UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff Feld Entertainment, Inc. hereby gives notice of its intention to rely upon the additional authorities listed below in the hearing currently scheduled for June 23, 2011, at 10:00 a.m., on defendants' motions to dismiss in the above-captioned matter:

1. *Borough of Duryea, Pennsylvania v. Guarnieri*, 2011 U.S. Lexis 4564 (U.S. June 20, 2011).
2. *United States v. Siegelman*, 2011 U.S. App. Lexis 9503 (11th Cir. May 10, 2011).
3. *International Floor Crafts, Inc. v. Dziemet*, 2011 U.S. App. Lexis 8181 (1st Cir. Apr. 21, 2011).
4. *United States v. Bergrin*, 2011 U.S. App. Lexis 7457 (3rd Cir. Apr. 12, 2011).
5. *Virginia Surety Co. v. Macedo*, 2011 U.S. Dist. Lexis 49077 (D.N.J. May 6, 2011).
6. *Thomas v. Ross & Hardies*, 9 F. Supp. 2d 547 (D. Md. 1998).
7. *In re American Honda Motor Co.*, 958 F. Supp. 1045 (D. Md. 1997).
8. *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069 (S.D. Ohio 1994).
9. New York City Bar Association, Formal Opinion 2011-02 (June 15, 2011).
10. *Edmondson & Gallagher, et al. v. Alban Towers Tenants Ass'n, et al.*, Civil Action No. 15426-92 (D.C. Super. Ct.), First Amended Complaint (Apr. 30, 1993).

Copies of the above-listed authorities are attached as exhibits to this filing.

Dated: June 21, 2011

Respectfully submitted,

/s/

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Defendants.	:	
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PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 1

1 of 1 DOCUMENT

BOROUGH OF DURYEA, PENNSYLVANIA, ET AL., PETITIONERS v. CHARLES J. GUARNIERI

No. 09-1476

SUPREME COURT OF THE UNITED STATES

2011 U.S. LEXIS 4564

March 22, 2011, Argued
June 20, 2011, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Guarnieri v. Duryea Borough, 364 Fed. Appx. 749, 2010 U.S. App. LEXIS 2530 (3d Cir. Pa., 2010)

DISPOSITION: Vacated and remanded.

SYLLABUS

After petitioner borough fired respondent Guarnieri as its police chief, he filed a union grievance that led to his reinstatement. When the borough council later issued directives instructing Guarnieri how to perform his duties, he filed a second grievance, and an arbitrator ordered that some of the directives be modified or withdrawn. Guarnieri then filed this suit under *42 U.S.C. § 1983*, alleging that the directives were issued in retaliation for the filing of his first grievance, thereby violating his *First Amendment* "right . . . to petition the Government for a redress of grievances"; he later amended his complaint to allege that the council also violated the *Petition Clause* by denying his request for overtime pay in retaliation for his having filed the *§ 1983* suit. The District Court instructed the jury, *inter alia,* that the suit and the grievances were constitutionally protected activity, and the jury found for Guarnieri. Affirming the compensatory damages award, the Third Circuit held that a public employee who has petitioned the government through a formal [*2] mechanism such as the filing of a lawsuit or grievance is protected under the *Petition Clause* from retaliation for that activity, even if the petition concerns a matter of solely private concern. In so ruling, the court rejected the view of every other Circuit to have considered the issue that, to be protected, the petition must address a matter of public concern.

Held: A government employer's allegedly retaliatory actions against an employee do not give rise to liability under the *Petition Clause* unless the employee's petition relates to a matter of public concern. The Third Circuit's conclusion that the public concern test does not limit public employees' *Petition Clause* claims is incorrect. Pp. 4-19.

(a) A public employee suing his employer under the *First Amendment's Speech Clause* must show that he spoke as a citizen on a matter of public concern. *Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. Even where the employee makes that showing, however, courts balance his employee's right to engage in speech against the government's interest in promoting the efficiency and effectiveness of the public services it performs through its employees. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811.* [*3] Although cases might arise in which special *Petition Clause* concerns would require a distinct analysis, public employees' retaliation claims do not call for this divergence. The close connection between the rights of speech and petition has led Courts of Appeals other than the Third Circuit to apply the public concern test to public employees' *Petition Clause* claims. This approach is justified by the substantial common ground in the definition and delineation of these rights. Pp. 4-8.

(b) The substantial government interests that justify a cautious and restrained approach to protecting public employees' speech are just as relevant in *Petition Clause* cases. A petition, no less than speech, can interfere with government's efficient and effective operation by, *e.g.*, seeking results that "contravene governmental policies or impair the proper performance of governmental functions," *Garcetti v. Ceballos, 547 U.S. 410, 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689*. A petition taking the form of a lawsuit against the government employer may be particularly disruptive, consuming public officials' time and attention, burdening their exercise of legitimate authority, and blurring the lines of accountability between them and the public. [*4] Here, for example, Guarnieri's attorney invited the jury to review myriad details of government decisionmaking. It is precisely to avoid this sort of intrusion into internal governmental affairs that this Court has held that, "while the *First Amendment* invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id., at 420, 126 S. Ct. 1951, 164 L. Ed. 2d 689*. Interpreting the *Petition Clause* to apply even where matters of public concern are not involved would be unnecessary, or even disruptive, when there is already protection for the public employees' rights to file grievances and litigate. Adopting a different rule for *Petition Clause* claims would provide a ready means for public employees to circumvent the public concern test's protections and aggravate potential harm to the government's interests by compounding the costs of complying with the Constitution. Pp. 8-13.

(c) Guarnieri's claim that applying the public concern test to the *Petition Clause* would be inappropriate in light of the private nature of many petitions for redress lacks merit. Although the Clause undoubtedly has force and application in the context of a personal grievance addressed to the government, [*5] petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole. The Clause's history reveals the frequent use of petitions to address a wide range of political, social, and other matters of great public import and interest. Pp. 13-17.

(d) The framework used to govern public employees' *Speech Clause* claims, when applied to the *Petition Clause*, will protect both the government's interests and the employee's *First Amendment* right. If a public employee petitions as an employee on a matter of purely private concern, his *First Amendment* interest must give way, as it does in speech cases. *San Diego v. Roe, 543 U.S. 77, 82-83, 125 S. Ct. 521, 160 L. Ed. 2d 410*. If he petitions as a citizen on a matter of public concern, his *First Amendment* interest must be balanced against the government's countervailing interest in the effective and efficient management of its internal affairs. *Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811*. If that balance favors the public employee, the *First Amendment* claim will be sustained. If the balance favors the employer, the employee's *First Amendment* claim will fail even though the petition is on a matter of public concern. As under [*6] the *Speech Clause*, whether a petition relates to a matter of public concern will depend on its "content, form, and context . . . , as revealed by the whole record." *Connick, supra, at 147-148, n. 7, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. The forum in which a petition is lodged will also be relevant. See *Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 179 L. Ed. 2d 172*. A petition filed with a government employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context. Pp. 17-18.

(e) Absent full briefs by the parties, the Court need not consider how the foregoing framework would apply to this case. P. 19.

364 Fed. Appx. 749, vacated and remanded.

COUNSEL: Daniel R. Ortiz argued the cause for petitioner.

Joseph R. Palmore argued the cause for the United States, as amicus curiae.

Eric Schnapper argued the cause for respondent.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part.

OPINION BY: KENNEDY

OPINION

JUSTICE KENNEDY delivered the opinion of the court.

Among other rights essential to freedom, the *First Amendment* protects "the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const., Amdt. 1*. [*7] This case concerns the extent of the protection, if any, that the *Petition Clause* grants public employees in routine disputes with government employers. Petitions are a form of expression, and employees who invoke the *Petition Clause* in most cases could invoke as well the *Speech Clause of the First Amendment*. To show that an employer interfered with

rights under the *Speech Clause,* the employee, as a general rule, must show that his speech was on a matter of public concern, as that term is defined in the precedents of this and other courts. Here the issue is whether that test applies when the employee invokes the *Petition Clause*.

Alone among the Courts of Appeals to have addressed the issue, the Court of Appeals for the Third Circuit has held that the public concern test does not limit *Petition Clause* claims by public employees. For the reasons stated below, this conclusion is incorrect.

I

Charles Guarnieri filed a union grievance challenging his termination as chief of police for the borough of Duryea, a town of about 4,600 persons in northeastern Pennsylvania. His grievance proceeded to arbitration pursuant to the police union collective-bargaining agreement. The arbitrator found that [*8] the borough council, Duryea's legislative body and the entity responsible for Guarnieri's termination, committed procedural errors in connection with the termination; and the arbitrator also found that Guarnieri engaged in misconduct, including "attempting to intimidate Council members." App. 37, 38. The arbitrator ordered Guarnieri reinstated after a disciplinary suspension. *Id.*, at 38.

Upon Guarnieri's return to the job, the council issued 11 directives instructing Guarnieri in the performance of his duties. The council's attorney explained that the council "wanted to be sure that the chief understood what was going to be expected of him upon his return." Tr. 19:12-14 (Apr. 16, 2008). One directive prohibited Guarnieri from working overtime without the council's "express permission." App. 59, P1. Another indicated that "[t]he police car is to be used for official business only." *Id.*, at 60, P9. A third stated that the "Duryea municipal building is a smoke free building" and that the "police department is not exempt." *Id.*, at 61, P10. Guarnieri testified that, because of these and other directives, his "coming back wasn't a warm welcome feeling." Tr. 65:7-8 (Apr. 15, 2008). Guarnieri [*9] filed a second union grievance challenging the directives. The arbitrator instructed the council to modify or withdraw some of the directives on the grounds that they were vague, interfered with the authority of the mayor, or were contrary to the collective-bargaining agreement.

Guarnieri filed this lawsuit against the borough, the borough council, and individual members of the council under *42 U.S.C. § 1983*. Guarnieri claimed that his first union grievance was a petition protected by the *Petition Clause of the First Amendment*, and he alleged that the directives issued upon his reinstatement were retaliation for that protected activity.

After this suit was filed, the council denied a request by Guarnieri for $ 338 in overtime. The United States Department of Labor investigated and concluded that Guarnieri was entitled to be paid. The council offered Guarnieri a check for the amount, but Guarnieri refused to accept it. Instead, Guarnieri amended his complaint to encompass the denial of overtime. Guarnieri alleged that his *§ 1983* lawsuit was a petition and that the denial of overtime constituted retaliation for his having filed the lawsuit.

Under the law of the Circuit, the defendants could [*10] not obtain judgment as a matter of law on the basis that the lawsuit and grievances were not on a matter of public concern. The case proceeded to a jury. Guarnieri's attorney argued that the council was "sending a message to" Guarnieri through the directives and the denial of overtime: "You might have won your arbitration, but we control you." Tr. 53:24-25 (Apr. 17, 2008). The District Court instructed the jury that the lawsuit and union grievances were "protected activity . . . under the constitution," and that the jury could find defendants liable if it found an adequate connection between the protected activity and the alleged retaliation. *Id.*, at 61:17-20; 62. The jury found in favor of Guarnieri. The jury awarded $ 45,000 in compensatory damages and $ 24,000 in punitive damages for the directives, as well as $ 358 in compensatory damages and $ 28,000 in punitive damages for the denial of overtime. The District Court awarded $ 45,000 in attorney's fees and denied defendants' renewed motion for judgment as a matter of law.

Defendants appealed on the ground that Guarnieri's grievances and lawsuit did not address matters of public concern. Courts outside the Third Circuit have held [*11] that allegedly retaliatory actions by government employers against government employees may not give rise to liability under the *Petition Clause* unless the employee's petition related to a matter of public concern. See, *e.g., Kirby v. Elizabeth City, 388 F.3d 440, 448-449 (CA4 2004)*; *Tang v. Rhode Island, Dept. of Elderly Affairs, 163 F.3d 7, 11-12 (CA1 1998)*; *White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (CA2 1993)*. These courts rely on a substantial overlap between the rights of speech and petition to justify the application of *Speech Clause* precedents to *Petition Clause* claims. They reason that, whether the grievance is considered under the *Speech Clause* or the *Petition Clause*, the government employer is entitled to take adverse action against the employee unless the dispute involves a matter of public concern.

Rejecting that view, the Court of Appeals here affirmed the award of compensatory damages, although it found insufficient evidence to sustain the award of punitive damages. The Court of Appeals concluded that "'a public employee who has petitioned the government

through a formal mechanism such as the filing of a lawsuit or grievance is protected under the *Petition Clause* [*12] from retaliation for that activity, even if the petition concerns a matter of solely private concern.'" *364 Fed. Appx. 749, 753 (CA3 2010)* (quoting *Foraker v. Chaffinch, 501 F.3d 231, 236 (CA3 2007))*. The decision of the Court of Appeals was consistent with the rule adopted and explained by that court in *San Filippo v. Bongiovanni, 30 F.3d 424, 442 (1994)*. This Court granted certiorari to resolve the conflict in the Courts of Appeals. *562 U.S. ___, 131 S. Ct. 456, 178 L. Ed. 2d 285 (2010)*.

II

When a public employee sues a government employer under the *First Amendment's Speech Clause*, the employee must show that he or she spoke as a citizen on a matter of public concern. *Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*. If an employee does not speak as a citizen, or does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Ibid.* Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the *First Amendment* interest of the employee against "the interest of the State, as an employer, [*13] in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*.

This framework "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *San Diego v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam)*. There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. "Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government." *Connick, supra, at 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708*; see also *Keyishian v. Board of Regents of Univ. of State of N. Y., 385 U.S. 589, 605-606, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)*. Nevertheless, a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*. The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise the conduct of public employees. "When someone who is paid a salary so that [*14] she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill, 511 U.S. 661, 675, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)* (plurality opinion). Restraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest.

This case arises under the *Petition Clause*, not the *Speech Clause*. The parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the *Petition Clause*. This Court's precedents confirm that the *Petition Clause* protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. "[T]he right of access to courts for redress of wrongs is an aspect of the *First Amendment* right to petition the government." *Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-897, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984)*; see also *BE&K Constr. Co. v. NLRB, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002)*; *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)*; *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. Although retaliation [*15] by a government employer for a public employee's exercise of the right of access to the courts may implicate the protections of the *Petition Clause*, this case provides no necessity to consider the correct application of the *Petition Clause* beyond that context.

Although this case proceeds under the *Petition Clause*, Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit. That claim would have been subject to the public concern test already described. Because Guarnieri chose to proceed under the *Petition Clause*, however, the Court of Appeals applied a more generous rule. Following the decision of the Court of Appeals in *San Filippo, supra*, at 443, Guarnieri was deemed entitled to protection from retaliation so long as his petition was not a "sham." Under that rule, defendants and other public employers might be liable under the *Petition Clause* even if the same conduct would not give rise to liability under the *Speech Clause*. The question presented by this case is whether the history and purpose of the *Petition Clause* justify the imposition of broader liability when an employee invokes its protection [*16] instead of the protection afforded by the *Speech Clause*.

It is not necessary to say that the two Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are "cognate rights." *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct.*

315, 89 L. Ed. 430 (1945); see also *Wayte v. United States, 470 U.S. 598, 610, n. 11, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)*. "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." *Thomas, 323 U.S., at 530, 65 S. Ct. 315, 89 L. Ed. 430*. Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the [*17] right to petition is generally concerned with expression directed to the government seeking redress of a grievance.

Courts should not presume there is always an essential equivalence in the two Clauses or that *Speech Clause* precedents necessarily and in every case resolve *Petition Clause* claims. See *ibid.* (rights of speech and petition are "not identical"). Interpretation of the *Petition Clause* must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns. See *Sure-Tan Inc., supra, at 896-897, 104 S. Ct. 2803, 81 L. Ed. 2d 732*.

This Court's opinion in *McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985)*, has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition. In those circumstances the Court found "no sound basis for granting greater constitutional protection to statements made in a petition . . . than other *First Amendment* expressions." *Id., at 485, 105 S. Ct. 2787, 86 L. Ed. 2d 384*. There may arise [*18] cases where the special concerns of the *Petition Clause* would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.

As other Courts of Appeals have recognized, however, claims of retaliation by public employees do not call for this divergence. See *supra*, at 4. The close connection between these rights has led Courts of Appeals other than the Third Circuit to apply the public concern test developed in *Speech Clause* cases to *Petition Clause* claims by public employees. As will be explained further, this approach is justified by the extensive common ground in the definition and delineation of these rights. The considerations that shape the application of the *Speech Clause* to public employees apply with equal force to claims by those employees under the *Petition Clause*.

The substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the *Petition Clause*. Petitions, no less than speech, can interfere with the efficient and effective operation of government. A petition [*19] may seek to achieve results that "contravene governmental policies or impair the proper performance of governmental functions." *Garcetti, 547 U.S., at 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689*. Government must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve. A petition, like other forms of speech, can bring the "mission of the employer and the professionalism of its officers into serious disrepute." *Roe, 543 U.S., at 81, 125 S. Ct. 521, 160 L. Ed. 2d 410*. A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That behavior could cause a serious breakdown in public confidence in the government and its employees. And if speech or petition were directed at or concerned other public employees, it could have a serious and detrimental effect on morale.

When a petition takes the form of a lawsuit against the government employer, it may be particularly disruptive. Unlike speech of other sorts, a lawsuit demands a response. Mounting a defense to even frivolous claims may consume the time and resources of the government employer. Outside the context of public employment, this Court has [*20] recognized that the *Petition Clause* does not protect "objectively baseless" litigation that seeks to "'interfere *directly* with the business relationships of a competitor.'" *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*. In recognition of the substantial costs imposed by litigation, Congress has also required civil rights plaintiffs whose suits are "frivolous, unreasonable, or without foundation" to pay attorney's fees incurred by defendants. *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)*; see also *Fed. Rule Civ. Proc. 11* (providing sanctions for claims that are "presented for [an] improper purpose," frivolous, or lacking evidentiary support). The government likewise has a significant interest in disciplining public employees who abuse the judicial process.

Unrestrained application of the *Petition Clause* in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working [*21] conditions, pay, discipline, promotions, leave, vacations, and terminations. See Brief for National School Boards Association as *Amicus Curiae* 5. Every government action in response could present a potential federal constitutional issue. Judges and juries, asked to determine whether the government's actions were in fact retaliatory, would be required to give scrutiny to both the government's response to the grievance and the government's justification for its actions. This would occasion review of a host of collateral matters typically left to the discretion of public officials. Budget priorities, personnel decisions, and substantive policies might all be laid before the jury. This would raise serious federalism and separation-of-powers concerns. It would also consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public.

This case illustrates these risks and costs. Guarnieri's attorney invited the jury to review myriad details of government decisionmaking. She questioned the council's decision to issue directives in writing, rather than orally, Tr. 66 (Apr. 14, 2008); the council's [*22] failure to consult the mayor before issuing the directives, *id.*, at 105 (Apr. 15, 2008); the amount of money spent to employ "Philadelphia lawyers" to defend Guarnieri's legal challenges, *id.*, at 191-193:7-10 (Apr. 14, 2008); 152-153 (Apr. 16, 2008); and the wisdom of the council's decision to spend money to install Global Positioning System devices on police cars, *id.*, at 161-162 (same). Finally, the attorney invited the jury to evaluate the council's decisions in light of an emotional appeal on behalf of Guarnieri's "little dog Hercules, little white fluffy dog and half Shitsu." *Id.*, at 49:13-14 (Apr. 14, 2008). It is precisely to avoid this intrusion into internal governmental affairs that this Court has held that, "while the *First Amendment* invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Garcetti, supra, at 420, 126 S. Ct. 1951, 164 L. Ed. 2d 689* (quoting *Connick, 461 U.S., at 154, 103 S. Ct. 1684, 75 L. Ed. 2d 708*).

If the *Petition Clause* were to apply even where matters of public concern are not involved, that would be unnecessary, or even disruptive, when there is already protection for the rights of public employees to file grievances and to litigate. The government can and [*23] often does adopt statutory and regulatory mechanisms to protect the rights of employees against improper retaliation or discipline, while preserving important government interests. Cf. *Garcetti, supra, at 425, 126 S. Ct. 1951, 164 L. Ed. 2d 689* (noting a "powerful network of legislative enactments"). Employees who sue under federal and state employment laws often benefit from generous and quite detailed antiretaliation provisions. See, *e.g., Pa. Stat. Ann., Tit. 43, § 1101.1201(a)(4)* (Purdon 2009); *§ 1101.1302*. These statutory protections are subject to legislative revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies. The *Petition Clause* is not an instrument for public employees to circumvent these legislative enactments when pursuing claims based on ordinary workplace grievances.

In light of the government's interests in the public employment context, it would be surprising if *Petition Clause* claims by public employees were not limited as necessary to protect the employer's functions and responsibilities. Even beyond the *Speech Clause*, this Court has explained that "government has significantly greater [*24] leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)*; see also *NASA v. Nelson, 562 U.S. ___, ___, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011)*. The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected. There is no reason to think the *Petition Clause* should be an exception.

The public concern test was developed to protect these substantial government interests. Adoption of a different rule for *Petition Clause* claims would provide a ready means for public employees to circumvent the test's protections. Consider Sheila Myers, who was the original plaintiff in *Connick*. She circulated "a questionnaire soliciting the views of her fellow staff members" on various office matters. *461 U.S., at 141, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. The Court held that Myers' claim for retaliation failed the public concern test because the questionnaire was "most accurately characterized as an employee grievance concerning internal office policy." *Id., at 154, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. It would undermine [*25] that principle if a different result would have obtained had Myers raised those same claims using a formal grievance procedure. Myers' employer "reasonably believed [Myers' complaints] would disrupt the office, undermine his authority, and destroy close working relationships." *Ibid.* These concerns would be no less significant in the context of a formal grievance. Employees should not be able to evade the rule articulated in the *Connick* case by wrapping their speech in the mantle of the *Petition Clause*.

Articulation of a separate test for the *Petition Clause* would aggravate potential harm to the government's interests by compounding the costs of compliance with the Constitution. A different rule for each *First Amendment* claim would require employers to separate petitions from other speech in order to afford them different treatment; and that, in turn, would add to the complexity and expense of compliance with the Constitution. Identifying petitions might be easy when employees employ formal grievance procedures, but the right to petition is not limited to petitions lodged under formal procedures. See, *e.g., Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966)*. Indeed, the employee in *Connick* could [*26] have made a colorable argument that her questionnaire ought to be viewed as a petition for redress of grievances.

Guarnieri claims application of the public concern test to the *Petition Clause* would be inappropriate in light of the private nature of many petitions for redress of grievances. The *Petition Clause* undoubtedly does have force and application in the context of a personal grievance addressed to the government. See, *e.g., Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33 (1964)*; *Thomas, 323 U.S., at 530-531, 65 S. Ct. 315, 89 L. Ed. 2d 430*. At the founding, citizens petitioned on a wide range of subjects, including matters of both private and public concern. Petitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence. Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, *96 Yale L. J. 142, 146 (1986)*. Although some claims will be of interest only to the individual making the appeal, for that individual the need for a legal remedy may be a vital imperative. See, *e.g., M.L.B. v. S.L.J.., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)*; *Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)*. [*27] Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern.

There is, however, no merit to the suggestion that the public concern test cannot apply under the *Petition Clause* because the majority of petitions to colonial legislatures addressed matters of purely private concern. In analogous cases under the *Speech Clause*, this Court has noted the "Constitution's special concern with threats to the right of citizens to participate in political affairs," *Connick, supra, at 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708*, even though it is likely that, in this and any other age, most speech concerns purely private matters. The proper scope and application of the *Petition Clause* likewise cannot be determined merely by tallying up petitions to the colonial legislatures. Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the *First Amendment*, among other rights fundamental to liberty.

Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole. Petition, [*28] as a word, a concept, and an essential safeguard of freedom, is of ancient significance in the English law and the Anglo-American legal tradition. See, *e.g.,* 1 W. Blackstone, Commentaries *143. The right to petition applied to petitions from nobles to the King, from Parliament to the King, and from the people to the Parliament, and it concerned both discrete, personal injuries and great matters of state.

The right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King. W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 467 (rev. 2d ed. 1958). The Magna Carta itself was King John's answer to a petition from the barons. *Id.*, at 30-38. Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions. 3 Car. 1, ch. 1 (1627). The Petition of Right stated four principal grievances: taxation without consent of Parliament; arbitrary imprisonment; quartering or billeting of soldiers; and the imposition of martial law. After its passage by both Houses of Parliament, the Petition received the King's [*29] assent and became part of the law of England. See S. Gardiner, The First Two Stuarts and the Puritan Revolution, 1603-1660, pp. 60-61 (1886). The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689.

The following years saw use of mass petitions to address matters of public concern. See 8 D. Hume, History of England from the Invasion of Julius Caesar to the Revolution in 1688, p. 122 (1763) ("Tumultuous petitioning . . . was an admirable expedient . . . for spreading discontent, and for uniting the nation in any popular clamour"). In 1680, for instance, more than 15,000 persons signed a petition regarding the summoning and dissolution of Parliament, "one of the major political issues agitating the nation." Knights, London's 'Monster' Petition, 36 Historical Journal 39, 40-43 (1993). Nine years later, the Declaration of Right listed the illegal acts of the sovereign and set forth certain rights of the King's subjects, one of which was the right to petition the sovereign. It stated that "it is the Right of the Subjects to petition the King, and all Commitments and Prosecutions [*30] for such Petitioning are Illegal." 1 W. & M., ch. 2;

see also L. Schwoerer, The Declaration of Rights, 1689, pp. 69-71 (1981).

The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." The Declaration of Independence P30.

After independence, petitions on matters of public concern continued to be an essential part of contemporary debates in this country's early history. Two years before the adoption of the Constitution, James Madison's Memorial and Remonstrance against Religious Assessments, an important document in the history of the *Establishment Clause*, was presented to the General Assembly of the Commonwealth of Virginia as a petition. See 1 D. Laycock, Religious Liberty: Overviews and History 90 (2010); *Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. ___, ___, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011)*. It attracted over 1,000 signatures. Laycock, *supra*, at 90, n. 153. During the ratification debates, Antifederalists circulated petitions urging [*31] delegates not to adopt the Constitution absent modification by a *bill of rights*. Boyd, Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792, 9 Publius, No. 2, pp. 123, 128-133 (Spring 1979).

Petitions to the National Legislature also played a central part in the legislative debate on the subject of slavery in the years before the Civil War. See W. Miller, Arguing About Slavery (1995). Petitions allowed participation in democratic governance even by groups excluded from the franchise. See *Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford. L. Rev. 2153, 2182 (1998)*. For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement. See Cogan & Ginzberg, 1846 Petition for Woman's Suffrage, New York State Constitutional Convention, 22 Signs 427, 437-438 (1997). The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.

Petitions to the courts and similar bodies can likewise address matters of great public import. In the [*32] context of the civil rights movement, litigation provided a means for "the distinctive contribution of a minority group to the ideas and beliefs of our society." *NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)*. Individuals may also "engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *In re Primus, 436 U.S. 412, 431, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978)*. Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.

The government may not misuse its role as employer unduly to distort this deliberative process. See *Garcetti, 547 U.S., at 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689*. Public employees are "the members of a community most likely to have informed and definite opinions" about a wide range of matters related, directly or indirectly, to their employment. *Pickering, 391 U.S., at 572, 88 S. Ct. 1731, 20 L. Ed. 2d 811*. Just as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees' participation in petitioning activity. Petitions [*33] may "allow the public airing of disputed facts" and "promote the evolution of the law by supporting the development of legal theories," *NLRB, 536 U.S., at 532* (internal quotation marks omitted), and these and other benefits may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity. When a public employee seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or petition, "it is necessary to regard the [employee] as the member of the general public he seeks to be." *Pickering, supra, at 574, 88 S. Ct. 1731, 20 L. Ed. 2d 811*.

The framework used to govern *Speech Clause* claims by public employees, when applied to the *Petition Clause*, will protect both the interests of the government and the *First Amendment* right. If a public employee petitions as an employee on a matter of purely private concern, the employee's *First Amendment* interest must give way, as it does in speech cases. *Roe, 543 U.S., at 82-83, 125 S. Ct. 521, 160 L. Ed. 2d. 410*. When a public employee petitions as a citizen on a matter of public concern, the employee's *First Amendment* interest must be balanced against the countervailing interest of the government in the effective and efficient [*34] management of its internal affairs. *Pickering, supra, at 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811*. If that balance favors the public employee, the employee's *First Amendment* claim will be sustained. If the interference with the government's operations is such that the balance favors the employer, the employee's *First Amendment* claim will fail even though the petition is on a matter of public concern.

As under the *Speech Clause*, whether an employee's petition relates to a matter of public concern will depend on "the content, form, and context of [the petition], as revealed by the whole record." *Connick, 461 U.S., at 147-148, and n. 7, 103 S. Ct. 1684, 75 L. Ed. 2d 708*. The

forum in which a petition is lodged will be relevant to the determination of whether the petition relates to a matter of public concern. See *Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011)*. A petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context.

Of course in one sense the public may always be interested in how government officers are performing their duties. But as the *Connick* and *Pickering* test has evolved, that will not [*35] always suffice to show a matter of public concern. A petition that "involves nothing more than a complaint about a change in the employee's own duties" does not relate to a matter of public concern and accordingly "may give rise to discipline without imposing any special burden of justification on the government employer." *United States v. Treasury Employees, 513 U.S. 454, 466, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995)*. The right of a public employee under the *Petition Clause* is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.

III

Because the Third Circuit did not find it necessary to apply this framework, there has been no determination as to how it would apply in the context of this case. The parties did not address the issue in the opening brief or the response, and the United States did not address the issue in its brief as *amicus curiae*. In their reply brief, petitioners suggest that this Court should address the issue and resolve it in their favor. Yet in their opening brief petitioners sought only vacatur and remand. This Court need not consider [*36] this issue without the benefit of full briefs by the parties.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: THOMAS; SCALIA (In Part)

CONCUR

JUSTICE THOMAS, concurring in the judgment.

For the reasons set forth by JUSTICE SCALIA, I seriously doubt that lawsuits are "petitions" within the original meaning of the *Petition Clause of the First Amendment*. See *post*, at 2-3 (opinion concurring in judgment in part and dissenting in part). Unreasoned statements to the contrary in this Court's prior decisions do not convince me otherwise. Like the Court, however, I need not decide that question today because "[t]he parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the *Petition Clause*." *Ante*, at 6.

I also largely agree with JUSTICE SCALIA about the framework for assessing public employees' retaliation claims under the *Petition Clause*. The "public concern" doctrine of *Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*, is rooted in the *First Amendment's* core protection of speech on matters of public concern and has no relation to the right to petition. See *post*, at [*37] 3-7. I would not import that test into the *Petition Clause*. Rather, like JUSTICE SCALIA, I would hold that "the *Petition Clause* protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign." *Post*, at 7.

But I would not end the analysis after determining that a petition was addressed to the government as sovereign. Recognizing "the realities of the employment context," we have held that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600, 599, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)*. Even where a public employee petitions the government in its capacity as sovereign, I would balance the employee's right to petition the sovereign against the government's interest as an employer in the effective and efficient management of its internal affairs. Cf. *Garcetti v. Ceballos, 547 U.S. 410, 419, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)* (noting that employees "speaking as citizens about matters of public concern" still must "face . . . speech restrictions [*38] that are necessary for their employers to operate efficiently and effectively"); *United States v. Treasury Employees, 513 U.S. 454, 492, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995)* (Rehnquist, C. J., dissenting) ("In conducting this balance [in the *Speech Clause* context], we consistently have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved was on a matter of public concern"); *O'Connor v. Ortega, 480 U.S. 709, 721-722, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987)* (plurality opinion) (balancing the "the realities of the workplace" against the "legitimate privacy interests of public employees" to conclude that a warrant requirement would "seriously disrupt the routine conduct of business" and "be unduly burdensome"). In assessing a retaliation claim under the *Petition Clause*, courts should be able to conclude that, in instances when the petition is especially disruptive, as some lawsuits might

be, the balance of interests may weigh in favor of the government employer.

Applying this framework, I would vacate the judgment and remand. The Court of Appeals erred with respect to both Guarnieri's union grievance and his *42 U.S.C. § 1983* suit. First, even assuming the grievance was a petition, it was [*39] addressed to the local government in its capacity as Guarnieri's employer. See *post*, at 8 (opinion of SCALIA, J.). Second, Guarnieri addressed his *§ 1983* suit to the Federal Government in its capacity as sovereign, not to the local government as his employer. See *ibid.* But the Court of Appeals did not consider whether the local government's interest as an employer "in achieving its goals as effectively and efficiently as possible" nevertheless outweighs Guarnieri's interest in petitioning the Federal Government regarding his local employment. *Engquist, supra, at 598, 128 S. Ct. 2146, 170 L. Ed. 2d 975* (internal quotation marks omitted). I would vacate and remand for the Court of Appeals to conduct that analysis in the first instance.

DISSENT BY: SCALIA (In Part)

DISSENT

JUSTICE SCALIA, concurring in the judgment in part and dissenting in part.

I disagree with two aspects of the Court's reasoning. First, the Court is incorrect to state that our "precedents confirm that the *Petition Clause* protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Ante*, at 6. Our first opinion clearly saying that lawsuits are "Petitions" under the *Petition Clause* came less than 40 years [*40] ago. In *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, [1] an opinion by Justice Douglas, the Court asserted that "[t]he right of access to the courts is indeed but one aspect of the right of petition." *Id., at 510, 92 S. Ct. 609, 30 L. Ed. 2d 642*. As authority it cited two habeas corpus cases, *Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969)*, and *Ex parte Hull, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941)*, neither of which even mentioned the *Petition Clause*. The assertion, moreover, was pure dictum. The holding of *California Motor Transport* was that the *Noerr-Pennington* doctrine, a judicial gloss on the Sherman Act that had been held to immunize certain lobbying (legislature-petitioning) activity, did *not* apply to sham litigation that "sought to bar . . . competitors from meaningful access to adjudicatory tribunals," *404 U.S., at 510-512, 92 S. Ct. 609, 30 L. Ed. 2d 642*. The three other cases cited by the Court as holding that lawsuits are petitions, *ante*, at 6, are all statutory interpretation decisions construing the National Labor Relations Act, albeit against the backdrop of the *Petition Clause*. See *BE&K Constr. Co. v. NLRB, 536 U.S. 516, 534-536, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002)*; *Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-897, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741-743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)*. [*41] The Court has never actually *held* that a lawsuit is a constitutionally protected "Petition," nor does today's opinion hold that. The Court merely observes that "[t]he parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the *Petition Clause*," *ante*, at 6, and concludes that Guarnieri's *42 U.S.C. § 1983* claim would fail even if that premise were correct.

> 1 Respondent would agree, since he cited this case in argument as the earliest. Tr. of Oral Arg. 36. There were, however, three cases in the 1960's which adverted vaguely to lawsuits as involving the right to petition. See *United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222-224, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967)*; *Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33 (1964)*; *NAACP v. Button, 371 U.S. 415, 430, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)*.

I find the proposition that a lawsuit is a constitutionally protected "Petition" quite doubtful. The *First Amendment's Petition Clause* states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The reference to "the right of the people" indicates that the *Petition Clause* was intended to codify a pre-existing [*42] individual right, which means that we must look to historical practice to determine its scope. See *District of Columbia v. Heller, 554 U.S. 570, 579, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*.

There is abundant historical evidence that "Petitions" were directed to the executive and legislative branches of government, not to the courts. In 1765, the Stamp Act Congress stated "[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament." Declaration of Rights and Grievances, Art. 13, reprinted in 1 B. Schwartz, The *Bill of Rights*: A Documentary History 195, 198 (1971); it made no mention of petitions directed to the courts. As of 1781, seven state constitutions protected citizens' right to apply or petition for redress of grievances; all seven referred only to legislative petitions. See Andrews, A Right of Access to Court Under the *Petition Clause of the First Amendment*: Defining the Right, *60 Ohio St. L. J. 557, 604-605, n. 159 (1999)*. The Judiciary Act of 1789 did not grant federal trial courts jurisdiction to hear

lawsuits arising under federal law; there is no indication anyone ever thought that this restriction infringed on the right of citizens to petition [*43] the Federal Government for redress of grievances. The fact that the Court never affirmed a *First Amendment* right to litigate until its unsupported dictum in 1972 -- after having heard almost 200 years' worth of lawsuits, untold numbers of which might have been affected by a *First Amendment* right to litigate -- should give rise to a strong suspicion that no such right exists. "[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." *Nevada Comm'n on Ethics* v. *Carrigan*, *ante*, at 4 (internal quotation marks omitted).

I acknowledge, however, that scholars have made detailed historical arguments to the contrary. See, *e.g.*, Andrews, *supra*, at 595-625; Pfander, Sovereign Immunity and the Right to Petition: Toward a *First Amendment* Right to Pursue Judicial Claims Against the Government, *91 Nw. U. L. Rev. 899, 903-962 (1997)*. As the Court's opinion observes, the parties have not litigated the issue, and so I agree we should leave its resolution to another [*44] day.

Second, and of greater practical consequence, I disagree with the Court's decision to apply the "public concern" framework of *Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)*, to retaliation claims brought under the *Petition Clause*. The Court correctly holds that the *Speech Clause* and *Petition Clause* are not coextensive, *ante*, at 7-8. It acknowledges, moreover, that the *Petition Clause* protects personal grievances addressed to the government, *ante*, at 13. But that is an understatement -- rather like acknowledging that the *Speech Clause* protects verbal expression. "[T]he primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions." Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, *96 Yale L. J. 142, 145 (1986)*. "[T]he overwhelming majority of First Congress petitions presented private claims." 8 Documentary History of the First Federal Congress 1789-1791, p. xviii (K. Bowling, W. DiGiacomantonio, & C. Bickford eds. 1998). The Court nonetheless holds that, at least in public employment cases, the *Petition Clause* and *Speech Clause* should be treated identically, so that since the *Speech Clause* does not prohibit [*45] retaliation against public employees for speaking on matters of private concern, neither does the *Petition Clause*. The Court gives two reasons for this: First, "[a] different rule for each *First Amendment* claim would . . . add to the complexity and expense of compliance with the Constitution" and "would provide a ready means for public employees to circumvent the test's protections," and second, "[p]etitions to the government . . . assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Ante*, at 12-14.

Neither reason is persuasive. As to the former: The complexity of treating the *Petition Clause* and *Speech Clause* separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a *First Amendment* that included *both* provisions as *separate* constitutional rights. A plaintiff does not engage in pernicious "circumvention" of our *Speech Clause* precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.

As to the latter: Perhaps petitions on matters of public concern do in some sense involve an "added dimension," but [*46] that "added dimension" does not obliterate what has traditionally been the principal dimension of the *Petition Clause*. The public-concern limitation makes sense in the context of the *Speech Clause*, because it is speech on matters of public concern that lies "within the core of *First Amendment* protection." *Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)*. The *Speech Clause* "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. FEC, 558 U.S. ___, ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)* (internal quotation marks omitted). The unique protection granted to political speech is grounded in the history of the *Speech Clause*, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick, supra, at 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708* (internal quotation marks omitted).

But the mere fact that we have a longstanding tradition of granting heightened protection to *speech* of public concern does not suggest that a "public concern" requirement should be written into other constitutional provisions. We would not say that religious proselytizing is entitled [*47] to more protection under the *Free Exercise Clause* than private religious worship because public proclamations are "core free exercise activity." Nor would we say that the due process right to a neutral adjudicator is heightened in the context of litigation of national importance because such litigation is somehow at the "core of the due process guarantee." Likewise, given that petitions to redress *private* grievances were such a high proportion of petitions at the founding -- a proportion that is infinitely higher if lawsuits are considered to be petitions -- it is ahistorical to say that petitions on matters of public concern constitute "core petitioning activity." In the Court's view, if Guarnieri had

submitted a letter to one of the borough of Duryea's council members protesting a tax assessment that he claimed was mistaken; and if the borough had fired him in retaliation for that petition; Guarnieri would have no claim for a *Petition Clause* violation. That has to be wrong. It takes no account of, and thus frustrates, the principal purpose of the *Petition Clause*.

The Court responds that "[t]he proper scope and application of the *Petition Clause* . . . cannot be determined merely by [*48] tallying up petitions to the colonial legislatures," *ante*, at 14, but that misses the point. The text of the *Petition Clause* does not distinguish petitions of public concern from petitions of private concern. Accordingly, there should be no doctrinal distinction between them unless the history or tradition of the *Petition Clause* justifies it. The mere fact that the Court can enumerate several historical petitions of public importance, *ante*, at 14-16, does not establish such a tradition, given that petitions for redress of private grievances vastly outnumbered them. Indeed, the Court's holding is contrary to this Court's historical treatment of the *Petition Clause*, assuming (as the Court believes) that the Clause embraces litigation: We have decided innumerable cases establishing constitutional rights with respect to litigation, and until today not a one of them has so much as hinted that litigation of public concern enjoys more of those rights than litigation of private concern. The Court's belief in the social importance of public petitions, and its reminiscences of some of the public-petition greats of yesteryear, *ibid.*, do not justify the proclamation of special constitutional rights [*49] for public petitions. It is the Constitution that establishes constitutional rights, not the Justices' notions of what is important, or the top numbers on their Petition Hit Parade. And there is no basis for believing that the *Petition Clause* gives special protection to public petitions.

Rather than shoehorning the "public concern" doctrine into a Clause where it does not fit, we should hold that the *Petition Clause* protects public employees against retaliation for filing petitions unless those petitions are addressed to the government in its capacity as the petitioners' employer, rather than its capacity as their sovereign. As the Court states, we have long held that "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Ante*, at 11-12 (quoting *Engquist, supra, at 599, 128 S. Ct. 2146, 170 L. Ed. 2d 975*; internal quotation marks omitted). To apply to the *Petition Clause* context what we have said regarding the *Speech Clause*: When an employee files a petition with the government in its capacity as his employer, he is not acting "as [a] citize[n] for *First Amendment* purposes," because "there is no relevant analogue [*50] to [petitions] by citizens who are not government employees." *Garcetti v. Ceballos, 547 U.S. 410, 421, 423-424, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)*. To be sure, the line between a petition addressed to government as the petitioner's employer and one addressed to it as sovereign is not always clear, but it is no more fuzzy than the line between matters of private and matters of public concern. [2] The criterion I suggest would largely resolve the legitimate practical concerns identified by the Court, *ante*, at 10-12, while recognizing and giving effect to the difference between the *Speech and Petition Clauses*.

> 2 Compare, *e.g., Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 927 (CA9 2004)* (testimony concerning claim of employment discrimination by government contractor constituted matter of public concern because "[l]itigation seeking to expose . . . wrongful governmental activity is, by its very nature, a matter of public concern"), with *Padilla v. South Harrison R-II School Dist., 181 F.3d 992, 997 (CA8 1999)* (teacher's testimony approving sexual relationship between teacher and minor was matter of private concern because it "does not relate to the teacher's legitimate disagreement with a school board's policies"). [*51] And compare, *e.g., Voigt v. Savell, 70 F.3d 1552, 1560 (CA9 1995)* (speech regarding how judge handled two internal personnel matters was matter of public concern because "[t]he public has an interest in knowing whether the court treats its job applicants fairly"), with *Maggio v. Sipple, 211 F.3d 1346, 1353 (CA11 2000)* (testimony at hearing concerning employee grievance was matter of private concern because it did "not allege . . . fraud or corruption in [defendant's] implementation of its personnel policies and appeal procedures").

Under what I think to be the proper test, the Third Circuit judgment before us here should be reversed in part and affirmed in part. The portion of it upholding Guarnieri's claim of retaliation for having filed his union grievance must be reversed. A union grievance is the epitome of a petition addressed to the government in its capacity as the petitioner's employer. No analogous petitions to the government could have been filed by private citizens, who are not even permitted to avail themselves of Guarnieri's union grievance procedure. Contrariwise, the portion of the judgment upholding Guarnieri's claim of retaliation for having filed his *§ 1983* claim must [*52] be affirmed. Given that Guarnieri was not an employee of the Federal Government, it is impossible to say that the *§ 1983* claim was addressed to government in its capacity as his employer. I think it clear that retaliating against a state employee for writing a letter to his Con-

gressman about his state job would run afoul of the *Petition Clause*. Assuming that the *§ 1983* lawsuit should be treated like a letter to a Congressman for *Petition Clause* purposes -- a proposition which, I again emphasize, is doubtful, but which the parties do not dispute in this case -- retaliation for having filed his lawsuit also violates the Clause.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 2

LEXSEE

Analysis
As of: Jun 21, 2011

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DON EUGENE SIEGELMAN, RICHARD SCRUSHY, Defendants-Appellants.

No. 07-13163

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2011 U.S. App. LEXIS 9503; 22 Fla. L. Weekly Fed. C 2026

May 10, 2011, Decided
May 10, 2011, Filed

PRIOR HISTORY: [*1]

Appeals from the United States District Court for the Middle District of Alabama. D.C. Docket No. 05-00119-CR-F-N.

Siegelman v. United States, 130 S. Ct. 3542, 177 L. Ed. 2d 1120, 2010 U.S. LEXIS 5529 (U.S., 2010)

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. All pending motions in this case are DENIED. Remanded for resentencing.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants former governor and corporate officer were convicted of federal funds bribery, (18 U.S.C.S. § 666(a)(1)(B)) and honest services mail fraud and conspiracy, (18 U.S.C.S. §§ 1341, 1346, and 18 U.S.C.S. § 371). The governor was also convicted of obstruction of justice, (18 U.S.C.S. § 1512(b)(3)). The case was on remand from the Supreme Court of the United States for reconsideration in light of intervening case law.

