  
7 Open-ended continuity refers to past conduct that by its nature indicates a threat  
8 of future criminal conduct. It is established by showing either that the predicate  
9 acts specifically threaten repetition or that they were an ongoing entity's regular  
10 way of doing business.” *Id.*

11 Plaintiff’s Complaint alleges that Defendants’ predicate acts occurred  
12 between August 11, 2017 and August 13, 2017. A period of three days does not  
13 constitute “a substantial period of time,” as required by closed-ended  
14 continuity.<sup>1+</sup> Plaintiff’s Complaint also fails to establish open-ended continuity. As  
15 currently pleaded, the Complaint only alleges a single isolated activity on the part  
16 of Defendants. It does not allege that Defendants’ predicate acts threaten  
17 repetition or that the predicate acts have become Defendants’ regular way of  
18 doing business.

19 Accordingly, Plaintiff’s Complaint will be dismissed with leave to amend.  
20 Plaintiff will have 45 days from the date of this order to file an amended  
21 complaint.

### 22 **III. Request for Appointment of Counsel**

23 Plaintiff has filed a request for appointment of counsel.  
24

---

25  
26 <sup>1</sup> The 9th Circuit has observed that while there is no “hard and fast, bright line,  
27 one-year” rule for the continuity requirement, it will generally not be “satisfied by  
28 a pattern of activity lasting less than a year” and “a pattern of activity lasting only  
a few months does not reflect the long term conduct to which RICO was intended  
to apply.” See *Allwaste*, F.3d at 1528.