OVERVIEW: The bribery convictions were based on allegations that defendants agreed that the corporate officer would donate to a political cause the governor championed in exchange for a state board appointment. The honest services mail fraud convictions alleged that the corporate official used the board seat to obtain favorable treatment for his corporation. The obstruction of justice conviction was based on allegations of a separate "pay-to-play" scheme. Inter alia the court held that, even if a quid pro quo instruction was required under 18 U.S.C.S. § 666, there was no reversible error in the bribery instructions given and the evidence was sufficient to permit a reasonable juror to find such a quid pro quo at any rate. The jury having been instructed they must find a quid pro quo to convict of the bribery alleged, and having done so, any error in the honest services instructions was harmless. However, given the absolute lack of evidence from which the jury could infer that the governor knowingly agreed to or participated in a broader scheme that included the corporate official's alleged subsequent self-dealing while on the board, the court reversed those counts as to the governor.

OUTCOME: The court reversed as to the governor's convictions based on the corporate official's self-dealing while on the board but affirmed on all remaining counts. The case was remanded for resentencing.

CORE TERMS: juror, bribery, honest, campaign, conspiracy, indictment, deliberation, governor, donation, motorcycle, quid pro quo, exposure, extrinsic, new trial, lottery, seat, campaign contributions, mail fraud, jury verdict, convicted, coverup, email, scanner, self-dealing, extraneous, jury deliberations, juror misconduct, pay-to-play, extortion, departure

LexisNexis(R) Headnotes

Criminal Law & Procedure > Verdicts > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Verdicts
[HN1]The jury's verdict commands the respect of the appellate court, and that verdict must be sustained if there is substantial evidence to support it. Furthermore, to the extent that the verdict rests upon the jury's evaluations of the credibility of individual witnesses, and the reasonable inferences to be drawn from that testimony, the court owes deference to those decisions. In our system, the jury decides what the facts are, by listening to the witnesses and making judgments about whom to believe. The court shall not substitute its judgment for theirs. This is not to say that the judgment below is inviolable. Having determined what the facts are, a jury applies the law as the judge instructs them.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN2]An appellate court is to answer properly presented questions from the parties in the case as to whether the law was correctly interpreted by the district court.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN3]The federal funds bribery statute criminalizes the taking of a bribe by an official of a state agency that receives over $10,000 in federal funds annually. 18 U.S.C.S. § 666.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN4]It a crime for a state official to corruptly agree to accept anything of value from another person intending to be influenced in that person's favor in an official action. 18 U.S.C.S. § 666(a)(1)(B).

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN5]Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN6]The U.S. Supreme Court has guarded against the possibility of convicting a defendant for his exercise of free political speech and the right to support issues of great public importance by interpreting federal law to require more for conviction under 18 U.S.C.S. § 666 than merely proof of a campaign donation followed by an act favorable toward the donor.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > General Overview
[HN7]Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, under color of official right. To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN8]Only if payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act, are they criminal.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > Elements
[HN9]A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of quid pro quo, the prohi-

bited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Extortion > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
[HN10]McCormick uses the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. Explicit, however, does not mean express. McCormick does not impose such a stringent standard. The Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Extortion > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
[HN11]The jury instruction concerning extorting campaign contributions approved in Evans requires that the acceptance of the campaign donation be in return for a specific official action - a quid pro quo. No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of it to be criminal under 18 U.S.C.S. § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice. But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be explicit, but there is no requirement that it be express. To hold otherwise would allow defendants to escape criminal liability through knowing winks and nods.

Governments > Legislation > Interpretation
[HN12]The Latin "quid pro quo" means something for something.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
[HN13]After McCormick, an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
[HN14]For purposes of the Hobbs Act, an explicit agreement may be implied from the official's words and actions. The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the jury is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > General Overview
[HN15]A bribery conviction under general federal bribery statute, 18 U.S.C.S. § 201, may be supported by inferences drawn from relevant and competent circumstantial evidence.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN16]18 U.S.C.S. §§ 1341 and 1346 criminalize the use of the mails to deprive another of the intangible right of honest services.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
[HN17]Congress intended 18 U.S.C.S. §§ 1341 and 1346 to reach only those schemes to defraud the public that are based upon allegations of bribery and/or kickbacks. After Skilling, therefore, prosecutions based upon any other theory - for example, self-dealing - are not permitted.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > General Overview
[HN18]The U.S. Supreme Court in Skilling has clarified that Congress intended to reenact only that portion of the pre-McNally case law that was aimed at bribery and kickback schemes.

Criminal Law & Procedure > Jury Instructions > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN19]Jury instructions must be evaluated as a whole.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > General Overview
[HN20]Skilling limits 18 U.S.C.S. § 1346 to bribery and kickback schemes, holding that, in the absence of such narrowing, the statute would provide insufficient notice of what conduct is prohibited by it. Even the narrowed honest services statute must provide constitutionally adequate notice of what conduct is prohibited.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Political Speech
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Bribery > Public Officials > General Overview
[HN21]Since a campaign donation - unlike bags of cash delivered to the official himself - is protected First Amendment activity and, indeed, the normal course of politics in this country, due process requires that the potential campaign donor have notice of what sort of conduct is prohibited. Absent an explicit agreement to buy an appointment there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt agreement that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Hobbs Act > Elements
[HN22]In interpreting the extortion under color of official right statute, the United States Supreme Court requires a quid pro quo in order to prove that the official and the campaign contributor corruptly agreed to a specific exchange. In so doing, the Court protects both the First and the Fifth Amendments by reading the statute to require an agreement to swap money for office, thereby putting both government officials and potential contributors on notice that such an agreement would subject them to prosecution.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Extortion > Elements
[HN23]A defendant may be held criminally liable for a codefendant's conduct only if he was a knowing party to a scheme that included that conduct.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > Elements
[HN24]See 18 U.S.C.S. § 1512(b)(3).

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN25]In evaluating the sufficiency of the evidence to support the jury's verdict, an appellate court required to view the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict. The evidence need not be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence
[HN26]In the absence of a defendant's confession or observation of his wrongdoing by a third person, proof by circumstantial evidence and the fair inferences to be drawn therefrom is both necessary and permissible.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > Elements
[HN27]18 U.S.C.S. § 1512(b)(3) is satisfied by the possibility or likelihood that the defendants' false and misleading information would be transferred to federal authorities.

Evidence > Hearsay > Exemptions > Statements by Coconspirators > Statements During Conspiracy
[HN28]Under Fed. R. Evid. 801(d)(2)(E), a court has the discretion to admit co-conspirator statements made during and in furtherance of the conspiracy. The court's admission of such statements is an abuse of its discretion to do so if the statements do not meet this legal standard. The United States Court of Appeals for the Eleventh Circuit applies a liberal standard in determining whether a statement was in furtherance of a conspiracy. The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way. If the statement could have been intended to affect

future dealings between the parties, then the statement is in furtherance of a conspiracy. Finally, statements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy. Even defendants concede that boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidence or allaying the suspicions of co-conspirators.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > New Trial
[HN29]An appellate court reviews the denial of a motion for new trial based on alleged juror misconduct for an abuse of discretion.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
[HN30]The district court's findings of facts supporting its legal conclusion are reviewed only for clear error.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Fair Cross-Section Challenges > Sixth Amendment Guarantee
[HN31]The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. U.S. Const. amend. VI. To protect the right to an impartial jury, the U.S. Supreme Court has recognized that due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. The jury must determine guilt solely on the basis of the evidence presented at trial and the court's instructions as to the applicable law. The appellate court presumes, however, that the jury has been impartial. A defendant who alleges denial of this right resulting from juror exposure to extraneous information has the burden of making a colorable showing that the exposure has, in fact, occurred. If the defendant does so, prejudice to the defendant is presumed and the burden shifts to the government to show that the jurors' consideration of extrinsic evidence was harmless to the defendant.

Governments > Courts > Judicial Precedents
[HN32]All decisions of the United States Court of Appeals for the Fifth Circuit prior to October 1, 1981, when the United States Court of Appeals for the Eleventh Circuit was established, have been adopted as decisions of Eleventh Circuit court.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Outside Influences
Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Outside Influences
[HN33]If a district court concludes that a juror's exposure to extrinsic evidence was harmless to the defendant, on appeal, the appellate court reviews this conclusion for an abuse of discretion. In doing so, the appellate court looks at all the circumstances and considers: (1) the nature of the extrinsic evidence; (2) the manner in which it reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and, (4) the strength of the government's case.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Ability to Follow Instructions
[HN34]The jury is presumed to follow the district court's instructions.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Invasion of Jury's Province
Evidence > Competency > Jurors > Deliberations
[HN35]District courts are subject to very stringent limitations on their authority to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all. In fact, for nearly a century, the U.S. Supreme Court has recognized a near-universal and firmly established common-law rule flatly prohibiting the use of juror testimony to impeach a verdict.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview
Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Privacy of Deliberations
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Invasion of Jury's Province
Evidence > Competency > Jurors > Deliberations
[HN36]The U.S. Supreme Court has repeatedly emphasized the important policy considerations that require the shielding of juries from public scrutiny of their deliberations. The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or inno-

cence. Because our system of justice so prizes this unique and essential feature of our criminal justice system, it both anticipates and tolerates some level of imperfection in the system. There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of lay people would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview
Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Privacy of Deliberations
Criminal Law & Procedure > Juries & Jurors > Jury Nullification > General Overview
Criminal Law & Procedure > Verdicts > Inconsistent Verdicts
[HN37]Appellate courts permit logically inconsistent jury verdicts as to different counts, and even as to different co-defendants. They permit jury nullification. They do not inquire whether a verdict is the result of compromise, mistake or even carelessness.

Evidence > Competency > Jurors > Deliberations
[HN38]In an effort to protect the jury system, the Federal Rules of Evidence enshrine the common law rule against the admission of a juror's testimony to impeach the jury's verdict.

Evidence > Competency > Jurors > Deliberations
[HN39]See Fed. R. Evid. 606(b).

Evidence > Competency > Jurors > Deliberations
[HN40]By disallowing a juror to impeach the jury's verdict by testimony about their deliberations, Fed. R. Evid. 606(b) operates to protect jurors from postverdict investigation and to protect the verdict from endless attack.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > General Overview
Criminal Law & Procedure > Verdicts > General Overview
[HN41]A split verdict lends supports to a conclusion that the jury carefully weighed the evidence and reached a reasoned verdict free of undue influence and did not decide the case prematurely.

Criminal Law & Procedure > Pretrial Motions & Procedures > Disqualification & Recusal
[HN42]A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. The purpose of the rule is to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge.

Criminal Law & Procedure > Grand Juries > Procedures > Impaneling > Selection > General Overview
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Fair Cross-Section Challenges > Sixth Amendment Guarantee
[HN43]Federal criminal defendants have both a statutory and a constitutional right to a grand and a petit jury selected at random from a fair cross-section of their community. Juror Selection and Service Act of 1968 (JSSA), 28 U.S.C.S. §§ 1861-1869; U.S. Const. amend. VI. By its terms, the JSSA provides remedies for only a substantial failure to comply with its requirements for jury selection procedures that are random, objective, and that produce a jury that is a fair-cross section of the community. 28 U.S.C.S. § 1861 and 1867(d). Mere technical deviations from the JSSA's requirements do not violate the JSSA if they do not result in impermissible discrimination in the jury selection process.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > General Overview
Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Fair Cross-Section Challenges > Sixth Amendment Guarantee
[HN44]The United States District Court for the Middle District of Alabama's jury selection procedures - including the liberal deferral policy and the procedures for summoning previously deferred jurors - does not substantially violate the Juror Selection and Service Act of 1968 (JSSA), 28 U.S.C.S. §§ 1861-1869. Additionally, the Middle District's jury selection procedures did not result in the systematic under-representation of Afri-

can-American jurors on the 2001 Qualified Jury Wheel or in the jury pools selected from that wheel.

Criminal Law & Procedure > Sentencing > Guidelines > Departures > Governmental Disruption

[HN45]Upward departures are allowed where the district court finds that there was pervasive corruption of a governmental function resulting in a loss of public confidence in state or local government. U.S. Sentencing Guidelines Manual §§ 2C1.1 cmt.n.5, 5K2.0.

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JUDGES: Before TJOFLAT, EDMONDSON, and HILL, [*2] Circuit Judges.

OPINION

PER CURIAM:

This case is before us on remand from the Supreme Court of the United States for reconsideration in light of *Skilling v. United States*, 561 U.S. , 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). The parties were ordered to re-brief the case; oral argument was heard.

I.

Don Eugene Siegelman is the former Governor of Alabama. Richard Scrushy is the founder and former Chief Executive Officer of HealthSouth Corporation ("HealthSouth"), a major hospital corporation with operations throughout Alabama. The defendants were convicted of federal funds bribery, in violation of 18 U.S.C. § 666(a)(1)(B), and five counts of honest services mail fraud and conspiracy, in violation of 18 U.S.C. §§ 1341, 1346, and 18 U.S.C. § 371. Siegelman was also convicted of obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The bribery convictions were based on allegations that the defendants made and executed a corrupt agreement whereby Scrushy gave Siegelman $500,000 in exchange for Siegelman's appointing him to Alabama's Certificate of Need Review Board (the "CON" Board). The honest services mail fraud convictions were also based in part upon these bribery allegations, but two of the counts also [*3] alleged that Scrushy used the CON Board seat to obtain favorable treatment for HealthSouth's applications. The conspiracy count alleged that Scrushy and Siegleman conspired to violate the honest services statute. Siegelman's obstruction of justice conviction is based on allegations that he corruptly influenced another to create a series of sham check transactions to cover up a separate "pay-to-play" payment to him. [1]

1 The obstruction of justice allegations involved conduct unrelated to the Siegelman-Scrushy bribery, mail fraud and conspiracy charges.

This is an extraordinary case. It involves allegations of corruption at the highest levels of Alabama state government. Its resolution has strained the resources of both Alabama and the federal government.

But it has arrived in this court with the "sword and buckler" of a jury verdict. The yeoman's work of our judicial system is done by a single judge and a jury. Twelve ordinary citizens of Alabama were asked to sit through long days of often tedious and obscure testimony and pour over countless documents to decide what happened, and, having done so, to apply to these facts the law as the judge has explained it to them. And they do. Often [*4] at great personal sacrifice. Though the popular culture sometimes asserts otherwise, the virtue of our jury system is that it most often gets it right. This is the great achievement of our system of justice. [HN1]The jury's verdict commands the respect of this court, and that verdict must be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L. Ed. 680 (1942).

Furthermore, to the extent that the verdict rests upon the jury's evaluations of the credibility of individual witnesses, and the reasonable inferences to be drawn from that testimony, we owe deference to those decisions. In our system, the jury decides what the facts are, by listening to the witnesses and making judgments about whom

to believe. This they have done, and, though invited to do so, [2] we shall not substitute our judgment for theirs.

2 The defendants assert that this is a case in which we owe no deference to the jury's findings of fact, but we disagree.

This is not to say that the judgment below is inviolable. Having determined what the facts are, a jury applies the law as the judge instructs them. The defendants' lawyers assert that there were errors in those instructions. They also contend [*5] that the court committed other legal mistakes during the course of the trial. Our duty as [HN2]an appellate court is to answer properly presented questions from the parties in the case as to whether the law was correctly interpreted by the district court. With this in mind, we have reviewed the claims of legal error in the proceedings below, and our opinion as to their merit follows. First, however, we recount the facts as the jury found them. [3]

3 Where the jury need not have found a particular fact to be established in order to reach their verdict, we indicate who testified to that fact.

II.

Don Siegelman was elected Governor of Alabama in 1998 on a campaign platform that advocated the establishment of a state lottery to help fund education in Alabama. After his election, he established the Alabama Education Lottery Foundation (the "Foundation") to raise money to campaign for voter approval of a ballot initiative to establish a state lottery. Darren Cline, the Foundation's fundraising director, testified that Siegelman "called the shots" on the lottery campaign. The lottery initiative was eventually defeated in a referendum held in October of 1999.

On March 9, 2000, the Foundation borrowed [*6] $730,789.29 from an Alabama bank in order to pay down debt incurred by the Alabama Democratic Party for get-out-the-vote expenses during the lottery campaign. This note was personally and unconditionally guaranteed by Siegelman. [4]

4 There was another personal guarantor, but each was individually liable.

Richard Scrushy, the CEO of HealthSouth had served on the CON Board under three previous governors of Alabama. The CON Board is an arm of the State Health Planning and Development Agency and exists to prevent unnecessary duplication of healthcare services in Alabama. The Board determines the number of healthcare facilities in Alabama through a process that requires healthcare providers to apply for and obtain a certificate of a healthcare need before opening a new facility or offering a special healthcare service. The CON Board decides which healthcare applications will be approved for an announced healthcare need, choosing between competing applications and ruling on objections filed by an applicant's competitor. The Governor of Alabama has sole discretion to appoint the members of the CON Board, who serve at his pleasure. [5] Scrushy had supported Siegelman's opponent in the just prior [*7] election.

5 Three of the nine seats on the Board are reserved for health care industry providers.

Nick Bailey was one of Siegelman's closest associates and had worked on Siegelman's campaign for governor. Cline testified that "whatever [Bailey] told me that the Governor wanted was what the Governor said." Cline also testified that "if the Governor wanted to get something done, then [Bailey] went ahead - blindly went ahead and did it."

Bailey testified that, after Siegelman's election in 1998, Siegelman met with Eric Hanson, an outside lobbyist for HealthSouth, and told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do" at least $500,000 in order to "make it right" with the Siegelman campaign. Bailey testified that Siegelman was referring to the campaign for the lottery initiative, and that Hanson was to relay this conversation to Scrushy. Bailey also testified that, in another conversation, Hanson told Bailey that Scrushy wanted control of the CON Board.

Mike Martin is the former Chief Financial Officer of HealthSouth. He testified that having influence over the CON Board was important to Scrushy and HealthSouth [*8] because it determined the number of healthcare facilities in the state, thereby affecting HealthSouth's ability to grow. He testified that Scrushy told him that to "have some influence or a spot on the CON Board," they had to help Siegelman raise money for the lottery campaign. Scrushy said that if they did so, "[they] would be assured a seat on the CON Board." Martin testified, "[W]e were making a contribution . . . in exchange for a spot on the CON Board."

Bailey testified that lobbyist Hanson "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that we could not let him down" with respect to the CON Board seat. Bailey also testified that he "reminded the Governor periodically of the conversations that [Bailey] had with Eric Hanson and the conversations that the Governor had with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board."

Martin also testified that Scrushy told him that HealthSouth could not make the payment to the lottery campaign, nor could he do it personally because "we [HealthSouth] had not supported that and that his wife, Leslie, was against the lottery, and it would just look bad if HealthSouth [*9] made a direct contribution to the lottery, so we needed to ask - he instructed me in particular to ask our investment banker, Bill McGahan, from [the Swiss bank] UBS, to make the contribution."

Bill McGahan did not want to make such an "out of the norm" donation and hoped the matter would "go away." Over the next two weeks, Martin called McGahan at least once a day to ask him about the status of the UBS donation, and told McGahan that Scrushy was going to fire UBS if it did not make the contribution. Finally, Martin testified, Scrushy himself called McGahan to "put more pressure" on him to make the contribution.

McGahan testified that he did not want UBS to make such a large contribution directly, so he told Martin that he would get Integrated Health Services ("IHS") of Maryland to make the donation to the lottery campaign in exchange for UBS reducing an outstanding fee that IHS owed UBS. IHS agreed to this arrangement and donated $250,000 to the Foundation in exchange for a reduction of $267,000 in the fee it owed UBS.

The IHS "donation" was in the form of a check dated July 19, 1999, made payable from itself to the Foundation. Martin testified that Scrushy told him it was important [*10] that he, Scrushy, hand deliver the IHS check to Siegelman, so Martin delivered the check to Scrushy so that he could do so.

Some time later, [6] Siegelman and Scrushy met in Siegelman's office. Bailey testified that after Scrushy left, Siegelman showed the IHS check to Bailey and told him that Scrushy was "halfway there." Bailey asked, "what in the world is he [Scrushy] going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so."

> 6 Bailey told the FBI that Scrushy gave the check to Siegelman in a meeting on July 14, 1999, but testified at trial that he did not remember exactly when the meeting was.

Siegelman appointed Scrushy to the CON Board on July 26, 1999 - one week after the date on the IHS check. [7] Siegelman directed Bailey to contact the Board chair-designee to tell her that Siegelman wanted Scrushy to be vice-chair of the CON Board, and the Board so chose. Bailey testified that Siegelman made Scrushy vice-chair "[b]ecause [Scrushy] asked for it." Scrushy stayed on the Board until January of 2001, at which time Siegelman appointed Thom Carman, HealthSouth's vice-president, [*11] to the remainder of Scrushy's term. Siegelman subsequently reappointed Carman to a full term. While Carman was on the Board, HealthSouth successfully applied for and received Certificates of Need for a mobile PET scanner and a rehabilitation hospital.

> 7 Seven other Board members were appointed that day.

Darren Cline, the Foundation's fundraising director, testified that Siegelman gave him the IHS check and told him it was from Scrushy. Cline was concerned about the amount of the donation from one person, and Siegelman told him to hold the check. In November of 1999, however, at Siegelman's direction, Bailey retrieved the check and opened a new checking account in the Foundation's name at a Birmingham bank. Bailey made an initial deposit of $275,000 - the $250,000 IHS check and a $25,000 check from another company. Cline was never told.

On March 9, 2000, the Foundation borrowed, from the same Birmingham bank, $730,789.29 to repay the Alabama Democratic Party's debt in connection with the lottery initiative and Siegelman guaranteed the loan. At that time, the Foundation had over $447,000 in its checking account at the bank, $250,000 of which had come from the IHS check deposited in November [*12] of 1999. On March 13, 2000, $440,000 was debited from the account to pay down the Foundation's loan.

In May, Siegelman and Bailey traveled to HealthSouth's headquarters in Birmingham, where Siegelman met privately with Scrushy in Scrushy's office. At that meeting, Scrushy gave Siegelman a check issued by HealthSouth for $250,000 payable to the Foundation. [8] On May 23, 2000, the $250,000 check was applied directly against the Foundation's loan balance.

> 8 HealthSouth's political contributions coordinator testified that she did not know about the donation until she read about it in the newspaper. The Foundation's fundraising director testified that he was not present when Scrushy gave Siegelman either of the checks.

The Foundation was required to disclose contributions received and expenditures made in statements filed with the Alabama Secretary of State. It failed to file timely any disclosure regarding any funds received until July of 2002, after Alabama newspapers questioned whether the financial dealings between the Foundation and the Alabama Democratic Party had been properly reported and the Secretary of State's Office had written a letter to the state Attorney General's Office about [*13] the Foundation's non-disclosure of the payoff of the

Democratic Party's campaign loan. All funds received were then reported.

Lanny Young was a long-time business associate of Siegelman's who testified that he was part of a "pay-to-play" arrangement with Siegelman existing over many years. He testified that he would provide money, campaign contributions, and other benefits in return for official action, as needed, that benefitted Young's business interests. He testified that in January of 2000, Siegelman asked him for $9,200 to buy a motorcycle. The evidence was that Siegelman had already purchased the motorcycle. Young testified that he and Bailey worked out the details for the transaction.

Bailey testified that he did not want Young to give the money directly to Siegelman, so Bailey told Young to write the check to him, Bailey, which he deposited into his own account. He then wrote a check to Lori Allen, Siegelman's wife, which he gave to Siegelman and which was deposited into Siegelman's bank account that same day. There was testimony that a check written to the IRS for fourth quarter estimated taxes would not have cleared the account but for the $9200 deposit.

By June of 2001, Siegelman [*14] was well aware of the federal-state investigation into the Foundation's finances and his dealings with Young. Bailey and Young each testified that, in an effort to cover up Young's $9,200 payment to Siegelman, Bailey gave Young a check for $10,503.39, on which he noted "repayment of loan [the $9,200] plus interest" in order to make it appear that he had borrowed the $9,200 from Young. Bailey also wrote a check to Siegelman for $2,973.35 with the notation "balance due on m/c" to provide a reason for his borrowing money from Young, which was to purchase the motorcycle from Siegelman. Bailey testified that he did not borrow the money to buy the motorcycle, but that Young's $9,200 had gone through him to Siegelman and "we used the motorcycle to cover it up." Bailey testified that Siegelman was aware of and approved Bailey's writing of the $10,503.39 check to Young.

Bailey testified that he gave Siegelman the $2,973.35 check at the office of Siegelman's attorney, who, along with Bailey's own attorney, was present for the transfer. Neither lawyer was told that the purpose of the transaction was part of the coverup of the $9,200 payment from Young to Siegelman. Siegelman accepted the check, [*15] and provided Bailey with a bill of sale for the motorcycle, which the attorneys helped finalize. Bailey testified that he lied about the transaction to the lawyers, that he and Siegelman knew that the federal investigation was going on, and that he later lied to federal investigators about the transaction to protect himself and Siegelman.

On December 12, 2005, a grand jury returned a second superseding indictment against Siegelman and Scrushy and two other defendants. [9] Both Siegelman and Scrushy were charged with federal funds bribery, honest services conspiracy and honest services mail fraud. [10] Siegelman was also charged with multiple counts of racketeering conspiracy, racketeering, honest services wire fraud, obstruction of justice and extortion.

9 The superseding indictment replaced an earlier version of the indictment.

10 [HN3]The federal funds bribery statute criminalizes the taking of a bribe by an official of a state agency that receives over $10,000 in federal funds annually. 18 U.S.C. § 666. Honest services mail fraud criminalizes the mailing of a letter in connection with a scheme to defraud a state agency of an official's honest services in the performance of his official duties. [*16] 18 U.S.C. §§ 1341 and 1346. The conspiracy count charged the defendants with agreeing to violate the honest services statute. 18 U.S.C. § 371.

Trial on the indictment began on May 1, 2006. On June 29, 2006, the jury convicted Siegelman and Scrushy on the bribery, conspiracy and honest services mail fraud counts, and Siegelman was convicted of one count of obstruction of justice. The jury acquitted Siegelman on the remaining twenty-two counts. The other two defendants were acquitted on all counts against them.

Siegelman and Scrushy were each sentenced to approximately seven years in federal prison. [11]

11 Siegelman and Scrushy were denied bond pending appeal, but a panel of this court subsequently released Siegelman pending resolution of this appeal.

On appeal, Siegelman and Scrushy together allege nine errors in the trial proceedings. With respect to the bribery, conspiracy and honest services mail fraud counts against them, defendants assert that the court's instructions erroneously failed to require the jury to find a *quid pro quo* in order to convict; that, in any event, there was insufficient evidence of any *quid pro quo*; that the bribery counts were barred by the statute of limitations; [*17] and that the trial court erroneously admitted hearsay to prove these counts. Defendants also allege that there was juror misconduct requiring the grant of a new trial and that the procedures used to select their grand and petit juries violated the Jury Selection and Services Act of 1968 and the United States Constitution. Siegelman contends that there was insufficient evidence that he obstructed justice and that the district court abused its discretion in sentencing him by upwardly departing from

the Sentencing Guidelines. We shall consider each of these allegations of error in turn.

III.

1. *Counts 3 and 4: Federal Funds Bribery.*

The bribery statute under which defendants were convicted makes[HN4] it a crime for a state official to corruptly agree to accept anything of value from another person "intending to be influenced" in that person's favor in an official action. 18 U.S.C. § 666(a)(1)(B).

Siegelman and Scrushy's bribery convictions in this case were based upon the donation Scrushy gave to Siegelman's education lottery campaign. [12] As such, the convictions impact the First Amendment's core values - protection of free political speech and the right to support issues of great public importance. [*18] It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. [13] In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

> 12 Although the conspiracy and mail fraud counts (Counts 5-9) alleged a broader scheme for Scrushy to self-deal once on the CON Board, they also incorporated the bribery scheme alleged in Counts 3 and 4.
>
> 13 Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. [HN5]Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election campaign contribution does. Defendants assert, and we do not know otherwise, that this is the first case to be based upon issue-advocacy campaign contributions.

[HN6]The Supreme Court has guarded against this possibility by interpreting federal law to require [*19] more for conviction than merely proof of a campaign donation followed by an act favorable toward the donor. *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). In reviewing a Hobbs Act prosecution for the federal crime of extortion under color of official right, the Court said:

> [HN7]Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would [*20] open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 272.

To avoid this result, the Court made clear that [HN8]only if "payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act, are they criminal." *Id.* at 273 (emphasis added). The Court quoted the Court of Appeals for the Fifth Circuit, which had said that:

> [HN9]A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

Id. (quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982)).

While the Supreme Court has not yet considered whether the federal funds bribery, conspiracy [*21] or

honest services mail fraud statutes require a similar "explicit promise," the Seventh Circuit Court of Appeals has observed that extortion and bribery are but "different sides of the same coin." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993). [14]

> 14 We acknowledge, as the defendants point out, that several district courts, in unpublished opinions, have extended the *McCormick* rationale to the bribery and honest service statutes. The government points to no contrary authority, relying instead on inapposite authority not involving campaign contributions.

The district court in this case instructed the jury that they could not convict the defendants of bribery in this case unless "the defendant and the official *agree* that the official will take specific action in exchange for the thing of value." (emphasis added). This instruction was fashioned by the court in direct response to defendants' request for a *quid pro quo* instruction, and was given in addition to the Eleventh Circuit's pattern jury instruction for § 666 bribery cases. So, even if a *quid pro quo* instruction was required, such an instruction was given.

Defendants, however, assert that this instruction was inadequate under [*22] *McCormick*. Defendants assert that the instruction failed to tell the jury that not only must they find that Siegelman and Scrushy agreed to a *quid pro quo*, the CON Board seat for the donation, but that this agreement had to be *express*. We disagree that *McCormick* requires such an instruction.

[HN10]*McCormick* uses the word "explicit" when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. Explicit, however, does not mean *express*. Defendants argue that only "proof of actual conversations by defendants," will do, suggesting in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do.

But *McCormick* does not impose such a stringent standard. One year after *McCormick*, the Supreme Court approved the following jury instruction:

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the [federal extortion statute] regardless of whether the payment is made in the form of a campaign contribution.

Evans v. United States, 504 U.S. 255, 258, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992). The [*23] Court held that the instruction "satisfies the *quid pro quo* requirement of *McCormick v. United States*." *Id.* at 268. The Court said that the "Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.*

[HN11]The instruction approved in *Evans* required that the acceptance of the campaign donation be in return for a *specific* official action - a *quid pro quo*. [15] No generalized expectation of some future favorable action will do. The official must agree to take or forego some specific action in order for the doing of it to be criminal under § 666. In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice.

> 15 [HN12]The Latin means "something for something," Black's Law Dictionary 1282 (8th ed. 2004).

But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*. To hold otherwise, as Justice Kennedy [*24] noted in *Evans*, would allow defendants to escape criminal liability through "knowing winks and nods." 504 U.S. at 274 (Kennedy, J. concurring). *See also United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) ("*Evans* instructed that by 'explicit' *McCormick* did not mean express"); *accord United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001); *United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998); *United States v. Hairston*, 46 F. 3d 361, 365 (4th Cir. 1995). [16]

> 16 Nor is this court's prior holding in *United States v. Davis*, 30 F.3d 108 (11th Cir. 1994), to the contrary. In *Davis*, we acknowledged that, [HN13]after *McCormick*, "an explicit promise by a public official to act or not act is an essential element of Hobbs Act extortion, and the defendant is entitled to a reasonably clear jury instruction to that effect." *Id.* at 108. We reversed Davis' conviction not only because his jury did not receive a reasonably clear instruction, but because the court in that case "informed the jury that 'a specific *quid pro quo* is not always necessary for a public official to be guilty of extortion.'" *Id.*

Furthermore, [HN14]an explicit agreement may be "implied from [the official's] words and actions." [*25] *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). As Justice Kennedy explained:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the [jury] is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Id. See also United States v. Massey, 89 F.3d 1433, 1439 (11th Cir. 1996) (holding that [HN15]bribery conviction under general federal bribery statute, 18 U.S.C. § 201, may be supported by "inferences drawn from relevant and competent circumstantial evidence").

In this case, the jury was instructed that they could not convict the defendants of bribery unless they found that "the Defendant and official *agree[d]* that the official will take *specific* action in *exchange* for the thing of value." This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution. Finding this fact would satisfy *McCormick's* requirement for an explicit agreement involving a *quid pro quo*. Therefore, even assuming a *quid pro quo* instruction is required to convict the defendants under § 666, we find no reversible [*26] error in the bribery instructions given by the district court. [17] Furthermore, the evidence of a corrupt agreement between Siegelman and Scrushy to exchange the CON Board seat for a campaign donation was sufficient to permit a reasonable juror to find such a *quid pro quo*.

> 17 *Skilling* did not deal with federal funds bribery under § 666 at all and, so, does not affect our consideration of these counts of conviction.

2. *Counts 5, 6, 7, 8, 9: Honest Services Mail Fraud & Conspiracy*

Counts 6, 7, 8 and 9 charge Siegelman and Scrushy with violations of [HN16]18 U.S.C. §§ 1341 and 1346, which criminalize the use of the mails "to deprive another of the intangible right of honest services." Count 5 charges the defendants with a conspiracy to commit these "honest services" offenses, in violation of 18 U.S.C. § 371. Both defendants were convicted of all these counts.

After the defendants were convicted, the Supreme Court had the opportunity to consider the reach of these honest services criminal statutes. In *Skilling v. United States*, 561 U.S. , 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010), the Court held that [HN17]Congress intended these statutes to reach only those schemes to defraud the public that are based upon allegations [*27] of bribery and/or kickbacks. [18] After Skilling, therefore, prosecutions based upon any other theory - for example, self-dealing - are not permitted. The defendants contend that *Skilling*, and other errors, require that their honest services convictions be overturned.

> 18 Deprivation of an intangible right to honest services was a lower court sanctioned theory of prosecution under the mail fraud statute - § 1341- at one time. In *McNally v. United States*, 483 U.S. 350, 360, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), however, the Supreme Court held that the mail fraud statute reached only schemes to defraud another of tangible property. Congress responded almost immediately by enacting § 1346, which broadened mail fraud to reach schemes to defraud another of the intangible right to honest services. After twenty years of widely diverging theories as to what could be prosecuted as a deprivation of honest services, [HN18]the Court in *Skilling* clarified that Congress intended to reenact only that portion of the *pre-McNally* case law that was aimed at bribery and kickback schemes. 130 S. Ct. at 2905.

A. *Counts 6 and 7: The Bribery of Siegelman as Honest Services Fraud*

Counts 6 and 7 charge that Scrushy's bribery of Siegelman deprived the [*28] public of the right to the defendant's honest services. Thus, there is no *Skilling* error here - a bribery (or kickback) scheme is required under *Skilling* and one was alleged.

Notwithstanding this fact, the defendants assert that their convictions on these counts must be reversed because the jury was not instructed that the government was required to prove a *quid pro quo* in order to convict them on a bribery theory of honest services fraud. [19] We find no merit in this contention.

> 19 This is the same argument defendants asserted as to the § 666 bribery instructions.

The honest services fraud alleged in Counts 6 and 7 of the indictment is predicated upon the same pay-to-play scheme that was alleged in the § 666 bribery counts - Counts 3 and 4. [20] Without deciding whether a *quid pro quo* must be proved in an honest services bribery prosecution, [21] we hold that any error in the honest services instructions as to Counts 6 and 7 was harmless. Since Counts 6 and 7 re-allege the pay-to-play scheme charged in Counts 3 and 4, the jury instructions as to all these counts may be read in tandem. On Counts 3 and 4, the jury was instructed that they could not convict Scrushy of bribing Siegelman unless [*29] they found that the defendants "agree[d] that the official will take

specific action in exchange for the thing of value." Having been instructed they must find a *quid pro quo* to convict of the bribery alleged in Counts 3 and 4, and having done so, any error in the honest services instructions as to Counts 6 and 7 was harmless. *See Cupp v. Naughten*, 414 U.S. 141, 148-48, 94 S. Ct. 396, 38 L. Ed. 2d 368. (1973) [HN19](jury instructions must be evaluated as a whole). Therefore, we shall affirm defendants' convictions on Counts 5, 6 and 7. [22]

20 Count 6 charges mail fraud in connection with the mailing of a letter appointing Thom Carman as Scrushy's replacement on the CON Board. Count 7 charges a mailing in connection with Carman's reappointment to the Board.

21 [HN20]*Skilling* limited § 1346 to bribery and kickback schemes, holding that, in the absence of such narrowing, the statute would provide insufficient notice of what conduct is prohibited by it. The Court's rationale reminds us that even the narrowed honest services statute must provide constitutionally adequate *notice* of what conduct is prohibited.

[HN21]Since a campaign donation - unlike bags of cash delivered to the official himself - is protected First Amendment activity and, indeed, [*30] the normal course of politics in this country, due process requires that the potential campaign donor have notice of what sort of conduct is prohibited. Absent an explicit agreement to "buy an appointment" there is nothing inherently corrupt about a donation followed by an appointment. It is the corrupt *agreement* that transforms the exchange from a First Amendment protected campaign contribution and a subsequent appointment by a grateful governor into an unprotected crime.

[HN22]In *McCormick*, which interpreted the extortion under color of official right statute, the Court required such an agreement - a *quid pro quo* - in order to prove that the official and the campaign contributor *corruptly agreed* to a *specific exchange*. In so doing, the Court protected both the First and the Fifth Amendments by reading the statute to require an agreement to swap money for office, thereby putting both government officials and potential contributors on notice that such an agreement would subject them to prosecution.

Although *Skilling* refers us to the *pre-McNally* bribery cases as examples of the fact patterns that would supply notice of what constitutes an honest services bribery violation, none of these cases [*31] was a campaign donation case. After *Skilling*, it may well be that the honest services fraud statute, like the extortion statute in *McCormick*, requires a *quid pro quo* in a campaign donation case. Thus seen, § 1346 would criminalize only the *agreement* to exchange a campaign donation for an appointment The official's duty to provide honest services, which includes the duty to exercise his appointment powers independently of the receipt of any campaign donation, would be violated only by an agreement to exchange an appointment for a campaign donation. Such an agreement would amount to the official's "selling" to the appointee the official's duty and authority to make appointments.

22 We held above that the evidence of a bribery scheme was sufficient to support the jury's verdict as to Counts 3 and 4, and, similarly, we hold it sufficient as to the same scheme alleged in Counts 5, 6, and 7.

B. *Counts 8 and 9: Scrushy's Self-Dealing*

Counts 8 and 9 allege a broader scheme than that alleged in Counts 6 and 7. These counts allege that Scrushy "would and did use his seat on the CON Board to attempt to affect the interests of HealthSouth and its competitors," and that Scrushy "would and did offer [*32] things of value to another Board member to attempt to affect the interests of HealthSouth and its competitors." [23] Although Scrushy was not on the Board when the alleged self-dealing occurred, the indictment charged that it was part of the scheme that Siegelman and Scrushy "orchestrated Scrushy's replacement on the Board by another person employed by HealthSouth." The mailings charged in connection with these allegations were letters sent by the Board to HealthSouth, notifying it that it had been awarded Certificates of Need in connection with the rehabilitation hospital (Count 8) and the PET scanner (Count 9).

23 The government's initial brief on appeal states that, as to Counts 8 and 9, "the jury had to find that Scrushy and Siegelman intended to deprive the public of their right to honest services and intended to deceive the public, and that Siegelman intended to alter his official actions as a result of Scrushy's purported campaign contributions." Red Brief, p. 53-54 (emphasis added)

Although Counts 8 and 9 incorporate the bribery scheme, thus surviving *Skilling*, they allege a broader scheme of which, Siegelman argues, he was unaware and in which he did not participate. He contends [*33] that there was no evidence at trial to link him to Scrushy's self-dealing scheme. We agree.

[HN23]Siegelman may be held criminally liable for Scrushy's conduct on the Board only if he was a knowing party to a scheme that included that conduct. *United States v. Toney*, 598 F.2d 1349, 1355 (5th Cir. 1979). It was the government's theory, argued at trial and in its brief on appeal, that not only did Siegelman know that Scrushy wanted the seat in order to self-deal on the CON Board, but that "it was certainly foreseeable to Siegelman that Scrushy would bribe another Board member to further HealthSouth's interests" since "[a]fter all, Scrushy paid Siegelman $500,000 to get HealthSouth a seat on the Board in the first place." The problem for the government is that there was scant evidence at trial to support this position.

The evidence at trial was that Scrushy resigned from his seat on the Board in January of 2001 and that, the next day, Siegelman appointed Thom Carman, HealthSouth vice-president, to the remainder of the term. When Scrushy's term expired in July, Siegelman reappointed Carman.

While on the Board, Carman employed another member of the Board, Tim Adams, to prepare the application for [*34] the PET scanner, paying him $8000 to do so. [24] There was also testimony that Adams was paid another $3000 for "additional work he apparently had done on the PET scanner application" in return for his agreement to attend the CON Board meeting at which HealthSouth's application for a rehabilitation hospital in Phoenix City was considered. At the meeting, Carman recused himself from voting on the application. Adams attended, and although he abstained from voting, under the Board's rules, his abstention did not affect the quorum his presence established, thus permitting a vote to be taken. There was no opposition to the application and the Board unanimously approved the application.

24 There was testimony that Adams had never written a CON Board application, and that his work was substandard.

Six months later, the PET scanner application was also approved. At this meeting, Adams' presence was not necessary to the quorum. Carman recused himself, and Adams abstained from voting. The application was unopposed and passed unanimously.

Alva Lambert, the Executive Director of the Board, testified that unopposed applications were routinely approved, and that both these applications were consistent [*35] with prior Board actions. There was no evidence that Siegelman knew of Carman's actions in hiring Adams to prepare the application. There was no evidence that he knew of any of these Board actions.

The testimony in support of the government's allegation of a pay-to-play scheme whereby Scrushy paid Siegelman for a seat on the CON Board came principally from Bailey, Martin, Young, McGahan, and Skelton. Of these witnesses, only Skelton, HealthSouth's lawyer in charge of certificates of need, had any knowledge about Scrushy's subsequent alleged self-dealing while on the CON Board. Her testimony, however, did not mention Siegelman. Alva Lambert, the Executive Director of the CON Board during the relevant time and the other primary government witness in support of the allegations of Scrushy self-dealing, testified that the Siegelman CON Board was an "extremely well-balanced" Board, that CON Boards had never to his knowledge turned down an application for a PET scanner, and that he never saw Siegelman exert any influence or try to exert any influence whatsoever over a Board decision.

Neither in its brief nor at oral argument did the government point to *any* testimony in support of its allegation [*36] that Siegelman and Scrushy agreed to a broader scheme in which Scrushy would self-deal on the Board. Nor has our independent and careful review of record revealed any.

Rather, the government's brief argues that Siegelman's knowing participation in the broader self-dealing scheme may be inferred from three facts proven at trial: first, that Siegelman and Scrushy agreed to exchange the CON Board seat for money; second, that the amended Foundation financial statements that disclosed the Scrushy donations, which were filed around the time of the mailings, did not list Scrushy as the ultimate source of the IHS check; and third, that Siegelman was still governor when the PET scanner and Phenix City projects were approved and could have removed Scrushy or Carman from the Board at any time. The first two of these facts relate primarily to the initial pay-to-play scheme, and the final fact is not sufficient to show participation in a broader scheme, much less knowing participation. None is remotely sufficient to permit a jury to infer that Siegelman agreed to a broader self-dealing scheme.

In view of this absolute lack of any evidence whatsoever from which the jury could infer that Siegelman [*37] knowingly agreed to or participated in a broader scheme that included Scrushy's alleged subsequent self-dealing while on the Board, we shall reverse Siegelman's convictions on Counts 8 and 9.

As to Scrushy's convictions on Counts 8 and 9, one thing is clear. After *Skilling*, his conviction cannot rest upon the self-dealing theory articulated in the indictment. The government, therefore, points to other allegations in Counts 8 and 9 that Scrushy bribed Tim Adams (a member of the CON Board) in order to obtain favorable CON Board action on the two HealthSouth applications. This post- *Skilling* theory of Scrushy's honest services fraud as

to the Board remains viable. The issue on appeal, then, is whether the government sufficiently proved that Scrushy bribed Adams. [25]

> 25 Scrushy did not challenge the sufficiency of the evidence as to Counts 8 and 9 in his initial brief on appeal. He did challenge the legal sufficiency of the charges. This challenge has now been vindicated by *Skilling*. In view of the fact that the government has now offered a bribery theory in support of the convictions on these counts, he is entitled to challenge that evidence this time around.

The government's proof of these [*38] allegations was that Scrushy resigned from his seat on the CON Board in January of 2001 and that, the next day, Siegelman appointed Thom Carman, HealthSouth vice-president, to the remainder of the term.

Carman employed another member of the Board, Tim Adams, to prepare the application for the PET scanner, paying him $8000 for the work. There was testimony that Scrushy "was aware" of this. There was also testimony that Adams was paid another $3000 for "additional work he apparently had done on the PET scanner application" in return for his agreement to attend the CON Board meeting at which HealthSouth's application for a rehabilitation hospital in Phenix City was considered. Lori Skelton, a HealthSouth lawyer testified that Adams had never written a CON Board application and that his work was substandard. At the meeting during which the hospital application was considered, Adams attended but abstained from voting, as he had prepared the application. Under the rules, his abstention did not affect the quorum, thus permitting a vote to be taken. There was no opposition to the application and the Board unanimously approved the application.

Six months later the PET scanner application was [*39] also approved. At this meeting, Adam's presence was not necessary to the quorum, and he again abstained from voting. The application was unopposed and passed unanimously. Alva Lambert, the Executive Director of the board testified that the unopposed applications were routinely approved, and that both these applications were consistent with prior board actions. There was no evidence that Scrushy knew of any of these actions.

During closing, the government primarily argued the Siegelman/Scrushy pay-to-play conspiracy, but did say that:

> [Scrushy's] own lawyer [Skelton] told you that Adams began to ask him for stuff, and they began to be concerned that he was trying to use his position. And they were concerned that he might harm their interests. So what did they do? Did they report him? No, because that's not why Scrushy was up here. He was trying to influence him. What did he do? He paid him, even though his lawyer told him you need to leave this guy alone; this isn't good.

The government also argued that, as a result of the CON Board seat, Scrushy was able "to start manipulating Tim Adams' activities, start courting him and bringing him down and engaging in agreements to give him money."

We [*40] conclude that the evidence that Scrushy bribed Adams is insufficient to support Scrushy's conviction on these counts. The evidence at best shows only that Skelton hired Adams to prepare the scanner application, which he did, and for which he was paid. Scrushy was "aware" of this.

The government's case, even in Counts 8 and 9, was always primarily focused on the pay-to-play scheme between Scrushy and Siegelman. The vast majority of the allegations and testimony went to prove this scheme. The government always described the scheme alleged in Counts 8 and 9 as self- dealing, and its attempt now - post-*Skilling* - to emphasize the alleged bribery of Adams finds some, but not much, support in the proof. The evidence that Adams intended to alter his official actions as a result of the receipt of benefits from Scrushy is insufficient, and Scrushy's convictions on Counts 8 and 9 must be reversed. [26]

> 26 The legal sufficiency of the jury instruction regarding the bribery of Adams is not discussed here because we find the evidence insufficient to support the jury's verdict. But we note that the Adams bribery could not benefit from the same spill over effect of the *quid pro quo* instruction given in [*41] the § 666 instructions, since it was a different bribery. Therefore, the honest services jury instruction would have to support Scrushy's convictions on these counts, and that instruction is deficient if a *quid pro quo* is required for conviction. The instruction required that "they intended to alter their official actions as a result of the receipt of campaign contributions or other benefits." The instruction conveys the requirements for a *quid* - a campaign contribution - and a *quo* - an official action - but the "as a result of" language fails adequately to require the *pro* - the corrupt agreement to make a specific exchange.

3. Count 17: Obstruction of Justice

Siegelman was charged with two counts of obstruction of justice. [27] The indictment alleged and the government undertook to prove that eighteen months after the $9200 pay-to-play payment to Siegelman from Lanny Young, Siegelman and Bailey became aware of the federal-state corruption investigation and instigated a series of sham check transactions in an effort to cover up the payment. The coverup was designed to make it appear that Bailey had borrowed the $9200 from Young so that he could buy a motorcycle from Siegelman.

27 Section 1512(b)(3) [*42] provides in pertinent part:

> [HN24]Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -
>
> . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . .

Count 16 alleged that Siegelman corruptly persuaded Bailey to write a check for $10,503 to Young with the notation "repayment of loan plus interest." Count 17 alleged that Siegelman corruptly persuaded Bailey to write and give him a check for $2973.35 with the notation on it that it was the "balance due on m/c." Count 17 also alleged that Siegelman engaged in misleading Bailey's attorney with the intent to hinder or prevent the attorney's communication of information regarding these transactions to the FBI.

The jury acquitted Siegelman of Count 16, but convicted him on Count 17. Siegelman contends that the evidence was insufficient to show that he persuaded Bailey to write the check charged in Count 17 or that he misled Bailey's attorney. We turn now to the evidence.

At trial, Young [*43] testified that in January of 2000, Siegelman asked him for $9200 to buy a motorcycle and that he gave it to Siegelman as part of the pay-to- play, on-going agreement he had with Siegelman. He also testified that, eighteen months later, after the federal-state corruption investigation began, he and Bailey had the following conversation:

> Young: Right after the investigation started, Nick [Bailey] called me and asked me if I could recall how I made out the check for the motorcycle. And I said - on what account I had written the check for the motorcycle. And I said no, why? He said because if it's on one of your personal accounts, you are going to have a motorcycle in your driveway tonight.

Bailey testified that the coverup began when:

> Bailey: I found out about the investigation that was going on with Lanny - could have involved others; we weren't sure at the time. I wanted to repay Lanny's $9200. I did it in the form of a check. Did a promissory note with Lanny to repay this $9200 plus interest, $10,503.

Bailey gave the following testimony regarding Siegelman's involvement in this first step in the coverup:

> Government: When you went to write this check to Lanny [Young] to disguise this earlier [*44] transaction, did you do that with the knowledge of the Governor?
>
> Bailey: Yes.
>
> Government: Did you talk to him about it before you did it?
>
> Bailey: Yes.
>
> Government: Was he in agreement with you doing that?
>
> Bailey: Yes.
>
> Government: When you talked to him about why you were going to do that, did you guys talk about the fact that this criminal investigation was going on?
>
> Bailey: Yes.
>
> Government: What were you and the Governor trying to accomplish when you wrote that check back to Lanny Young 17 months after that check had been written for $9200 to the Governor?
>
> Bailey: To disguise the $9200 that went from Lanny to me to the Governor.

Young's testimony regarding the purported repayment was:

> Government: Had you loaned Nick Bailey any money that would cause him to give you that $10,503 check?
> Young: No.
> Government: Well, what was going on when he wrote you that check, if you know?
> Young: He was trying to make the $9200 look like a loan.

Bailey testified that the final step in the coverup was to give Siegelman a $2,793.35 check with the notation on it that it was "balance due on m/c" to make it appear that the check was Bailey's final payment for the motorcycle. His testimony about Siegelman's involvement [*45] in this step of the coverup was:

> Government: What was going on here?
> Bailey: We made a decision to finalize the agreement we made regarding the motorcycle early on, and this was to finish that. We met at the Governor's attorney's office and with my attorney, and that's when I finished paying the Governor in full for the motorcycle to carry out the plan that we had entered into probably 12 to 18 months earlier.
> Government: And what was that plan?
> Bailey: To disguise the $9200 from Lanny to the Governor.

Finally, Bailey testified regarding his interview with the FBI regarding this meeting:

> Government: Now, not long after [he gave the check to Siegelman] you had an occasion to be interviewed by federal and state criminal investigators, didn't you.
> Bailey: Yes, sir.
> Government: When they questioned you about this transaction on that occasion, did you tell them the truth about what had happened?
> Bailey: No.
> Government: Why not?
> Bailey: There were a number of reasons; but primarily, I was still trying to protect myself and my boss.

The jury considered all of this testimony and found Siegelman guilty of the obstruction of justice charged in Count 17, but not in Count 16. This means that the jury decided, [*46] as a matter of fact, that Siegelman persuaded Bailey to write the check for $2973.35, but not the initial check for $10,500.

[HN25]In evaluating the sufficiency of the evidence to support the jury's verdict, we are required to "view the evidence in the light most favorable to the government and resolve all reasonable inferences and credibility evaluations in favor of the jury's verdict." *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir. 2007). The evidence needs not "be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

A reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the coverup by giving him a $2793.35 check with the notation that it was final payment for the motorcycle. *See United States v. Tocco*, 135 F.3d 116, 126-27 (2d Cir. 1998) (affirming jury inference of persuasion from defendant's strong influence over witness who was employee); *United States v. Morrison*, 98 F.3d 619, 629-30, 321 U.S. App. D.C. 170 (D.C. Cir. 1996) (making a request sufficient persuasion). [*47] The testimony was that Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by "paying back" Young with his own check. The evidence further showed that Siegelman accepted and cashed the $2973.35 check from Bailey with the notation that it was final payment for the motorcycle. Finally, the jury had heard testimony that Bailey always did what Siegelman asked him to do.

The jury's acquittal on Count 16 shows that it was not convinced beyond a reasonable doubt that Siegelman instigated the coverup by directing Bailey to "pay back" Young with the initial $10,500 check. But, by the time Bailey wrote the check to Siegelman for $2793.35, just over four months later, as a final step in the coverup, the jury's conviction on Count 17 indicates that it concluded Siegelman not only knew what Bailey was doing to cover up Young's corrupt payment, but that he was directing the coverup by persuading Bailey to write the check to him.

This sort of split verdict is itself evidence that the jury considered the charges carefully and individually, addressed the strength of the evidence on each charge, and reached a reasoned conclusion. *See* [*48] *United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir.

2000) (making these comments in the context of allegations of premature jury deliberations).

Siegelman's argument against the sufficiency of this evidence is the same he made against his convictions on virtually all the other counts - that the evidence in this case was not perfect, that it relied too heavily on circumstances and required the jury to draw inferences from those circumstances that might have been drawn differently by different jurors.

But this is far too academic a view of trial by jury. [HN26]In the absence of a defendant's confession or observation of his wrongdoing by a third person, proof by circumstantial evidence and the fair inferences to be drawn therefrom is both necessary and permissible. Siegelman's contention throughout his brief that "there was no evidence" to support a particular inference too often means merely that there was no evidence other than Bailey or Young's testimony. While Siegelman may not approve that the testimony of co-conspirators was sufficient to support the jury's findings of fact, the jury was free to disregard or disbelieve it. They believed it.

With respect to the "misleading" prong [*49] of the statute, the evidence was more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to "finalize" the sale of the motorcycle to Bailey was an attempt to "create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth," *United States v. Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998) ([HN27]statute satisfied by "the *possibility* or *likelihood* that [the defendants'] false and misleading information would be transferred to federal authorities. . ."). The jury was entitled to infer from the sham check transaction in Bailey's lawyer's presence that Siegelman intended to mislead the lawyer into believing that the transaction was legitimate, that Bailey had, indeed, purchased the motorcycle from him, and that the check was final payment. As the "unwitting third party," the lawyer would be in a position factually to support the coverup since Siegelman clearly knew that there was a "possibility" that the federal investigators would come asking. [28]

> 28 Indeed, the "bill of sale" for the motorcycle, prepared by the [*50] attorneys, was introduced at this trial. Similarly, Bailey had also delivered the "loan re-payment" check for $10,503.39 to Young in the office of Young's lawyer.

4. *Admission of a Co-conspirator's Statement*

Defendants challenge the admission of Hanson's out-of-court statement to Martin at a HealthSouth retreat in the fall of 1999. Martin testified that Hanson "was bragging about the fact that he was able to get [HealthSouth] a spot on the CON Board with the help of the [IHS] check."

[HN28]Under Fed. R. Evid. 801(d)(2)(E), a court has the discretion to admit co- conspirator statements made during and in furtherance of the conspiracy. The court's admission of such statements is an abuse of its discretion to do so if the statements do not meet this legal standard. *United States v. Magluta*, 418 F.3d 1166 (11th Cir. 2005).

This court applies a liberal standard in determining whether a statement was in furtherance of a conspiracy. *United States v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988). "The statement need not be necessary to the conspiracy, but must only further the interests of the conspiracy in some way." *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002). "[I]f the statement [*51] 'could have been intended to affect future dealings between the parties,' then the statement is in furtherance of a conspiracy." *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988) (quoting *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979)). Finally, "[s]tatements between conspirators which provide reassurance, serve to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy further the ends of the conspiracy . . . ." *United States v. Ammar*, 714 F.2d 238, 252 (3d Cir. 1983). Even defendants concede that boasting or bragging is in furtherance of a conspiracy if the statements are directed at obtaining the confidence or allaying the suspicions of co-conspirators. *Santiago*, 837 F.2d at 1549.

Hanson's statement at the HealthSouth retreat furthered the conspiracy. We agree with the government that, given Martin's own involvement in the conspiracy (obtaining the IHS check), Hanson's bragging to him about purchasing the CON Board seat "with the help of" the IHS check informed Martin that their plan had worked and that Martin's involvement had helped. This alone is sufficient to permit its introduction under *Ammar*, 714 F.2d at 252. [*52] Additionally, however, the statement is easily seen to affect the co-conspirators' future dealings because Martin's assistance might be needed in connection with the second $250,000 donation and Hanson knew this. Thus, Hanson's statement easily meets the *Caraza* standard. 843 F.2d at 436 (approving statement admitted after several acts of conspiracy helping to ensure final acts). The district court did not abuse its discretion in admitting this evidence.

5. *Juror Misconduct*

Defendants filed a joint motion for a new trial under Fed. R. Crim. P. 33(a), alleging juror misconduct by way of both juror exposure to extraneous information as well

as by improper juror deliberation and that each impropriety violated the Sixth Amendment and requires a new trial. [29] After conducting two evidentiary hearings on this issue, [30] the district court held that no substantial violation of the Sixth Amendment occurred that required a new trial. [HN29]We review the denial of a motion for new trial based on alleged juror misconduct for an abuse of discretion. *United States v. Venske*, 296 F.3d 1284, 1290 (11th Cir. 2002). [31] We will consider each of the claims of misconduct in turn.

29 Scrushy has moved this court to [*53] appoint a special master under Fed. R. App. R. 48 to investigate the matter. The request is denied.

30 In the first of these hearings, the court considered the affidavit of Juror 5 to determine whether it established sufficient reason to conduct further inquiry, concluding that it did.

31 Of course, [HN30]the district court's findings of facts supporting its legal conclusion are reviewed only for clear error. *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990).

A. Juror Exposure to Extraneous Information

[HN31]The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. U.S. Const. amend. VI. To protect the right to an impartial jury, the Supreme Court has recognized that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). The jury must determine guilt solely on the basis of the evidence presented at trial and the court's instructions as to the applicable law. *Turner v. Louisiana*, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

We presume, however, [*54] that the jury has been impartial. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979). [32] A defendant who alleges denial of this right resulting from juror exposure to extraneous information has the burden of making a colorable showing that the exposure has, in fact, occurred. *Id. See also United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir. 1987). If the defendant does so, prejudice to the defendant is presumed and the burden shifts to the government to show "that the jurors' consideration of extrinsic evidence was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954); *United States v. Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006). [33]

32 [HN32]All decisions of the Fifth Circuit prior to October 1, 1981, when this court was established, have been adopted as decisions of this court. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

33 *Ronda* recognized that there has been some inconsistency in our application of *Remmer*, but, as in *Ronda*, we decline to consider this issue because it has no bearing on the outcome. 455 F.3d at 1299 n.36.

[HN33]If the district court concludes the exposure to the extrinsic evidence was harmless to the defendant, on appeal, we review [*55] this conclusion for an abuse of discretion. *Id.* at 1296 n.33. In doing so, we look at all the circumstances and we consider: (1) the nature of the extrinsic evidence; (2) the manner in which it reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and, (4) the strength of the government's case. *Id.* at 1299-1300.

Defendants attached several exhibits to their motion regarding juror misconduct, including news articles after the trial and copies of affidavits by Juror 5 and his wife and his wife's pastor. This material, especially the affidavit of Juror 5, suggested that, during the trial, some of the jurors may have seen information about the trial on the internet.

Finding that the defendants had made a colorable showing of extrinsic influence on the jury, the district court held a hearing to which all twelve jurors were summoned and told to bring with them any material related to outside information that they or any other juror considered during trial or deliberations. At the hearing, the court asked each juror a series of twelve questions designed to reveal the nature and extent of any extrinsic evidence to which [*56] the jurors were exposed. [34] Each juror testified under oath in response to the twelve questions and follow-up questions.

34 These questions are attached as Exhibit "A" to this opinion.

Based upon this testimony, the district court found that there was credible evidence establishing that during deliberations some of the jurors were exposed to the following extrinsic evidence: (1) a copy of the Second Superseding Indictment obtained from the district court's own website; and (2) juror information from the website concerning the foreperson's obligation to preside over the jury's deliberations and to give every juror a fair opportunity to express his views.

1. Exposure to a Book About the Role of the Foreperson

As a matter of fact, and based upon the testimony given by the jurors in the hearing, the district court found that the extrinsic evidence accessed from the district court's own website by Juror 7 and mentioned by him in jury deliberations did not pertain to any substantive issue in defendants' trial. It concerned only the process of deliberation. Furthermore, it did not contradict any instruction given by the court, was consulted and discussed for only a few moments of a more than five-day [*57] deliberation. It was discussed to encourage full participation by all the jurors. The district court concluded that the exposure of the jury to this extrinsic information was harmless to the defendants.

We agree. In substantially similar circumstances, we affirmed a district court's decision that a new trial was not required in a case where the jury foreman went to the library and checked out a book entitled *What You Need to Know for Jury Duty*, and then exposed the jury to it. *United States v. De La Vega*, 913 F.2d 861, 869 (11th Cir. 1990). In that case, the foreperson read the book, implemented suggestions for jury procedures outlined in the book, brought the book to the jury room, and showed some other jurors a page in the book that outlined organizational steps for deliberation. *Id.* at 869-70. We held that the district court did not abuse its discretion in concluding that there was no reasonable possibility that the introduction of this extrinsic information prejudiced the defendants such that a new trial was required. *Id.* at 870-71.

The district court did not abuse its discretion in concluding that the introduction of similar information in this case was harmless beyond a reasonable [*58] doubt. The district court carefully investigated this matter. Its factual findings that this information was unrelated to the charges or any evidentiary matter in the case, and that it was introduced by a juror, not an outside influence, are not clearly erroneous. Furthermore, the district court held, and we agree, that the government's case was strong on the counts of conviction. In view of these findings, we conclude that the district court did not abuse its discretion in holding that there was no reasonable possibility of prejudice to the defendants arising out of the exposure of the jury to this extrinsic evidence and denying the motion for a new trial.

2. Exposure to the Unredacted Second Superseding Indictment

During trial, the district court granted the government's motion to cure what the court had determined was mutiplicitous charging of the federal funds bribery counts by removing reference to Siegelman in Count 4 and to Scrushy in Count 3 of the Second Superseding Indictment. [35] The district court provided the jury with a copy of the resulting redacted Second Superseding Indictment for its deliberations.

35 The government had charged both in each count, thereby permitting each [*59] to be convicted twice for the same offense.

Based upon its questioning of the jurors, the district court found that Juror 7 and Juror 40 accessed a copy of the unredacted Second Superseding Indictment early during the jury's deliberations. They each obtained the indictment from the court's website in order to be able to review the allegations outside of the jury deliberation room. Additionally, some other members of the jury became aware that Jurors 7 and 40 had spent time outside of the jury room reviewing the content of this document. While the jury did not discuss this fact at length, it did discuss it. There was no evidence, however, that any members of the jury other than Jurors 7 and 40 actually read the unredacted Second Superseding Indictment, or that either Juror 7 or Juror 40 ever realized that there was any difference between the two indictments.

The district court found that the two jurors had been exposed to the unredacted indictment, which was extrinsic information, and that other jurors had been exposed to the fact that those jurors had obtained a copy of the document from the internet. Considering the totality of the circumstances, including the substantial evidence of [*60] defendants' guilt on the counts of conviction, the district court concluded that the jury's exposure to this extrinsic information was harmless beyond a reasonable doubt and it denied them a new trial.

We agree. This extrinsic evidence was the charging document itself. The district court specifically found that, prior to the redaction, the jurors had been repeatedly exposed to comment by the court and all the parties on the contents of the Second Superseding Indictment. Exposure to the original indictment, including the duplicitous charging, was, therefore, innocuous and cumulative of information properly before the jury. The district court specifically found that the exposure of any juror to the unredacted indictment would not have provided that juror with factual information to which the juror did not already properly have access, nor would it have provided that juror with any legal knowledge different from that provided to the jury as a whole.

Furthermore, the jury was repeatedly instructed that the indictment was not evidence of guilt, and that it must decide the case solely on the evidence properly admitted during the trial. [HN34]The jury is presumed to follow the district court's instructions. [*61] *See United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996).

Based upon the district court's investigation of this claim, its careful review of the nature, source and use of

the extrinsic information in the context of the substantial evidence of defendants' guilt, we hold that the district court did not abuse its discretion in denying defendants a new trial for this reason.

3. Exposure to Limited Portions of Media Coverage

During the hearing, Jurors 7, 22, and 40 revealed that they had inadvertently experienced limited exposure to some media coverage during the trial. These jurors testified that, despite their best efforts, they had overheard snippets of television coverage or seen headlines regarding the case in newspapers or online. The court found that such limited, inadvertent exposure was not surprising given the intense media scrutiny of the trial. The court further found that the jurors' testimony was especially credible since it was clear to it that the jurors felt compelled to disclose even the most incidental and inadvertent exposure to extrinsic information. Juror 22 testified that she would leave the room or mute the television when the news came on, and Jurors 7 and [*62] 40, who saw headlines, testified that they did not read the accompanying stories prior to the verdict. The court also found that there was no evidence that the jury discussed any media reports prior to the verdict.

Our review of the record supports these findings and the district court's conclusion that the exposure of these jurors to media reports about the trial was harmless. In view of the limited and incidental nature of this exposure and the substantial evidence of defendants' guilt on the counts of conviction, we hold that the district court did not abuse its discretion in denying the defendants a new trial for this reason.

B. Juror Deliberations

Defendants rely upon purported emails allegedly exchanged between jurors during trial and deliberations. Documents said to be copies of such exchanges were mailed anonymously to the defense, to argue that there was both premature jury deliberation and deliberation by fewer than all the jurors in this case, and that this improper deliberation deprived the defendants of their Sixth Amendment right to an impartial jury.

These allegations posed a very different problem for the district court from those suggesting that the jury had been subject [*63] to external influences. [HN35]District courts are subject to very stringent limitations on their authority to question jurors about their deliberations, and to use one or more juror's testimony to impeach the verdict of all. In fact, for nearly a century, the Supreme Court has recognized a near-universal and firmly established common-law rule *flatly prohibiting* the use of juror testimony to impeach a verdict. *Tanner v. United States*, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987); *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).

[HN36]The Court has repeatedly emphasized the important policy considerations that require the shielding of juries from public scrutiny of their deliberations. *Williams v. Florida, 399 U.S. 78, 100, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)*. "The essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.* Because our system of justice so prizes this unique and essential feature of our criminal justice system, it both anticipates and tolerates some level of imperfection in the system. *United States v. D'Angelo*, 598 F.2d 1002, 1004-05 & n.4 (5th Cir. 1979). [*64] [36] As the Supreme Court has explained:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussions in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21 (internal citations omitted).

> 36 For example, [HN37]we permit logically inconsistent jury verdicts as to different counts, and even as to different co-defendants. We permit jury nullification. We do not inquire whether a verdict is the result of compromise, mistake or even carelessness.

Permission to attack jury verdicts by postverdict interrogations of jurors would allow defendants to launch inquiries into [*65] jury conduct in the hope of discovering something that might invalidate the verdicts against them. "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Id.* at 119-20 (quoting *McDonald*,

238 U.S. at 267-68)). Such events would result in "the destruction of all frankness and freedom of discussion" in the jury room. *Id.* And, as early as 1892, the Supreme Court expressed concern that such postverdict investigation would "induce tampering with individual jurors subsequent to the verdict." *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L. Ed. 917 (1892). In a justice system that depends upon public confidence in the jury's verdict, such events are unacceptable.

[HN38]In an effort to protect the jury system, the Federal Rules of Evidence enshrine the common law rule against the admission of a juror's testimony to impeach the jury's verdict. Rule 606(b) provides:

> [HN39](b) **Inquiry into validity of verdict or indictment**. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the [*66] effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

[HN40]By disallowing a juror to impeach the jury's verdict by testimony about their deliberations, the rule operates to protect jurors from postverdict investigation and to protect the verdict from endless attack. [37]

> 37 The only exception to the rule is to permit the sort of examination of jurors conducted by the district court in this case to determine whether the jury considered extrinsic information to the defendant's prejudice, as discussed in the immediately preceding portion of this opinion. The district court found as a matter of fact that it had "no doubt whatsoever [*67] that the documents purporting to be juror emails on which the Defendants rely are wholly unrelated to any evidence of jury exposure to extraneous information or outside influence." We conclude that this finding of fact is not clearly erroneous. In addition, we see no abuse of discretion in the way the district court dealt with the three other emails called to its attention after the evidentiary hearings.

We have previously affirmed district courts that have denied motions for a new trial while declining to conduct investigations into jury deliberations. *Cuthel*, 903 F.2d at 1381. In *Cuthel*, we held that the district court did not abuse its discretion in failing to conduct an evidentiary hearing despite evidence of premature deliberations by the jury and evidence of intrajury pressure to reach a verdict. *Id.* at 1383; *see also United States v. Barshov*, 733 F.2d 842, 852 (11th Cir. 1984) (duty to investigate arises only in the context of extrinsic influence); *United McElroy by McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1511 (11th Cir. 1990) (denying defendant's requests to interview the jury members based on allegations of improper deliberations).

The district court said that [*68] it had serious reservations about the authenticity of these purported emails, but concluded that the law barred it from questioning the jurors about their deliberations, or about the emails purporting to suggest that the jurors deliberated improperly. [38] Instead, it stated that "[e]ven if the Court were to assume *arguendo* the authenticity of these documents," it would not find that the emails established that the jury either deliberated prematurely or without all its members in any significant measure.

> 38 Defendants urged the court to obtain information regarding the emails from the jurors' internet providers but provided the court with no legal authority in support of this "unusual and intrusive investigation of jurors." In view of the law governing postverdict investigation of jurors, the court denied the request.

The court based this conclusion upon its factual findings that some of the emails might relate to discussion of the case prior to the submission of the case to the jury, that others might indicate limited deliberation by fewer than all the members of the jury, and that some indicate possible consideration of penalties faced by the defendants. According to the district court, [*69] this was the most that the emails showed.

The court concluded that, while "it is unquestionably clear that such discussions constitute misconduct, it is not the sort of conduct that this Court can or should directly inquire into by interrogating jurors, nor is it in this Court's view grounds for granting a new trial." Considering the totality of the circumstances, the strength of

the government's case, the length of jury deliberations, and the court's instructions to the jury, including the instructions not to decide or discuss the case prematurely, the district court held that there was no reasonable possibility that the defendants suffered prejudice from any premature deliberations, discussion of penalty, or deliberation with fewer than all the members of the jury present.

We agree. Additionally, we note that the verdict in this case was split in that Siegelman was acquitted of many of the charges. [39] Such [HN41]a split verdict lends supports to a conclusion that the jury carefully weighed the evidence and reached a reasoned verdict free of undue influence and did not decide the case prematurely. *United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir. 2000); *Cuthel*, 903 F.2d at 1383.

> 39 Scrushy [*70] argues that because he was convicted on all counts against him, that the verdict was not split as to him. The law, however, is to the contrary. *See United States v. Baker*, 432 F.3d 1189, 1237 (11th Cir. 2005) (a split verdict is one in which the jury finds "guilt as to some defendants or charges but not as to others").

We conclude, therefore, that the district court did not abuse its discretion in deciding that the purported emails, assuming they are authentic, do not entitle defendants to a new trial. The district court applied the relevant factors to the email evidence, and was well within its discretion to conclude that they did not demonstrate premature deliberation or deliberation with fewer than all jury members sufficient to arise to a constitutional violation. [40]

> 40 Defendants moved just before oral argument for permission to file supplemental information regarding juror misconduct. At oral argument, the government represented to the court that its investigation into that misconduct did not involve the allegations of juror misconduct at issue in this appeal. For this reason, we shall deny the motion.

6. *District Court Failure to Recuse*

Scrushy contends that he is entitled to a new [*71] trial because Chief Judge Fuller should have disclosed his "extraordinary extrajudicial income from business contracts with the United States Government pursuant to 28 U.S.C. § 455(a)." This claim is predicated upon Chief Judge Fuller's ownership interest in two aviation companies that engage in business with agencies of the United States government. This claim was raised over nine months after trial and incorporated information learned from the internet and from Chief Judge Fuller's Financial Disclosure Reports.

[HN42]A motion for recusal based upon the appearance of partiality must be timely made when the facts upon which it relies are known. The untimeliness of such a motion is itself a basis upon which to deny it. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986). The rule has been applied when the facts upon which the motion relies are public knowledge, even if the movant does not know them. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 957-59 (2d Cir. 1978). The purpose of the rule is to "conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge." *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997).

Scrushy's [*72] recusal motion was untimely, based upon information readily available to him prior to trial, and has all the earmarks of an eleventh-hour ploy based upon his dissatisfaction with the jury's verdict and the judge's post-trial rulings. It has no merit.

7. *Jury Selection Procedures*

[HN43]Federal criminal defendants have both a statutory and a constitutional right to a grand and a petit jury selected at random from a fair cross-section of their community. Juror Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (the "JSSA"); U.S. Const. amend. VI. By its terms, the JSSA provides remedies for only a "substantial failure to comply" with its requirements for jury selection procedures that are random, objective, and that produce a jury that is a fair-cross section of the community. 28 U.S.C. § 1861 and 1867(d). Mere technical deviations from the JSSA's requirements do not violate the JSSA if they do not result in impermissible discrimination in the jury selection process. *United States v. Gregory*, 730 F.2d 692, 699 (11th Cir. 1984).

Before their trial, both Siegelman and Scrushy filed virtually identical motions, alleging that the Middle District of Alabama committed substantial violations of [*73] the JSSA in constructing its Qualified Jury Wheels in 2001 and 2005, and in the selection from those wheels of both their grand and petit juries. Defendants claimed that these violations resulted in their juries being not a fair- cross section of their community. Specifically, Scrushy and Siegelman challenged the Middle District's liberal deferral policy and its procedures for summoning previously deferred jurors, claiming that they resulted in juries that under- represented African-Americans. The district court denied these challenges. Defendants appeal this denial.

A panel of this court has upheld the jury selection procedures of the Middle District of Alabama in a case raising virtually the same claims as those asserted here. *United States v. Carmichael*, 560 F.3d 1270 (11th Cir.

2009). *Carmichael* held that [HN44]the Middle District's jury selection procedures - including the liberal deferral policy and the procedures for summoning previously deferred jurors - did not substantially violate the JSSA. *Id.* at 1281. Additionally, *Carmichael* held that the Middle District's jury selection procedures did not result in the systematic under-representation of African-American jurors on the 2001 Qualified [*74] Jury Wheel or in the jury pools selected from that wheel. *Id.*

In his brief, which Siegelman adopted, Scrushy acknowledges the identity between the claims presented in *Carmichael* and his claims presented here, conceding that "[b]ut for the fact that only the petit jury which was drawn from the 2001 jury wheel was challenged there [and the petit jury was drawn from the 2005 wheel here], the issues presented overlap." This is not surprising since the same expert who opined in *Carmichael* about alleged violations of the JSSA and the Constitution is relied upon here, using the same evidence in support of those claims. At the time defendants filed their pre-trial motion, however, *Carmichael* had not yet been decided. Now that it has, it disposes of their claims as to the 2001 jury wheel.

With respect to the 2005 wheel, the district court in this case held that defendants were not entitled to any relief because the challenged objectivity and randomness practices did not apply to that wheel. Additionally, the district court found that defendants had not shown the absolute racial disparity between the composition of his juries and the community at-large of over 10% that is required to establish [*75] a statutory or constitutional violation. *See Carmichael, id.; see also United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995). We agree.

Defendants' claims regarding the Middle District of Alabama's jury selection procedures are without merit and do not entitle them to any relief.

8. *Siegelman's Sentence*

Siegelman contends that the district court's decision to grant an upward departure under U.S.S.G. §§ 2C1.1 cmt.n.5, 5K2.0 (2002) violated the First Amendment and 18 U.S.C. § 3553(a) because it was allegedly based on Siegelman's statements criticizing the prosecutors in and the prosecution of this case. If this were true, we might agree. [41] It does not, however, accurately describe the district court's reasons for the upward departure.

> 41 The government argues persuasively that, even if there was error here, it was harmless as the departure did not affect Siegelman's ultimate sentence. As we need not, we do not reach this argument.

In both its written motion for an upward departure and its arguments at sentencing, the government maintained that Siegelman's criminal conduct reflected such a systematic and pervasive corruption of the office of Governor and Lieutenant Governor, as [*76] well as various state agencies, such as the CON Board, as to cause a loss of public confidence in the government of the State of Alabama. The government's motion focused on this allegation of systematic and pervasive corruption of state government. The government contended that Siegelman "for over six years abused the Executive Branch of the State of Alabama."

[HN45]The statute permits and the cases relied upon by the government uphold upward departures where the district court finds that there was pervasive corruption of a governmental function resulting in a loss of public confidence in state or local government. *See* U.S.S.G. §§ 2C1.1 cmt.n.5, 5K2.0; *United States v. Shenberg*, 89 F.3d 1461, 1476-77 (11th Cir. 1996); *United States v. Reyes*, 239 F.3d 722, 744-45 (5th Cir. 2001).

Although the government did refer at sentencing to Siegelman's very public criticisms of the federal criminal justice system, including complaints of selective prosecution, there is no indication that the court based its upward departure decision on these attacks. In replying to Siegelman's counsel statement about saving the issue of alleged selective prosecution for another day, the court responded, "Then let's do [*77] that."

In considering the request for an upward departure "as set forth in the Government's motion," the district court found that Siegelman's conduct resulted in a loss of public confidence in the executive branch of Alabama government. The district court took judicial notice of the "plethora of media attention" to the case by the local and national media, and relied on this in finding that the case had severely undermined public confidence in Alabama state government.

Siegelman does not contend that an upward departure for his systematic and pervasive corruption of state government was inappropriate, and even his attorney at sentencing conceded that "certainly the argument could be made, in all candor, that there could be some question as to public confidence in this case."

The district court expressly stated that it was upwardly departing in order to "preserve the integrity of the judiciary and the confidence of the people of the state of Alabama in its elected officials." We find no abuse of discretion in the district court's upward departure in sentencing Siegelman.

III.

As to Siegelman, we affirm Counts 3, 5, 6, 7 and 17. We reverse as to Counts 8 and 9 and vacate the convictions [*78] on these counts.

As to Scrushy, we affirm as to Counts 4, 5, 6, and 7. We reverse the convictions on Counts 8 and 9. Scrushy's sentence as to Counts 8 and 9 is vacated.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. All pending motions in this case are DENIED. Remanded for resentencing.

Exhibit A

First question: Did anyone other than another juror try to influence your thinking about this case or your vote on the substantive counts against any Defendant?

Second question: Do you have any reason to believe that any juror was subjected to attempts to influence his or her thinking about the case by anyone other than another juror?

Third question: Did anyone other than another juror attempt to discuss the case with you during the time you were a juror in this case?

Fourth question: During the time that you were serving as a juror did you view any news reports or other information relating to this case or to any Defendant from sources such as newspapers, magazine, radio, or television broadcasts or Internet sites?

Fifth question: During the time that you were serving as a juror did you view any materials from any books, newspapers, Internet sites or any other source relating to any witness, any [*79] legal issue, or any factual issue related to this case?

Sixth question: During the time that you were serving as a juror did you in any way attempt to independently investigate any facts or law relating to this case?

Seventh question: During the time that you were serving as a juror did you overhear any conversations between persons not on the jury or between non-jurors as to any member of the jury relating to this case?

Eighth question: During the time that you were serving as a juror did you view or hear any extraneous information about the penalty that might be applicable to any Defendant if he was convicted of the charges in this case?

Ninth question: During the time that you were serving as a juror did you obtain extraneous information from any source about your role as a juror, your jury service generally, or the role of the foreperson?

Tenth question: During the time that you served as a juror did any other juror say or do anything that caused you to believe that he or she may have been exposed to extraneous information as I have defined it about this case from any source?

Eleventh question: During the time that you were serving as a juror did you view or hear any extraneous information [*80] about either the law applicable to this case or any factual material relating to this case?

Twelfth question: Did you bring any documents in response to the subpoena relating to extraneous information?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 3

LEXSEE

Analysis
As of: Jun 21, 2011

INTERNATIONAL FLOOR CRAFTS, INC., Plaintiff, Appellee/Cross-Appellant, v. JANE DZIEMIT, Defendant, Appellant/Cross-Appellee, DAVID W. ADAMS; TYRONE WILLIAMS; KEVIN BRITTO; RONALD E. MITCHELL, Individually and d/b/a Mansfield Rug Company, a/k/a Mansfield Rug Department, a/k/a Remco; MICHAEL E. BROWN, Individually and d/b/a Dalton Padding, d/b/a Empire Weavers; AGATHA ESPOSITO; DONALD SHOOP; CHINESE CARPET CENTER, INC., d/b/a CCC International; JOHN D. SUN; DAVID D. SUN; PAUL SUN, Defendants.

Nos. 09-1555, 09-1556, 09-2349

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2011 U.S. App. LEXIS 8181

April 21, 2011, Decided

SUBSEQUENT HISTORY: As Amended May 24, 2011.

PRIOR HISTORY: [*1]

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nathaniel M. Gorton, U.S. District Judge.

Int'l Floor Crafts, Inc. v. Adams, 656 F. Supp. 2d 240, 2009 U.S. Dist. LEXIS 84412 (D. Mass., 2009)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff corporation brought a civil action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., and various Massachusetts state laws. A jury returned a verdict against defendants, a former employee and a mortgage lender. The U.S. District Court for the District of Massachusetts imposed an appeal bond in the amount of $10,000. The lender appealed. The corporation filed a cross-appeal.

OVERVIEW: As to the civil RICO claim, the lender argued that the corporation failed to prove that she knowingly and willfully committed mail or wire fraud. The court found that the corporation presented sufficient evidence that the lender knowingly and willfully participated in defrauding the corporation because a jury could have reasonably inferred from the circumstantial evidence that the lender actually knew that the invoices she mailed to the corporation were fraudulent. The corporation presented sufficient evidence to support its common law fraud claim because the jury needed to find only actual knowledge or willful blindness to deem the lender liable for fraud. If there was any error in supplying the jury with a willful blindness instruction, it was harmless because the jury did not need to rely on the willful blindness instruction to reach its verdict on the fraud claim. There was no error of law in the inclusion of attorneys' fees for the lender's Fed. R. App. P. 7 bond because the court assumed that appellate fees were part of the fees calculable as costs under 8 U.S.C.S. § 1964(c), and the corporation proved a RICO injury and defended the finding on appeal.

OUTCOME: The district court's judgment was affirmed. The corporation's cross-appeal was dismissed. Costs were awarded to the corporation. The matter was remanded to the district court for a determination as to the awarding of appellate attorneys' fees.

CORE TERMS: attorneys' fees, willful, invoice, appeal bond, blindness, vendor, rug, common law fraud, purchase order, mortgage, buyer, mail, partner, jury verdict,

fraud claim, wire, plain error, fee-shifting, fraudulent, warehouse, accounts payable, key-rec, circumstantial evidence, knowingly, padding, knowingly and willfully, lent, matter of law, wire fraud, cross-appeal

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
[HN1]An appeal bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.

Civil Procedure > Trials > Judgment as Matter of Law > Postverdict Judgments
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN2]An appellate court reviews de novo a district court's denial of a renewed motion for judgment as a matter of law. Under such circumstances, the appellate court examines the evidence in the light most favorable to the verdict and may reverse only if no reasonable person could have reached the conclusion arrived at by the jury. The appellate court's review is weighted toward preservation of the jury verdict, which will stand unless the evidence was so strongly and overwhelmingly inconsistent with the verdicts that no reasonable jury could have returned them.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims > General Overview
Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Coverage
[HN3]To succeed on a civil Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., claim under 18 U.S.C.S. § 1962(c), a plaintiff must prove: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. By statute, the pattern element requires a plaintiff to show at least two predicate acts of racketeering activity, which is defined to include violations of specified federal laws, such as the mail and wire fraud statutes. Mail or wire fraud requires proof of: (1) a scheme to defraud, (2) knowing and willful participation in the scheme with the intent to defraud, and (3) the use of the mails or interstate wire in furtherance of the scheme.

Evidence > Procedural Considerations > General Overview
[HN4]Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence
[HN5]A party may prove its case through the use of circumstantial evidence so long as the total evidence, including reasonable inferences, is sufficient to warrant a jury to conclude that the defendant is guilty.

Civil Procedure > Trials > Jury Trials > Verdicts > Inconsistent Verdicts
Civil Procedure > Appeals > Reviewability > Preservation for Review
Civil Procedure > Appeals > Standards of Review > Plain Error > General Overview
[HN6]Objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged. Failure to object timely renders the claim waived or forfeited and, at most, subject to only plain error review.

Civil Procedure > Appeals > Standards of Review > Plain Error > General Overview
[HN7]Under plain error review, an appellate court reverses only if (1) there is an error, (2) that was obvious and clear under current law, (3) that affected substantial rights, and (4) that threatened a miscarriage of justice. Plain error is strictly applied in civil cases, and the appellate court will grant relief only to prevent a clear miscarriage of justice or where the error seriously affected the fairness, integrity or public reputation of judicial proceedings.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Torts > Business Torts > Fraud & Misrepresentation > Actual Fraud > Elements
[HN8]To prove fraud under Massachusetts law, a plaintiff must show that the defendant made a false representation of material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff reasonably relied upon the representation as true and acted upon it to his damage. Under a willful blindness formulation, the defendant does not need to actually know that the statements she made were false if the falsity is susceptible of actual knowledge.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > Plain Error > General Overview
[HN9]When a party raises a jury instruction issue for the first time on appeal, an appellate court reviews only for plain error. Fed. R. Civ. P. 51(d)(2).

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
[HN10]See Fed. R. App. P. 7.

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN11]An appellate court reviews for abuse of discretion a district court's imposition of an appeal bond, including its view that an appeal is frivolous. Whether attorneys' fees may be part of the costs on appeal under Fed. R. App. P. 7, however, presents a question of law accorded de novo review.

Civil Procedure > Appeals > Standards of Review > General Overview
[HN12]An appellate court may affirm a district court decision on any ground supported by the record.

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
[HN13]A Fed. R. App. P. 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > American Rule
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
Civil Procedure > Appeals > Costs & Attorney Fees
[HN14]Fed. R. App. P. 7 does not define the term "costs on appeal." Although the American rule establishes that each party to a litigation is responsible for paying its own attorneys' fees, several statutes enacted prior to both the 1968 adoption of the Federal Rules of Appellate Procedure and the 1979 amendment to Rule 7 contain exceptions to the American rule and define costs recoverable to include fees. Courts understand these fee-shifting statutes to account for appellate fees as well. It is presumed that the Rule drafters were aware of these statutes and understood "costs" under Rule 7 to provide for these fees when applicable.

Civil Procedure > Settlements > Offers of Judgment > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
[HN15]The United States Supreme Court has interpreted "costs" as stated in Fed. R. Civ. P. 68 to encompass attorneys' fees when a fee-shifting statute included the fees as part of the recoverable costs.

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
[HN16]No part of Fed. R. App. P. 39 purports to define costs; each concerns only the procedures for taxing them. Further, the Rule does not limit "costs on appeal" under Fed. R. App. P. 7. The costs described in Rule 39(e) are costs of the appeal and, as such, are within the undertaking of the appeal bond. The costs delineated in Rule 39(e) are among, but not necessarily the only, costs available on appeal or for a bond.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies
Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > Statutory Awards
[HN17]See 18 U.S.C.S. § 1964(c).

Civil Procedure > Remedies > Bonds > General Overview
Civil Procedure > Appeals > Costs & Attorney Fees
[HN18]Any bond imposed pursuant to Fed. R. App. P. 7 burdens an appeal to some degree, yet courts presume that Rule 7 is valid. To the extent that a bond may impermissibly burden an appeal, a litigant can move an appellate court to stay the bond or to reduce its amount.

COUNSEL: Isaac H. Peres for appellant/cross-appellee Dziemit.

Paul J. Klehm, with whom Benjamin L. Falkner and Krasnoo Klehm LLP were on brief, for appellee/cross-appellant International Floor Crafts, Inc.

JUDGES: Before Torruella, Stahl and Howard, Circuit Judges.

OPINION BY: STAHL

OPINION

STAHL, Circuit Judge. This trio of related appeals arises from a 2005 civil action brought by International Floor Crafts, Inc. ("IFC") for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and various Massachusetts state laws after IFC discovered a multi-million dollar fraudulent scheme being perpetrated against it by numerous individuals and entities. By mid-2008, only two defendants remained in the suit -- David Adams, a former employee of IFC, and Jane Dziemit, an outside business woman. After a joint five-day trial, the jury returned a verdict against both Adams and Dziemit.

There are three appellate issues before the court, which involve only Dziemit and IFC. [1] Dziemit argues that the denial of her motion for judgment as a matter of law was in error and [*2] that the district court's jury instruction on common law fraud was incorrect. IFC cross-appeals with respect to one state law claim it brought under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), on which the district court refused to enter judgment. Lastly, Dziemit separately appeals the district court's imposition of an appeal bond for $10,000. For the following reasons, we affirm the district court's judgment against Dziemit and its imposition of the bond, and, at IFC's request, we decline to rule on the Chapter 93A claim.

1 Adams did not appeal the jury verdict.

I. Background

We recite the facts in the light most favorable to the jury verdict. Anaya-Burgos v. Lasalvia-Prisco, 607 F.3d 269, 270 n.1 (1st Cir. 2010). Building 19, Inc. ("Building 19") is a company that operates fourteen retail discount stores throughout the New England area selling a wide variety of consumer products. IFC manages the rug department of Building 19, and it is responsible for supplying Building 19's flooring inventory, which consists mostly of surplus and salvage oriental rugs, indoor and outdoor rugs, remnants, padding, and wood flooring.

Because the scheme at issue involved [*3] the exploitation of IFC's business practices, we summarize briefly IFC's procedures for buying and selling rugs. Typically, IFC buyers negotiate with outside vendors to purchase merchandise for retail sale. Upon placing an order with a vendor, the IFC buyer creates a purchase order detailing the product bought, the price of the product, and the outside vendor's information. The buyer then provides copies of this purchase order to the vendor, an IFC warehouse, and IFC's accounts payable department.

After receiving a copy of the purchase order, the vendor sends IFC an invoice and delivers the goods to the IFC warehouse. An IFC receiver accepts the product, and a supervisor at the warehouse completes a receiving document termed a "key-rec." The key-rec details the merchandise received, and the supervisor is required to initial the document after having verified the contents of the delivery. Once the key-rec is complete, it is sent to IFC's accounts payable department. The accounts payable department cross-checks the corresponding purchase order, invoice, and key-rec. If personnel see no discrepancies in the paperwork, an accounts payable manager issues payment to the vendor.

A. The Scheme

Starting [*4] sometime in the mid-1990s and lasting until April 2005, Adams and co-conspirator Kevin Britto devised and managed a fraudulent scheme that duped IFC into paying out millions of dollars to various vendors based on fabricated invoices. As IFC buyers, [2] Adams and Britto prepared purchase orders for partially or completely fake merchandise shipments, recording on the orders an exaggerated amount of items purchased. Britto communicated these fake purchases to Tyrone Williams, another IFC employee and the supervisor of IFC's largest warehouse. Williams, in turn, completed fraudulent key-recs to match the fraudulent purchase orders.

2 Britto worked for IFC from July 1988 to November 1997, and again from September 1998 to September 2001. He continued to receive money from the scheme even after he left IFC. Adams was initially an outside vendor who did business with IFC, but IFC later hired him as a buyer. Adams was terminated from IFC sometime in 2005, which precipitated the discovery of the fraud.

Various outside vendors were brought into the scheme, and some of these vendors were sham operations. These outside vendors would send invoices to IFC that matched the phony purchase orders and key-recs, [*5] allowing the scheme to continue undetected by the accounts payable department. Adams directed the ven-

dors to charge a specific amount on its invoices, and when IFC's accounts payable department issued a check based on that amount, the vendors would distribute approximately seventy-five percent of the ill-gotten gains to Adams, keeping the remainder for themselves.

Chinese Carpet Center, Inc. ("CCC") was the primary vendor that colluded with Adams and Britto. David Sun, CCC's former treasurer, testified at trial about the company's knowing participation, and he detailed the scheme's inner-workings. He explained that CCC was consistently required to advance to Adams large sums of money via cash, check, and wire transfers. In turn, CCC would bill IFC for short or nonexistent shipments. When CCC received payment from IFC, it was paid back the initially loaned amount along with a profit, which was shared between CCC and Adams. Sun explained that this loan system kept CCC in the scheme and made it difficult to disengage, lest CCC not recoup the money it had advanced.

B. Dziemit's Role and the Evidence Against Her

Prior to her involvement in the scheme, Dziemit worked as a mortgage lender associated [*6] with various companies, many of which were owned and operated by her boyfriend, Tony Maresca. Dziemit's primary activity was the completion of loan paperwork for the companies, and she worked out of her home in Connecticut. At times, Dziemit would also make loans to third parties, drawing upon Maresca's mortgage companies or her own personal accounts to supply the funds. Each time Dziemit completed a loan, she executed a mortgage and a promissory note, and she profited from the loan based on the interest that it accrued.

Maresca was a long-time friend of Ronald Mitchell. Mitchell owned and operated a carpet underlay supply business known as Remco, and later, as Mansfield Rug, which sold padding. At some point in his career, Mitchell, doing business as Remco, sold padding to retail operations that he obtained from legitimate businesses. His company had no employees other than himself. In 1999 or 2000, Dziemit began working with Mitchell as part of Remco, [3] and she became a partner of the company for a few years. Around this time, Dziemit and Mitchell, along with Maresca, met with Adams at a Building 19 store to initiate a business relationship.

> 3 Evidence at trial also demonstrated that [*7] Dziemit was involved with Mansfield Rug, a successor in name to Remco, to the extent that she received at least two checks from the Mansfield Rug bank account.

Mitchell and Dziemit testified at trial about their dealings with Adams and the transactions that were involved. According to their testimony, Adams would communicate to Mitchell a specific amount of money that Mitchell, d/b/a Remco, was to lend to Adams, purportedly so that Adams could purchase rugs. Then, Adams would send Mitchell an IFC purchase order that included a description of product ostensibly being supplied by Remco and the amount that Remco was to charge IFC on an eventual invoice. The invoice amount was always greater than the loan amount, and the two figures in no way corresponded. Mitchell would then fax the purchase order to Dziemit and communicate to her the amount of the loan to Adams.

Dziemit, acting in her lending capacity, would lend to Mitchell the money to be advanced to Adams. Except for the first loan executed, Dziemit did not secure any notes or mortgages evidencing or securing these loans. [4] Then, switching hats and acting as a Remco partner, Dziemit would advance the money to Adams, or at times, to [*8] Britto. Many of these advances were completed via wire transfers. Although Mitchell and Dziemit claimed that Adams used this advanced money to buy the merchandise that was listed on the purchase order and that was ostensibly being supplied by Remco, neither of them ever saw any product that was bought or shipped, and they never sought to visit a warehouse. Beyond the purchase order, there was no documentation that the product existed.

> 4 At one point in January 2001, Mitchell, not Dziemit, obtained a mortgage on Adams' property. Dziemit claimed to have an assignment on the mortgage, but she never produced this during discovery or at trial. Even if Dziemit had a mortgage on Adams' property, she did not have one on Mitchell's property, even though the money she lent went to Mitchell, doing business as Remco.

Approximately two or three weeks after Dziemit advanced money to Adams, Adams would alert Remco to submit an invoice to IFC. Dziemit drafted the bulk of the invoices and either she or Mitchell would mail them. Upon receipt of the invoice, IFC would send a check to Dziemit's post office box, or, at least one time, directly to Dziemit's home. Dziemit would endorse the check from IFC and [*9] deposit it into the account from which she initially borrowed the funds, which could have been her personal account or the account of one of Maresca's companies; Dziemit did not keep good records, and many of the transactions were recorded as handwritten notations on various papers. Dziemit would then send Adams a portion of the profit and share the remainder with Mitchell. At no time throughout her involvement was Dziemit ever actually engaged in the sale of padding, Remco's purported business.

When Dziemit testified at trial, she walked the jury through a sample transaction, using a $25,000 loan she made to Mitchell and then advanced to Adams on November 18, 1999. On January 19, 2000, approximately two months later, Dziemit received an invoice payment from IFC for $41,550.04. She deposited that amount into one of her mortgage accounts, wired just over $10,000 to Adams as his share of the profit, and split the remainder of the gains with Mitchell. Dziemit personally profited $2915.28 from this loan. She agreed that this transaction indicated what would have been a 66 percent interest rate on an annual basis for the $25,000 loan, much more than what she would have earned on a typical [*10] secured mortgage loan. [5]

5 As explained to the jury, Dziemit's payment represented approximately 11 percent of the loaned $25,000, which, extrapolated to a yearly rate, demonstrated that Dziemit would have made 66 percent on the loan.

Sometime in late 2001, Dziemit ceased being a partner in Remco. She did, however, continue to loan funds to Mitchell, and these loans, along with a profit, were repaid to her. She also received money both during the time she was a partner and later, through 2003, even when she did not advance any funds. In total, Dziemit completed approximately 35 transactions for Remco, and each transaction took less than an hour. She estimated that for these 35 hours of work, she made approximately $130,000.

Dziemit admitted at trial that these transactions were a departure from her normal course of business. Dziemit had never before lent money to one of her business partners, nor had she ever lent money without receiving security. Dziemit estimated that she advanced a total of approximately $1.4 million to Mitchell for the transactions. Apparently, of the total amount lent, she had security for only $40,000. Further, never before in her business did Dziemit earn money [*11] from a loan based on a profit, rather than on the accrued interest. Indeed, in all of her previous lending activities, Dziemit knew the percentage she would earn on a loan, but with respect to the loans to Mitchell, she did not know how much she would earn on a particular loan at the time she made the advance. Additionally, there was no relationship between the amount Dziemit advanced and the ultimate profit that she earned.

C. The Discovery of the Fraud and the Subsequent Suit

In March 2005, IFC terminated Adams for poor performance. The buyer hired to replace Adams began to notice various discrepancies between purchases Adams allegedly made and the product available for retail sale. After delving through records, the new buyer contacted Mitchell about several missing deliveries ostensibly from Mansfield Rug. Mitchell, trying to stave off any inquiries into the transactions, forwarded a fake bill of lading that he created with the help of Britto. He also misled the buyer into believing that he had a warehouse full of goods and that other documents related to any deliveries were destroyed and therefore unavailable for verification. Around this time, IFC's accounts payable department [*12] performed an internal investigation, which ultimately uncovered the scheme. The department determined that it had paid almost $10 million in fraudulent invoices from Remco, Mansfield Rug, and CCC.

On August 10, 2005, IFC brought suit against Adams, Britto, Williams, CCC and its officers, Mitchell, and Dziemit, among many others, for violations of RICO and Massachusetts state law. In 2006, it settled with CCC and its officers and employees. In 2007, it filed a suggestion of apparent death as to Britto, who had been suffering from a grave liver disease. Prior to Britto's death, IFC videotaped his deposition, wherein Britto confessed to the scheme, implicated Adams and Williams, and denied the knowing involvement of Dziemit and Mitchell. In 2008, an agreement for judgment was entered against Mitchell for over $3 million, and default judgment was entered against Williams. By July 21, 2008, only Dziemit and Adams remained to stand trial for the following claims: (1) violations of RICO; (2) conspiracy to violate RICO; (3) common law fraud; and (4) as to Adams only, breach of fiduciary duty. The district court reserved for itself IFC's Chapter 93A claim against Dziemit and Adams.

On July 29, [*13] 2009, the district court charged the jury, and the following day, the jury returned its verdict. It found both Adams and Dziemit liable to IFC for violations of RICO and common law fraud. It further found Adams, but not Dziemit, to have engaged in conspiracy to violate RICO, and it found Adams liable for breach of fiduciary duty. The jury awarded IFC $5 million in damages against Adams, and $250,000 against Dziemit. Pursuant to the RICO statute, the district court trebled these damages and awarded IFC $522,281 in costs, including attorneys' fees.

A flurry of post-trial motions ensued, only some of which are relevant for present purposes. IFC moved for entry of judgment against Adams and Dziemit on the Chapter 93A count. The district court denied the motion in an electronic order issued that same day, stating, "Because full damages were determined by the jury and trebled by the Court pursuant to 18 U.S.C. § 1964(c), the Chapter 93A claim is rendered duplicative and redundant and plaintiff's motion is denied." IFC sought reconsideration, which the district court also denied.

Thereafter, Dziemit renewed her motion for judgment as a matter of law, for which she initially moved at the close [*14] of IFC's case-in-chief and at the close of trial, arguing that there was insufficient evidence to find that she knowingly and willfully engaged in any fraud, or was willfully blind to the scheme. The district court denied this motion as well.

In her subsequent appeal, Dziemit now argues that IFC failed to present sufficient evidence to establish that she knowingly and willfully committed two or more acts of mail and/or wire fraud, rendering the RICO and common law fraud verdicts void. She also argues that the district court erred in providing the jury with a "willful blindness" instruction as to the common law fraud claim, and, to the extent that the instruction was proper, there was still insufficient evidence to prove that she was willfully blind.

IFC cross-appealed. It argues that although the district court was correct to reserve the Chapter 93A claim for itself, the court erroneously denied IFC's motion for judgment on the claim because IFC presented sufficient evidence to support it.

Lastly, Dziemit appeals the district court's order that she post an appeal bond that includes attorneys' fees as "costs on appeal." IFC sought a bond pursuant to Federal Rule of Appellate Procedure 7, [*15] after Dziemit filed her notice of appeal, to ensure payment of its appellate costs, including attorneys' fees. The district court granted IFC's motion and required Dziemit to post a bond for $10,000, of which a portion was meant to cover appellate fees.

Because we find that IFC presented sufficient evidence to support the jury's verdict that Dziemit violated RICO and committed common law fraud, and because we find no plain error in the district court's jury instructions, we affirm the judgment against Dziemit. Because we affirm the judgment against Dziemit, we decline to rule on IFC's Chapter 93A claim at IFC's request. Lastly, we affirm the issuance of the appeal bond and hold that [HN1]an appeal bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.

II. Analysis

A. Dziemit's Appeal in Relation to the Jury Trial and Verdict

[HN2]We review de novo a district court's denial of a renewed motion for judgment as a matter of law. Alvarado-Santos v. Dep't of Health, 619 F.3d 126, 132 (1st Cir. 2010). Under such circumstances, [*16] we examine the evidence "in the light most favorable to the verdict and may reverse only if no reasonable person could have reached the conclusion arrived at by the jury." Id. (citing Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 95-96 (1st Cir. 2006). The court's review "is weighted toward preservation of the jury verdict," Rodowicz v. Mass. Mut. Life Ins. Co., 279 F.3d 36, 41 (1st Cir. 2002), which will stand "'unless the evidence was 'so strongly and overwhelmingly' inconsistent with the verdicts that no reasonable jury could have returned them,'" id. (quoting Walton v. Nalco Chem. Co., 272 F.3d 13, 23 (1st Cir. 2001)).

1. RICO

[HN3]To succeed on a civil RICO claim under 18 U.S.C. § 1962(c), a plaintiff must prove: "'(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.'" Kenda Corp. v. Pot O' Gold Money Leagues, Inc., 329 F.3d 216, 233 (1st Cir. 2003) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)). "By [*17] statute, the 'pattern' element requires a plaintiff to show at least two predicate acts of 'racketeering activity,' which is defined to include violations of specified federal laws, such as the mail and wire fraud statutes." Id. (quoting Efron v. Embassy Suites (P.R.) Inc., 223 F.3d 12, 15 (1st Cir. 2000)) (internal quotations marks omitted); see also 18 U.S.C. § 1961(1), (5). Mail or wire fraud requires proof of: (1) a scheme to defraud, (2) knowing and willful participation in the scheme with the intent to defraud, and (3) the use of the mails or interstate wire in furtherance of the scheme. Bonilla v. Volvo Car Corp., 150 F.3d 62, 66 (1st Cir. 1998).

Dziemit does not challenge that IFC proved the existence of a scheme to defraud or that Dziemit used the mails or interstate wire in furtherance of the scheme. She argues only that IFC failed to prove that she knowingly and willfully committed mail or wire fraud, asserting that she was a peripheral participant and unaware of her complicity. She states that the lack of direct evidence attesting to her knowledge coupled with her own exculpatory testimony and that of Britto demonstrates that a reasonable juror could not have found her liable [*18] under RICO.

We reject Dziemit's contention. A review of the evidence in the light most favorable to IFC demonstrates that IFC presented sufficient evidence for a jury to conclude by a preponderance of the evidence that Dziemit knowingly and willfully participated in defrauding IFC. First, the jury heard testimony from Mitchell and David Sun from which it could infer Dziemit's knowledge. Mitchell, Dziemit's partner, admitted that he agreed to a judgment against himself and that he lied to IFC in an attempt to stave off inquiries into his companies' deal-

ings. David Sun admitted to CCC's complicity and described in terms strikingly similar to Dziemit that it was required to advance large sums of money to Adams via wire transfers and checks, and that it would make a profit on these advances once IFC paid its invoices.

Second, the evidence demonstrated that Dziemit was involved from the start in the transactions between Remco and Adams. Dziemit, along with Mitchell and Maresca, met Adams at a Building 19 store to initiate their dealings, and she continued to conduct transactions with Adams for approximately three years.

Third, Dziemit, a Remco partner purportedly in the business of selling [*19] rug padding, advanced large sums of money to Adams, a buyer of rug products. Further, she acknowledged that she never saw a Remco warehouse or any product it allegedly sold. Although she drafted and sent invoices to IFC, she never had any verification, apart from Adams' word as told to her through Mitchell, that any rugs were being delivered to IFC.

Fourth, and perhaps most significant, Dziemit admitted to the unusual nature of her profits and her dealings with Adams and Mitchell. Dziemit advanced money to Mitchell, her business partner, and then, in turn, advanced that money to Adams, the ostensible buyer, often through wire transfers or checks. She lent this money from and deposited money back into various accounts, including both business and personal accounts, and she kept haphazard records. Dziemit advanced a total of approximately $1.4 million to Mitchell but had only $40,000 secured. She earned money not from the interest rate of the loans she provided, but from a profit realized upon charging IFC an amount that had no relation to the initial loan. Were these profits interpreted as earned interest, they would be considerably higher than any typical interest rate earned on a mortgage. [*20] In total, Dziemit was paid $130,000 for approximately 35 hours of work, less than a typical workweek. She was compensated even when she was no longer a partner and even when she did not advance any money.

This evidence, when viewed in the aggregate, was sufficient for the jury to conclude that Dziemit knowingly committed two or more acts of mail or wire fraud. See Bourjaily v. United States, 483 U.S. 171, 179-80, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) ([HN4]"[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it."). To be sure, Dziemit's and Britto's testimony claimed, unsurprisingly, that Dziemit did not knowingly engage in the scheme, but the abundant circumstantial evidence at trial permitted the jury to make a contrary inference. See United States v. Boylan, 898 F.2d 230, 242 (1st Cir. 1990) (noting that [HN5]a party may "'prove its case through the use of circumstantial evidence so long as the total evidence, including reasonable inferences, is sufficient to warrant a jury to conclude that the defendant is guilty'" (quoting United States v. Campa, 679 F.2d 1006, 1010 (1st Cir. 1982))).

In support of her argument, Dziemit contends for the first time on appeal that the evidence [*21] regarding her knowing and willful participation in the scheme is further undermined by the jury's verdict, which did not find her liable for conspiring to violate RICO. She asserts that if the jury did not find her to have knowingly joined a conspiracy, then it could not have found her to have knowingly and willfully committed fraud.

This argument is a dead end. [HN6]"Objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged." Babcock v. Gen. Motors Corp., 299 F.3d 60, 63 (1st Cir. 2002); see also Kenda, 329 F.3d at 223 n.4. Failure to object timely renders the claim waived or forfeited and, at most, subject to only plain error review. Babcock, 299 F.3d at 63-64 (applying plain error review to unpreserved inconsistent verdict claim deemed forfeited); see also Uphoff Figueroa v. Alejandro, 597 F.3d 423, 435 n.15 (1st Cir. 2010) (finding inconsistent verdict claim waived and afforded no review because party failed to object before jury was dismissed); Wennik v. PolyGram Grp. Distrib., Inc., 304 F.3d 123, 130 (1st Cir. 2002) (finding inconsistent verdict claim waived and, at most, entitled to plain error review).

Here, even if we apply [*22] the plain error standard, Dziemit's claim fails. [HN7]Under plain error review, we reverse only if (1) there is an error, (2) that was obvious and clear under current law, (3) that affected substantial rights, and (4) that threatened a miscarriage of justice. Babcock, 299 F.3d at 64-65. Plain error is strictly applied in civil cases, and we will grant relief "only to prevent a clear miscarriage of justice or where the error seriously affected the fairness, integrity or public reputation of judicial proceedings." Id. at 65 (quoting Romano v. U-Haul Int'l, 233 F.3d 655, 664 (1st Cir. 2000)) (internal marks omitted). Dziemit does not even attempt to demonstrate how her claim meets this standard, nor do we see how it could.

2. Common Law Fraud

Dziemit next argues that IFC failed to present sufficient evidence to support its common law fraud claim. [HN8]To prove fraud under Massachusetts law, a plaintiff must show that "the defendant 'made a false representation of material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff reasonably relied upon the representation as true and acted upon it to his damage.'" Taylor v. Am. Chemistry Council, 576 F.3d 16, 31 (1st Cir.

2009) [*23] (quoting Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 772 N.E.2d 1054, 1066 (Mass. 2002)). At trial, the district court instructed the jury that it could infer Dziemit's knowledge from circumstantial evidence or, as to the fraud claim only, from evidence that showed willful blindness. Under a willful blindness formulation, the defendant does not need to actually know that the statements she made were false if the falsity is "susceptible of actual knowledge." See Kozdras v. Land/Vest Props., Inc., 382 Mass. 34, 413 N.E.2d 1105, 1111 (Mass. 1980).

IFC's theory of the case was that Dziemit was liable for fraud for the same reason that she was liable under RICO, because she knowingly submitted false invoices to IFC. In turn, Dziemit asserts on appeal that IFC's evidence was inadequate to sustain its fraud claim for the same reasons she stated in challenging the RICO judgment, that is, that the evidence against her did not demonstrate that she actually knew that the invoices she sent to IFC were fraudulent. Further, she claims that, to the extent that the court properly instructed the jury that knowledge as to common law fraud could be proved by willful blindness (which she contests on appeal), the evidence [*24] did not indicate that she was willfully blind to her fraud since not even IFC was able to discover the scheme until almost ten years after it began.

Dziemit's challenge to the fraud claim unravels in view of our conclusion that the evidence at trial reasonably supported a finding of RICO liability. As we explained in our determination of Dziemit's RICO argument, a jury could have reasonably inferred from the circumstantial evidence that Dziemit actually knew that the invoices she mailed to IFC were fraudulent. This alone is sufficient to sustain the fraud claim, as the jury needed to find only actual knowledge or willful blindness to deem Dziemit liable for fraud.

3. Willful Blindness Instruction

Dziemit claims that the district court erred in supplying the jury with a willful blindness instruction for the common law fraud claim. [6] She argues, first, and with no citation to case law, that the instruction is improper in the civil context and instead is reserved solely for criminal matters. Second, parroting her sufficiency of the evidence argument, she contends that even if the instruction was not in error as a matter of law, it was improper in this case because there was not "'record [*25] evidence reveal[ing] 'flags' of suspicion that, uninvestigated, suggest willful blindness.'" See United States v. Epstein, 426 F.3d 431, 440 (1st Cir. 2005) (quoting United States v. Coviello, 225 F.3d 54, 70 (1st Cir. 2000)).

> 6 The relevant portion of the common law fraud instruction was as follows:
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> > [T]he defendant then under consideration is liable if he or she made a false statement of fact knowing it to be false. You may infer such knowledge from circumstantial evidence or from evidence showing willful blindness of that person. If you find that a person had a strong suspicion but shut his or her eyes for fear of what he or she might learn, you may conclude that that person acted knowingly.

[HN9]Dziemit raises this issue for the first time on appeal, and so we review only for plain error. [7] See Fed. R. Civ. P. 51(d)(2); Ji v. Bose Corp., 626 F.3d 116, 125 (1st Cir. 2010). Here, we need not consider whether any error occurred because even if it did, it was harmless. [8] As is evident from the jury's determination that Dziemit was liable for violating RICO, it found that Dziemit actually knew that she engaged in mail and/or wire fraud. The jury, then, did not need to rely on the willful blindness [*26] instruction to reach its verdict on the fraud claim; its finding of liability would have been the same even without the instruction.

> 7 Dziemit claims to have objected below to the willful blindness instruction for common law fraud. She is wrong. The record demonstrates unambiguously that she did not object to this instruction at the charge conference or at any time after the instruction was given to the jury. Indeed, the only issue as to the willful blindness instruction arose from whether it could be used to support liability under RICO, for which IFC advocated and which the district court rejected (an issue not raised on appeal). Indeed, Dziemit's trial counsel stated that he did not believe the instruction was proper for the RICO claim, but that it was appropriate for the common law fraud count because for "fraud ? there is language in cases, I think, that allows a lower standard, if you will, which is this willful blindness, where you may know something but you basically take the position, I don't want to know what it is that's going on."
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> 8 We note, however, that Massachusetts appears to support a willful blindness instruction in civil fraud suits. The Massachusetts Superior Court [*27] Civil Practice Jury Instructions for intentional misrepresentation read:

> The defendant is liable if [he/she] made a false statement of fact, knowing it to be false. Likewise, if the defendant made an unqualified statement about facts, the truth or falsity of which the defendant could have determined with certainty, and gave the plaintiff the reasonable impression that [he/she] was speaking of [his/her] own knowledge, then the defendant is not excused from liability if [he/she] did not in fact know whether that statement was true or false. The law regards such willful disregard of the facts as equivalent to an intentional misrepresentation. Actual intent to deceive need not be proven.

Mass. Super. Ct. Civil Practice Jury Instr. § 20.1.4; see also, e.g., Kozdras, 413 N.E.2d at 1111 ("'[I]f a statement of fact which is susceptible of actual knowledge is made as of one's own knowledge and is false, it may be the basis for an action of deceit without proof of an actual intent to deceive.'" (quoting Pietrazak v. McDermott, 341 Mass. 107, 167 N.E.2d 166, 168 (Mass. 1960)).

B. IFC's Cross-Appeal in Relation to its Chapter 93A Claim

On its cross-appeal, IFC argues that the district court erred in denying its [*28] motion for entry of judgment against Dziemit on its Chapter 93A claim. It seeks a remand to the district court to make findings, or a ruling from this court on the merits.

During oral argument, this court asked counsel for IFC whether it wished to pursue its Chapter 93A claim in the event that the court upheld the jury verdict against Dziemit. Although counsel indicated during argument that it would still seek the claim's resolution, it reversed its position in a letter subsequently mailed to the court. In view of IFC's stance, because we affirm the judgment against Dziemit based on the jury verdict, we decline to address its Chapter 93A claim.

C. Dziemit's Appeal in Relation to the Appeal Bond

Federal Rule of Appellate Procedure 7 states, [HN10]"In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. IFC moved in the district court for such a bond after Dziemit filed her notice of appeal, asking that Dziemit be required to post $30,000 to cover $5000 of IFC's anticipated expenses and $25,000 of its appellate attorneys' fees. IFC argued that the inclusion [*29] of attorneys' fees in a Rule 7 bond is proper when the statute underlying the litigation contains a fee-shifting provision that includes attorneys' fees as part of costs awardable, as RICO does. The district court granted IFC's motion and ordered Dziemit to post an appeal bond of $10,000 within fifteen days. In doing so, it did not adopt IFC's reasoning and instead held that because Dziemit's appeal bore "the indicia of frivolousness," the bond could include fees as part of the costs on appeal.

Dziemit appealed the district court order and did not post the bond by the deadline. Thereafter, the parties filed several motions, both in district court and in this court, related to the bond. Dziemit sought to stay the bond, IFC sought to dismiss Dziemit's appeals for her failure to post the bond, IFC sought to stay the merits appeals pending resolution of the bond appeal, and IFC moved for a briefing extension in view of the appeal bond issue. This court issued an order on November 17, 2009, denying Dziemit's motion to stay the bond and IFC's motions to stay or dismiss the appeals. We granted IFC's motion for a briefing extension and directed the parties to address the circuit split concerning [*30] the inclusion of attorneys' fees in an appeal bond.

[HN11]We review for abuse of discretion a district court's imposition of an appeal bond, including its view that an appeal is frivolous. Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987). Whether attorneys' fees may be part of the "costs on appeal" under Rule 7, however, presents a question of law accorded de novo review. See Riva v. Ficco, 615 F.3d 35, 40 (1st Cir. 2010); Adsani v. Miller, 139 F.3d 67, 71 (2d Cir. 1998).

In accounting for attorneys' fees in the appeal bond, the district court relied on our opinion in Sckolnick v. Harlow, 820 F.2d 13. There, we found a district court did not abuse its discretion by including fees in a bond because it concluded impliedly that "the appeal might be frivolous and . . . an award of sanctions against plaintiff on appeal was a real possibility." Id. at 15. Here, however, we need not evaluate the district court's finding of frivolity because we affirm the issuance of the bond on an alternative ground. See P.R. Ports Auth. v. Umpierre-Solares, 456 F.3d 220, 224 (1st Cir. 2006) ([HN12]"We may affirm a district court decision on any ground supported by the record."). In doing so, we endorse the majority [*31] view that [HN13]a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligi-

ble to recover them. See Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950 (9th Cir. 2007); In re Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004); Pedraza v. United Guar. Corp., 313 F.3d 1323 (11th Cir. 2002); Adsani, 139 F.3d 67.

As the Second, Sixth, Ninth, and Eleventh Circuits have found, there are several reasons to support our holding. First, [HN14]Rule 7 does not define the term "costs on appeal." Although the American rule establishes that each party to a litigation is responsible for paying its own attorneys' fees, several statutes enacted prior to both the 1968 adoption of the Federal Rules of Appellate Procedure and the 1979 amendment to Rule 7 contain exceptions to the American rule and define costs recoverable to include fees. [9] See Marek v. Chesny, 473 U.S. 1, 7-8, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985). Courts understand these fee-shifting statutes to account for appellate fees as well. Azizian, 499 F.3d at 958; see also Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 91 & n.2 (1st Cir. 1970) [*32] (noting that Clayton Act, which includes fee-shifting provision comparable to RICO, allows a plaintiff to recover appellate fees if he sustains on appeal a district court judgment of a violation). It is presumed that the Rule drafters were aware of these statutes and understood "costs" under Rule 7 to provide for these fees when applicable. See Adsani, 139 F.3d at 73; see also Marek, 473 U.S. at 8-9.

> 9 At the adoption of the Rules, Rule 7 required an appellant to file a bond in the fixed amount of $250. An amendment in 1979 eliminated the requirement and left the bond issuance and amount to the discretion of the district court. See Fed. R. App. P. 7 advisory committee's note (1979).

Supreme Court precedent supports this view. In Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1, [HN15]the Court interpreted "costs" as stated in Federal Rule of Civil Procedure 68 [10] to encompass attorneys' fees when a fee-shifting statute included the fees as part of the recoverable costs. It explained:

> [G]iven the importance of "costs" to the Rule, it is very unlikely that this omission [of a definition of "costs"] was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended [*33] to refer to all costs properly awardable under the relevant substantive statute or other authority.

Id. at 9.

> 10 Rule 68 controls offers of judgment. For offers not accepted, "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d) (2010). In Marek, the Court found that these "costs" include attorneys' fees when the relevant statute underlying the litigation defined awardable costs as both costs and fees. 473 U.S at 8-9.

Second, our holding is not contrary to Federal Rule of Appellate Procedure 39. Rule 39, entitled "Costs" establishes: (a) against whom costs may be assessed, (b) the circumstances under which costs may be assessed for or against the United States, (c) costs for brief and appendix copies, (d) the procedure for claiming costs, and (e) costs on appeal that are taxable in the district court. Dziemit argues that the list of taxable costs in subdivision (e), which does not include attorneys' fees, [11] defines "costs" for Rule 7 purposes and limits the universe of costs that may be awarded on appeal. We are unconvinced. [HN16]No part of Rule 39 purports [*34] to define costs; each concerns only the procedures for taxing them. Adsani, 139 F.3d at 74. Further, the Rule does not limit "costs on appeal" under Rule 7. The advisory committee's note at the adoption of the Rules explains that "[t]he costs described in [Rule 39(e)] are costs of the appeal and, as such, are within the undertaking of the appeal bond." Fed. R. App. P. 39(e) advisory committee's note (1967) (emphasis added). We understand this to mean that the costs delineated in Rule 39(e) "are among, but not necessarily the only, costs available on appeal" or for a bond. Azizian, 499 F.3d at 958. [12]

> 11 Rule 39(e) reads:
>
> The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:
>
> (1) the preparation and transmission of the record;
>
> (2) the reporter's transcript, if needed to determine the appeal;
>
> (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
>
> (4) the fee for filing the notice of appeal.

12 We acknowledge that earlier editions of some treatises stated that attorneys' fees were outside the scope of a Rule 7 bond. See Hirschensohn v. Lawyers Title Ins. Corp., No. 96-7312, 1997 U.S. App. LEXIS 13793, at *6 (3d Cir. June 10, 1997) [*35] (unpublished) (citing 20 James Wm. Moore, et al., Moore's Federal Practice, § 339.41 (3d ed. 1997); 16A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3953 (2d ed. 1996)). More recent editions, however, merely acknowledge the circuit split without endorsing a position. See, e.g., 16A Charles Alan Wright et al., Federal Practice & Procedure § 3953 (4th ed. 2008).

Third, although two cases, one from the D.C. Circuit and one from the Third Circuit, have found Rule 39(e) to restrict the costs calculable for Rule 7 purposes, the cases presented distinguishable circumstances since neither involved a fee-shifting statute. Adsani, 139 F.3d at 73-74; see In re Am. Presidential Lines, Inc., 779 F.2d 714, 250 U.S. App. D.C. 324 (D.C. Cir. 1985); Hirschensohn, 1997 U.S. App. LEXIS 13793, at *7 (finding Virgin Island statute did not provide for appellate attorneys' fees). Moreover, the D.C. Circuit has since concluded that Rule 39 "costs" taxable in the district court do include appellate attorneys' fees when the statute underlying the appeal allows the recovery of the fees as part of costs. See Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 784, 259 U.S. App. D.C. 479 (D.C. Cir. 1987).

Applied [*36] here, we find no error of law in the inclusion of attorneys' fees for Dziemit's Rule 7 bond. Under the RICO statute, [HN17]"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee" (emphasis added). 18 U.S.C. § 1964(c). We assume for present purposes that appellate fees are part of the fees calculable as costs under RICO; Dziemit does not argue that this is not so, thereby waiving the argument, neither party has briefed the issue, and we have found no authority to counter our assumption. IFC proved below a RICO injury and defends the finding on appeal. We therefore see no reason why Dziemit's appeal bond may not include IFC's anticipated appellate fees.

Dziemit argues that to allow for the inclusion of attorneys' fees in appeal bonds will chill unsuccessful litigants from pursuing their right to appeal district court decisions. This reasoning is unpersuasive. [HN18]Any bond imposed pursuant to Rule 7 burdens an appeal to some degree, yet we presume that Rule 7 is valid. [*37] See Adsani, 139 F.3d at 76. To the extent that a bond may impermissibly burden an appeal, a litigant can move us to stay the bond or to reduce its amount. Here, we are satisfied that Dziemit's rights were not hampered. Although she submitted in her motion to stay the bond that she was in poor financial shape, we found that she did not demonstrate any prospect of irreparable harm and she vowed to post the bond were her motion denied, which she did.

III. Conclusion

For the reasons stated herein, we **affirm** the district court's judgment based on the jury verdict entered against Dziemit, **dismiss** IFC's cross-appeal related to its Chapter 93A claim, and **affirm** the district court's order imposing an appeal bond in the amount of $10,000.

Costs are awarded to IFC. We remand this matter to the district court for a determination as to the awarding of appellate attorneys' fees.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 4

LEXSEE

Analysis
As of: Jun 21, 2011

UNITED STATES OF AMERICA, Appellant v. PAUL W. BERGRIN; YOLANDA JAUREGUI, a/k/a Yolanda Bracero; THOMAS MORAN; ALEJANDRO BARRAZA-CASTRO, a/k/a George; VICENTE ESTEVES, a/k/a Vinny

No. 10-2204

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2011 U.S. App. LEXIS 7457

December 15, 2010, Argued
April 12, 2011, Filed

SUBSEQUENT HISTORY: As Amended April 20, 2011.

PRIOR HISTORY: [*1]

On Appeal from the United States District Court for the District of New Jersey. (D.C. No. 09-cr-00369) District Judge: Honorable William J. Martini.

United States v. Bergrin, 707 F. Supp. 2d 503, 2010 U.S. Dist. LEXIS 39084 (D.N.J., 2010)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants were indicted on charges of violating 18 U.S.C.S. § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), of RICO conspiracy under § 1962(d), and of the commission of violent crimes in aid of racketeering under 18 U.S.C.S. § 1959(a). The United States District Court for the District of New Jersey granted defendants' motion to dismiss the indictment. The government appealed.

OVERVIEW: One of the defendants was a defense attorney who was accused of leading an "association-in-fact" criminal enterprise involving, inter alia, arrangements to murder witnesses, drug trafficking, and loan fraud. The district court found that the indictment did not adequately allege a RICO "enterprise" or a "pattern of racketeering activity." The court of appeals found that the indictment satisfied Fed. R. Crim. P. 7(c)(1). The indictment sufficiently alleged an "enterprise"; the association was described as an ongoing organization of associates who operated as a unit to provide illicit services to the attorney's clients and one another, and there were sufficient allegations that the association was a distinct entity. The allegations that the association pursued various predicate crimes did not negate the "enterprise" element. The indictment also alleged that each defendant engaged in at least two predicate acts so as to constitute a pattern of racketeering activity. The "relatedness" requirement was sufficiently alleged, and both closed- and open-ended continuity were alleged. The fact that the alleged schemes differed from one another did not establish that there was no pattern.

OUTCOME: The district court's judgment was reversed, and the matter was remanded.

CORE TERMS: indictment, racketeering activity, predicate, racketeering, Bergrin Law Enterprise BLE, predicate acts, murder, conspiracy, common purposes, association-in-fact, entity, Law Office, criminal activities, leader, law firm, organized crime, continuity, commit, joined, citations omitted, matter of law, predicate crimes, trafficking, disparate, diverse, Racketeering Acts, legal entity, course of conduct, distinguishing characteristics, co-defendants

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN1]See 18 U.S.C.S. § 1962(c).

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN2]18 U.S.C.S. § 1962(d) criminalizes conspiring to violate any of the provisions of § 1962(a), (b), or (c).

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview
[HN3]The Violent Crimes in Aid of Racketeering statute applies to anyone who, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any state or the United States, or attempts or conspires so to do. 18 U.S.C.S. § 1959(a).

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN4]Charges of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Violent Crimes in Aid of Racketeering statute both require elements of an underlying RICO charge.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
[HN5]A district court has jurisdiction pursuant to 18 U.S.C.S. § 3231 if defendants are charged with violating offenses against the laws of the United States.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Appellate Review
Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Jurisdiction
[HN6]A court of appeals has jurisdiction over a district court's order dismissing an indictment pursuant to 18 U.S.C.S. § 3731.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Appellate Review
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Conclusions of Law
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Dismiss
[HN7]When reviewing a motion to dismiss an indictment, a court of appeals' standard of review is mixed, employing plenary or de novo review over a district court's legal conclusions, and reviewing any challenges to a district court's factual findings for clear error.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > General Overview
[HN8]A finding is clearly erroneous when, although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Requirements
[HN9]Fed. R. Crim. P. 7(c)(1) requires an indictment to be a plain, concise, and definite written statement of the essential facts constituting the offense charged. The Federal Rules are designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure. While detailed allegations might well have been required under common-law pleading rules, they surely are not contemplated by Rule 7(c)(1).

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Requirements
Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Sufficiency
[HN10]An indictment is sufficient so long as it (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. Moreover, no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his

defense and to invoke double jeopardy in the event of a subsequent prosecution.

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Requirements
Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Sufficiency
[HN11]To determine whether an indictment contains the elements of the offense intended to be charged, a district court may look for more than a mere recitation in general terms of the essential elements of the offense. A district court must find that a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Procedure
Evidence > Procedural Considerations > Weight & Sufficiency
[HN12]A ruling on a motion to dismiss is not a permissible vehicle for addressing the sufficiency of the government's evidence. Evidentiary questions--such as credibility determinations and the weighing of proof--should not be determined at that stage. Rather, in considering a defense motion to dismiss an indictment, a district court must accept as true the factual allegations set forth in the indictment.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN13]To establish an 18 U.S.C.S. § 1962(c) Racketeer Influenced and Corrupt Organizations Act violation, the government must prove the following four elements: (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN14]The United States Code defines an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN15]For purposes of the Racketeer Influenced and Corrupt Organizations Act, an association-in-fact enterprise is an entity, for such purposes a group of persons associated together for a common purpose of engaging in a course of conduct, and it is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit, separate and apart from the pattern of activity in which it engages. An association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN16]The United States Supreme Court has listed a number of structural elements that the government need not prove to establish an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO): An association-in-fact enterprise need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods-by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Business & Corporate Law > Corporations > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN17]In order to be "employed by or associated with" a Racketeer Influenced and Corrupt Organizations Act

enterprise, a defendant must be a "person" legally distinct from the "enterprise" with which the person is employed or associated. One person and one wholly-owned entity can be distinct. A corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And nothing in the statute requires more "separateness" than that. Linguistically speaking, the employee and the corporation are different "persons," even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs. Courts have also recognized that an "association-in-fact" enterprise can exist--and satisfy the "distinctiveness" requirement--when it is comprised of members that are a mixture of individual persons and entities that they control.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN18]A "pattern of racketeering activity" is defined as requiring at least two acts of racketeering activity, one of which occurred after the effective date of the chapter and the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C.S. § 1961(5). It is the "person" charged with the racketeering offense--not the entire enterprise--who must engage in the "pattern of racketeering activity."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN19]To prove a pattern for purposes of the Racketeer Influenced and Corrupt Organizations Act, a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. "Relatedness" can be shown through evidence that the criminal activities have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. Crimes can be interrelated by a distinguishing characteristic when they are committed pursuant to the orders of key members of the enterprise in furtherance of its affairs. "Continuity" includes both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. "Closed-ended continuity" can be established by proving a series of related predicates extending over a substantial period of time. A finding of "open-ended continuity," on the other hand, depends on whether the threat of continuity is demonstrated. Although for analytic purposes relatedness and continuity must be stated separately, in practice their proof will often overlap.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN20]"Racketeering activity" is defined by 18 U.S.C.S. § 1961(1) to include dozens of crimes, including any act or threat involving murder, bribery, or dealing in a controlled substance, as well as any act which is indictable under 18 U.S.C.S. § 1343 (relating to wire fraud), 18 U.S.C.S. § 1512 (relating to tampering with a witness, victim, or an informant), and 18 U.S.C.S. § 1952 (relating to racketeering). In keeping with Congress's intent, the United States Supreme Court has recognized that racketeering activities of criminal enterprises are often quite diverse and can include predicate offenses ranging from loan sharking and theft to trafficking in illicit prescription drugs and counterfeiting music albums. In view of the purposes and goals of the Act, as well as the language of the statute, the Supreme Court is unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime. Because § 1961(1) casts such a wide net, the Racketeer Influenced and Corrupt Organizations Act's reach can be exceptionally broad.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN21]In numerous instances, the United States Supreme Court has been asked to impose limits on how the Racketeer Influenced and Corrupt Organizations Act (RICO) may be applied, and it has consistently declined to do so. Instead, the Court has repeatedly pointed to RICO's legislative history and § 904(a) of the Organized Crime Control Act of 1970, 84 Stat. 947, which provides that the provisions of the title shall be liberally construed to effectuate its remedial purposes, as evidence that Congress intended to create a broad and powerful new statutory weapon for the federal government to wield against individuals and organizations. The Court has rejecting the limitation that an "enterprise" must have an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages, has rejected the limitation that an "enterprise" must have an economic motive, and has rejected the limitation that an "enterprise" must be a legitimate entity.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview

[HN22]Congress drafted the Racketeer Influenced and Corrupt Organizations Act (RICO) broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways. It would be counterproductive and a mismeasure of congressional intent to adopt a narrow construction. RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for a court.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Grounds > Defective Instrument
Evidence > Procedural Considerations > Weight & Sufficiency

[HN23]Fed. R. Crim. P. 12(b)(3)(B) allows a district court to review the sufficiency of the government's pleadings on a motion alleging a defect in the indictment. The court is limited, however, in what it may consider during this analysis. Its determination must be based on whether the facts alleged in the indictment, if accepted as entirely true, state the elements of an offense and could result in a guilty verdict. A pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence. Former Fed. R. Crim. P. 12(b)(2) (now 12(b)(3)(B)) authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges. Generally speaking, it is a narrow, limited analysis geared only towards ensuring that legally deficient charges do not go to a jury.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
Evidence > Procedural Considerations > Circumstantial & Direct Evidence

[HN24]A jury is entitled to infer the existence of a Racketeer Influenced and Corrupt Organizations Act enterprise on the basis of largely or wholly circumstantial evidence.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN25]Whether the Racketeer Influenced and Corrupt Organizations Act seeks to prevent a person from victimizing, say, a small business, or to prevent a person from using a corporation for criminal purposes, the person and the victim, or the person and the tool, are different entities, not the same.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN26]The allegations supporting the "enterprise" element of the Racketeer Influenced and Corrupt Organizations Act are not negated by the fact that an organization pursued various predicate crimes. Rather, the organization's versatility provides even stronger evidence that it was an ongoing association formed to pursue criminal objectives.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN27]For purposes of the Racketeer Influenced and Corrupt Organizations Act, the government may use the same evidence to prove a pattern of racketeering activity and an enterprise.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Procedure

[HN28]At the motion to dismiss stage, a district court has to accept as true all allegations in the indictment, regardless of its uncertainty as to how the government would prove those elements at trial. The question is merely whether the indictment put the defendants on notice as to the nature of the charges against them, and whether the facts, if proven, are sufficient as a matter of law for a jury to convict.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN29]For purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), the fact that an enterprise's alleged schemes differed from one another does not establish that, as a matter of law, there was no pattern. Congress intended for RICO to apply to individuals who, through involvement in an enterprise, commit any combination of the many and diverse predicate acts, whether the usual organized crime-type offenses (e.g., bribery, extortion, gambling), more violent crimes (e.g., murder, kidnapping), or more niche crimes (e.g., counterfeiting music or trafficking in illicit prescription drugs). A criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities. In short, the acts of a criminal enterprise within the scope of the enterprise's evolving objectives

form pattern enough to satisfy the requirements of the RICO statute.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN30]The Racketeer Influenced and Corrupt Organizations Act's (RICO's) pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > Grounds > Defective Instrument
Criminal Law & Procedure > Accusatory Instruments > Dismissal > Grounds > Legal Insufficiency

[HN31]Regarding whether Panarella--which calls for courts to determine whether the specific facts alleged in a charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation--can be treated as though it allows inquiry into what the government will be able to prove at trial, such fact-finding is impermissible at the motion to dismiss stage. For purposes of determining the sufficiency of the superseding information, the court assumes the truth of the facts alleged.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

[HN32]The existence vel non of a Racketeer Influenced and Corrupt Organizations Act enterprise is a question of fact for the jury.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN33]Evidence of a common purpose can be used to prove both a "pattern of racketeering activity" and an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN34]An "association-in-fact" enterprise is a union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN35]The United States Supreme Court has used a disjunctive list when explaining what constitutes evidence of a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act: criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. The "methods employed" need not be similar; in fact, it is hard to imagine how they could be similar in cases where the predicate acts themselves are fundamentally different.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN36]For purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), there need not be a rigid temporal relationship among predicate acts. While a group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN37]No authority is cited that stands for the proposition that there is no "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act if an association-in-fact forms for purposes that primarily benefit one member or operates with total dependence on one member.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN38]The United States Supreme Court has repeatedly and explicitly rejected the notion that a Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise must have the type of structure, defined leadership, organization, or history generally associated with traditional organized crime associations. Continuous associations include, but extend well beyond, those traditionally

grouped under the phrase "organized crime." The argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text and is at odds with the tenor of its legislative history.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview

[HN39]The Racketeer Influenced and Corrupt Organizations Act is a powerful weapon that significantly alters the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview

[HN40]The fact that the Racketeer Influenced and Corrupt Organizations Act (RICO) has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. The United States Supreme Court has repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN41]Under 18 U.S.C.S. § 371, a conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy. 18 U.S.C.S. § 1962(c) demands much more: the creation of an "enterprise"--a group with a common purpose and course of conduct--and the actual commission of a pattern of predicate offenses.

Criminal Law & Procedure > Accusatory Instruments > Indictments > Contents > Sufficiency
Criminal Law & Procedure > Jury Instructions > Limiting Instructions

[HN42]The fear that complex limiting instructions will confound a court is distinct from the question of whether an indictment alleges all of the elements of a crime.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN43]The United States Supreme Court has interpreted "pattern" for purposes of the Racketeer Influenced and Corrupt Organizations Act such that it requires only relationship and continuity, broadly construed. There is no support for the notion that the individual predicates crimes must all be joinable in one trial.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Criminal Law & Procedure > Pretrial Motions & Procedures > Joinder & Severance > Joinder of Defendants

[HN44]Fed. R. Crim. P. 8(b) permits joinder of defendants charged with participating in the same racketeering enterprise or conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with, a commonly charged Racketeer Influenced and Corrupt Organizations Act enterprise of conspiracy.

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David B. Glazer, Glazer & Luciano, Livingston, NJ, Attorney for Defendant-Appellee Barraza-Castro.

John McGovern, Newark, NJ, Attorney for Defendant-Appellee Esteves.

JUDGES: Before: RENDELL, JORDAN and HARDIMAN, Circuit Judges.

OPINION BY: HARDIMAN

OPINION

OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

This case arises under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). The Government appeals the District Court's order dismissing a RICO indictment of attorney Paul W. Bergrin and his codefendants. Because the indictment adequately pleaded a RICO violation, we will [*2] reverse and remand.

I

Bergrin is a high-profile defense attorney and former federal prosecutor from New Jersey who now stands accused of leading an extensive criminal enterprise from 2003 through 2009.

On November 10, 2009, a federal grand jury in Newark, New Jersey returned a thirty-nine count superseding indictment charging Bergrin and seven co-defendants with a host of offenses, all allegedly connected through an "association-in-fact" enterprise called the Bergrin Law Enterprise (BLE or Enterprise). According to the indictment, the BLE was comprised of five individuals--Paul Bergrin; Yolanda Jauregui; Thomas Moran; Alejandro Barrazo-Castro; and Vicente Esteves--and four corporations--the law firm Pope, Bergrin & Verdesco, PA (PB&V); the Law Office of Paul W. Bergrin, PC; Premium Realty Investment Corp., Inc.; and Isabella's International Restaurant, Inc. [1]

1 Three defendants named in the indictment--Alonso Barraza-Castro, Jose Jiminez, and Sundiata Koontz--were charged with individual substantive crimes, but were not alleged to be part of the BLE.

The indictment alleged that Bergrin was the leader of the BLE and played an instrumental role in all of the Enterprise's six criminal schemes. His [*3] co-defendants' alleged roles differed by scheme, with each having significant involvement in at least one scheme and little or no involvement in others. The six alleged schemes, also listed as "racketeering acts," are summarized below:

1. Racketeering Act One: In 2003 and 2004, Bergrin, as a partner in PB&V, represented a client with the initials "W.B.," who was being held on federal drug trafficking charges. W.B. informed Bergrin during a private attorney-client visit that "K.D.M." was the government's key witness against him. Bergrin relayed that information to W.B.'s drug associates along with his own message that if they killed K.D.M., he could assure that W.B. escaped prison, but if they did not, W.B. would spend the rest of his life in jail. Those associates subsequently murdered K.D.M.

2. Racketeering Acts Two and Three: In 2008 and 2009, Bergrin, through his law firm, Law Office of Paul W. Bergrin, PC, represented Esteves, who was charged with federal drug crimes in Monmouth County, New Jersey. "Under the guise of providing legitimate attorney services," Enterprise members Bergrin, Jauregui, and Moran assisted Esteves in arranging to have a witness against him murdered. Members [*4] of the BLE solicited a hitman to locate and kill the witness, traveled to meetings with the hitman, offered to assist the hitman in obtaining a gun, instructed the hitman on how to commit the murder, and then received $20,000 in cash for their services to Esteves.

3. Racketeering Act Four: In 2009, Bergrin, through his law firm, Law Office of Paul W. Bergrin, PC, represented a client with the initials "R.J.," who was charged with robbing "M.P." in Essex County, New Jersey. Enterprise members Bergrin, Jauregui, and Moran bribed and assisted in bribing M.P., who was to testify for the government against R.J. They did so by causing a third party, "M.C.," to participate in telephone conversations with M.P., after which they paid M.P. $3,000 in cash to change his/her testimony.

4. Racketeering Acts Five, Six, and Seven: From 2005 to 2009, Bergrin, Jauregui, and Barraza-Castro--along with several non-Enterprise members--trafficked in kilogram quantities of cocaine "[u]nder the guise of conducting legitimate business" at Law Office of Paul W. Bergrin, PC, PB&V, Premium Realty Investment Corp., Inc, and Isabella's International Restaurant, Inc. As part of the operation, a "stash house" was maintained [*5] at Isabella's in Newark.

5. Racketeering Acts Eight and Nine: In 2004 and 2005, Bergrin, through his law firms, Law Office of Paul W. Bergrin, PC and PB&V, represented a client with the initials "J.I.," who ran a prostitution

business in New York. Bergrin helped J.I. evade New Jersey Parole Board restrictions by telling the Board that J.I. worked at the Law Office of Paul W. Bergrin, PC. Bergrin also supported that claim with false paychecks drawn on Premium Realty Investment Corp., Inc. accounts. When J.I. was arrested again, Bergrin took over the prostitution business, but he too was caught and charged in New York. Following Bergrin's arrest for his role in the business, Jauregui solicited M.C.--*i.e.*, the "third party" in Scheme Three--to murder a witness against Bergrin. Jauregui then supplied M.C. with information about the witness and paid him/her $10,000.

6. Racketeering Acts Ten, Eleven, Twelve, and Thirteen: In 2005 and 2006, Bergrin and Jauregui committed and assisted others in committing wire fraud relating to the sale of real estate properties to individuals they knew to have fraudulently obtained mortgage loans. They did so "[u]nder the guise of conducting [the] legitimate [*6] business" of the Law Office of Paul W. Bergrin, PC and Premium Realty Investment Corp., Inc. At least one of the properties was owned by Bergrin and Jauregui through Premium Realty. Bergrin and other attorneys from the Law Office of Paul W. Bergrin acted as closing attorneys on the transactions.

The indictment also alleged the following seven purposes of the Enterprise, which we quote in full:

a. providing The Bergrin Law Enterprise and its leaders, members and associates with an expanding base of clients for legal and illegal services;

b. generating, preserving and protecting The Bergrin Law Enterprise's profits and client base through acts of, among other things, witness tampering, murder, conspiracy to commit murder, traveling in aid of racketeering enterprises, bribery, drug trafficking, prostitution, wire fraud, and money laundering.

c. protecting and preserving defendant PAUL BERGRIN's status as a licensed attorney;

d. enhancing defendant PAUL BERGRIN's reputation as a criminal defense attorney;

e. promoting and enhancing The Bergrin Law Enterprise and its leaders', members' and associates' activities;

f. enriching the leaders, members, and associates of The Bergrin Law Enterprise; [*7] and

g. concealing and otherwise protecting the criminal activities of The Bergrin Law Enterprise and its members and associates from detection and prosecution.

Bergrin, Jauregui, Moran, and Barazza-Castro were each charged in Count One with violating RICO, 18 U.S.C. §1962(c), and in Count Two with conspiring to violate RICO, § 1962(d). [2] Bergrin, Jauregui, Moran, and Esteves were also charged in Count Three with the commission of violent crimes in aid of racketeering (VICAR), 18 U.S.C. § 1959(a). [3]

2 Section 1962(c) states:

> [HN1]It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[HN2]Section 1962(d) criminalizes "conspir[ing] to violate any of the provisions of subsection (a), (b), or (c) of this [§ 1962]."

3 [HN3]The VICAR statute applies to anyone who:

> as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for [*8] the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims,

> assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do.
>
> 18 U.S.C. § 1959(a).

Bergrin and his co-defendants moved to dismiss the RICO and racketeering-based counts. On April 7, 2010, the District Court heard oral argument on whether the Government alleged in its indictment facts sufficient to support RICO charges. Two weeks later, the District Court granted the motions to dismiss Count One, finding that the indictment did not adequately allege a racketeering "enterprise" or a "pattern of racketeering activity." *United States v. Bergrin*, 707 F. Supp. 2d 503, 519 (D.N.J. 2010). Because [HN4]charges of conspiracy to violate RICO and VICAR both require elements of an underlying RICO charge, Counts Two and Three were dismissed as well. *Id.* The Government filed this timely appeal. [4]

> 4 [HN5]The District Court had jurisdiction pursuant to 18 U.S.C. § 3231 because Bergrin [*9] and his co-defendants were charged with violating "offenses against the laws of the United States." [HN6]We have jurisdiction over the District Court's order dismissing the indictment pursuant to 18 U.S.C. § 3731.

II

[HN7]"[W]hen reviewing a motion to dismiss an indictment, our standard of review is mixed, employing plenary or *de novo* review over a district court's legal conclusions, and reviewing any challenges to a district court's factual findings for clear error." *United States v. Shenandoah*, 595 F.3d 151, 156 (3d Cir. 2010) (citing *United States v. Nolan-Cooper*, 155 F.3d 221, 229 (3d Cir. 1998)). [HN8]"A finding is clearly erroneous when[,] although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)) (internal quotation marks omitted).

III

A

We begin our analysis by setting forth the requirements of a well-pleaded indictment and the rules governing a district court's review of a motion to dismiss.

[HN9]Federal Rule of Criminal Procedure 7(c)(1) [*10] requires an indictment to "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." The Supreme Court has explained that "the Federal Rules 'were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure.' . . . While detailed allegations might well have been required under common-law pleading rules, . . . they surely are not contemplated by Rule 7(c)(1)." *United States v. Resendiz-Ponce*, 549 U.S. 102, 110, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007) (citations omitted) (quoting *United States v. Debrow*, 346 U.S. 374, 376, 74 S. Ct. 113, 98 L. Ed. 92 (1953)). Likewise, we have held:

> [HN10][A]n indictment [is] sufficient so long as it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Vitillo*, 490 F.3d 314 (3d Cir.2007) (internal quotation marks omitted). Moreover, "no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit [*11] the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir.1989).

United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007).

[HN11]To determine whether an indictment "contains the elements of the offense intended to be charged," a district court may look for more than a mere "recit[ation] in general terms [of] the essential elements of the offense." *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002). A district court must find that "a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *Id.*; *see also United States v. Schiff*, 602 F.3d 152, 162-66 (3d Cir. 2010) (indictment alleging "failure to rectify misstatements of others" does

not, as a matter of law, state an offense under securities statute that criminalizes omissions of information); *Gov't of V.I. v. Greenidge*, 600 F.2d 437, 438-40, 16 V.I. 154 (3d Cir. 1979) (indictment alleging assault on male companion of a rape victim does not, as a matter of law, state an offense under statute that criminalizes [*12] assaulting a rape victim).

[HN12]A ruling on a motion to dismiss is not, however, "a permissible vehicle for addressing the sufficiency of the government' s evidence." *United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000) (citations omitted). "Evidentiary questions"--such as credibility determinations and the weighing of proof--"should not be determined at th[is] stage." *United States v. Gallagher*, 602 F.2d 1139, 1142 (3d Cir. 1979). Rather, "[i]n considering a defense motion to dismiss an indictment, the district court [must] accept[] as true the factual allegations set forth in the indictment." *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16, 72 S. Ct. 329, 96 L. Ed. 367 (1952)).

B

Having reviewed the legal principles governing motions to dismiss indictments generally, we turn now to the specific question of what a RICO indictment must allege under 18 U.S.C. § 1962(c). In *United States v. Irizarry*, we elaborated on the pleading requirements thusly:

> [HN13]To establish a § 1962(c) RICO violation, the government must prove the following four elements: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant [*13] was employed by or associated with the enterprise; (3) that the defendant participated . . ., either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity."

341 F.3d 273, 285 (3d Cir. 2003) (quoting *United States v. Console*, 13 F.3d 641, 652-653 (3d Cir.1993)). We are also guided in our application of § 1962(c) by statutes and Supreme Court decisions that have more precisely defined the many operative words and phrases in the RICO law, including "enterprise" and "pattern of racketeering activity."

1

[HN14]The United States Code defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). According to the indictment in this case, the BLE was "a group of individuals and legal entities associated in fact." The Supreme Court held in *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)--and reaffirmed in *Boyle v. United States*, 129 S. Ct. 2237, 2244, 173 L. Ed. 2d 1265 (2009)--that such [HN15]an "[association-in-fact] enterprise is an entity, for present purposes a group of persons [*14] associated together for a common purpose of engaging in a course of conduct," and it "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. . . . separate and apart from the pattern of activity in which it engages." In *Boyle*, the Court added that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." 129 S. Ct. at 2244. [HN16]The Court also listed a number of structural elements that the government need *not* prove to establish an "enterprise":

> [A]n association-in-fact enterprise . . . . need not have a hierarchical structure or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods-by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation [*15] ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Id. at 2245-46. [5]

5 Long before *Boyle*, we held in *United States v. Riccobene* that establishing an enterprise requires proof of an "ongoing organization" with a "superstructure or framework," members who "each . . . perform a role in the group consistent with the organizational structure," and "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." 709 F.2d 214, 221-24 (3d Cir. 1983), *overruled by Griffin v. United States*, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). To the extent that this holding is inconsistent with *Boyle*, it is no longer good law. But even if *Riccobene* were unaffected by *Boyle*, our decision in this appeal would remain [*16] the same.

[HN17]In order to be "employed by or associated with" a RICO enterprise, a defendant must be a "person" legally distinct from the "enterprise" with which the person is employed or associated. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). The Supreme Court recognized in *Cedric Kushner Promotions* that one person and one wholly-owned entity can be distinct. 533 U.S. at 163 ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that. . . . [L]inguistically speaking, the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." (citations omitted)). Courts have also recognized that an "association-in-fact" enterprise can exist--and satisfy the "distinctiveness" [*17] requirement--when it is comprised of members that are a mixture of individual persons and "entities that they control." *See, e.g., United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (Posner, J.) (finding an "enterprise" made up of a lawyer, his law firm, two police officers, and their respective police departments).

2

[HN18]A "pattern of racketeering activity" is defined as "requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). It is the "person" charged with the racketeering offense--not the entire enterprise--who must engage in the "pattern of racketeering activity." *See H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

[HN19]"[T]o prove a pattern . . . a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* at 239 (emphasis in original). "Relatedness" can be shown through evidence that the criminal activities "have the same or similar purposes, results, participants, victims, [*18] or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (quoting 18 U.S.C. § 3575(e)). Crimes can be "interrelated by [a] distinguishing characteristic[]" when they are "committed pursuant to the orders of key members of the enterprise in furtherance of its affairs." *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990). "Continuity" includes "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J., Inc.*, 492 U.S. at 241. "Closed-ended continuity" can be established "by proving a series of related predicates extending over a substantial period of time." *Id.* at 242. A finding of "open-ended continuity," on the other hand, "depends on whether the threat of continuity is demonstrated." *Id.* (emphasis in original). Although "[f]or analytic purposes [relatedness and continuity] . . . must be stated separately, . . . in practice their proof will often overlap." *Id.* at 239.

[HN20]"Racketeering activity" is defined by 18 U.S.C. §1961(1) to include dozens of crimes, including "any [*19] act or threat involving murder, . . . bribery, . . . or dealing in a controlled substance," as well as "any act which is indictable under . . . [18 U.S.C. §] 1343 (relating to wire fraud), . . . [18 U.S.C. §] 1512 (relating to tampering with a witness, victim, or an informant), . . . [and 18 U.S.C. §] 1952 (relating to racketeering)." In keeping with Congress's intent, the Supreme Court has recognized that racketeering activities of criminal enterprises are often quite diverse and can include predicate offenses ranging from loan sharking and theft to trafficking in illicit prescription drugs and counterfeiting music albums. *Turkette*, 452 U.S. at 590 ("In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime . . . ." (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 and 116 Cong. Rec. 592 (1970))). Because § 1961(1) casts such a wide net, RICO's reach can be exceptionally broad.

We are also guided by the Supreme Court's expansive interpretation of RICO. [HN21]In numerous instances, the Court has been asked to impose [*20] lim-

its on how RICO may be applied, and it has consistently declined to do so. Instead, the Court has repeatedly pointed to RICO's legislative history and §904(a) of the Organized Crime Control Act of 1970 [6] as evidence that Congress intended to create a broad and powerful new statutory weapon for the federal government to wield against individuals like Bergrin and organizations like the BLE. *See Boyle*, 129 S. Ct. at 2244-47 (7-2 decision rejecting limitation that "enterprise" must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages"); *Cedric Kushner Promotions*, 533 U.S. at 164-65 (unanimous decision rejecting limitation that president and sole shareholder of a company is not distinct "person" from wholly-owned company "enterprise"); *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256-62, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (unanimous decision rejecting limitation that "enterprise" must have "an economic motive"); *Turkette*, 452 U.S. at 586-87 (1981) (8-1 decision rejecting limitation that "enterprise" must be legitimate entity); *see also H.J., Inc.*, 492 U.S. at 248-49 ([HN22]"Congress drafted RICO broadly enough to encompass a wide range of criminal activity, [*21] taking many different forms and likely to attract a broad array of perpetrators operating in many different ways. It would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction . . . . RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court."); *Russello v. United States*, 464 U.S. 16, 21, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("Congress selected [the] general term ["interest" in § 1963(a)] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth.").

> 6 84 Stat. at 947 ("The provisions of this Title shall be liberally construed to effectuate its remedial purposes.").

With these definitions and points of reference in mind, we turn to the District Court's decision to dismiss the indictment in this case.

C

[HN23]Federal Rule of Criminal Procedure 12(b)(3)(B) allows a district court to review the sufficiency of the government's pleadings on "a motion alleging a defect in the indictment." The court is limited, however, in what it may consider during this analysis. Its determination must be based on whether the facts alleged in the indictment, if accepted as entirely [*22] true, state the elements of an offense and could result in a guilty verdict. *DeLaurentis*, 230 F.3d at 660-61 ("[A] pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence. . . . Federal Rule of Criminal Procedure 12(b)(2) [now 12(b)(3)(B)] authorizes dismissal of an indictment if its allegations do not suffice to charge an offense, but such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges." (citations omitted)). Generally speaking, it is a narrow, limited analysis geared only towards ensuring that legally deficient charges do not go to a jury.

The District Court dismissed the indictment of Bergrin and his alleged co-conspirators based on its determination that "Count One . . . both fails to set forth a pattern of racketeering and an enterprise." *Bergrin*, 707 F. Supp. 2d at 519. Neither of these conclusions is correct; the indictment adequately alleges all of the sub-elements required to establish both a pattern of racketeering activity and an enterprise, as well as all of the other elements of a RICO offense. [7]

> 7 Although some of the sub-elements are not explicitly [*23] discussed--for example, the indictment does not contain the words "closed or open-ended continuity"--the facts alleged are sufficiently numerous and detailed to "apprise[] the defendant of what he must be prepared to meet" and, if proven, provide an ample basis for a guilty verdict. *See United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978) ([HN24]"A jury is entitled to infer the existence of an enterprise on the basis of largely or wholly circumstantial evidence."); cf. *Boyle*, 129 S. Ct. at 2244 ("Although an association-in-fact enterprise must have these structural features, it does not follow that a district court must use the term 'structure' in its jury instructions.").

The indictment alleges that the BLE constituted a RICO enterprise because it states this element of the charged offense, is sufficiently specific both to advise the defense of what it must be prepared to defend against and to allow recognition of a double jeopardy problem in future cases, and contains facts that fall within the scope of the RICO statute as a matter of law.

According to the indictment, the BLE was an "association-in-fact" of five individuals and four corporations that met all of the sub-elements outlined [*24] in *Turkette*. The indictment describes the BLE as a group of persons and entities that associated and engaged in a course of conduct (*i.e.*, a pattern of racketeering activity) for several common purposes (e.g., to make money, expand its client base, etc.) and was an "ongoing organization" (though an informal one) comprised of associates who operated as a unit to provide illicit services to Bergrin's clients and one another. The indictment also alleg-

es facts that satisfy the *Boyle* requirements: purpose, relationships among the members (though, again, relatively loose and informal), and longevity sufficient to enable the BLE to pursue its goals of, *inter alia*, making money and protecting its own members and criminal schemes.

Similarly, there are sufficient facts in the indictment to apprise the defense that the Government will seek to prove that the BLE is a distinct entity, not merely a different name for the individual RICO defendants. The Government alleges that the individual defendants (*i.e.*, the "persons") worked together and in conjunction with multiple corporations to achieve long-term common goals, and thus each individual defendant was merely a part of, not an alter ego of, the [*25] "association-in-fact" enterprise. As the Supreme Court noted in *Cedric Kushner Promotions*, [HN25]"[w]hether the Act seeks to prevent a person from victimizing, say, a small business, . . . or to prevent a person from using a corporation for criminal purposes, . . . the person and the victim, or the person and the tool, are different entities, not the same." 533 U.S. at 162 (citations omitted). Although *Cedric Kushner Promotions* dealt with the infiltration of legitimate businesses, not "association-in-fact" enterprises, the principle remains the same: if Bergrin and the other individual defendants are "the persons," the BLE is adequately alleged to be "the tool" that Bergrin directed.

[HN26]The allegations supporting the "enterprise" element are not negated by the fact that the BLE pursued various predicate crimes. Rather, the BLE's versatility provides even stronger evidence that it was an ongoing association formed to pursue criminal objectives. *See, e.g., Masters*, 924 F.2d at 1366; ("The strongest evidence [of an enterprise] is the handling of the problem of dealing with [the leader's cheating wife]. When that problem arose, a loose-knit but effective criminal organization was in place ready [*26] to respond effectively by planning and carrying out a . . . crime that would have been beyond the capacities of the individual defendants acting either singly or without the aid of their organizations.").

2

The indictment also alleges facts indicating that each individual defendant engaged in at least two predicate acts, which is the basis for the assertion that each engaged in a "pattern of racketeering activity." [8]

> 8 The Supreme Court has recognized that [HN27]the government may use the same evidence to prove the pattern of racketeering activity and the enterprise. *Turkette*, 452 U.S. at 583; *Boyle*, 129 S. Ct. at 2246 n.5, 2247. [HN28]At the motion to dismiss stage, the District Court had to accept as true all allegations in the indictment, regardless of its uncertainty as to how the Government would prove those elements at trial. The question is merely whether the indictment put the defendants on notice as to the nature of the charges against them, and whether the facts, if proven, are sufficient as a matter of law for a jury to convict.

First, it is undisputed that the indictment charges each defendant with committing at least two predicate acts, the last of which occurred within ten years after the commission of a prior act of racketeering, thus certainly meeting [*27] the statutory threshold set forth in § 1961(5).

Second, the "relatedness" sub-element of *H.J. Inc.* is satisfied because the indictment states that the predicate crimes were all committed for "the same or similar purposes," *e.g.*, "promoting and enhancing the Bergrin Law Enterprise and its leaders', members' and associates' activities; enriching the leaders, members and associates of the Bergrin Law Enterprise; and concealing and otherwise protecting the criminal activities of the Bergrin Law Enterprise." Furthermore, there are several "distinguishing characteristics" that imply that the predicate crimes were "not isolated events." Most notably, four of the six schemes involved the performance of some kind of service for Bergrin's clients (*e.g.*, murdering witnesses against two clients, bribing a witness against another, and helping a fourth run an illicit business).

Moreover, the indictment alleges both closed- and open-ended continuity. Regarding the former, the predicate offenses are alleged to have occurred over a "closed period of repeated conduct," *i.e.*, six years during which six criminal schemes were executed. Several of the schemes themselves occurred over a number of years and [*28] involved repeated conduct (*e.g.*, Scheme Four: a four-year drug trafficking conspiracy, which involved three individuals, four companies, and multiple predicate acts such as conspiracy to distribute five kilograms or more of cocaine, distribution of 500 grams or more of cocaine, and maintaining drug-involved premises). As to the latter, the alleged number of schemes and the BLE's apparent willingness to engage in criminal acts to aid Bergrin's clients suggest that there is also a "*threat* of continui[ng]" criminal activity in the future.

As was the case with the "enterprise" element, [HN29]the fact that the BLE's alleged schemes differed from one another does not establish that, as a matter of law, there was no pattern. Congress intended for RICO to apply to individuals who, through involvement in an enterprise, commit any combination of the many and diverse predicate acts, whether the usual organized crime-type offenses (*e.g.*, bribery, extortion, gambling),

more violent crimes (*e.g.*, murder, kidnapping), or more niche crimes (*e.g.*, counterfeiting music or trafficking in illicit prescription drugs). We are not alone in agreeing with Judge Posner's observation that "[a] criminal enterprise is [*29] more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities." *See United States v. Eufrasio*, 935 F.2d 553, 566 (3d Cir. 1991) (quoting *Masters*, 924 F.2d at 1367); *see also United States v. Brandao*, 539 F.3d 44, 55 (1st Cir. 2008); *United States v. Eppolito*, 543 F.3d 25, 57 (2d Cir. 2008). In short, "[t]he acts of a criminal enterprise within the scope of the enterprise's evolving objectives form pattern enough to satisfy the requirements of the RICO statute." *Masters*, 924 F.2d at 1367.

We have also noted that [HN30]"RICO's pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise," *Eufrasio*, 935 F.2d at 566, as was the case with the BLE. Based on the kinds of commonalities listed in *H.J., Inc.* --*e.g.*, common purpose and direction from common leadership--we, as well as other circuit courts of appeals, have found patterns of racketeering activity in cases with equally (and in some cases, even more) disparate predicate crimes. *See,* [*30] *e.g., id.* ("The murder conspiracy predicate was, for purposes of the pattern requirement, legally related to the gambling and extortion predicates, and they to each other, because all were undertaken to further varied and diverse Scarfo enterprise purposes, namely, to control, manage, finance, supervise, participate in and set policy concerning the making of money through illegal means. Each charged predicate was related one to the other also because each was carried out by Idone or members of his crew, pursuant to orders of 'key members of the enterprise', either Idone or Scarfo."); *Masters*, 924 F.2d at 1366-67 (finding pattern when defendants participated in kickback scheme between police departments and a law firm, bribery of police to ignore illegal gambling activity, and a conspiracy to commit and cover up the murder of one enterprise member's cheating wife); *Elliott*, 571 F.2d at 884-95 (finding a pattern when predicate acts included arson, counterfeiting titles to stolen cars, stealing Hormel meat products, attempting to influence the outcome of "the stolen meat trial," stealing Swift meat and dairy products, stealing a forklift and ditchwitch, stealing "Career Club" shirts, [*31] engaging in illegal drug transactions, and plotting to steal fungicide).

D

Because the indictment in this case alleged facts sufficient to charge Bergrin and his co-defendants with RICO violations, it should have survived a motion to dismiss, and the District Court erred in finding to the contrary.

1

In our view, the District Court's principal error was its failure to accept as true all of the facts alleged in the indictment. [HN31]The District Court treated *Panarella*--which calls for courts to determine whether "the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, *as a matter of statutory interpretation*," 277 F.3d at 685 (emphasis added)--as though it allows inquiry into what the Government will be able to prove at trial. Such factfinding is impermissible at the motion to dismiss stage. *Id.* at 681 ("For purposes of determining the sufficiency of the superseding information, we assume the truth of the . . . facts alleged."); *Console*, 13 F.3d at 650 ([HN32]"The existence *vel non* of a RICO enterprise is a question of fact for the jury.").

In granting Appellees' motions to dismiss, the District Court relied in part on findings that the indictment failed [*32] to allege a common purpose or other commonality among the predicate acts. [9] On these points, the Court openly weighed the evidence and questioned the Government's ability to prove that all of the purported members of the enterprise shared the alleged common purposes. The Court began by asserting that, "[a]lthough the Government attempts to tie together the disparate predicates by arguing that they each furthered the 'principal goals of the enterprise,' . . . the purposes offered in the Indictment undermine the assertion that the RICO persons share any such common objectives." *Bergrin*, 707 F. Supp. 2d at 512. The Court then listed four alleged purposes and concluded:

> Given these alleged objectives, it strikes the Court that each pertains to Paul Bergrin individually as an attorney. . . . The enhancement of Bergrin's reputation and the preservation of his law license are clearly of unique importance to Bergrin himself, as is the expansion of his law firm's client base. . . . *[I]t strains credulity to argue*, for example, that Alejandro Barraza-Castro, an alleged drug dealer, shared the aforementioned purposes regarding Bergrin's law license and his client base.

Id. at 513 (emphasis added). [*33] [10] On its face, the indictment contradicts the District Court's findings. The indictment avers seven (not four) common purposes, *all*

of which cohere in light of the Government's allegation that all the members of the BLE benefited from Bergrin's status as a licensed attorney because "the special privileges granted to licensed attorneys" allowed them "to engage in and assist Client Criminals to engage in criminal activities." BLE members also, according to the indictment, shared the common purpose of "enriching the leaders, members and associates of The Bergrin Law Enterprise; and concealing and otherwise protecting the criminal activities of The Bergrin Law Enterprise and its members and associates from detection and prosecution." Moreover, the indictment alleges that certain entities (i.e., PB&V and the Law Office of Paul W. Bergrin, PC) were used to commit the predicate acts. It also states, though admittedly without much elaboration, that the predicate acts were committed "[u]nder the guise of providing legitimate attorney services."

> 9 This finding is especially problematic because, as discussed in Part III.B., *supra*, [HN33]evidence of a common purpose can be used to prove both a "pattern [*34] of racketeering activity" and an "enterprise."
>
> 10 Similar examples can be found throughout the opinion. For instance, the Court lists the six schemes and the individuals accused of being involved in their commission, making no mention of the corporations also allegedly involved, and then concludes: "[T]his panoply of criminal activity has but one common denominator, Paul Bergrin . . . . [T]he Indictment's failure to set forth similar or common purposes, victims, manners of commission, or otherwise distinguishing characteristics relating these predicates warrants dismissal." *Bergrin*, 707 F. Supp. 2d at 512. Again, without mentioning the common purposes or entities involved, the Court refers to the Kemo murder case (Scheme One), stating: "This case shares nothing in common with the other schemes, save for the presence of Paul Bergrin." *Id.*

The District Court also opined that "[t]here is no core group alleged, other than Paul Bergrin himself," *id.* at 516, and that "'The Bergrin Law Enterprise' as pled is essentially Paul Bergrin, the licensed attorney, by another name," *id.* at 518. [11] These findings cannot be squared with the indictment, which identifies a number of BLE members, any combination [*35] of which a jury could find were the "core group." [12] Moreover, the notion that the BLE "is essentially Paul Bergrin" cannot be reconciled with the indictment's allegations that other individuals and entities joined together to form [HN34]an "association-in-fact" enterprise--*i.e.*, a "union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Whether a jury will find that such an enterprise existed is an open question, but as a matter of law, the Government pleaded facts sufficient to support such a finding. The District Court was obliged to accept as those allegations as true.

> 11 *See also id.* at 517 ("[L]ooking at the schemes alleged in the Indictment by date and by defendant, the facts belie any assertion that an enterprise existed before, during, or after [The BLE's alleged] growth and diversification.").
>
> 12 Although reasonable minds might differ as to whether Moran or Isabella's International Restaurant were "core" members, the indictment alleges that Bergrin and one of his law firms were involved in every racketeering act, and that Jauregui joined in four of the six schemes.

In addition to making impermissible factual findings, the District Court also [*36] penalized the Government for failing to allege facts that are unrelated to any required element of a RICO offense. For example, the Court suggested that, to constitute a "pattern," the predicate acts must be similar in ways not actually required by the statute or judicial precedent (*e.g.*, that there must be similar methods employed or some temporal proximity linking the predicate acts). [13] The Court also suggested that proving the existence of a distinct RICO enterprise requires the Government to show that the enterprise's goals do not primarily benefit one specific member and that its operations do not too heavily rely on the skill or status of one specific member. [14] Lastly, the Court opined that a RICO enterprise must have structure, defined leadership, organization, and history comparable to more traditional organized crime-type enterprises (*e.g.*, La Cosa Nostra). [15]

> 13 *See, e.g., Bergrin*, 707 F. Supp. 2d at 512 ("[I]t is clear from the nature of the allegations that the Kemo murder case shares little, if anything, in common with the methods allegedly employed in the commission of the other predicates. . . . [I]t is evident on the face of these schemes that they lack any similarity [*37] in method."); *Id.* at 513("[T]he Indictment as pled offers a series of disconnected street crimes and white collar frauds carried out using divergent methods for distinct purposes at different times as the RICO 'pattern.'"); *Id.* at 516 ("There is no common criminal conduct; instead, the acts alleged range from prostitution to murder to mortgage fraud without any apparent overlap or coordination, again other than the presence of Paul Bergrin, over different periods of time.").
>
> 14 *See, e.g., id.* at 515 ("Each of the seven purposes pled in ¶ 7 of the Indictment inure to the benefit of Paul Bergrin, as discussed above with

regard to the pattern of racketeering."); *Id.* at 518 ("Through its focus on the misuse of legal services, the Government ties this enterprise together through Bergrin's status as an attorney. 'The Bergrin Law Enterprise' therefore is simply Paul W. Bergrin, Esq., without whom, as the Indictment states, none of the criminal schemes would be possible.").

15 *See, e.g., id.* at 515 ("No structure, or at best a minimal structure, is pled in the instant Indictment with regard to 'The Bergrin Law Enterprise.' Instead, the Government attempts to graft an enterprise onto the actions [*38] of Defendant Bergrin by alleging that he led 'The Bergrin Law Enterprise.' . . . The Indictment, however does not describe what this leadership entailed. Except for the labeling of Bergrin as the 'leader,' there is no discussion of the roles of the other associates, other than their commission of illegal acts. . . . This pleading stands in stark contrast to the typical form of a RICO Indictment. In an organized crime or union corruption RICO Indictment, for example, there is often a lengthy discussion of each associate's role in the enterprise and how the enterprise came to be. . . . There is no such pleading as to the history of the enterprise or the role of its members' roles here." (citations omitted)).

These factual averments are not required to prove a RICO case. *See supra* Part III.B. Indeed, [HN35]the Supreme Court in *H.J., Inc.* used a disjunctive list when explaining what constitutes evidence of a "pattern of racketeering activity": "criminal acts that have the same or similar purposes, results, participants, victims, *or* methods of commission, *or* otherwise are interrelated by distinguishing characteristics and are not isolated events." 492 U.S. at 240 (emphasis added) (citation omitted). [*39] The "methods employed" need not be similar; in fact, it is hard to imagine how they could be similar in cases where the predicate acts themselves are fundamentally different (*e.g.*, extortion, drug trafficking, gambling, murder, and counterfeiting music albums). *Boyle* also makes clear that[HN36] there need not be a rigid temporal relationship among predicate acts. 129 S.Ct. at 2245 ("While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."). [HN37]Neither the District Court nor the Appellees cite any authority that stands for the proposition that there is no "enterprise" if an association-in-fact forms for purposes that primarily benefit one member or operates with total dependence on one member. Finally, [HN38]the Supreme Court has repeatedly, and most explicitly in *Boyle*, rejected the notion that a RICO enterprise must have the type of structure, defined leadership, organization, or history generally associated with traditional organized crime associations. *Id.* at 2245-46; *see also H.J., Inc.*, 492 U.S. at 243-44 ("[Continuous] [*40] associations include, but extend well beyond, those traditionally grouped under the phrase 'organized crime.' . . . [T]he argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text and is at odds with the tenor of its legislative history.").

Throughout its opinion, the District Court raised equitable or logistical concerns. Because these concerns are either endemic to RICO prosecutions or involve the application of irrelevant legal standards, it was improper for the Court to dismiss the indictment for any of these reasons.

On several occasions, the District Court alludes to RICO's broad scope and the potential for the law to be misapplied so as to unfairly try and punish common criminals and conspirators who were not the original targets of the law. [16] If we were writing on a blank slate circa 1971, the District Court's concerns might carry the day. In the forty years since RICO was enacted, however, much has been written on the proverbial slate. The Supreme Court has unwaveringly disagreed with the District Court's sincere policy concern and [*41] we must do likewise. As we have noted, the Supreme Court has repeatedly reaffirmed that [HN39]RICO is a powerful weapon that significantly alters the way trials are conducted in cases that involve racketeering acts committed by members of an enterprise. Most recently, the Court in *Boyle* stated:

> Because the statutory language is clear, there is no need to reach petitioner' s remaining arguments based on statutory purpose, legislative history, or the rule of lenity. In prior cases, we have rejected similar arguments in favor of the clear but expansive text of the statute. See *National Organization for Women*, 510 U.S., at 262, 114 S.Ct. 798 ([HN40]"The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (quoting *Sedima*, 473 U.S. at 499, 105 S.Ct. 3275, brackets and internal quotation marks omitted)); see also *Turkette*, 452 U.S. at 589-591, 101 S.Ct. 2524. "We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a precon-

> ceived notion of what Congress intended to proscribe." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 660, 128 S.Ct. 2131, 2145, 170 L.Ed.2d 1012 (2008).

129 S. Ct. at 2246-47. [*42] During oral argument in *Boyle*, the petitioner argued that too broad a reading of RICO amounts to "overreaching" because it results in a conflation of conspiracy and enterprise: "[C]onspirators are liable for the acts of their co-conspirators, which is the Pinkerton doctrine which collapses 1962(c) into a general conspiracy statute, if you are going to define an enterprise principally by virtue of its common purpose." Oral Argument at 58:13, *Boyle v. United States*, 129 S.Ct. 2237, 173 L. Ed. 2d 1265 (No. 07-1309), *available at* http://www.oyez.org/cases/2000-2009/2008/2008_07_1309/argument. The Supreme Court, in keeping with its broad understanding of RICO, brushed this concern aside. *Boyle*, 129 S. Ct. at 2246 ([HN41]"Under § 371, a conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy. Section 1962(c) demands much more: the creation of an enterprise'-a group with a common purpose and course of conduct-and the actual commission of a pattern of predicate offenses." (citation omitted)). In the final analysis, irrespective of any logical or theoretical appeal to the District Court's [*43] concerns, they have been soundly rejected by the Supreme Court.

> 16 *See, e.g., Bergrin*, 707 F. Supp. 2d at 511 ("[T]he Government admitted that the acts would be prejudicially joined under Rule 14(a). . . . These admissions speak volumes as to the disparate nature of the substantive crimes that, in effect, also serve as the racketeering predicates. While the Government maintains that these wide-ranging crimes nonetheless fall within the ambit of a RICO pattern, to hold as much would be to condone the precise type of overreaching that courts and commentators have warned against since the enactment of RICO."); *Id.* at 516 n.15 (finding that if "the common purpose of the enterprise is to break the law and the course of conduct is committing illegal acts . . . . [RICO] would convert any garden variety criminal conspiracy into a RICO enterprise, which would be true neither to the letter nor the spirit of the RICO statute").

The District Court also was concerned about the difficulties of managing a complex multi-defendant, multi-count criminal trial. [17] Again, although this is an understandable concern for a trial judge, [HN42]the fear that "complex limiting instructions . . . would confound the Court" [*44] is distinct from the question of whether an indictment alleges all of the elements of a crime.

> 17 *Bergrin*, 707 F. Supp. 2d at 511 n.10 ("The differences between these RICO predicates are not merely a pleading concern. Thinking through the practicalities of trial, it concerns the Court that evidence of these different alleged criminal acts likely would pose evidentiary problems. . . . [T]he spillover prejudice from the introduction of each witness murder case [sic] in a trial of the other would give the Court serious pause. Beyond this, the Government would introduce its mortgage fraud case and prostitution cases during the same megatrial. The many and complex limiting instructions that would have to be employed as to the counts and defendants would confound the Court, let alone the jurors.").

Finally, the District Court analogized RICO to a more familiar legal framework by discussing how the various predicates would be analyzed under joinder and severance standards if they were tried as stand-alone offenses. [18] The Court again had a rational reason for discussing joinder and severance under Rules 8 and 14 of the Federal Rules of Criminal Procedure. The Government's indictment was somewhat [*45] unwieldy, charging all of the RICO and non-RICO defendants with all of the RICO counts and underlying substantive crimes. Faced with a handful of motions to sever, the Court needed to analyze these rules. The misstep that the Court made, however, is that it did not merely assess whether the RICO counts and defendants could be tried along with the non-RICO counts and defendants. Instead, it determined that the predicate crimes underlying the RICO counts could not all be joined in one trial without a RICO charge binding them together, and from that, it extrapolated that the predicates cannot establish a "pattern of racketeering activity." In this case, however, there was a RICO count, and [HN43]the Supreme Court has interpreted "pattern" such that it requires only "relationship and continuity," broadly construed. *H.J., Inc.*, 492 U.S. at 239. There is no support in *H.J., Inc.* or elsewhere for the notion that the individual predicates crimes must all be joinable in one trial, and it was therefore improper for the District Court to consider such an inapplicable standard as part of its analysis of the alleged "pattern." [19]

> 18 *See, e.g., Bergrin*, 707 F. Supp. 2d at 510-11 ("There is little on the [*46] face of the Indictment demonstrating relatedness among the varied white collar frauds and street crimes of-

fered by the Government as RICO predicates. The Government even conceded as much during oral argument, admitting that these disparate acts could not be joined but for the allegation of a RICO enterprise. . . . [T]he Government admitted that the acts would be prejudicially joined under Rule 14(a). . . . These admissions speak volumes as to the disparate nature of the substantive crimes that, in effect, also serve as the racketeering predicates."); *Id.* at 516-17 ("[T]he predicate acts themselves are so disparate in type and method that the Government conceded that they could not be properly joined under Rule 8(b) absent a RICO count.").

19 *Cf. Eufrasio*, 935 F.2d at 567 ([HN44]"Rule 8(b) . . . . permits joinder of defendants charged with participating in the same racketeering enterprise or conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant . . . are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with, a commonly charged RICO enterprise [*47] of conspiracy.").

III

For all the foregoing reasons, we hold that the District Court erred in dismissing the RICO and RICO-based counts. Accordingly, we will reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 5

LEXSEE

Analysis
As of: Jun 21, 2011

VIRGINIA SURETY COMPANY, INC., Plaintiff, v. JACK MACEDO, SANDRA MACEDO-BILYNSKY, CARLOS PEIXOTO, MACEDOS CONSTRUCTION CO., INC. OF NEW JERSEY, C.C.S. SERVICES OF EAST HANOVER, INC., JOSE MOREIRA, and JANE DOES 1-3, Defendants.

Civil Action No. 08-5586 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2011 U.S. Dist. LEXIS 49077

May 6, 2011, Decided
May 6, 2011, Filed

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: Va. Sur. Co. v. Macedo, 2010 U.S. Dist. LEXIS 88720 (D.N.J., Aug. 27, 2010)

CORE TERMS: workers' compensation, fraudulent, predicate acts, insurance policies, mail, fraud claims, racketeering activity, insurance claims, particularity, continuity, insurance benefits, insurance fraud, compensation benefits, tax form, conspiracy, contractor, litigation privilege, accepting, construction project, employment status, predicate, hired, real party in interest, wire fraud, citations omitted, actionable, renewed, unjust, misrepresentation, participated

COUNSEL: [*1] For **VIRGINIA SURETY COMPANY,INC.**, **Plaintiff**: ADAM R. SCHWARTZ, FLORINA A. MOLDOVAN, RYAN P. MULVANEY, *LEAD ATTORNEYS*, RICHARD S. MILLS, MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, MORRISTOWN, NJ.

For **JACK MACEDO, SANDRA MACEDO-BILYNSKY, MACEDOS CONSTRUCTION CO., INC., OF NEW JERSEY, C.C.S. SERVICES OF EAST HANOVER, INC.**, **Defendants**: MARC D. HAEFNER, *LEAD ATTORNEY*, CHRISTINE INTROMASSO GANNON, CONNELL FOLEY, LLP, ROSELAND, NJ.

For **CARLOS PEIXOTO**, **Defendant**: MICHAEL SAMUEL BUBB, *LEAD ATTORNEY*, BUBB, GROGAN & COCCA, LLP, MORRISTOWN, NJ.

For **JOSE MOREIRA, ROSA GOMES**, **Defendants**: WILLIAM HUDSON HOFMANN, SMITH STRATTON WISE HEHER & BRENNAN LLP, PRINCETON, NJ.

JUDGES: Hon. GARRETT E. BROWN, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: GARRETT E. BROWN, JR.

OPINION

MEMORANDUM OPINION

BROWN, Chief Judge:

This matter comes before the Court on the renewed motion to dismiss (Doc. No. 68) filed by Defendants Jack Macedo, Sandra Macedo-Bilynsky, Macedos Construction Co. Inc., of New Jersey, and C.C.S. Services of East Hanover, Inc. and joined by Defendant Carlos Peixoto (collectively "Macedos Defendants"), and the renewed motion to dismiss (Doc. No. 67) filed by Defendant Jose Moreira. The Court has considered the parties' submissions [*2] and decided the matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the following reasons, the Court will deny Defendants' motions.

I. BACKGROUND

For the purpose of this motion, the Court accepts as true the factual allegations in the Amended Complaint and draws all reasonable inferences in favor of Plaintiff. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). This matter arises from an October 2005 residential construction project accident and involves allegations of insurance fraud by an insurance company against an insured construction company and an injured carpenter. Plaintiff Virginia Surety Company, Inc. ("VSC") issued a workers' compensation policy and a commercial general liability (CGL) policy to Defendant Macedos Construction Company Inc. of New Jersey (MCC), a New Jersey corporation that performed commercial concrete construction work, that was in effect at the time of the accident. Defendant C.C.S. Services of East Hanover, Inc. (CCS) was effectively a subsidiary of MCC owned in whole or part by members of the Macedo family. (Am. Compl. ¶¶ 7-10, 18-21.) VSC alleges that MCC, CCS, various individuals who are principals and employees with [*3] these companies, and Jose Moreira, the injured carpenter, engaged in a scheme to procure workers' compensation benefits for Moreira, despite the fact that Moreira did not work for MCC, and despite the fact that MCC was not the contractor for the construction project.

According to the Amended Complaint, Defendant Carlos Peixoto and his wife purchased undeveloped real property at Block 27, Lot 115.01, 1 Parsonage Lot Road in Tewksbury, New Jersey, and in the fall of 2005, were in the process of building a family residence on the property (hereinafter the "Parsonage Lot Property"). At the time of this residential construction project, Peixoto was employed by MCC as a foreman. While the residence was in development, Peixoto and his wife resided at 7 Dell Road in Stanhope, New Jersey. The construction permits issued by Tewksbury Township in November 2004 and April 2005, Permit Nos. T-04-516 and T-04-516+A, listed Peixoto as the "Contractor" for the home construction project at the Property and did not list MCC as a contractor. (Am. Compl. ¶¶ 26-41.) According to VSC, in September 2005, Peixoto asked two MCC employees if they could recommend any carpenters for the building of the home. (*Id.* [*4] ¶¶ 48-49.) These employees referred Peixoto to Manuel Covas (*id.* ¶ 50), and Peixoto hired Covas and his co-worker Moreira to provide carpentry services for the home construction project (*id.* ¶ 54). VSC alleges that Moreira and Covas were employed by D. Reis Contracting and its owner Dominick Reis when they began working on the Parsonage Lot Property. (*Id.* ¶¶ 42-47.) On October 1, 2005, while working at the Property, Moreira climbed onto a raised scaffold approximately 25 feet above the ground, and the scaffolding collapsed, causing Moreira to fall to the ground and suffer substantial injuries requiring hospitalization. (*Id.* ¶¶ 63-66.) Because of these injuries, Moreira has been unable to work since the incident.

MCC, through its co-manager Sandra Macedo-Bilynsky, filed workers' compensation and CGL claims under the VSC policies on behalf of Moreira, representing that he was a covered employee for the job. As a result of this and other representations, VSC paid $284,698.83 to Moreira in workers' compensation benefits and another $31,891.97 defending MCC from a collateral lawsuit filed by Moreira. (*Id.* ¶ 337.) On July 30, 2007, Moreira and his wife filed suit in Superior Court, Law Division, [*5] Huntington County, Docket No. L-464-07 against MCC, Peixoto, and others alleging negligence and loss of consortium (hereinafter "*Moreira* action"). In conjunction with the *Moreira* action, Moreira filed a certification indicating that he had never worked for MCC. VSC responded by filing this federal action alleging that Defendants fraudulently conspired to provide insurance coverage for Moreira's injuries under MCC's policies. (*See* RICO Statement at 22.) VSC's original Complaint asserted claims under the federal Racketeering Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1962(c), (d), and various fraud-based state-law claims, against the Macedos Defendants (Macedo, Macedo-Bilynsky, MCC, CCS, and Peixoto), Moreira, and Moreira's wife Rosa Gomes. VSC also sought declaratory relief voiding and rescinding coverage for the Moreira claims. All Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In an Order issued September 29, 2009, and Opinion issued September 30, 2009, then United States District Judge and now Circuit Judge Joseph A. Greenaway, Jr., granted Defendants' motion to dismiss without prejudice. [1] *Va. Surety Co. v. Macedo*, No. 08-5586, 2009 U.S. Dist. LEXIS 90603, 2009 WL 3230909 (D.N.J. Sept. 30, 2009). [*6] Judge Greenaway primarily concluded that VSC failed to plead its RICO and state-law fraud causes of action with sufficient particularity to satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). 2009 U.S. Dist. LEXIS 90603, [WL] at *7-8, *10-12. Judge Greenaway also stated that misrepresentations concerning Moreira's employment relationship with MCC were "not actionable as mail and wire fraud," because New Jersey law treats employment status as a mixed question of law and fact. 2009 U.S. Dist. LEXIS 90603, [WL] at *8. In December 2009, VSC filed an Amended Complaint. While its initial complaint contained RICO claims against Macedo, Macedo-Bilynsky, and Peixoto, VSC's Amended Complaint only includes a RICO claim against Macedo-Bilynsky. VSC also asserts claims of statutory insurance fraud, statutory workers' compensation fraud, common law fraud, fraud-based unjust enrichment, and

conspiracy to defraud against all Defendants. Finally, VSC seeks various forms of declaratory relief rescinding and voiding coverage for Moreira under the insurance policies. VSC no longer asserts any claims against Moreira's wife, Rosa Gomes. Defendants renewed their motions to dismiss.

1 By order of April 14, 2010, this matter was reassigned [*7] to the undersigned.

By Opinion and Order of August 27, 2010, this Court denied the Defendants' renewed motions to dismiss without prejudice and ordered VSC to file a RICO Case Statement pursuant to Local Civil Rule 16.1(b)(4). VSC timely filed the RICO Statement, and Defendants renewed their motions to dismiss. Defendants primarily argue that Judge Greenaway's September 29, 2009 Opinion is law of the case and requires dismissal of VSC's amended fraud claims, because representations regarding Moreira's employment status are not actionable as fraud. Defendants further argue that VSC's pleadings do not satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), or even the plausibility standard applicable under Rule 12(b)(6). Defendants also attack VSC's claims that are predicated on various Defendants' statements in legal filings before the state Workers' Compensation Division and in the *Moreira* action in state court, on the ground that such statements are shielded by the litigation privilege and the *Noerr-Pennington* doctrine. VSC responds that Judge Greenaway's opinion does not control their amended pleadings of fraud, that their amended claims satisfy applicable [*8] pleading requirements, and that the litigation privilege and *Noerr-Pennington* doctrine do not apply to the fraudulent court filings at issue in this case.

This Court has subject matter jurisdiction over VSC's RICO claim pursuant to 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331, and supplemental jurisdiction over VSC's state law claims pursuant to 28 U.S.C. § 1367.

II. RICO CASE STATEMENT

According to VSC's RICO Statement, Moreira and Covas began work on the Parsonage Lot Property on September 24 and 25, 2005. Covas received payment for these services via a check drawn on the personal bank account of Peixoto and his wife. Moreira sustained the relevant injuries on the third day of work at the Parsonage Lot Property, October 1, 2005. Shortly after the injury occurred, Peixoto visited Moreira in the hospital and informed him that MCC would be covering payments for his injuries. (RICO Statement at 2; Am. Compl. ¶¶ 57-58, 61-64, 67-68.) VSC avers that MCC, through its principals Sandra Macedo-Bilynsky and Jack Macedo--who are Peixoto's sister-in-law and father-in-law, respectively--conspired with Peixoto and Moreira to submit false claims based on fraudulent documentation for the purpose of procuring [*9] insurance coverage for Moreira's injuries and shielding Peixoto from liability for the same. (*See* RICO Statement at 3, 22.)

VSC provides specific details about each Defendant's role in the alleged conspiracy. Beginning with Macedo-Bilynsky, VSC claims that this Defendant was the co-manager of MCC who conducted the daily administration of MCC's construction business, was involved in the procurement of the VSC insurance policies, and served as the primary contact for MCC's insurance broker. VSC alleges that Macedo-Bilynsky committed at least six fraudulent acts in the furtherance of the enterprise. First, VSC asserts that she completed and submitted a Worker's Compensation First Notice of Claim via MCC's insurance broker that falsely stated: (i) that Moreira was a full-time carpenter hired by MCC on October 1, 2005 (the date of injury); and (ii) that MCC paid Moreira at a rate of $61.25 per hour / $2,450 per week. (RICO Statement at 5; Am. Compl. ¶¶ 71-81.) Second, VSC alleges that Macedo-Bilynsky caused MCC's insurance broker to submit a claim under the CGL policy on October 10, 2005. (RICO Statement at 6; Am. Compl. ¶¶ 86-87.) Third, VSC states that Macedo-Bilynsky sent a false construction [*10] agreement bearing the date March 15, 2004 (hereinafter "2004 construction agreement") to VSC's claims administrator on January 24, 2007, as proof that MCC had a construction agreement with Peixoto to be the general contractor on the Parsonage Lot Property at the time of Moreira's injury. (RICO Statement at 6; Am. Compl. ¶¶ 104-05.) Fourth, VSC avers that Macedo-Bilynsky sent VSC a false W-2 tax form on January 24, 2007, which stated that CCS (an MCC subsidiary) was Moreira's employer, and that Moreira had yearly earnings from CCS totaling $367.50. (RICO Statement at 7; Am. Compl. ¶¶ 113-15.) Fifth, VSC contends that Macedo-Bilynsky filed an Answer on behalf of MCC on or about February 2, 2007, in response to a Claim Petition filed in the State Department of Labor, Workers' Compensation Division, that failed to indicate whether Moreira was an MCC employee, whether his injury arose from his employment, and listed his occupation as "Under Investigation." (RICO Statement at 7; Am. Compl. ¶¶ 118-19.) Finally, VSC alleges that Macedo-Bilynsky prepared and submitted a false certification to the Superior Court in the *Moreira* action on or about March 20, 2008, which stated that Moreira was [*11] a non-union MCC employee at the time of his injury, whose pay was processed by CCS. (RICO Statement at 8; Am. Compl. ¶¶ 124-27.) VSC contends that these representations were fraudulent because: (1) Moreira was a full-time employee of D. Reis Contracting at the time of his injuries; (2) Moreira was hired by Peixoto to perform carpentry services for $7,500 and began work

on September 24, 2005; (3) Moreira and Covas were paid for their services at the Parsonage Lot Property by a personal check from Peixoto's bank account; (4) neither Moreira nor Covas ever received payment from MCC or CCS; (5) the Tewksbury Township construction permits indicate that Peixoto was the general contractor for the residential construction project; (6) MCC represented on its insurance applications that it only performed commercial concrete construction work; and (7) the putative 2004 construction agreement between MCC and Peixoto listed the Parsonage Lot Property as Peixoto's mailing address, despite the fact that the residence had not been completed and was not habitable at the time of the alleged construction agreement. (*See* RICO Statement at 5-9.)

As for Defendant Peixoto, an MCC foreman and the property [*12] owner where the accident occurred, VSC alleges that this Defendant conspired with Macedo-Bilynsky and his father-in-law "to fraudulently induce coverage from VSC" through the submission of the aforementioned false documents because he did not possess a homeowner's insurance policy that would provide coverage for the injuries sustained by Moreira. (*Id.* at 10.) In the furtherance of this enterprise, VSC avers that Peixoto met with Moreira in the hospital shortly after the injury occurred to inform him that MCC would be covering payments for his injuries. (*Id.*; Am. Compl. ¶¶ 67-68.) VSC contends that these acts were fraudulent, because the Tewksbury Township construction permits unambiguously listed Peixoto as the property owner and general contractor. (RICO Statement at 10.)

With regard to Defendant Jack Macedo, Peixoto's father-in-law and the principal and/or owner of MCC, VSC alleges that this Defendant participated in the conspiracy by executing the false 2004 construction agreement (subsequently submitted to VSC) between MCC and Peixoto after Moreira's injury occurred in October 2005. (*Id.* at 8-9; Am. Compl. ¶ 111.) Furthermore, after Moreira instituted the state court action against [*13] MCC, VSC alleges that this Defendant arranged a meeting with Moreira and Moreira's then-current employer, Dominick Reis (coincidentally Macedo's brother-in-law), at "Churrasqueira Bairrada" restaurant in February 2008. At this meeting, VSC alleges that Macedo attempted to persuade Moreira to abandon the state court action against MCC and pursue the workers' compensation benefits from VSC. (RICO Statement at 9; Am. Compl. ¶¶ 133-47.)

Finally, as for Defendant Moreira, the injured carpenter, VSC alleges that this Defendant participated in the enterprise by completing and submitting Workers Compensation Claim No. 0028139132 Questionnaire to VSC's claims administrator on October 14, 2005, which falsely stated that he was an employee hired by MCC on October 1, 2005. Thereafter, VSC asserts that Moreira completed and submitted an Employee's Claim Petition to the New Jersey Division of Workers' Compensation that contained a false statement regarding his gross weekly wages from his employment with MCC. (RICO Statement at 11; Am. Compl. 88-99.) Moreira subsequently filed a certification in Superior Court in the *Moreira* action generally denying that he worked for MCC or CCS. (RICO Statement at [*14] 11-12.) Specifically, Moreira certified the following facts: (1) that he and Covas were hired to perform carpentry work on the Parsonage Lot Property by Peixoto on or about September 17, 2005; (2) that he and Covas worked on the property the weekend prior to the incident, September 24-25, 2005; (3) that all materials related to his work on the property were provided by Peixoto, the property owner; (4) that he received no paycheck from MCC for his work prior to the incident, but that Covas received payment from Peixoto and his wife; (5) that he "first learned that [he] would be treated as if [he] was an employee of [MCC]" while he was in the hospital receiving treatment for his injuries, whereupon he was told that MCC would provide workers' compensation benefits to cover the expenses of his injuries; (6) that he never received a W-2 tax form from MCC; (7) that "at no point in time, up to and including the date of the incident, did [he] understand to be employed through [MCC] or did anyone from [MCC] retain control over [his] conduct, prescribe the manner in which [his] work was performed [] while on the [Parsonage Lot] Property"; and (8) that he was subsequently provided with a W-2 [*15] tax form, ostensibly issued by CCS, during discovery, but that he "[was] not familiar with such an entity nor was [he] employed by them." (RICO Statement at 11-12; Am. Compl. ¶ 153 (quoting Mills Decl. Ex. B (Moreira Certif.)).)

Based on these allegations, VSC submits that Defendant Macedo-Bilynsky engaged in the following RICO predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343: (1) wire submission of the false Workers Compensation First Notice of Claim, on behalf of MCC, to VSC via MCC's insurance broker on or about October 5-6, 2005; (2) wire and/or mail submission of the false Acord General Liability Notice of Occurrence Form, on behalf of MCC, to VSC via MCC's insurance broker on or about October 10, 2005; (3) wire and/or mail submission of the false 2004 construction agreement, allegedly prepared after-the-fact by Defendant Jack Macedo, to VSC on or about January 24, 2007; and (4) wire and/or mail submission of a false 2005 W-2 tax form indicating that Moreira worked for and earned income from MCC's subsidiary CCS, to VSC on or about January 24, 2007. (RICO Statement at 13-14.) VSC asserts that Defendants MCC, CCS, Macedo, Macedo-Bilynsky, and Peixoto [*16] formed an association-in-fact enterprise, and VSC contends that they have

sufficiently alleged a "pattern of racketeering activity" under 18 U.S.C. § 1961(5), because they have alleged multiple predicate acts within a ten-year period, and the predicate acts are related and continuous.

III. SUPERIOR COURT'S DECISION ON VSC'S CLAIMS

After the renewed motions to dismiss were initially filed with this Court, the Superior Court in the *Moreira* action decided similar motions filed by the Defendants in this case, which sought to dismiss VSC's fraud-based claims. [2] As they do with the present motions, the defendants had relied on Judge Greenaway's September 29, 2009 Opinion that the representation regarding employment status could not be actionable as fraud, and that certain statements made during the course of litigation were protected by the litigation privilege and the *Noerr-Pennington* doctrine. By opinion and order of June 11, 2010, the Honorable Peter A. Buchsbaum, J.S.C., denied the Peixotos and Macedos defendants motions. (Mills Decl. Ex. D at 11-16.) Applying the motion to dismiss standard, Judge Buchsbaum concluded that VSC's allegations stated claims for insurance fraud under N.J. Stat. Ann. § 17:33A-1 et seq., [*17] workers' compensation fraud under N.J. Stat. Ann. §§ 34:15-1 et seq. and 34:15-57.4, common law fraud, unjust enrichment, and civil conspiracy. (*Id.*) Judge Buchsbaum specifically rejected these defendants' litigation privilege and *Noerr-Pennington* arguments, noting that these doctrines did not provide protection to "shams," and stating that he was unaware of any First Amendment right or privilege that would protect fraud on the court. (*Id.* at 13-14 ("While defamatory statements may be protected, on free speech grounds, the extension of that protection to allegations of outright fraud designed to in effect steal from an insurance company would be breathtaking.").) Judge Buchsbaum also rejected defendants' contention that Judge Greenaway's September 29, 2009 opinion controlled the disposition of VSC's counterclaims, making the following observations:

> The arguments as to whether Moreira was an 'employee' overly complicate the allegation that factually he did not work for Macedos in any way, and notwithstanding that fact, the defendants allegedly came together, *created a false* employment contract, and falsely stated Moreira worked for Macedos in order to obtain insurance benefits. There [*18] are factual questions for a jury not technical legal conclusions amounting to opinion. Involved are not arcana of employment law, but whether there was a scheme to cook up a wholly fictional relationship in order to obtain insurance. The ink spilled on the status of 'employment' as a matter of law is thus irrelevant to the actual allegations.
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> . . . [I]t is far from clear that Judge Greenaway's past ruling on the employment issue would control. His opinion does not directly focus on that issue. In fact, the portion of Judge Greenaway's opinion dealing with state fraud claims does not mention the employment issue at all.
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> . . . Although the defendants argue issues of law cannot constitute the basis for fraud, that argument contradicts the Court's holding in *Westervelt v. Demarest*, 46 N.J.L. 37, 40 (1884). Furthermore, VSC alleged a misrepresentation other than employment status in the form of a lack of information with the insurance application as to residential projects. [citations omitted] In addition, reading the pleadings with a generous and hospitable view, as the Court must, the focus of VSC's claims appears to be whether Moreira worked for Macedos in any capacity, not just within [*19] the legal definition of an employee.

(*Id.* at 11-14.)

2 The Court understands that VSC, as a defendant in the *Moreira* action, presented all of the same fraud claims, as counterclaims, that they pled in this case, with the exception of the federal RICO claim.

IV. MOTIONS TO DISMISS

Defendants argue that VSC's claims are barred by the law of the case, Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6), the litigation privilege, and the *Noerr-Pennington* doctrine. This Court disagrees on each point.

A. Law of the Case

The law of the case doctrine instructs a court to continue to apply a ruling of law decided at an earlier stage in the litigation at subsequent stages. *See, e.g., Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). The doctrine "reflects courts' general reluctance to reconsider matters soundly decided," *Falor v.*

G&S Billboard, Civ. No. 04-2373, 2008 U.S. Dist. LEXIS 99613, 2008 WL 5190860, at *2 (D.N.J. Dec. 10, 2008), and "is designed to protect traditional ideals such as finality, judicial economy and jurisprudential integrity," *In re City of Phila. Litig.*, 158 F.3d 711, 717-18 (3d Cir.1998). Much like the standard for a motion for reconsideration, a court will only abandon a prior legal ruling under the [*20] following "extraordinary circumstances": where "(1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice." *In re City of Phila. Litig.*, 158 F.3d at 718 (citing *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir.1997)); *see also Falor*, 2008 U.S. Dist. LEXIS 99613, 2008 WL 5190860, at *2 ("In many ways, 'law of the case' disputes are the opposite side of the motion for reconsideration coin. The only difference between the two is the filing party: prevailing parties or similarly-situated parties seek to apply the 'law of the case' against subsequent parties in similar circumstances, and losing parties seek reconsideration of the adverse decision."). However, the doctrine only applies to legal conclusions, and does not apply to dicta. *See, e.g., In re City of Phila. Litig.*, 158 F.3d at 718; *Falor*, 2008 U.S. Dist. LEXIS 99613, 2008 WL 5190860, at *2; Wright & Miller, Federal Practice and Procedure § 4478.

Having reviewed the parties' arguments, this Court agrees with VSC and Judge Buchsbaum that Judge Greenaway's September 29, 2009 opinion does not control the amended pleadings now pending before [*21] the Court. Defendants' myopic focus on VSC's allegations regarding Moreira's employment status miss the broader scope of VSC's allegations--that Moreira never worked for MCC in any capacity, that MCC was not even the general contractor for the residential project at the Parsonage Lot Property, and that MCC's principal created a construction contract after-the-fact to cover the conspirators' tracks. This Court agrees with Judge Buchsbaum that "[t]he arguments as to whether Moreira was an 'employee' overly complicate the allegation that factually he did not work for Macedos in any way." (Mills Decl. Ex. D at 11.) The portion of Judge Greenaway's opinion relied on by Defendants (i.e., that representations regarding employment status are not actionable as fraud) does not address the full canvas of VSC's allegations of fraud as set forth in the pleadings currently before the Court, but only addresses the narrow universe of Defendants' representations about Moreira's employment status. Furthermore, it is unclear whether this portion of Judge Greenaway's opinion is dicta, because the opinion appears to present this reasoning as alternative grounds for dismissal of the federal wire and mail [*22] fraud claims (the primary ground appears to be Rule 9(b)'s heightened pleading standard), but then does not refer to this issue in dealing with VSC's state law fraud claims, which are predicated on the same misrepresentations. *See Virginia Sur. Co.*, 2009 U.S. Dist. LEXIS 90603, 2009 WL 3230909, at *8-12. The amended claims of fraud do not rely on lay persons' legal opinions regarding an individual's employment status. Rather, they provide broad and detailed allegations that Defendants conspired to concoct an entire employment relationship, as well as a construction agreement, after Moreira sustained his injuries. The Court agrees with Judge Buchsbaum that Judge Greenaway's opinion does not control the amended pleadings. Consequently, the amended pleadings, which include the RICO Statement, must be viewed under the standards for Rules 8, 9(b), and 12(b)(6).

B. Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6)

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) may only be granted if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff has failed to set forth fair notice of what the claim [*23] is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citations omitted). A complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). The plausibility standard requires that "the plaintiff plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). Although a court must accept as true all factual allegations in a complaint, that tenet is "inapplicable to legal conclusions," and "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). These pleading requirements under Rule 12(b)(6) derive from Rule 8's requirement that a pleading [*24] contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Federal Rule of Civil Procedure 9(b)'s heightened pleading standard applies to VSC's claims, which sound in fraud. *See, e.g., Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004) (applying Rule 9(b) to federal RICO claims based on mail and wire fraud); *Christidis v. First Pa. Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. 1983) (applying Rule 9(b) to state-law fraud claims). Accor-

dingly, VSC "must state with particularity the circumstances constituting fraud or mistake," but "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The Third Circuit has held that "Rule 9(b) requires, at a minimum, that plaintiffs support their allegations of . . . fraud with all of the essential factual background that would accompany 'the first paragraph of any newspaper story'--that is, the 'who, what, when, where and how' of the events at issue." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002) (citations omitted); *see also Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) ("[T]he [*25] plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation."). This heightened pleading standard is designed "to ensure that defendants are placed on notice of the 'precise misconduct with which they are charged, and to safeguard defendants against spurious charges' of fraud." *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984).

Plaintiff's Amended Complaint contains numerous claims, consisting of New Jersey insurance fraud, workers' compensation fraud, common law fraud, and unjust enrichment claims against Defendants Moreira, Peixoto, Macedo-Bilynsky, Macedo, MCC, and CCS respectively, one RICO claim against Macedo-Bilynsky, one civil conspiracy claim against all Defendants, and four counts seeking declaratory relief under their insurance policies. The Court considers the RICO, state law, and declaratory judgment claims in turn.

1. RICO

a. RICO Standards

RICO prohibits certain racketeering activities established under 18 U.S.C. § 1962, and the statute authorizes a civil [*26] action for "[a]ny person injured in his business or property by reason of section 1962." 18 U.S.C. § 1964(c). VSC alleges violations of § 1962(c) and (d). [3] Section 1962(c), the primary violation upon which the parties focus most of their attention, prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1962(d) prohibits any person from conspiring to violate any of the subsections of § 1962. While the primary congressional purpose in enacting RICO was "to seek the eradication of organized crime in the United States," Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970), Congress mandated that RICO "be liberally construed to effectuate its remedial purposes," *id.* at 942. Therefore, the Supreme Court has generally held that RICO must be liberally applied, and that it reaches legitimate businesses and enterprises, operating with and without a profit motive. *See, e.g., Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). [*27] However, while the Supreme Court has reaffirmed the liberal construction of RICO, it has cautioned that such a reading is "not an invitation to apply RICO to new purposes that Congress never intended." *See Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). "Because the mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants, . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Manhattan Telecomms. Corp. v. DialAmerica Mktg.*, 156 F. Supp. 2d 376, 380 (S.D.N.Y. 2001) (quotations and citations omitted). "[C]ourts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb." *Id.* (quoting *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998)).

> 3 Although the Amended Complaint also appears to allege a claim under § 1962(b), VSC's RICO Statement unambiguously abandons that claim. (RICO Statement at 25-26.)

To allege a RICO claim pursuant to § 1962(c), a plaintiff must plead "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, [plus (5) an] injury to property [*28] or business." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 362 (3d Cir. 2010) (quoting *Lum*, 361 F.3d at 223; *Sedima*, 473 U.S. at 496). The "conduct" element of RICO requires allegations that the defendant "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The defendant must "have some part in directing those affairs," and is not liable under § 1962(c) "unless [she] has participated in the operation or management of the enterprise itself." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)). The statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has construed the term "enterprise" broadly, only requiring a "showing [of] a 'structure,' that is, a common 'purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *In re Ins. Brokerage Antitrust Litig.*,

618 F.3d at 368 [*29] (recognizing that the Supreme Court's decision in *Boyle v. United States*, 129 S.Ct. 2237, 173 L. Ed. 2d 1265 (2009) rejected the more stringent association-in-fact enterprise tests previously adopted by various courts of appeals that required a showing of a decision-making process or hierarchy). Meanwhile, a "pattern of racketeering activity" under RICO consists of at least two predicate acts of racketeering activity within a ten-year period. *Id.* § 1961(5). Predicate acts of racketeering activity include, *inter alia*, mail fraud and wire fraud. *See id.* § 1961(1) (citing 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud)); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 363.

As discussed above, where a RICO plaintiff relies upon mail and wire fraud as the predicate acts of racketeering, the fraud allegations must be pled with particularity in accordance with Rule 9(b). While the heightened pleading standard of Rule 9(b) does not appear to apply to RICO elements other than a fraudulent predicate offense, those elements must still meet the general requirements of Federal Rule of Civil Procedure 8 as applied in *Twombly. In re Ins. Brokerage Antitrust Litig.*, Nos. 04-5184/05-1079, 2007 U.S. Dist. LEXIS 73220, 2007 WL 2892700, at * 8 (D.N.J. Sept. 28, 2007) [*30] (collecting cases). [4]

> 4 Still, where "a plaintiff's claims as to any element other than the predicate offense interrelates with a fraudulent conduct that the plaintiff asserts to be the predicate offense, e.g., if the 'how' aspect of the fraud is based on defendant's use of an enterprise structure--it would indeed be anomalous for the plaintiff not to plead the structure aspect of the enterprise element with particularity while setting forth plaintiff's claims as to the enterprise but to plead the very same structure aspect with particularity while setting forth plaintiff's claims as to the predicate offense." *In re Ins. Brokerage Antitrust Litig.*, Nos. 04-5184/05-1079, 2007 U.S. Dist. LEXIS 25632, 2007 WL 1062980, at *6 n.4 (D.N.J. Apr. 5, 2007); *see also In re Ins. Brokerage*, 2007 U.S. Dist. LEXIS 73220, 2007 WL 2892700, at * 8 n.6.

b. Defendants' RICO Arguments

Beyond their law-of-the-case argument, which this Court rejected *supra*, Defendants challenge VSC's standing, "enterprise" allegations, and "conduct" allegations as to Macedo-Bilynsky's role in the alleged scheme. Further, if VSC cannot show a RICO violation, Defendants argue that VSC cannot show a RICO conspiracy. Defendants also contend that certain factual allegations made by VSC have [*31] been disproved by discovery in the *Moreira* action.

With regard to standing, Defendants contend that VSC has not suffered an injury to its business or property that was proximately caused by a RICO violation, as required by 18 U.S.C. § 1964(c), because VSC has not presented allegations or proof of a concrete financial loss, *see Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000). Defendants argue that, "VSC was the insurer for Moreira's October 1, 2005, injury at the jobsite run by MCC under one of the two policies. As things currently stand VSC has paid exactly what it should have paid, VSC's entire injury rests upon the presumption that some day another court will find that Moreira was not an employee and that a court will also then find that VSC was misled." (Macedos Defs.' Br. at 23.)

As for VSC's "enterprise" allegations, Defendants assert that VSC has not shown the structure, purpose, and function that the Supreme Court held in *Boyle v. United States*, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) were necessary to show an association-in-fact enterprise. According to Defendants, VSC's allegations "state[], on its face, that the alleged 'enterprise' was essentially the employees and owners of MCC running [*32] the affairs of MCC as best as they knew how. There is no allegation of the running of criminal enterprise qua criminal enterprise." (Macedos Defs.' Br. at 25.) VSC has done nothing more, Defendants contend, than "[s]imply assert[] that some of the members of the enterprise haphazardly engaged in acts that plaintiff has decided it does not like . . . ." (*Id.*) Defendants contend that VSC's allegations fail to show that Defendants acted in concert, or that Macedo-Bilynsky did anything more than make reasonable, *ad hoc* business decisions to file insurance claims for workers' compensation on behalf of an MCC employee.

On the matter of "conduct," Defendants challenge VSC's assertion that Macedo-Bilynsky "directed" the enterprise, noting that Macedo-Bilynsky played no part in the Peixoto-Moreira hospital meeting or Moreira's workers' compensation and state court filings. Moreover, Defendants note that statements made in Macedo-Bilynsky's legal filings before the New Jersey Division of Workers' Compensation and the Superior Court in the *Moreira* action were made with the advice of legal counsel provided by VSC, who initially provided legal counsel for Defendants in these proceedings.

In addition [*33] to these arguments, Defendants contend that discovery in the *Moreira* action has revealed that Moreira did receive a $367.50 check from CCS, which matches the amount stated in the W-2 tax form. (Macedos Defs.' Br. at 13.) This fact, Defendants contends, reveals VSC's fraud claims as nothing more than a conspiracy theory.

c. Analysis & Conclusion

After carefully reviewing VSC's Amended Complaint and RICO Statement, and upon careful consideration of Defendants' arguments, the Court concludes that VSC has sufficiently alleged particularized facts that, presumed true, state a RICO claim against Macedo-Bilynsky. VSC has provided detailed allegations that Macedo-Bilynsky, as the co-manager of MCC who mailed and/or wired the allegedly false insurance claims and supporting documentation, directly participated in the conduct of the enterprise's affairs. VSC has alleged facts that plausibly support the existence of an association-in-fact enterprise, consisting of Macedo-Bilynsky, Macedo, Moreira, Peixoto, MCC, and CCS, that conspired to create a construction agreement and an employment relationship in order to obtain insurance coverage for the injuries Moreira sustained at the Parsonage Lot Property [*34] on October 1, 2005. VSC's allegations indicate that Defendants acts were coordinated, had shared purposes in procuring insurance benefits and avoiding liability, and that each Defendant played a part in the enterprise. VSC's allegations also indicate that VSC has suffered a concrete injury of more than $300,000.

Accepting VSC's allegations as true, Defendants engaged in the following fraudulent acts: (1) informing Moreira, while in the hospital, that MCC would cover the expenses of his injuries (Peixoto); (2) submitting insurance claims in October 2005 asserting that Moreira was an MCC employee (Macedo-Bilynsky); (3) preparing a putative 2004 construction agreement after-the-fact to make it appear that MCC was the contractor on the project (Macedo, Peixoto) and (4) submitting the same to VSC in January 2007(Macedo-Bilynsky); submitting a false W-2 tax form to VSC in January 2007 (Macedo-Bilynsky); (5) arranging a February 2008 meeting with Moreira and his actual employer, Dominick Reis, at the restaurant "Churrasqueira Bairrada" for purposes of persuading Moreira to accept the workers' compensation benefits and abandon the state court action against co-Defendants (Macedo); and (6) making [*35] false filings before the New Jersey Division of Workers' Compensation in and the Superior Court in the *Moreira* action that continued the enterprise's contention that Moreira was an MCC employee on the date of his injury (Macedo-Bilynsky). Among these allegations of fraud, VSC has averred that Macedo-Bilynsky committed four predicate acts of mail and/or wire fraud, consisting of her October 2005 mail and/or wire submissions of the insurance claims containing false statements and her January 2007 mail and/or wire submissions of the W-2 tax form and the 2004 putative construction contract. Although some of VSC's allegations lack exact dates (e.g., when the putative agreement was executed, when the restaurant meeting took place), VSC's allegations on the whole allege with significant precision the relevant *who, what, where, when*, and *how* for each of these acts. Furthermore, VSC alleges specific circumstantial facts that, presumed to be true, permit a reasonable inference that each Defendant acted with scienter in committing the aforementioned acts. For instance, VSC alleges: (a) that Moreira was a full-time employee of D. Reis Contracting at the time of his injuries; (b) that Moreira was [*36] hired by Peixoto to perform carpentry services for $7,500 and began work on September 24, 2005; (c) that Moreira and Covas were paid for their services at the Parsonage Lot Property by a personal check from Peixoto's bank account; (d) that neither Moreira nor Covas ever received payment from MCC or CCS; (e) that the Tewksbury Township construction permits indicate that Peixoto was the general contractor for the residential construction project; (f) that MCC represented on its insurance applications that it only performed commercial concrete construction work; and (g) that the putative 2004 construction agreement between MCC and Peixoto listed the Parsonage Lot Property as Peixoto's mailing address, despite the fact that the residence had not been completed and was not habitable at the time of the alleged construction agreement. (*See* RICO Statement at 5-9.) VSC also proffers an explanation for *why* Defendants engaged in this scheme to avoid liability: because Peixoto did not have a homeowner's insurance policy to cover the incident. (*Id.* at 10.) The Court further notes that, according to the Amended Complaint, many of Defendants are related through marriage.

Importantly, VSC has alleged [*37] particular facts permitting the reasonable inference that Macedo-Bilynsky acted with scienter. Specifically, VSC alleges that Macedo-Bilynsky, a co-manager of MCC with knowledge of the daily administration of MCC's business, completed and submitted (via a broker) an insurance claim to VSC on October 5, 2005, that stated that Moreira was hired by MCC on the date of loss, October 1, 2005, when Moreira and Covas began work on the Parsonage Lot Property the week before, and Covas had been paid for prior services by Peixoto's personal check. Furthermore, more than a year after the incident, Macedo-Bilynsky's answer to the workers' compensation administrative proceedings omitted responses, or simply stated "under investigation," in response to basic questions regarding Moreira's employment and injury, [5] certification to the Superior Court attested, upon personal information. Meanwhile, more than two years after the incident, Macedo-Bilynsky certified to the Superior Court, upon her knowledge and belief, similar statements to those she made on the insurance claims in October 2005, namely that Moreira was an MCC employee on the date of his injury, and that he was paid by CCS. (Am.

Compl. ¶¶ [*38] 119-127.) As noted in both the Amended Complaint and the RICO Statement, Moreira's certification to the Superior Court in the Moreira action categorically denied an employment relationship with MCC and CCS at the time of his injury. (*Id.* ¶ 153; RICO Statement at 11-12.) Presuming these facts to be true, as this Court must on a motion to dismiss, one can reasonably infer, in light of the aforementioned allegations, that the statements in the insurance claim, the answer, and the certification were not a simple mistakes or mere coincidences.

> 5 According to the Amended Complaint, Macedo-Bilynsky's answer in the workers' compensation administrative proceeding omitted responses to the questions "Petitioner was employed on the date alleged in the petition," and "Arose out of and in the course of employment," and responded "Under investigation" to the questions "How injury occurred," "Where injury occurred," "Petitioner's occupation," and "Date Respondent had knowledge and notice of injury." (Am. Compl. ¶ 119.) An addendum to the answer indicated that "Respondent puts petitioner to his proofs regarding employment, causation, and the nature and extent of permanent disability." (*Id.* ¶ 121.)

With [*39] regard to Defendants' argument that VSC does not have standing, because it has not suffered a concrete injury, Defendants improperly ask this Court to draw an adverse inference that VSC's allegations are false. Not only do Defendants ask this Court to presume that the Parsonage Lot Property construction project was "run" by MCC, but Defendants ask this Court to conclude that VSC has only alleged a breach of contract, because no court has made a determination regarding Moreira's employment status or a finding of fraud at this time. (*See* Macedos Defs.' Br. at 23-24.) Yet such conclusions would turn pleading standards on their head by making VSC present proof in order to survive a motion to dismiss. Contrary to Defendants' arguments, VSC does not allege that Defendants simply breached a contract. Nor does VSC allege that MCC *ran* the construction project at the Parsonage Lot Property. Rather, VSC alleges that Defendants conspired to treat Moreira as an MCC employee, while knowing that he was not an MCC employee, and knowing that MCC was not the contractor for the Parsonage Lot Property. VSC alleges that Defendants concocted this scheme in order to receive insurance benefits and avoid liability [*40] for Moreira's fall. As noted above, this Court finds that VSC has alleged facts with particularity that would support this inference. At the motion to dismiss stage, this Court must accept such well-pleaded facts to be true. Accepting these allegations as true, Defendants have engaged in insurance fraud, and VSC has suffered actual losses consisting of $284,697.97 in unwarranted workers' compensation benefits that it paid to Moreira and $31,891.97 that it paid defending Defendants in the *Moreira* action. VSC need not *prove* fraud and damages at this stage, and this Court is satisfied that VSC's allegations of fraud and damages satisfy the pleading requirements of Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6).

Turning to Defendants' attack on VSC's "enterprise" pleadings, the Court notes that the Supreme Court abandoned strict structural requirements in *Boyle*, concluding instead "that the 'enterprise' element of a § 1962(c) claim can be satisfied by showing a 'structure,' that is, a common 'purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 368. [*41] The *Boyle* Court described an association-in-fact enterprise as follows:

> an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods--by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Boyle, 129 S. Ct. at 2245-46. The Third Circuit recently [*42] explained that, "[A]fter *Boyle*, an association-in-fact enterprise need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent of the group's pattern

of racketeering activity." *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d at 368 (quoting *United States v. Hutchinson*, 573 F.3d 1011, 1021 (10th Cir. 2009)). Here, VSC alleges that Macedo-Bilynsky acted as MCC's liaison with the insurance company, Macedo and Peixoto forged a construction agreement, and Moreira willfully assumed the role of MCC employee to accept workers' compensation benefits. The Defendants' alleged acts, while occasionally *ad hoc*, were dependant on one another, were united in purpose, and have continued to play out over the past five years, with Defendants maintaining their positions in both state and federal litigation. Accepting VSC's well-pleaded allegations as true, this Court concludes that VSC has shown the existence of an enterprise, consisting of an informal family business decision-making structure, whose members acted in concert and with a shared purpose, and of sufficient longevity to pursue the goals of the enterprise. *Boyle* requires nothing [*43] more at this stage.

The Court is also persuaded that the predicate acts alleged by VSC satisfy the relatedness and continuity requirements for a "pattern of racketeering activity," as set forth by the Supreme Court in *HJ Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *HJ Inc.*, 492 U.S. at 240. Continuity, meanwhile,

> is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept--and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks [*44] or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

Id. at 241-42 (citations omitted). The Third Circuit has recognized that *HJ Inc.* abandoned more formalistic inquiries determined by the number of victims and/or transactions. *Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989) ("The Supreme Court's unequivocal rejection of the multiple scheme rationale makes it unlikely that the limited number of persons alleged to be victims of a scheme establishes as a matter of law that a plaintiff has failed to plead a RICO pattern."). *HJ Inc.* emphasized that "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." 492 U.S. at 242. Applying *HJ Inc.*, the Third Circuit in *United States v. Pellulo* found that a 19-month series of predicate acts presented a jury question on the issue of continuity, even though "with the exception of the $114,000 diversion, the [*45] racketeering activity charged in the indictment revolved around a single, apparently finite, scheme to defraud [a savings and loan association]." 964 F.2d 193, 210 (3d Cir. 1992) (noting that *HJ Inc.* specifically rejected the requirement of multiple schemes, and stating "[u]ltimately . . . continuity is a factual issue for the jury"). Similarly, in *Swistock*, the Third Circuit found that allegations of a 14-month series of mail fraud predicate acts, which were designed to induce a lease agreement and continuing lease payments, were sufficient to survive a motion to dismiss. *Swistock*, 884 F.2d at 759. In doing so, the *Swistock* court observed that, while some pleadings might warrant dismissal prior to discovery, "in many cases plaintiffs will be able to withstand a facial attack on the complaint and have the opportunity to have their pattern allegations threshed out in discovery. It may be that many of these issues will then be susceptible to resolution via summary judgment." *Id.* at 758.

This Court finds *Pellulo* and *Swistock* instructive. Unlike *Pellulo*, this case has not yet reached a fact-finding stage. [6] VSC has alleged fraud, including the predicate acts of mail and wire fraud, with [*46] particularity. Accepting these allegations as true, Macedo-Bilynsky committed at least four predicate acts of mail and/or wire fraud to further the scheme to procure improper insurance benefits over a fifteen-month period, October 2005-January 2007. However, this Court's review of continuity is not constrained by the time period of the predicate acts. As the Third Circuit later clarified in *Tabas v. Tabas*, the continuity inquiry focuses more broadly "on the duration of the underlying scheme." 47 F.3d 1280, 1294 (noting that the "scheme or artifice to defraud" was an element of the predicate act of mail fraud under 18 U.S.C. § 1341); *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1414 (3d Cir. 1991) ("[T]he continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice.

Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis."). Looking more broadly at the underlying fraudulent scheme, VSC has alleged with particularity numerous instances of fraud occurring over a 29-month period, October 2005--March 2008, and ostensibly continuing [*47] today, with Defendants continuing to claim entitlement to the insurance benefits. The Court further notes that, while VSC's allegations assert a single, over-arching scheme to acquire insurance benefits and avoid liability, the alleged result has been the provision of two different kinds of insurance benefits: (1) workers' compensation benefits to Moreira, and (2) indemnification of the legal expenses MCC incurred defending against the *Moreira* action. Whether the Court focuses on the narrow time-frame of the alleged predicate acts, or the more expansive time-frame of the continuing fraudulent scheme, the Court is persuaded that VSC has sufficiently alleged facts that, presumed true, would permit a finding of closed-period continuity. [7]

6 *Pellulo* involved the appeal of a jury verdict. The Third Circuit found that the allegations in the indictment were legally sufficient to permit a finding of continuity, and thus did not preclude retrial of the RICO count. *Pellulo*, 964 F.2d at 210.

7 The Court would make the same continuity finding even if it excluded from consideration the predicate act involving the allegedly fraudulent W-2 tax form submitted in January 2007. As noted above, Defendants [*48] have argued that discovery in the *Moreira* action has shown this allegation to be false. Specifically, Defendants cite deposition testimony and exhibits showing that Moreira received and cashed a check from MCC that they claim matches the amount reported in the W-2 form. However, it would be improper for this Court to decide such an issue of fact at the pleadings stage. Furthermore, the Court is not persuaded by Defendants' evidentiary proffer that VSC has alleged this predicate act in bad faith. Assuming *arguendo* the fact that Moreira received and cashed a check from MCC (and ostensibly not CCS as Defendants contend), and the fact that this amount matches the amount listed on the W-2 form, these facts alone would not reveal VSC's fraud allegations to be a house of cards. For instance, the paycheck does not dispose of the anomaly that Moreira would be hired by MCC and paid for work only on the third day of work, which coincidentally was the date of loss. Although it is not for this Court to speculate regarding Defendants' conduct, one could reasonably infer from VSC's other allegations that Defendants issued the small paycheck and matching W-2 tax form to make the employment relationship [*49] appear legitimate.

Finally, to the extent that Defendants contend that VSC's pleadings fail to allege facts supporting the conclusion that Macedo-Bilynsky engaged in RICO "conduct," the Court notes that VSC does not have to allege facts showing that Macedo-Bilynsky *directed* the operation, or was the ring-leader. Rather, the Supreme Court has stated that "conduct" only requires that "one has participated in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184. Such participation must be related to the "pattern of racketeering activity." Applying *Reves*, the Third Circuit in *In re Insurance Brokerage Antitrust Litigation* explained that "the nexus element requires a plaintiff to show that the defendant participated in the conduct of the enterprise's affairs . . . through--that is, 'by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of'--a pattern of racketeering activity." 618 F.3d at 372 (internal citation omitted). Here, VSC has [*50] alleged with particularity that Macedo-Bilynsky, a co-manager of MCC with knowledge of the daily administration of MCC's affairs, knowingly completed and submitted through an insurance broker fraudulent insurance claims to achieve the enterprise's scheme of procuring unwarranted insurance benefits and avoiding liability for Moreira's injuries. VSC further alleges that Macedo-Bilynsky committed later fraudulent acts in forwarding a false 2004 construction agreement and a false W-2 tax form, as well as her answer and certification in the workers' compensation and *Moreira* proceedings. This alleged pattern of fraudulent acts directly contributed to the enterprise's alleged fraudulent scheme. Accepting these well-pleaded facts as true, VSC has shown that Macedo-Bilynsky participated in the operation and management of the enterprise through a pattern of racketeering activity. [8]

8 The Court is sensitive to Defendants' claim that their legal filings were made under the advice of counsel provided by VSC. However, accepting VSC's allegations as true, the alleged misrepresentations concern issues of fact (i.e., whether MCC was the contractor on the project, whether MCC hired Moreira before the [*51] injury) that would be within Defendants' particular knowledge. Furthermore, as this Court explains in its discussion of the litigation privilege and *Noerr-Pennington* doctrines, *infra* Part IV.C,

none of Defendants' legal filings are vital to VSC's insurance fraud claims.

2. State Law Claims

VSC's Amended Complaint presents the following state law claims against all Defendants: (1) insurance fraud in violation of N.J. Stat. Ann. § 17:33A-1 et seq.; (2) workers' compensation fraud in violation of N.J. Stat. Ann. §§ 34:15-1 et seq. and 34:15-57.4; (3) common law fraud; (4) unjust enrichment; and (5) civil conspiracy. Judge Buchsbaum considered VSC's counterclaim pleadings for each of these claims in the *Moreira* action and decided that VSC stated claims for each of these violations. This Court has reviewed VSC's pleadings under the standards of Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6), and this Court agrees with Judge Buchsbaum that VSC has stated proper claims for relief.

a. N.J. Stat. Ann. § 17:33A-1 et seq., Insurance Fraud

The New Jersey Insurance Fraud Prevention Act (IFPA) prohibits the following acts:

> (a)(1) Presents or causes to be presented any written or oral statement [*52] as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy . . . knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim; or
>
> . . .
>
> (3) Conceals or knowingly fails to disclose the occurrence of an event which affects any person's initial or continued right or entitlement to (a) any insurance benefit or payment or (b) the amount of any benefit or payment to which the person is entitled;
>
> (4) Prepares or makes any written or oral statement, intended to be presented to any insurance company or producer for the purpose of obtaining: . . . (b) an insurance policy, knowing that the statement contains any false or misleading information concerning any fact or thing material to an insurance application or contract; or
>
> (5) Conceals or knowingly fails to disclose any evidence, written or oral, which may be relevant to a finding that a violation of the provisions of paragraph (4) of this subsection a. has or has not occurred.

N.J. Stat. Ann. § 17:33A-4(a)(1)-(5); *see also Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 172, 892 A.2d 1240 (2006). VSC has alleged facts permitting the inference that [*53] each Defendant, including the corporate Defendants through their officers, violated IFPA provisions. To recap the key elements of VSC's fraud claims against Defendants, VSC alleges that Defendants Macedo (claim questionnaire in October 2005) and Macedo-Bilynsky (insurance claims in October 2005) knowingly submitted or caused to be submitted statements containing materially false information in support of claims for benefits under MCC's insurance policies. [9] VSC alleges that Peixoto and Macedo prepared a writing containing materially false statements (2004 construction agreement) in order to support MCC's insurance claims on Moreira's behalf. Meanwhile, VSC alleges that CCS issued a false W-2 tax form, which Macedo-Bilynsky submitted to VSC to support the insurance claims. For the reasons discussed in the RICO section, *supra* Part IV.B.1, this Court finds that VSC has alleged the instances of fraud with particularity. Consequently, the Court finds that VSC has stated a claim against all Defendants under the IFPA.

9 Moreira contends that VSC's claims against him must be dismissed because his only alleged act was a misrepresentation of his employment status, which is not actionable as fraud. [*54] Moreira's position relies on Judge Greenaway's September 29, 2009 opinion. However, as this Court explained in its discussion of the law of the case doctrine, *supra* Part IV.A, the disputed portion of Judge Greenaway's opinion does not contemplate the breadth of VSC's particularized allegations of fraud, and therefore does not control here. VSC has alleged that Moreira, in October 2005, stated he was an MCC employee on a questionnaire supporting his claim for benefits under MCC's workers' compensation insurance policy, but two years later in the *Moreira* action, Moreira certified that he was told of this arrangement while he was in the hospital, and that he never understood MCC to be his employer. Accepting these well-pleaded allegations and Moreira's admissions as true, in the context of the broader insurance fraud scheme alleged by VSC, the circumstances do not suggest that Moreira simply gave a mistaken lay opinion on a matter of law. Rather, one could reasonably conclude that Moreira knowingly participated in the fraudulent scheme by acknowledging an entire employment relationship that never existed. Judge Buchsbaum

ruled in his June 11, 2010 opinion that such conduct was actionable [*55] as fraud under New Jersey law. (Mills Decl. Ex. D at 14 (citing *Westervelt v. Demarest*, 46 N.J.L. 37, 40 (1884)).) This Court agrees.

b. N.J. Stat. Ann. §§ 34:15-1 et seq. & 34:15-57.4, Workers' Compensation Fraud

New Jersey's workers' compensation law provides that it shall be unlawful for a person to purposefully or knowingly "[m]ake[], when making a claim for benefits pursuant to R.S.34:15-1 et seq., a false or misleading statement, representation or submission concerning any fact that is material to that claim for the purpose of wrongfully obtaining the benefits." N.J. Stat. Ann. § 34:15-57.4(a)(1). As noted above, VSC alleges that Defendants submitted the aforementioned questionnaire, insurance claims, false W-2 tax form, and false construction contract as part of an on-going scheme to secure workers' compensation benefits for Moreira from MCC's insurance policy. VSC has alleged the incidences of fraud with particularity. Accordingly, the Court finds that VSC has stated a claim against all Defendants under New Jersey's workers' compensation law.

c. Common Law Fraud

Under New Jersey law, the elements of common law fraud are: "(1) a material misrepresentation of a presently existing [*56] or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 172-73, 876 A.2d 253 (2005) (quoting *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350 (1997)). As noted above, VSC alleges that Defendants submitted the aforementioned questionnaire, insurance claims, false W-2 tax form, and false construction contract as part of an on-going scheme to secure workers' compensation benefits for Moreira from MCC's insurance policy. Presuming the allegations to be true, these acts involved material misrepresentations of present and/or past facts, with knowledge of the falsity of these statements, with an intention that VSC would rely on the statements, leading VSC to reasonably rely on the statements and suffer damages by paying unwarranted insurance benefits. VSC has alleged the elements of the fraud with particularity, and has pled sufficient facts to permit a reasonable inference that Defendants acted with knowledge of the statements' falsity and intent that VSC would rely on the statements. Thus, the Court finds that [*57] VSC has stated a claim against all Defendants for common law fraud.

d. Unjust Enrichment

To state a claim for unjust enrichment under New Jersey law, "a plaintiff must show that defendant received a benefit and that retention of that benefit without payment would be unjust." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994) (citations omitted). Here, VSC alleges that Defendants jointly committed fraudulent acts to procure two forms of insurance benefits: (1) workers' compensation benefits for Moreira, and (2) indemnification for MCC's legal defense expenses arising from Moreira's workers' compensation and state court claims. Accepting these well-pleaded and particularized allegations as true, all Defendants benefitted from this scheme--Moreira received workers' compensation benefits, Peixoto temporarily avoided liability, and the Macedos Defendants received money for their legal expenses. Retention of these benefits would be unjust in light of the alleged insurance fraud scheme. Therefore, the Court finds that VSC has stated a claim against all Defendants for unjust enrichment.

e. Civil Conspiracy

Civil conspiracy in New Jersey consists of "a combination of two or more persons acting [*58] in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." *Banco Popular*, 184 N.J. at 177 (quoting *Morgan v. Union County Bd. of Chosen Freeholders*, 268 N.J. Super. 337, 364, 633 A.2d 985 (App. Div.1993)). A plaintiff need not show an express agreement. "It is enough [for liability] if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Banco Popular*, 184 N.J. at 177 (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988)). "Most importantly, the gist of the claim is not the unlawful agreement, but the underlying wrong which, absent the conspiracy, would give a right of action." *Banco Popular*, 184 N.J. at 177-78 (internal quotation marks and citations omitted). VSC's pleadings assert that Defendants formed an enterprise to secure unwarranted insurance benefits and acted in concert to achieve those goals. Accepting VSC's well-pleaded allegations as true, Defendants had knowledge of the general objectives of the scheme [*59] and implicitly agreed to participate in the scheme. As a result, VSC avers that it has sustained actual damages in excess of $300,000. Absent this conspiracy, the alleged independent acts of insurance fraud would be actionable. Consequently, the Court concludes that VSC has stated a claim for civil conspiracy against all Defendants.

3. Declaratory Judgment Claims

VSC's declaratory judgment claims present alternative grounds for relief, because they seek to rescind MCC's insurance policies on the grounds of fraud in the application and fraud in the submission of claims. The latter fraud-in-the-submission claims speak to the same misconduct alleged by VSC's other fraud claims. The Court concludes that VSC has stated a claim for relief on these claims, because, as noted above, this Court finds that VSC has alleged these fraud claims with particularity. However, the fraud-in-the-application claims appear to presume alternative circumstances wherein MCC actually was the contractor on the Parsonage Lot Property. In that event, VSC alleges that MCC knowingly concealed that it performed work on residential projects when its insurance application stated that MCC worked exclusively on commercial [*60] concrete construction projects. VSC contends that such an omission would be material, and that it relied on MCC's application representations to its detriment. So far as the Court can tell, Defendants do not appear to present distinct arguments supporting dismissal of VSC's declaratory judgment claims. The Court finds no sound basis to dismiss these alternative claims at this time.

C. Litigation Privilege & Noerr-Pennington Doctrine

The last substantive points this Court must address with regard to VSC's fraud claims are Defendants' arguments that the litigation privilege and *Noerr-Pennington* doctrine bar the portions of VSC's claims that are predicated on Defendants' legal filings in the workers' compensation and *Moreira* proceedings. [10] Defendants construe VSC's Amended Complaint to treat these legal filings as separate actionable frauds, which must be struck on First Amendment and privilege grounds. However, this piecemeal deconstruction of VSC's claims overstates the import of these allegations. So far as the Court can tell, VSC does not contend that Defendants' legal filings in and of themselves constitute actionable instances of fraud. Rather, VSC contends that Defendants designed [*61] a scheme to obtain insurance benefits, that Defendants knowingly made material misrepresentations and created false documents to accomplish this goal, and *then* when Moreira filed the workers' compensation and *Moreira* proceedings, the Macedos Defendants maintained these representations in their legal filings in an attempt to preserve the underlying scheme, while Moreira categorically rejected them.

> 10 The litigation privilege in New Jersey refers to an absolute privilege and immunity that is accorded to "[a] statement made in the course of judicial, administrative, or legislative proceedings . . . . That immunity is predicated on the need for unfettered expression critical to advancing the underlying government interest at stake in those settings." *Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 563, 569 A.2d 793 (1990) (citations omitted). This privilege applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Hawkins v. Harris*, 141 N.J. 207, 216, 661 A.2d 284 (1995). The *Noerr-Pennington* doctrine derives from [*62] the Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) ("*Noerr*"), and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965) ("*Pennington*"), which recognized that an individual is immune from liability for exercising his or her First Amendment right to petition the government. *See, e.g., Barnes Found. v. Twp. of Lower Merion*, 242 F.3d 151, 159 (3d Cir. 2001).

Each of VSC's fraud claims, including RICO, could stand on its own in the absence of the allegations concerning Defendants' legal filings. Accepting the allegations as true, there would still be sufficient red flags--such as MCC's statement of an exclusively commercial concrete business on its insurance applications, the Tewksbury construction permits, the assertion that Moreira was hired on the day of loss as opposed to the day he began work, and the address on the putative construction contract--to permit the reasonable inference that Defendants engaged in insurance fraud. The legal filings do not make or break VSC's fraud claims. However, Defendants' statements in legal filings might have evidentiary value in revealing the true nature of Defendants' conduct and [*63] motives throughout the alleged scheme. Under these circumstances, the germane question is whether the litigation privilege and *Noerr-Pennington* doctrines preclude VSC from presenting evidence of Defendants' legal filings to support their claims of insurance fraud. The parties' briefs do not adequately address this discrete issue, and this Court need not issue a final ruling on this evidentiary issue at the pleadings stage. The parties will have an opportunity to address these issues either at the summary judgment stage or through pre-trial motions *in limine*.

D. Summary

For the aforementioned reasons, the Court finds that VSC has pled RICO and state law fraud claims with sufficient particularity to survive dismissal at this stage. The

Court agrees with Judge Buchsbaum that Judge Greenaway's September 29, 2009 opinion does not control the amended claims, and that the litigation privilege and the *Noerr-Pennington* doctrine does not bar VSC's claims. Consequently, the Court will deny Defendants' renewed motions to dismiss. Today's ruling only addresses the sufficiency of the pleadings. Naturally, VSC will need to present adequate proofs to permit a reasonable fact-finder to conclude that [*64] VSC has shown the requisite elements of each of its fraud claims in order to survive any subsequent motions that may be brought after discovery. The parties are directed to contact the Magistrate Judge to set a scheduling conference.

V. REAL PARTY IN INTEREST

During the briefing of the renewed motions to dismiss, Defendant Peixoto filed a reply brief that challenged VSC's interest in the insurance claims, arguing that VSC concealed the real party in interest. From the parties' representations, it appears that, in November 2006, VSC assigned its rights and responsibilities under its insurance policies to Old Republic Construction Program Group, Inc., (ORCPG) and authorized ORCPG to sue or defend in VSC's name in actions arising from VSC's insurance policies. VSC submits that this case was brought in VSC's name at the direction of ORCPG, as contemplated under the assignment agreement. (VSC Letter of Dec. 7, 2010 & Ex. 1 ("Assignment Agreement").)

Peixoto has not shown that VSC lacks a real interest in the outcome of these proceedings. Federal Rule of Civil Procedure 17(a)(1) states that "[a]n action must be prosecuted in the name of the real party in interest." "This rule requires that [*65] the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996). This rule serves "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17, Advisory Committee Note. Defendants do not appear to dispute that VSC issued the relevant insurance policies, or that VSC began payment of the workers' compensation benefits under the insurance policies. "It is settled law that an insurer, whether it has paid all of the loss or only part of the loss, is a real party in interest under Rule 17(a)." *Hancotte v. Sears, Roebuck & Co.*, 93 F.R.D. 845, 846 (E.D. Pa. 1982) (collecting cases). Furthermore, it appears that the Assignment Agreement authorized ORCPG to sue or defend in VSC's name in cases arising under VSC's insurance policies. The Court concludes that Peixoto has not made a proper showing that VSC is not a real party in interest at this time. [11]

> 11 Even if Defendants had made a proper showing that VSC was not a real party [*66] in interest, the appropriate remedy would be to allow a reasonable time for the joinder of a real party in interest, not dismissal. *See* Fed. R. Civ. P. 17(a)(3) ("The Court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action.").

VI. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' renewed motions to dismiss. An appropriate form of order accompanies this Memorandum Opinion.

Dated: May 6, 2011

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 6

LEXSEE

Cited
As of: Jun 21, 2011

LIONEL THOMAS, and HAZEL THOMAS, Plaintiffs, v. ROSS & HARDIES, and PHOENIX FINANCIAL SERVICES, INC., Defendants.

Civil Action No. AW-97-2284

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

9 F. Supp. 2d 547; 1998 U.S. Dist. LEXIS 8645

June 10, 1998, Decided
June 10, 1998, Opinion Filed

DISPOSITION: [**1] Defendant's motion to dismiss the second amended complaint [20-1] DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff homeowners filed an action against defendants, partnership law firm (firm) and mortgage broker, seeking damages under 18 U.S.C.S. § 1964(c) for diverting mortgage proceeds through a pattern of racketeering activity. The firm filed a motion to dismiss the homeowners' second amended complaint.

OVERVIEW: The homeowners alleged that one of the firm's partners and a client ran a scheme whereby the partner and client persuaded homeowners to mortgage their homes and turn over the proceeds to the mortgage broker. The partner allegedly helped direct the recruitment of homeowners and mortgage lenders and helped direct the fraudulent transfers of the mortgage proceeds. The homeowners filed an action seeking damages under § 1964(c). The court held that the complaint alleged facts sufficient to (1) satisfy the pattern requirement of 18 U.S.C.S. § 1962(c) because the acts strongly suggested a long-term scheme; and (2) suggest the homeowners were entitled to relief based on the partner's alleged conducting of an enterprise's affairs. The court found that the firm could be held liable for its partner's acts because the non-identity rule was not implicated and partnership liability served Congress' goals of deterrence and compensation of victims. The court ruled that the causation requirement was met because, if the partner committed predicate acts by directing the transfers of money, those acts were a cause of the claimed injuries.

OUTCOME: The court denied the firm's motion to dismiss the homeowners' second amended complaint.

CORE TERMS: homeowner, mortgage, racketeering activity, partnership liability, partnership, law firm, vicarious liability, predicate acts, aiding and abetting, non-identity, antitrust, partner, line of credit, fraudulent, helped, involvement, summary judgment, oral argument, negligent misrepresentation, professional services, indirectly, favorable, directing, long-term, lenders, entity, cause of action, period of time, respondeat superior, apparent authority

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN1]In considering a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiffs, and its allegations taken as true.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
[HN2]A motion to dismiss under Fed. R. Civ. P. 12(b)(6) may only be granted if the non-movant cannot prove any set of facts that would entitle her to relief. In considering a motion to dismiss, the complaint must be construed in

the light most favorable to the plaintiff and its allegations taken as true.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN3]See 18 U.S.C.S. § 1962(c).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN4]The elements of an 18 U.S.C.S. § 1962(c) violation are (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN5]To state a claim for a violation of 18 U.S.C.S. § 1962(c), a plaintiff must allege a pattern of racketeering activity. 18 U.S.C.S. § 1961(1) defines "racketeering activity" as an act chargeable under any of the individual state and federal crimes listed in § 1961(1). To have a "pattern of racketeering activity" there must be at least two acts of racketeering activity. 18 U.S.C.S.§ 1961(5). While two acts are the minimum requirement, two acts often are insufficient because two of anything do not generally form a "pattern."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN6]The key to establishing a pattern of predicate acts is not the number of acts; rather, it is the relationship the acts bear to each other or to an external principle, plus the "threat of continuing activity." The need for at least a threat of continuing activity is important because Congress was concerned in RICO with long-term criminal conduct. There are two different types of conduct that satisfy the continuity requirement, one in which the acts occur during a closed but extended period of time, and another in which the acts by their nature project a threat of future repetition.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN7]Whether certain acts pose a threat of continued activity depend on the specific facts of each case.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN8] 18 U.S.C.S. § 1962(c) only imposes liability on those who conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. In the "operation or management" test for § 1962(c), the necessary amount of control of the enterprise's activity is that one must have some part in directing the affairs of the enterprise. Mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN9]For purpose of the "operation or management" test for 18 U.S.C.S. § 1962(c), the operation of an enterprise is not limited to upper management and those under upper management's direction. Outsiders who exert control over the enterprise may also be liable. For example, an outsider who exerts control over an enterprise through the use of bribery may be liable.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN10]Under the "operation or management" test for 18 U.S.C.S. § 1962(c), there is no per se rule that one cannot operate or manage an enterprise via the provision of legal services. A person may violate § 1962(c) if he conducts the affairs of an enterprise, even though he does so through the provision of professional services. Because of the supportive nature of professional services, it is most often the case that lawyers and accountants do not conduct an enterprise's affairs. Nevertheless, there are situations in which the professional services provided strike at the very core of the enterprise and therefore the lawyer or accountant providing the services is managing or operating the firm.

Business & Corporate Law > Agency Relationships > Authority to Act > Apparent Authority > General Overview
Business & Corporate Law > Agency Relationships > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > Negligent Acts of Partners
[HN11]Under basic agency law, a principal is liable for torts committed by its agent if the agent acts with apparent authority. This is true even if the agent's act of fraud is committed solely to benefit the agent. The general rule of partnership liability is that a partner is an agent for the partnership, and a partnership is liable for the wrongful acts of its partners committed in the ordinary course of the business of the partnership. Rev. Unif. P'ship Act §§ 301, 305 (1994); Md. Code Ann. Corps. & Ass'ns § 9-305 (1997). With fraud claims, it is especially appropriate to hold a partnership liable when it benefited from the fraudulent acts of its partner.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Coverage
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Governments > Legislation > Interpretation
[HN12]Congress' intent is that 18 U.S.C.S. § 1962(c) be used to punish individuals who conduct the affairs of a business through a pattern of racketeering activity and that § 1962(c) is not targeted at the businesses that are innocent victims of racketeering activity. Nevertheless, RICO's civil provisions must be construed broadly in order to enforce RICO's remedial purposes.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
Governments > Legislation > Interpretation
Torts > Vicarious Liability > Employers > General Overview
[HN13]An employer may be held liable under agency principles when it benefits from violations of 18 U.S.C.S. § 1962(c) and is distinct from the enterprise.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
Governments > Legislation > Interpretation
[HN14]Imposing partnership liability under 18 U.S.C.S. § 1962(c) does not violate congressional intent. One must separate the concept of what constitutes a violation of § 1962(c) from which parties may be held liable under 18 U.S.C.S. § 1964(c) once an 18 U.S.C.S. § 1962(c) violation has been established. It is appropriate for a court to assume that traditional rules of agency law apply to a federal statute's civil liability provision when those traditional rules are consistent with the statute's purpose and when Congress has not indicated otherwise.

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN15]Holding a partnership liable for the RICO violations of its partner under doctrines of agency and partnership liability serves Congress' goal of deterring individuals from controlling organizations through a pattern of racketeering activity. Imposing liability under vicarious liability or partnership liability is consistent with RICO's compensatory goal. Holding a partnership liable when it benefits from the acts of its partners will prevent the partnership from being unjustly enriched and will help serve Congress's goal of compensating victims of racketeering activities.

Antitrust & Trade Law > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN16] 18 U.S.C.S. 1964(c) provides a civil remedy to people who have been injured in their business or property by a violation of 18 U.S.C.S. § 1962. The Fourth Circuit reads 18 U.S.C.S. § 1964(c) as requiring (1) an injury to business or property, and (2) that the injury was caused by the predicate acts of racketeering activity.

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview
Torts > Intentional Torts > General Overview
[HN17]The State of Maryland recognizes aiding and abetting tort liability. The defendant is liable if he encourages, incites, aids, or abets the acts of the direct perpetrator of the tort.

COUNSEL: Julian Karpoff, Esquire, Arlington, Virginia, for Plaintiffs.

Jacob A. Stein, Esquire, Washington, D.C., for Ross & Hardies, Defendant.

JUDGES: Alexander Williams, Jr., United States District Judge.

OPINION BY: Alexander Williams, Jr.

OPINION

[*550] **MEMORANDUM OPINION**

This case involves a complaint by homeowners who believe they were victimized by a scheme involving the diversion of mortgage proceeds. Currently pending before the Court is a motion to dismiss the second amended complaint filed by Defendant Ross & Hardies, a partnership law firm. A hearing was held in open court on November 24, 1997, and supplemental briefs were requested by the Court and received on May 1, 1998. For the reasons set forth below, the Court will deny Defendant's Motion.

Factual Background

[HN1]"In considering a motion to dismiss, the complaint must be construed in the light most favorable to the plaintiffs, and its allegations taken as true." Finlator v. Powers, 902 F.2d 1158, 1160 (4th Cir. 1990) (citing Jenkins v. McKeithen, 395 U.S. 411, 421-22, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)). A summary of the factual allegations [**2] set forth by the second amended complaint ("complaint") is as follows.

Plaintiffs are individual residents of Maryland, and bring this suit against Ross & Hardies, a partnership law firm, and Phoenix Financial Services, Inc. ("Phoenix"), a mortgage brokerage business. The complaint largely concerns the involvement of an attorney named Steven P. Kersner ("Kersner") in a financial program called the "7.5% Program." At all times relevant to the Complaint, Kersner was a partner at Ross & Hardies.

In the fall of 1994, Kersner and Ross & Hardies were retained by a man named Michael Clott ("Clott"). Clott previously was convicted of RICO violations, transportation of stolen securities, and bank and mail fraud. Clott was released from prison on supervised release in May 1994, a few months before he retained Kersner and Ross & Hardies. Part of Clott's supervised release was a consent order whereby he agreed not to engage in the financial securities business in Maryland. Clott retained Kersner and Ross & Hardies to provide Clott's company, Capital Financial Group, Inc. ("Capital"), a legal framework in which Clott could conduct business in the [*551] finance, securities, mortgage, and investment [**3] banking industries in Maryland.

In September 1994 Clott, acting through Capital, began a business relationship with Defendant Phoenix, which was in the mortgage brokerage business. Clott persuaded Phoenix and its owner and founder, Shirley Binion ("Binion"), to assist Clott in marketing his 7.5% Program ("Program") and to participate in the Program. Clott told Binion that the 7.5% Program worked as follows: Binion would help Clott solicit minority homeowners for the Program. The homeowners would mortgage their homes from third party mortgage companies for the maximum amount possible. The homeowners would then turn the proceeds of the mortgages over to Phoenix and Phoenix would then either pay off each mortgage in full or would purchase it from the mortgage company. In exchange for doing this, Phoenix would grant the homeowners a line of credit with a 7.5% interest rate. The rate would stay at 7.5% regardless of increases in the prevailing market rate. The homeowners were free to access the line of credit as frequently or infrequently as they wished, and could choose to never utilize it at all.

The gravamen of the complaint is that the 7.5% Program was a fraud. While homeowners did [**4] take out mortgages and turned proceeds over to Phoenix, the money was never used to pay off the mortgages and the homeowners never had access to lines of credit. Instead, the complaint alleges that Clott diverted the money and the homeowners were left with significant mortgages on their property. The scheme fell apart sometime during the summer of 1995, and both Clott and Kersner pled guilty to felony charges brought by the United States Attorney's office. Counsel informed the Court during oral argument that the two were confined to jail at least as of the date of oral argument.

Most relevant to the pending motion are the allegations as to the involvement of Kersner and Ross & Hardies. According to the complaint, Kersner was active in directing the operation of the Program, and allegedly played a key role in lending it credibility. He spoke with Binion early on, assuring her that he would "check, approve, and 'okay' everything that Clott advised her to do, so she would not have to be concerned about the appropriateness and legality of any transaction he suggested." Sec. Am. Compl. P 12. Once the scheme began, the complaint alleges that Kersner led Binion to believe that he and Ross [**5] & Hardies were providing Phoenix with legal representation concerning the operation of the Program, that this belief was essential in Binion's marketing of the Program, and that Kersner represented to some of the homeowners that he represented Phoenix. Sec. Am. Compl. PP 15-16.

The Complaint alleges other aspects of Kersner's and Ross & Hardies's involvement. For example, Kersner allegedly helped "pitch" the Program to legitimate mortgage lenders as early as December 1994, and allowed Clott to use the Ross & Hardies office in Washington, D.C. to conduct Capital's business. Sec. Am. Compl. P 17. Other attorneys at Ross & Hardies allegedly drafted consulting agreements that would allow Clott to advise

Phoenix without violating his consent order. Ross & Hardies attorneys are accused of helping Clott defend a parol violation investigation that was conducted by Maryland authorities. Id. For example, Kersner and John Fornaciaria ("Fornaciaria"), another Ross & Hardies partner, allegedly prepared paperwork and affidavits for Phoenix principals and Clott himself, all falsely representing the nature of Clott's involvement with Phoenix. Sec. Am. Compl. PP 26(a), (b). In fact, Fornaciaria [**6] is alleged to have visited Clott in jail and drafted affidavits for Clott exculpating the law firm. Sec. Am. Compl. P 28. Kersner allegedly wrote false letters on Ross & Hardies letterhead concerning Clott's sentencing. Sec. Am. Compl. P 18A. These acts were done even though Ross & Hardies attorneys, specifically Kersner and Fornaciaria, knew that they were misleading as to Clott's involvement in the business and that Clott's activities were fraudulent in nature. Sec. Am. Compl. PP 26(b), 29.

The Complaint also alleges that Kersner played a key role in perpetuating the scheme by meeting and assuring the victim homeowners. For example, Kersner helped resolve [*552] a problem that arose when Clott "whited-out" a limited endorsement on a check from a cautious homeowner. Sec. Am. Compl. P 19. Homeowners who were potential Program participants met with Kersner in Ross & Hardies's D.C. office and talked with him by phone, during which time Kersner assured them that the Program was legitimate and had Ross & Hardies's backing. Sec. Am. Compl. PP 20-22.

In addition, the complaint states that Kersner aided Clott in fraudulently transferring the loan proceeds to various bank accounts, opening empty [**7] accounts in the names of the participants to deceive them into believing that lines of credit had been established, preparing false documents to make it appear that the mortgages had been paid off, making monthly payments on some of the mortgages to conceal the fact that they had not been paid in full, telling lenders to contact Kersner with questions and not call the homeowners, and forging and altering certain checks. Sec. Am. Compl. P 30.

The complaint contains six counts. Count VI alleges a RICO violation, whereas Counts I through V allege state law claims for aiding and abetting fraud, aiding and abetting negligent misrepresentation, aiding and abetting conversion, negligent misrepresentation, and partnership liability.

Analysis

I. Motion to Dismiss

[HN2]A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may only be granted if the non-movant cannot prove any set of facts that would entitle her to relief. See Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). It bears repeating that "in considering a motion to dismiss, the complaint must be construed in the light [**8] most favorable to the plaintiffs, and its allegations taken as true." Finlator v. Powers, 902 F.2d 1158, 1160 (4th Cir.1990) (citing Jenkins v. McKeithen, 395 U.S. 411, 421-22, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)). Some materials outside of the pleadings have been submitted, but the Court has not considered them in its decision and therefore has not converted Defendants' motion into one for summary judgment. Rule 9(b) requires that plaintiffs plead fraud claims with particularity.

II. The RICO Claim

RICO's civil remedies section, 18 U.S.C. § 1964(c), provides a private cause of action for persons injured by a violation of § 1962. Although the complaint is not clear in relying on a specific section, it is evident from the briefs and oral argument that Plaintiffs allege a violation of § 1962(c). [HN3]Section 1962(c) makes it unlawful for:

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. [**9] § 1962(c). [HN4]The elements of a § 1962(c) violation are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985) (footnote omitted). Defendant argues that the complaint should be dismissed because it fails to allege sufficient facts to prove two of the elements of a § 1962(c) violation: A pattern of racketeering activity, and that Defendants conducted or participated in the affairs of the enterprise. In addition, Defendant argues Plaintiffs have not plead a RICO injury under § 1964(c).

A. Pattern of Racketeering Activity

[HN5]To state a claim for a violation of § 1962(c), a plaintiff must allege a pattern of racketeering activity. See Brubaker v. City of Richmond, 943 F.2d 1363, 1374 (4th Cir. 1991). Section 1961(1) defines "racketeering activity" as an act chargeable under any of the individual

state and federal crimes listed in § 1961(1). To have a "*pattern* of racketeering activity" there must be at least two acts of racketeering activity. 18 U.S.C. § 1961(5) (emphasis added). The Supreme Court explained that while two acts are the minimum [**10] requirement, two acts often are insufficient because "two of anything do not [*553] generally form a 'pattern.'" Sedima, 473 U.S. at 496 n.14.

The Supreme Court most clearly explained the pattern requirement in H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). [HN6]The key to establishing a pattern of predicate acts is not the number of acts; rather, it is the relationship the acts bear to each other or to an external principle, plus the "'threat of continuing activity.'" See id. at 238, 239 (quoting Senate report). The need for at least a threat of continuing activity is important because "Congress was concerned in RICO with long-term criminal conduct." See id. at 242. The Court envisioned two different types of conduct that would satisfy the continuity requirement, one in which the acts occurred during a closed but extended period of time, and another in which the acts by their nature projected a threat of future repetition. See id. at 241.

Defendant argues that the facts alleged by the complaint occurred over too a short period of time to satisfy the continuing threat requirement. [1] Defendant argues that the predicate [**11] acts as alleged in the complaint are various acts of mail and wire fraud and monetary transactions in property derived from unlawful activity. Plaintiffs have not challenged this conclusion. Paragraph 34 of the complaint states that the alleged racketeering activity continued over a nine month period.

> 1 The parties disagree as to whether the scheme alleged in the complaint is "closed-ended" or "open-ended." The complaint, P 34, states that the scheme was "closed-ended," but there was some discussion during oral argument and in the briefs as to whether that assertion is correct. See Pls.' Opp. to Def.'s Mot. to Dismiss Sec. Am. Compl. at 10; Def.'s Supp. Mem. in Supp. of Mot. to Dismiss Pls.' Sec. Am. Compl. at 2. For the purpose of this motion, the Court will construe the facts in a light most favorable to Plaintiffs, and will focus on the facts alleged in the complaint and not the labels attached to those facts. In this case, the scheme alleged by the complaint was open-ended.

Defendant largely relies upon [**12] three Fourth Circuit cases in which the Court found the length of time alleged was insufficient to suggest a threat of future activity. In Parcoil Corp. v. NOWSCO Well Service, Ltd., 887 F.2d 502 (4th Cir. 1989), two companies hired to drill oil wells falsified seventeen reports over a four month period concerning the type of sand they used. The Court found that this was not a sufficient allegation of continuity to satisfy the standard set forth in H.J. Inc. In Eastern Pub. and Advertising Inc. v. Chesapeake Pub. and Advertising, Inc., 895 F.2d 971 (4th Cir.), cert. denied, 497 U.S. 1025, 111 L. Ed. 2d 784, 110 S. Ct. 3274 and 498 U.S. 819, 112 L. Ed. 2d 39, 111 S. Ct. 65 (1990), one newspaper claimed that a second newspaper had violated its copyrights and exploited its customers. The scheme involved lasted only three months, and the Court affirmed the dismissal of the case. Menasco Inc. v. Wasserman, 886 F.2d 681 (4th Cir. 1989), involved a number of investors who sued their partners, alleging deceit and misrepresentations in the formation of oil companies. The Fourth Circuit found that the acts took place during a single year and that there were no ongoing activities that posed a continuing threat, [**13] and ordered the District Court to grant the plaintiffs an opportunity to amend their complaint.

These cases are all distinguishable for the same reason--each involved a scheme with a limited purpose which terminated upon the achievement of a limited goal. In Parcoil, the scheme ended once the wells had been drilled. In Eastern Pub., the Court found that the scheme was a "'single, non-recurring scheme to defraud a single entity'" in a narrow business context. Eastern Pub., 895 F.2d at 972 (quoting prior decision); 831 F.2d 488, 492 (4th. Cir. 1987). The scheme was "brought to fruition" within three months once the "limited purpose" was accomplished. See Eastern Pub., 895 F.2d at 973. Similarly, Menasco involved acts that were "narrowly directed towards a single fraudulent goal" and the "limited purpose" of defrauding two parties of specific oil interests. See Menasco, 886 F.2d at 684.

[HN7]Whether certain acts pose a threat of continued activity "'depend on the specific facts of each case.'" Menasco, 886 F.2d at 684 [*554] (quoting H.J. Inc., 492 U.S. 229 at 242, 109 S. Ct. 2893, 106 L. Ed. 2d 195). In the case *sub judice*, the scheme alleged by the complaint was not self-terminating and did not have [**14] a finite goal. There is no reason to believe Kersner and Clott had a fixed number of victims in mind for the broad, open-ended scheme. Instead, the facts alleged by the complaint strongly suggest that Kersner and Clott would have continued to defraud homeowners for as long as they could. See United States v. Grubb, 11 F.3d 426, 440 (4th Cir. 1993) (illegal activity likely to continue as long as defendant remained in office). Unlike the cases cited above, the scheme ended not because a limited goal had been accomplished, but because the perpetrators were caught and prosecuted. [2] Defendant's argument that the scheme posed no long-term threat because it necessarily unraveled upon attempts by the

homeowners to draw on their lines of credit is unpersuasive. The Court cannot conclude at this point that the scheme was inevitably doomed to fail in a short period of time, and the fact that Kersner and Clott were destined to be caught at some point does not change the nature of the scheme. Although the acts occurred over a brief period, their relationship to the external, organizing principle of recruiting and defrauding homeowners strongly suggests a long-term scheme that posed a serious [**15] threat of continuation. Plaintiffs have alleged facts sufficient to satisfy the pattern requirement of § 1962(c).

2 The parties discussed the recidivist inclinations of Kersner and Clott, debating whether there is *still* a threat of continued activity. Surely this is not required. The mere fact that the perpetrators of a RICO scheme are caught early in the scheme should not bar a civil suit when the nature of the acts suggests a threat of continuation.

B. Conduct the Affairs of the Enterprise

[HN8]Section 1962(c) only imposes liability on those who "conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity." In Reves v. Ernst & Young, 507 U.S. 170, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993), the Supreme Court authorized the "operation or management" test for § 1962(c). Reves resolved the question of how much control of the enterprise's activity is necessary, holding that "one must have some part in directing" the affairs of [**16] the enterprise. See id. at 179. Mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise.

[HN9]The operation of an enterprise is not limited to upper management and those under upper management's direction. Outsiders who exert control over the enterprise may also be liable. See id. at 184. In Reves the Court used the example of an outsider who exerts control over an enterprise through the use of bribery. Id. The Court concluded that an accounting firm had not satisfied the test, see id. at 186, even though the most favorable view of the evidence was that the firm had created financial statements it was hired to audit and took the responsibility of deciding how to value the client's most valuable asset. See id. at 189-90 (Souter, J., dissenting).

Since Reves, a number of Courts have dismissed complaints and granted summary judgment in favor of professionals, such as lawyers and accountants, whose professional services were essential to an enterprise yet did not participate in the direction, operation, or management of the enterprise. See, e.g., Nolte v. Pearson, [**17] 994 F.2d 1311 (8th Cir. 1993) (music company's law firm which prepared information regarding tax law for investors did not participate in operation or control of enterprise); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248 (S.D.N.Y. 1997) (granting summary judgment where accounting firm allegedly made misrepresentations in financial statements relied upon by investors).

Courts have recognized, however, that Reves did not establish [HN10]a *per se* rule that one cannot operate or manage an enterprise via the provision of legal services. See In re American Honda Motor Co., Inc. Dealerships Relations Litigation, 941 F. Supp. 528, 559-60 (D. Md. 1996). A person may violate [*555] § 1962(c) if he conducts the affairs of an enterprise, even though he does so through the provision of professional services. Because of the supportive nature of professional services, it is most often the case that lawyers and accountants do not conduct an enterprise's affairs. Nevertheless, there are situations in which the professional services provided strike at the very core of the enterprise and therefore the lawyer or accountant providing the services is managing or operating the [**18] firm. See, e.g., Napoli v. United States, 32 F.3d 31 (2d Cir. 1994) (where enterprise was law firm, lawyers participated in core activities of trying cases and obtaining settlements), cert. denied, 513 U.S. 1110, 130 L. Ed. 2d 784, 115 S. Ct. 900 (1995); Tribune Co. v. Purcigliotti, 869 F. Supp. 1076, 1098 (S.D.N.Y. 1994) (denying motion to dismiss where lawyers allegedly helped devise scheme and directed others to act to further scheme of filing false claims), aff'd sub nom. Tribune Co. v. Abiola, 66 F.3d 12 (2d Cir. 1995).

This is not a case in which the scheme was a mass filing of lawsuits and in which the lawyers who decided who to sue and how to handle the litigation obviously operated or managed the firm. The complaint alleges that Clott's firm Capital, a Ross and Hardies client, was the enterprise. As alleged by the complaint, Capital and Phoenix were in the business of persuading homeowners to obtain mortgages, receiving mortgage proceeds from the homeowners, transferring the mortgage proceeds to various accounts, and providing lines of credit to the homeowners. Kersner allegedly persuaded homeowners to obtain mortgages and give the proceeds to Capital, placated [**19] the mortgage companies who demanded payment, transferred proceeds between accounts, and established lines of credit for homeowners. These activities strike at the heart of Capital's alleged activities. If it is true that Kersner directed and controlled these essential activities of the enterprise then Kersner conducted, operated, and managed the enterprise in satisfaction of the standard established for § 1962(c) violations.

If the allegations of the complaint are true then this ruling allowing liability is not inconsistent with RICO's purpose as discussed by the Supreme Court. In Reves,

the Court noted that there were concerns in Congress that the definition of racketeering activity was far too broad. Reves, 507 U.S. at 183. The Court cited the explanation of Senator McClellan, who assured his colleagues that liability would not attach unless an individual not only engaged in a pattern of racketeering activity, but also used that pattern to operate an interstate business. Id. (citing 116 Cong. Rec. at 18940). Here, the complaint alleges that Kersner not only engaged in a pattern of wire fraud and illegal monetary transfers, but that he did so to help control and direct [**20] the conduct of Capital. This allegation of a potentially long-term scheme of running a business through a pattern of racketeering activity falls squarely within the confines of the behavior prohibited by RICO.

The Court is considering a motion to dismiss, and Plaintiffs are far from establishing that these were the core activities of the firm or that Kersner actually did these acts. For example, Defendant argues that all of the alleged predicate acts were committed by Phoenix, and that even if he controlled Capital Kersner could not have directed the scheme. This is a factual dispute that cannot be resolved in a motion to dismiss. The Court merely finds that the allegations set forth by the complaint sufficiently suggest that there exists a set of facts that would entitle the Plaintiffs to relief.

C. Partnership Liability under RICO

A difficult question facing the Court is whether there is partnership liability under RICO. Originally, the parties only briefed the issue of partnership liability in the context of the state law claim. Because this is an important topic worthy of discussion in the context of the RICO claim, the Court requested and received supplemental briefs from [**21] both sides.

As discussed throughout this opinion, the Court has concluded that the facts set forth by the complaint are sufficient to state a claim against Kersner for RICO violations. Kersner, however, is not a defendant to this action. Instead, it is his former law firm, [*556] Ross and Hardies, that Plaintiffs chose to sue. The Court must determine whether Plaintiffs can state a claim against a partnership law firm for the alleged RICO violations of one of the partnership's members. The Court's primary concern is that it not allow a plaintiff to use partnership liability to reach a party that Congress did not wish to hold liable under RICO. See Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1306 (7th Cir. 1987) (discussing two part test requiring that corporation benefited from acts and that liability would not violate congressional intent), cert. denied, 492 U.S. 917, 106 L. Ed. 2d 588, 109 S. Ct. 3241 (1989); see also Petro-Tech Inc. v. Western Co. of North America, 824 F.2d 1349, 1358 (3d Cir. 1987) (holding that respondeat superior may be applied to RICO claims where structure of RICO does not otherwise forbid it); Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1153 (9th [**22] Cir. 1992) (adopting rule from Petro-Tech).

[HN11]Under basic agency law, a principal is liable for torts committed by its agent if the agent acts with apparent authority. See American Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-66, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982). This is true even if the agent's act of fraud is committed solely to benefit the agent. See id. at 566. The general rule of partnership liability is that a partner is an agent for the partnership, and a partnership is liable for the wrongful acts of its partners committed in the ordinary course of the business of the partnership. See Revised Uniform Partnership Act §§ 301, 305 (1994); Md. Code Ann. Corps. & Ass'ns § 9-305 (Supp. 1997); see also 59A Am. Jur. 2d *Partnership* § 650 (1987). With fraud claims, it is especially appropriate to hold a partnership liable when it benefited from the fraudulent acts of its partner. See 59 A Am. Jr. 2d *Partnership* § 670.

Turning to RICO, it is well-settled that [HN12]Congress's intent was that § 1962(c) be used to punish individuals who conduct the affairs of a business through a pattern of racketeering activity, and that § [**23] 1962(c) is not targeted at the businesses that are innocent victims of racketeering activity. See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 280 U.S. App. D.C. 60, 883 F.2d 132, 140 (D.C. Cir. 1989), rev'd in part on other grounds, 286 U.S. App. D.C. 182, 913 F.2d 948 (D.C. Cir. 1990) (en banc), cert. denied, 501 U.S. 1222, 115 L. Ed. 2d 1007, 111 S. Ct. 2839 (1991). Nevertheless, the Supreme Court has said that RICO's civil provisions must be construed broadly in order to enforce RICO's remedial purposes. See Sedima, 473 U.S. at 497-98.

A number of Courts have held that vicarious liability, a doctrine related to partnership liability, is inconsistent with the express terms of § 1962(c). See, e.g., Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 425 (5th Cir.), cert. denied, 498 U.S. 895, 112 L. Ed. 2d 203, 111 S. Ct. 244 (1990); Yellow Bus Lines, 280 U.S. App. D.C. 60, 883 F.2d 132; Liquid Air Corp, 834 F.2d at 1306; Schofield v. First Commodity Corp., 793 F.2d 28, 30-32 (1st Cir. 1986). These cases, however, all involved the "non-identity" rule. This rule requires that the defendant to a RICO suit must be a different entity than the "enterprise" plead under § 1962(c). [**24] This requirement stems from the statute's language, which distinguishes the "person" who is employed by or associated with the "enterprise," from the "enterprise" itself. See Busby v. Crown Supply, Inc., 896 F.2d 833, 840 (4th Cir. 1990). It is the "person," and not the "enterprise," that is subject to RICO liability. These cases denying vicarious liability have been distinguished by subsequent

courts in light of their specific concern about the non-identity rule. See Crowe v. Henry, 43 F.3d 198, 206 n.19 (5th Cir. 1995) (discussing Landry); Cox v. Admin. U.S. Steel & Carnegie, 17 F.3d 1386, 1404-06, modified by 30 F.3d 1347 (11th Cir. 1994), cert. denied, 513 U.S. 1110, 130 L. Ed. 2d 784, 115 S. Ct. 990 (1995); Davis v. Mutual Life Ins. Co., 6 F.3d 367, 379-80 (6th Cir. 1993), [3] cert. denied, 510 U.S. 1193, 127 L. Ed. 2d 650, 114 S. Ct. 1298 (1994); 131 Main St. Assocs. v. Manko, 897 F. Supp. 1507, 1534 (S.D.N.Y. 1995) ("But the resolution [*557] of the issue of vicarious liability in these cases was intimately bound up with the holding that . . . a corporation may not be named as both a defendant 'person' and as the RICO 'enterprise.'").

3 In addition, the Sixth Circuit distinguished Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987) because it involved an enterprise that was the victim of the RICO activity. See Davis, 6 F.3d at 379.

[**25] Because Ross & Hardies is the defendant in this case and Capital is the enterprise, the non-identity rule is not an issue and the Court need not worry that an innocent firm overrun by RICO activity might be held liable under § 1962(c). In similar cases in which the non-identity rule was not at issue (where the "enterprise" and "person" were different entities), courts have ruled in favor of vicarious liability. In Brady, 974 F.2d at 1154-55, the Ninth Circuit held that [HN13]an employer may be held liable under agency principles when it benefits from violations of § 1962(c) and is distinct from the enterprise. The court found that this rule would further both RICO's compensatory goal and deterrence goal. Id. at 1155. The Eleventh Circuit similarly allowed vicarious liability under § 1962(c) because that circuit does not follow the non-identity rule, although it added that it would allow vicarious liability even if it did follow the non-identity rule. See Cox, 17 F.3d at 1406. The court chose to protect firms that are innocent victims of RICO violations by requiring that the acts be committed within the scope of employment, be in furtherance of the firm's business, and be [**26] authorized or subsequently acquiesced by the firm. See id. at 1406-07. See also Petro-Tech, 824 F.2d at 1361-62 (for counts in which defendant was not RICO enterprise, "theories of respondeat superior and aiding and abetting liability are not out of place"). But see Aspacher v. Kretz, 1997 WL 692943 at *2 (N.D. Ill. Aug. 13, 1997) (granting summary judgment where defendant corporation did not encourage or know about false assurance giving rise to RICO claim).

The Court agrees with the reasoning of the courts that have allowed vicarious liability, such as the Ninth Circuit in Brady, and finds that [HN14]imposing partnership liability under § 1962(c) does not violate congressional intent. One must separate the concept of what constitutes a violation of § 1962(c) from which parties may be held liable under § 1964(c) once a § 1962(c) violation has been established. It is appropriate for a court to assume that traditional rules of agency law apply to a federal statute's civil liability provision when those traditional rules are consistent with the statute's purpose and when Congress has not indicated otherwise. Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. [**27] 1984). See also Schofield, 793 F.2d at 33 (extent to which statute incorporates common law principles of agency liability depends on the extent to which the principles are consistent with the statute's language and purposes).

The Supreme Court's analysis in American Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982) is instructive. The Court held that traditional agency rules of apparent authority apply to the antitrust laws and that an organization may be held liable for the antitrust violations of an agent who acts with apparent authority, even if the acts were not committed to benefit the principal. Id. at 567-68, 570. The Court found that an important purpose of the private cause of action created by the antitrust laws is the deterrence of anticompetitive behavior. Id. at 572. That purpose is well-served when a principal is held liable for the antitrust violations of its agent because it gives the principal a "powerful incentive" to prevent future antitrust violations. Id. The Court was not influenced by the Sherman Act's imposition of treble damages, see id. at 574-76, a feature shared by RICO. The [**28] comparison to the analysis in American Soc. of Mech. Engineers is especially appropriate because RICO's civil liability section, § 1964(c), was modeled on 15 U.S.C. § 15, the very antitrust civil action provision at issue in American Soc. of Mech. Engineers. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). [4]

4 The Court's reasoning in Holmes is not completely decisive because the Court did not interpret the antitrust statute as including agency liability until after RICO was enacted. Moreover, the mere borrowing of the antitrust language does not necessarily indicate an intention to incorporate all aspects of the prior law. See Tafflin v. Levitt, 493 U.S. 455, 462, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990).

[*558] [HN15]Holding a partnership liable for the RICO violations of its partner under doctrines of agency and partnership liability serves Congress's goal of deterring individuals from controlling organizations through a pattern of racketeering [**29] activity. The Court also

agrees with the Ninth Circuit in its holding that imposing liability under vicarious liability (or in this case partnership liability) is consistent with RICO's compensatory goal. See Brady, 974 F.2d at 1154-55. Holding a partnership liable when it benefits from the acts of its partners will prevent the partnership from being unjustly enriched and will help serve Congress's goal of compensating victims of racketeering activities. This holding is consistent with that of at least one other Judge in this district, see Mylan Labs., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1069-70 (D. Md. 1991) (Ramsey, J.), and other scholarly opinions. See Denise Cote, Vicarious Liability Under Civil RICO, 155 Practicing Law Institute/Litigation and Administrative Practice Course Handbook Series 249, 251, 256-60 (November-December 1990) ("consistent with the language and overall scheme of the statute, a plaintiff should be able to hold a corporate entity liable under RICO when the corporation received a benefit from the racketeering activity of its agent/employee"). But see Maria M. Romani, Comment, Civil RICO and Vicarious Corporate Liability: Shrinking Civil RICO [**30] Back to Its Originally Intended Congressional Size, 15 Ohio N.U. L. Rev. 695, 703 (1988) (citing legislative history and arguing purpose of civil damages is to drive corrupt enterprises from marketplace, and vicarious liability does not serve that purpose).

This is a difficult question, in part, because of the very same issues underlying the non-identity rule. Congress carefully defined the type of person who violates § 1962(c), and the Court acknowledges that this supports the argument that Congress did not intend for partnership liability to apply to § 1964(c) suits for § 1962(c) violations. Nevertheless, in light of the statute's purposes and the caselaw from the circuit courts discussed herein, this is not a sufficiently clear indication that Congress meant to forsake traditional notions of partnership liability when it enacted §§ 1962(c) and 1964(c).

For example, compare Carpenter v. Harris, Upham & Co., Inc., 594 F.2d 388, 393-94 (4th Cir.), cert. denied 444 U.S. 868, 62 L. Ed. 2d 93, 100 S. Ct. 143 (1979), in which the Fourth Circuit addressed the "good faith" defense to securities claims under 15 U.S.C. § 78t(a). Although Congress imposed liability on a party who controls a person who violates [**31] the statute, it explicitly excluded liability when the controlling person acts in good faith and did not induce the violations. [5] The Court relied on this language in holding that a broker-dealer is not liable for every violation of a supervised individual. See 594 F.2d at 394. The Court takes no position on the application of respondeat superior under the securities laws or the meaning of the Carpenter decision; rather, it uses this statute as a means of comparison. This is the type of statutory language that might support a holding that partnership liability or traditional agency principles do not apply to a particular federal statute. The Court finds no equivalent language in § 1962(c) or § 1964(c), and is instead persuaded by the reported decisions holding that partnership liability applies to violations of § 1962(c), albeit with an exception for cases implicating the non-identity rule.

5 As quoted by the Court, the language read, in part, "Every person who, directly or indirectly, controls any person liable under any provision . . . shall also be liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." Carpenter, 594 F.2d at 393 (quoting 15 U.S.C. § 78t(a)).

[**32] Plaintiffs' allegation is that Kersner violated RICO while providing services to Clott and Capital. Kersner's alleged acts of transferring money, making fraudulent representations to victims, and pitching the Program to potential lenders are acts that fall within the scope of the work of a large law firm representing a corporate client. Capital was a paying client of Ross & Hardies, and the firm benefited from Kersner's representation of that client, including the alleged [*559] RICO violations. Holding Ross & Hardies liable for the RICO violations of Kersner would provide the firm, and other law firms, with a powerful incentive to take steps to prevent future violations and will assist in providing compensation to the victims of the racketeering activity.

D. RICO Injury

[HN16]Section 1964(c) provides a civil remedy to people who have been injured in their business or property by a violation of § 1962. The Fourth Circuit has read § 1964(c) as requiring (1) an injury to business or property, and (2) that the injury was caused by the predicate acts of racketeering activity. See Brandenburg v. Seidel, 859 F.2d 1179, 1187 (4th Cir. 1988). Defendant argues that Plaintiffs have failed to [**33] satisfy the causation requirement, contending that the Plaintiffs were injured when they joined the 7.5% Program, which occurred before the money transfers that constitute the predicate acts.

Defendant's argument is not persuasive. Kersner is alleged to have committed predicate acts by making fraudulent representations to the victims, inducing them to enroll in the Program. Sec. Am. Compl. PP 31-32. If Defendant believes the injury took place when the victims joined the Program, then Kersner's alleged misrepresentations would have been a cause of the injuries. In addition, the Court believes that the injuries took place not when the victims joined the Program, but when their money was fraudulently diverted. Thus, if Kersner com-

mitted predicate acts by directing the transfers of money, his predicate acts were a cause of the injuries claimed by the Plaintiffs.

III. The State Law Claims

Counts I, II, and III of the complaint assert claims of aiding and abetting fraud, aiding and abetting negligent misrepresentation, and aiding and abetting conversion. [HN17]The State of Maryland recognizes aiding and abetting tort liability. See Alleco Inc. v. Harry & Jeanette Weinberg Found., [**34] Inc., 340 Md. 176, 199-201, 665 A.2d 1038 (1995); 21 Md. Law Encycl. *Torts* § 7 (1997). The defendant is liable if he encourages, incites, aids, or abets the acts of the direct perpetrator of the tort. See id. at 199 (quoting Duke v. Feldman, 245 Md. 454, 457, 226 A.2d 345 (1967)). There are factual issues as to whether Ross & Hardies did anything to encourage any of the torts allegedly committed. In that these are factual issues, the Court will not dismiss these counts from the complaint.

Count V [6] asserts a claim of partnership liability against Ross & Hardies. In light of the discussion in Section II.C concerning the scope of Kersner's work, the Court will not dismiss Count V.

6 Count IV alleges a claim of negligent misrepresentation against Defendant Phoenix only.

Conclusion

According to the complaint, Clott and Kersner used Capital to run the 7.5% Program scheme, whereby they persuaded homeowners to mortgage their homes and turn over the proceeds to Phoenix. Kersner allegedly helped [**35] direct the recruitment of homeowners and mortgage lenders, and also helped direct the fraudulent transfers of the mortgage proceeds. These were the key acts of the scheme, and if the allegations are true then Kersner may be liable for directing an enterprise through a pattern of racketeering activity. The acts, if committed, were within the scope of Ross & Hardies's business as a large law firm serving the needs of corporate client. As a result, Ross & Hardies may be held liable under §§ 1962(c) and 1964(c) following traditional doctrines of partnership liability. The Defendant's motion to dismiss will be denied, and a separate order consistent with this memorandum opinion will follow.

6-10-98

Date

Alexander Williams, Jr.

United States District Judge

ORDER

Pursuant to the memorandum opinion, it is this 10th day of June, 1998, hereby ORDERED:

1. That the Defendant's motion to dismiss the second amended complaint [20-1] BE, and the same hereby IS, DENIED;

2. That the Defendants answer or otherwise respond to the second amended complaint [*560] within ten (10) days of the date of this order, and

3. That the Clerk of the Court mail copies of the memorandum opinion [**36] and order to all counsel of record.

Alexander Williams, Jr.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 7

LEXSEE

Positive
As of: Jun 21, 2011

IN RE AMERICAN HONDA MOTOR CO., INC. DEALERSHIPS RELATIONS LITIGATION

MDL 95 - 1069

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

958 F. Supp. 1045; 1997 U.S. Dist. LEXIS 3538

March 11, 1997, Decided
March 11, 1997, filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff dealers commenced an action, which alleged that defendants, a distributor, its parent corporation, a law firm, and one of its partners, had violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961 et seq., and the Robinson-Patman Act (R-P Act). The parent corporation and the law firm renewed their motions to dismiss. The parent corporation also sought certification for an interlocutory appeal.

OVERVIEW: The dealers alleged that the distributor had granted favorable treatment to other dealers in exchange for kickbacks and other payments. The parent corporation was responsible for the distributor's actions because its directors knew of and actively encouraged the illegal scheme. Moreover, an action under RICO, 18 U.S.C.S. § 1961 et seq., was sustainable against the law firm because it was allegedly responsible for the concealment of the kickback scheme, which made it an aider and abetter to the substantive offenses that constituted a pattern of racketeering activity under 18 U.S.C.S. § 1961(1). However, the dealers were unable to sustain an 18 U.S.C.S. § 1962(a) claim against the parent corporation because they did not allege the investment of monies in a RICO enterprise. Similarly, their claim under 18 U.S.C.S. § 1962(b) was barred because the parent corporation did not control the distributor through a pattern of racketeering. The court found that the dealers had stated actionable claims under 18 U.S.C.S. § 1962(c) and 18 U.S.C.S. § 1962(d) against the parent corporation. The dealers' claims under a provision of the R-P Act, 15 U.S.C.S. § 13(c), were dismissed.

OUTCOME: The motions to dismiss were granted with regard to the claims under the R-P Act. The parent corporation's motion was also granted with regard to the RICO claims that alleged that the kickback scheme had increased its profitability and that it had maintained control over the distributor. The motions to dismiss were otherwise denied. The court granted the parent corporation's motion to certify its decision for an interlocutory appeal.

CORE TERMS: dealer, kickback, subsidiary, predicate acts, racketeering activity, illegal activities, indirectly, dealership, discovery, manager, aiding and abetting, bribery, obstruction of justice, participated, bribe, ownership interests, claims asserted, corporate veil, sole stockholder, mail fraud, conspiracy, extortion, inferred, network, commit, vice, net profits, sufficient facts, fraud allegations, concealment

LexisNexis(R) Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN1]A defendant must have been either a party or an intermediary for a party to the relevant transactions in

order to be found liable under § 2(c) of the Robinson-Patman Act. 15 U.S.C.S. § 13(c).

Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview

[HN2]Generalized and vague pleadings cannot be allowed to circumvent the statutes and common-law rules that protect corporate separateness.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > General Overview
Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements

[HN3]Whatever name is given to the theory of liability, the critical question under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., is whether the illegal conduct alleged was known to and participated in by sufficiently high-level employees within a corporation and/or was sufficiently pervasive within the corporation as to be fairly attributable to the corporation.

Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > Alter Ego > Corporate Formalities
Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > Alter Ego > Inadequate Capitalization
Civil Procedure > Pleading & Practice > Pleadings > Answers

[HN4]In considering the broad issue of whether a sole stockholder (individual or corporate) can be held liable for the wrongful acts of its subsidiary, it is helpful to pose several narrower questions. First, can the parent be held liable for the subsidiary's conduct solely by virtue of its ownership of and control over the subsidiary? The answer to this question is no, unless the corporate veil can be pierced under conventional doctrines because of inadequate capitalization of the subsidiary, gross disregard of corporate formalities, and the like. Second, can the parent be held liable if it can be proved that the parent's ultimate decision-makers regarding the subsidiary's affairs, e.g. the board of directors, executive committee or chairperson of the board, expressly authorized and directed the subsidiary's wrongful acts? The answer to this question is rather clearly yes, since in such an instance the parent is not being held derivatively responsible for the subsidiary's conduct but for its own independent acts as a principal.

Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview

[HN5]A difficult question is whether the parent can be held liable for failing to exercise the power it has over the subsidiary to stop illegal conduct engaged in by the subsidiary after having obtained knowledge of it. Common sense suggests that the failure to exercise the strategic control a parent has over a subsidiary to make the latter comply with the law is functionally the equivalent of the parent committing the illegal acts itself. However, well established principles of corporate law dictate that a subsidiary is presumed to possess a free will, stemming from its corporate separateness, even on occasions of sin, and adoption of a "knowledge plus failure to remedy" approach would be to destroy legal fictions which have become business realities.

Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview
Torts > Vicarious Liability > Corporations > Subsidiary Corporations

[HN6]If a parent is not accountable for the sins of its offspring (unless it authorizes and directs them), it is responsible for its own transgressions. Thus, a question that must be asked is whether a parent can be held liable for its subsidiary's wrongs if the parent joins in the commission of those wrongs. The answer to this question is yes, provided that the parent's own conduct is encompassed by the law giving rise to the cause of action. This theory of liability is viable even if the subsidiary is a legitimate corporation whose veil cannot be pierced and even if there are insufficient allegations to establish that the parent exercised its control over the subsidiary to direct the subsidiary to engage in the alleged unlawful conduct.

International Law > Dispute Resolution > Comity Doctrine > General Overview

[HN7]No doctrine of international law or consideration of comity requires one nation to tolerate the citizen of another sending agents within its borders to promote the conduct of illegal activity.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions
Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview
[HN8]In order to state a claim against an individual stockholder, allegations would have to be made that an agent reported the illegal activities to her and that she directed him to encourage their continuation. When such a claim is asserted against a corporation, its directors own knowledge of the illegal activities and encouragement of the perpetuation of the activities would, rather clearly, seem to be directly imputable to corporation.

Civil Procedure > Discovery > Relevance
[HN9]When a matter lies within the exclusive knowledge of the defendants and is an element of the plaintiffs' claims, they are entitled to discovery on it.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview
Business & Corporate Law > Corporations > Shareholders > Disregard of Corporate Entity > General Overview
[HN10]Clearly, a defendant cannot immunize herself from wrongful conduct beneficial to her personally and insulate herself from liability that she would otherwise incur simply by also designating her personal agent as an officer and director of a corporation of which she is the sole stockholder. Although sometimes a phrase of uncertain meaning, the familiar maxim that the corporate veil can be used only as a shield and not as a sword expresses an essential truth which protects the law from being so easily manipulated.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN11]18 U.S.C.S. § 1962(a) requires plaintiffs to demonstrate, inter alia, that a defendant (1) received income directly or indirectly from a pattern of racketeering activity, and (2) used or invested, directly or indirectly, any part of that income in the operation of an enterprise engaged in or affecting interstate commerce.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN12]18 U.S.C.S. § 1962(b) makes it unlawful for any person through a pattern of racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in interstate or foreign commerce.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN13]An enterprise is not a valid Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., enterprise when it is alleged that it existed solely to carry out the alleged predicate acts.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN14]18 U.S.C.S. § 1962(c) provides that it shall be unlawful for any person employed by or associated with any enterprise engaged in interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN15]Because 18 U.S.C.S. § 1503 applies only to obstruction of federal judicial proceedings, false deposition testimony during the course of a state administrative proceeding cannot constitute a predicate act under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview
[HN16]18 U.S.C.S. § 1510 requires that obstruction of a criminal investigation be accomplished by bribery.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN17]18 U.S.C.S. § 1962(c) provides that it shall be unlawful for any person to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Short though

this phrase may be, for proper analysis it must be further parsed into two sub-phrases: (1) whether a person "participated, directly or indirectly, in the conduct of such enterprise's affairs," and (2) whether this participation was "through a pattern of racketeering activity."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN18]In order to be found to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs, a person must have had an operational or management role in the enterprise.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN19]Concealment is a necessary element of any ongoing illegal activity, and a person who is in charge of the coverup plays an operational and management role in the enterprise conducting that activity.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN20]It is not enough for a defendant to have conducted or participated directly or indirectly, in the conduct of an enterprise's affairs in order for him to be held liable under 18 U.S.C.S. § 1962(c). He also must have done so "through a pattern of racketeering activity."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN21]"Pattern of racketeering activity" is defined to mean the commission of at least two predicate acts of various federal crimes listed in 18 U.S.C.S. § 1961(1).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN22]Although there is some disagreement among the courts on the issue, it is becoming conventional wisdom that aiding and abetting liability under 18 U.S.C.S. § 1962(c) does not survive the Supreme Court's ruling that there is no aiding and abetting liability in a civil action brought under § 10(b) of the Securities Act of 1934.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN23]The predicate acts must be related and there must be a threat of continuing activity in order to constitute a "pattern of racketeering activity."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN24]Although 18 U.S.C.S. § 2 is not separately listed in 18 U.S.C.S. § 1961(1), presumably when that section refers to various substantive criminal statutes it also encompasses within them § 2 which, by its terms and by long established case law, is sufficient to establish substantive liability.

Criminal Law & Procedure > Accessories > Aiding & Abetting
[HN25]See 18 U.S.C.S. § 2.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN26]The distinction between finding direct application of 18 U.S.C.S. § 2 to 18 U.S.C.S. § 1962(c) (which the United States District Court for the District of Maryland believes to be implicitly prohibited) and applying § 2 to the substantive offenses listed in 28 U.S.C.S. § 1961(1) for the purpose of determining whether a defendant has committed a predicate act may seem sophistic, bringing through the back door that which is barred at the front. However, the distinction is key to a proper understanding of the case law, and it brings within the ambit of § 1962(c) precisely those defendants who belong there. Unless the distinction is recognized, in most cases there would be no principled basis for imposing § 1962(c) liability upon a class of defendants whom Congress surely intended should be within the statute's purview: leaders of enterprises who do not themselves commit predicate acts but who cause others to do so.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > Elements
[HN27]The liability of principals is created by 18 U.S.C.S. § 2(b) just as aiding and abetting liability is created by 18 U.S.C.S. § 2(a). Thus, if 18 U.S.C.S. § 2 is read out of 18 U.S.C.S. § 1961(1), the highest-level managers of a criminal enterprise who leave the hands-on work to others would be excluded from liabili-

ty under § 1962(c) by virtue of the "through a pattern of racketeering activity" phrase.

Criminal Law & Procedure > Criminal Offenses > Fraud > Mail Fraud > Elements
Criminal Law & Procedure > Criminal Offenses > Fraud > Wire Fraud > Elements
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN28]The mail fraud statute, 18 U.S.C.S. § 1341, uses the words "causes to be deposited" and "causes to be delivered" within its own terms, as do several of the other offenses contained within 28 U.S.C.S. § 1961(1). Although it could be inferred that such language was intended to implicate those who direct or cause others to commit those criminal acts, it is at least equally likely that these phrases were included because those infractions frequently or necessarily involve innocent actors who actually do the delivering or printing. For example, it is the postal service that actually "delivers" a piece of mail--the sender only "causes" it to be delivered by dropping it in a mailbox.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Witness Tampering > General Overview
Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN29]Several of the predicate acts listed in 18 U.S.C.S. § 1961(1) do not contain language similar to "causes to be deposited" or "causes to be delivered," yet the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., is clearly intended to implicate persons who repeatedly direct others to commit such crimes, e.g., 18 U.S.C.S. § 1503 (obstruction of justice) and 18 U.S.C.S. § 1512 (witness tampering). The only way for such persons to be prosecuted under 18 U.S.C.S. § 1962(c) is to find that they are principals under 18 U.S.C.S. § 2(b).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN30]It is the relatively rare case in which a person who can be held liable for a substantive offense only as an aider and abetter would meet the "operation or management" test of Reves for determining the necessary level of "participation."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations > General Overview
[HN31]The ultimate issue in any 18 U.S.C.S. § 1962(d) case is whether a defendant's knowledge of the nature, scope and operations of the illegal scheme are such that it can be inferred that he agreed that another violate 18 U.S.C.S. § 1962(c) by committing two acts of racketeering activity.

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JUDGES: J. Frederick Motz, United States District Judge

OPINION BY: J. [**2] Frederick Motz

OPINION

[*1047] OPINION

This multidistrict litigation arises from allegations that during the 1980s and early 1990s certain high-level executives of American Honda received kickbacks and other payments from various Honda dealers in the form of cash and secret ownership interests in Honda dealerships in return for various favors, primarily increased allocation of automobiles or the award of new dealer-

ships. The defendants are American Honda Motor Co., Inc. ("American Honda"); Honda Motor [*1048] Co., Ltd. ("Honda Motor"), American Honda's Japanese parent; Honda North America; Honda dealers who are alleged to have paid kickbacks; and Lyon & Lyon, a law firm which allegedly participated in managing the concealment of the illegal scheme, and Roland Smoot, a partner in Lyon & Lyon (collectively "Lyon & Lyon"). The plaintiffs are dealers who did not pay kickbacks.

Following in the wake of the successful criminal prosecution of five former American Honda executives (which itself stemmed from a civil action filed by a Honda dealer in the United States District Court for the District of New Hampshire), numerous civil actions have been filed around the country. The federal actions were transferred [**3] to the District of Maryland by order of the panel on multidistrict litigation in August, 1995. Discovery has been proceeding simultaneously with the briefing of motions to dismiss.

On August 30, 1996, I issued an opinion in which for the most part I denied motions to dismiss filed by defendants. *In re American Honda Motor Co. Dealerships Relations Litigation*, 941 F. Supp. 528 (D. Md. 1996) (*Honda I*). However, I ruled that plaintiffs' allegations against Honda Motor and Lyon & Lyon were deficient in some respects. I granted plaintiffs leave to amend their complaints against those defendants, indicating that if the pleading deficiencies I identified were cured, I would permit plaintiffs to proceed with their claims. Plaintiffs have filed amended complaints, and Honda Motor and Lyon & Lyon have renewed their motions to dismiss.

The motions to dismiss will be granted in part and denied in part. Plaintiffs' claims against both Honda Motor and Lyon & Lyon under the Robinson-Patman Act are dismissed for the simple reason that neither [HN1]Honda Motor nor Lyon & Lyon was a party or an intermediary for a party to the relevant transactions as required by § 2(c) of the Act. 15 U.S.C. § [**4] 13(c). As to plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), Honda Motor's motion is granted as to the claims asserted under 18 U.S.C. §§ 1962(a) and (b) but is denied as to the claims asserted under §§ 1962(c) and (d). Lyon & Lyon's motion is denied as to the claims asserted under §§ 1962(c) and (d), the only RICO claims asserted against it.

Sections I, II and III of this opinion discuss the RICO claims against Honda Motor; Sections IV and V discuss the RICO claims against Lyon & Lyon; and Section VI states the reasons I am granting a motion filed by Honda Motor pursuant to 28 U.S.C. § 1292(b) for certification of an interlocutory appeal.

I.

A.

At the times relevant to this case Honda Motor was (as it continues to be) the corporate parent of American Honda. All of the officers and directors of American Honda were appointed by Honda Motor, and decisions concerning the compensation to be paid to the top managers of American Honda were made by Honda Motor. Four of the eight members of American Honda's board of directors, including its president, were also members of Honda Motor's board. Each of the shared directors [**5] received approximately 70 percent of his salary from American Honda and 30 percent from Honda Motor. All of the shared directors were Japanese nationals, and the salary and certain other benefits that they received from Honda Motor were paid to them or their families in Japan. Each of them also received year-end bonuses and pension contributions paid partially by Honda Motor, based upon Honda Motor's performance.

Honda Motor and American Honda have two different functions. Honda Motor manufactures motor vehicles; American Honda distributes them in the United States. Nevertheless, Honda Motor rotated its executives to the United States to serve as officers and directors of American Honda on a regular basis. In addition, other Honda Motor executives and employees came to the United States frequently to oversee the operations of American Honda's regional offices. They visited Honda dealerships to collect information and reported what they learned to Honda Motor.

[*1049] During the period the alleged wrongful activities occurred, the persons who served simultaneously as directors of Honda Motor and directors and executives of American Honda were Koichi Amemiya, Tetsuo Chino, Takeo Okusa, Yoshihide [**6] Munekuni and Michiaki Shinkai. Amemiya, Chino and Munekuni each served at one time as American Honda's president; Munekuni became the chairman of American Honda in 1989; Okusa was the executive vice-president of American Honda from 1989 to 1992; Shinkai was American Honda's vice-president of administration from at least 1983 through 1989. Chino, Munekuni and Okusa have also served as directors of Honda North America, another Honda entity. Munekuni has been its chairman since 1989.

According to plaintiffs' allegations, the kickback scheme was of substantial economic benefit both to American Honda and to Honda Motor. Because American Honda executives were receiving kickbacks, American Honda was able to pay them substantially less compensation than their counterparts with other companies in the industry. This savings in executive compensation was

in turn passed on to Honda Motor which, as the sole stockholder of American Honda, received all of its net profits.

B.

Plaintiffs assert that Amemiya, Chino, Munekuni, Okusa and Shinkai were fully aware of the illegal activities in which American Honda executives and various Honda dealers engaged. Plaintiffs make numerous specific allegations [**7] in that regard, including the following:

. In the early 1980s J.D. Power, an auto market researcher hired by American Honda, heard reports that American Honda executives were taking kickbacks from dealers in return for favored treatment in the allocation of cars. He passed these reports on to Munekuni by a letter dated March 14, 1983. After receiving the letter, Munekuni did not cause any serious investigation to be conducted.

. In 1984 Power met with Munekuni and others, warning them about reports of bribery and kickbacks within the Honda sales organization. Jack Billmyer, a senior vice president of American Honda, was questioned by Japanese management about the allegations. Billmyer told his interrogators that if they did not like the way he was running the business they could hire someone else. Billmyer was retained in his position and no action was taken against him.

. In late 1984 or early 1985 Chino and Shinkai were told by Tony Piazza, an American Honda employee, and Don English, the head of American Honda's personnel administration department, that Billmyer was soliciting and taking bribes from certain dealers. They told Chino that they had discovered that Billmyer [**8] held secret ownership interests in several Honda dealerships and had solicited a bribe from a dealer for between $ 30,000 and $ 100,000. Chet Hale, an executive vice president and director of American Honda, also informed Chino that Billmyer held secret ownership interests in Honda dealerships.

. In or about August 1986 Shinkai discussed with English and Piazza another complaint, received by Piazza from a dealer, that Billmyer had demanded bribes. These allegations later were discussed in a meeting attended by Chino, Shinkai and English. This meeting did not result in any remedial action, and Chino later recommended that Billmyer be made a director of American Honda. The recommendation was followed.

. Between 1986 and 1988 Doug Divall, the senior manager of American Honda's and Honda North America's audit group, learned of the alleged kickback scheme, reported it to Chino and asked if he could conduct an investigation. Chino would not allow him to do so.

. During the 1980s Cecil Proulx, American Honda's procurement manager, having heard of the kickbacks and improper gratuities, discussed his concerns about them with Shinkai and asked him whether Shinkai and Chino would [**9] do anything to stop the corruption. Shinkai told Proulx that the kickback scheme was tolerated by American Honda because American Honda could not afford to pay its executives what [*1050] Ford, General Motors or Chrysler would pay them.

. Christiaan Walker, an American Honda sales representative, reported to management that he had learned that Stanley J. Cardiges and Edward Temple, respectively the vice president for auto field sales and an American Honda zone manager, had taken a bribe for awarding a Honda dealership. During early 1991, Amemiya and Robert Rivers, a senior American Honda executive, telephoned Robert Mazzitelli, another American Honda zone manager, about Walker's allegations. Amemiya told Mazzitelli not to discuss the matter with Cardiges for fear that it would prompt Cardiges to leave American Honda.

. In January 1992 Amemiya met with Rivers at American Honda's corporate headquarters to discuss Walker's allegations and stated: "That is not important now. We have to concentrate on selling cars . . . . Our priority is sales."

. In the mid 1980s Robert Estes, a new Honda dealer, received a telephone call from another Honda dealer, Richard Brooks. Brooks told Estes [**10] that Estes would be expected to contribute to a fund for American Honda executives. Estes immediately called a managerial-level executive at Honda Motor in Tokyo and informed him of the alleged fund. No investigation was conducted by Honda Motor as a result of this report.

. In or about 1991 Amemiya acknowledged to Roger Novelly, a zone manager for American Honda, that he was aware of the kickback scheme and other corrupt activities.

. Subsequently, Amemiya and Okusa met with Rivers again regarding Cardiges' activities. Amemiya asked Rivers to continue to cover up the matters because Amemiya needed to keep Cardiges happy to enable Honda to continue "to sell cars." Amemiya and Okusa also promised Rivers that he would be transferred to the position of vice president of marketing if he cooperated in the coverup.

. In June 1992 Okusa was deposed in an action instituted against American Honda by International Automobiles, Inc. before a New Jersey administrative agency. During his testimony Okusa committed perjury when he answered "I do not know" to the question "Has it ever come to your attention that anybody in the employ of

American Honda Motor Company has ever received [**11] anything of value from any dealer in return for granting of a franchise?"

. In September 1994 Munekuni falsely told the FBI that he was not aware of ever having received a letter from Power reporting allegations about the scheme. [1]

1 Amemiya, Chino, Munekuni and Okusa are also alleged to have accepted gifts of substantial value from several Honda dealers. It is not alleged, however, that they gave preferential treatment to those dealers in return.

II.

In *Honda I* I stated the following concerning plaintiffs' claims against Honda Motor [2]:

> This is a difficult area of the law, one that simultaneously calls for a proper respect for legitimate corporate formalities and a wariness against permitting form to prevail over substance. [HN2]Generalized and vague pleadings cannot be allowed to circumvent the statutes and common-law rules that protect corporate separateness. Here, however, . . . plaintiffs have done more than simply allege that Honda Japan should be held liable for the actions of its American subsidiary [**12] and its agents. It has particularized individuals who were closely associated and identified with Honda Japan, who were chosen by it to run a major portion of its worldwide distribution network and who actively participated in what, if plaintiffs' allegations are accepted to be true, can only be characterized as egregious misconduct.
>
> It is facts, not allegations, that will finally determine the outcome of this litigation. Plaintiffs bear the burden of proving not only the underlying bribes and the damages [*1051] that they suffered therefrom but also the part played by each of the defendants whom they have named. This will be no easy task. If, however, they produce facts that demonstrate that Honda Japan officials situated in the United States actively were involved in a bribery scheme, that they advised other highranking officers and directors of Honda Japan about it and that Honda Japan did nothing to stop the scheme, they will have gone a long way in meeting their burden. They will have gone even further if they can prove that the scheme broadened because of the involvement of executives who were identified with Honda Japan because, for example, dealers were more likely to pay bribes based [**13] on their perception that the bribery system was endorsed by the Japanese parent, or that dealers or Honda employees declined to inform anyone about the scheme out of despair or fear of retaliation. And presumably even Honda Japan would concede its liability if plaintiffs could establish that it directed and encouraged the scheme for reasons of its own. These and similar issues must be explored through discovery, and the adequacy of plaintiffs' proof under their various legal theories tested by summary judgment.

941 F. Supp. at 553.

2 It should be noted that in *Honda I* I referred to the Honda Motor Co. as "Honda Japan," as distinguished from "American Honda." On further consideration, I do not believe it creates any confusion to refer to Honda's Japanese parent simply as "Honda Motor."

I adhere to the views I then expressed. However, I covered a wide spectrum of conduct in describing what plaintiffs might be able to allege and prove against Honda Motor, and I have concluded that I should state with [**14] more precision the reasons I believe plaintiffs have stated viable claims against Honda Motor. [3]

3 In the discussion that follows I have not used such terms as ratification, apparent authority, respondeat superior and the like. These doctrines define the law and provide structure to it in many factual contexts. However, so many different meanings have accreted to them over time that I find that they confound analysis in addressing issues that need to be refined.

Similarly, I am not at all sure (although I referred to them briefly in *Honda I*, 941 F. Supp. at 552 n.27) that the terms "direct" and "vicarious" liability further understanding in discussing RICO issues. [HN3]Whatever name is given to the theory of liability, the critical question is whether the illegal conduct alleged was known to and participated in by sufficiently high-level employees within a corporation and/or was sufficiently per-

vasive within the corporation as to be fairly attributable to the corporation. *Compare Gruber v. Prudential-Bache Sec., Inc.*, 679 F. Supp. 165, 180-81 (D. Conn. 1987) *with R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1522 (N.D. Ill. 1990) (extent of high-level participation in illegal activity determines corporation's vicarious (*Gruber*) or direct (*R.E. Davis*) liability). *See also Volmar Distribs., Inc. v. New York Post Co.*, 899 F. Supp. 1187, 1192 n.5 (S.D.N.Y. 1995) (labeling liability direct or vicarious "superfluous," as focus should instead be on theory imputing liability).

[**15] [HN4]

In considering the broad issue of whether a sole stockholder (individual or corporate) can be held liable for the wrongful acts of its subsidiary, it is helpful to pose several narrower questions. First, can the parent be held liable for the subsidiary's conduct solely by virtue of its ownership of and control over the subsidiary? Obviously, the answer to this question is no, unless the corporate veil can be pierced under conventional doctrines because of inadequate capitalization of the subsidiary, gross disregard of corporate formalities, and the like. *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69-70 (2d Cir.), *cert. denied*, 117 S. Ct. 509, 136 L. Ed. 2d 399 (1996). Second, can the parent be held liable if it can be proved that the parent's ultimate decision-makers regarding the subsidiary's affairs, e.g. the board of directors, executive committee or chairperson of the board, expressly authorized and directed the subsidiary's wrongful acts? The answer to this question is rather clearly yes, since in such an instance the parent is not being held derivatively responsible for the subsidiary's conduct but for its own independent acts as a principal.

[HN5]A third and more difficult question is [**16] whether the parent can be held liable for failing to exercise the power it has over the subsidiary to stop illegal conduct engaged in by the subsidiary after having obtained knowledge of it. Common sense suggests that the failure to exercise the strategic control a parent has over a subsidiary to make the latter comply with the law is functionally the equivalent of the parent committing the illegal acts itself. However, well established principles of corporate law dictate that a [*1052] subsidiary is presumed to possess a free will, stemming from its corporate separateness, even on occasions of sin, and adoption of a "knowledge plus failure to remedy" approach would be to destroy legal fictions which have become business realities.

If this were the end of the inquiry, Honda Motor would be entitled to prevail on its motion to dismiss. For the reasons I stated in *Honda I*, 941 F. Supp. at 551-52, the corporate veil between American Honda and Honda Motor cannot be pierced under traditional doctrine. Likewise, plaintiffs have not alleged sufficient facts from which it could reasonably be inferred that Honda Motor exercised its power as corporate parent to direct American Honda to perpetuate [**17] the alleged kickback scheme. It is not sufficient for that purpose merely to assert that several of Honda Motor's directors knew of the scheme and that Honda Motor benefited from it. Although directors' knowledge might well be imputed to Honda Motor, such knowledge would not be sufficient to give rise to an inference of corporate action since a single director or a minority of directors cannot alone control a parent's board in directing the affairs of the subsidiary. Finally, for the reasons just stated, I reject the theory that a parent can be held liable solely for failing to stop its subsidiary's wrongful acts of which it has knowledge.

However, [HN6]if a parent is not accountable for the sins of its offspring (unless it authorizes and directs them), it is responsible for its own transgressions. Thus, a fourth question that must be asked is whether a parent can be held liable for its subsidiary's wrongs if the parent joins in the commission of those wrongs. The answer to this question is yes, provided that the parent's own conduct is encompassed by the law giving rise to the cause of action. I will address the particular issues raised by the proviso in this case in Section III, *infra* [**18] . Before doing so, however, I will explain why this theory of liability is viable even if the subsidiary is a legitimate corporation whose veil cannot be pierced and even if there are insufficient allegations to establish that the parent exercised its control over the subsidiary to direct the subsidiary to engage in the alleged unlawful conduct.

Let me start with a simple hypothetical. Assume that an individual businessperson, Jacqueline Jones, a resident of Texas, is the sole stockholder of a corporation, XYZ, Inc. Assume further that although Jones may be said to have effective control over XYZ because she appoints its directors who, in turn, choose its officers, XYZ's corporate veil could not be pierced to hold Jones liable for torts or other wrongs committed by XYZ because XYZ is adequately capitalized and corporate formalities have been scrupulously followed.

Make the following assumptions as well. Officers of XYZ embark upon a course of unlawful activity in Maryland which enhances the company's profitability. Jones learns about this activity and is not displeased because it increases the dividends XYZ pays to her as its sole stockholder. Thus, instead of bringing the activity [**19] to an end, she directs John Smith, one of her agents from whom she has learned about the activity and who works for her in Maryland, to encourage its perpetuation. Smith is not an officer or director of XYZ but he is widely

known among XYZ's employees and dealers as a person quite close to Jones, one who has her ear and carries out her bidding. Over time reports are made to XYZ's management personnel about the illegal activities but, at least partially because of the perception that in light of Smith's involvement the activities have Jones' blessing, nothing is done to curtail those activities. To the contrary, an organized effort, in which Smith himself directly participates, is made to conceal that which has occurred, resulting in the continuation of the illegal activity to the harm of various innocent victims.

Under these circumstances can there be doubt about Jones' liability for damages which were caused by the unlawful activities after she authorized Smith to perpetuate them? Her liability would not be derivative through XYZ. Instead, it would rest upon the fact that she contributed to the continuation of the illegal activities through her direct agent. Neither the formality [**20] of the relationship between Jones and XYZ nor the regularity of their finances would be germane to [*1053] the theory of liability. Rather, the fact that Jones is the sole shareholder of XYZ and, as such, receives all of its net profits by way of dividends would be relevant only to prove her motivation for participating in the illegal scheme through Smith.

This hypothetical differs from what plaintiffs allege against Honda Motor in only three respects: (1) Honda Motor is a citizen of a foreign country rather than a citizen of a state different from the one where the illegal activities are being conducted; (2) Honda Motor is itself a corporation instead of an individual like Jones; and (3) unlike Smith, who is hypothesized to hold no position in XYZ, Amemiya, Chino, Munekuni, Okusa and Shinkai were officers and directors of American Honda as well as being directors of Honda Motor itself. The first difference clearly is immaterial. [HN7]No doctrine of international law or consideration of comity requires one nation to tolerate the citizen of another sending agents within its borders to promote the conduct of illegal activity. [4]

> 4 The effectiveness of service of process upon the foreign citizen and the enforceability of any judgment that might ultimately be rendered are, of course, separate questions. However, neither of these questions is before me now. All that I am now called upon to decide is whether plaintiffs have stated a claim against Honda Motor.

[**21] The second difference is an important one but its importance makes the case against Honda Motor easier to prove than the case against Jacqueline Jones. Because Jones is an individual, [HN8]in order to state a claim against her, allegations would have to be made that Smith reported the illegal activities to her and that she directed him to encourage their continuation. Since Honda Motor is a corporation and Amemiya, Chino, Munekuni, Okusa and Shinkai were its directors, their own knowledge of the illegal activities and encouragement of the perpetuation of the activities would, rather clearly, seem to be directly imputable to Honda Motor. [5] *See generally United States v. One Parcel of Land*, 965 F.2d 311, 316-17 (7th Cir. 1992); Restatement (Second) of Agency § 275 (1958).

> 5 Even if it were to be argued that Honda Motor's liability depended upon Amemiya, Chino, Munekuni, Okusa and Shinkai reporting back to management in Japan, Honda Motor's motion to dismiss should be denied. Although plaintiffs make no express allegation to that effect, it may be reasonably inferred, based on allegations that at least five Honda Motor directors had knowledge of the kickback scheme and that executives were regularly rotated between Japan and the United States, that reports of the scheme were made to high management officials in Japan. This is [HN9]a matter that lies within the exclusive knowledge of the Honda defendants and if it is an element of plaintiffs' claims (which is doubtful), plaintiffs are entitled to discovery on it.

[**22] The third difference is one which on the surface obfuscates analysis since it brings the question of corporate interrelatedness to the fore. Because Amemiya, Chino, Munekuni, Okusa and Shinkai were officers and directors of American Honda as well as being directors of Honda Motor (unlike John Smith, who is not hypothesized to be an officer and director of XYZ), Honda Motor posits that it cannot bear responsibility for the directors' activities. It takes but little reflection, however, to realize that this change in the hypothesized facts is likewise immaterial to sound analysis. [HN10]Clearly, a defendant cannot immunize herself from wrongful conduct beneficial to her personally and insulate herself from liability that she would otherwise incur simply by also designating her personal agent as an officer and director of a corporation of which she is the sole stockholder. Although sometimes a phrase of uncertain meaning, the familiar maxim that the corporate veil can be used only as a shield and not as a sword expresses an essential truth which protects the law from being so easily manipulated.

In summary, plaintiffs have not alleged sufficient facts either to hold Honda Motor liable under [**23] a corporate veil piercing theory or to show that Honda Motor, as American Honda's parent, caused American Honda to embark on or perpetuate its illegal course of conduct. However, plaintiffs have alleged sufficient facts to demonstrate that Amemiya, Chino, Munekuni, Okusa and Shinkai joined in the kickback scheme in their ca-

pacity as directors of Honda Motor, and for its benefit, by encouraging, concealing and obstructing investigations of the scheme. These actions are imputable to Honda Motor [*1054] by virtue of its directors' status in that corporation.

III.

The next question that must be considered is one upon which I deferred ruling in *Honda I*: whether the acts allegedly committed by Amemiya, Chino, Munekuni, Okusa and Shinkai and imputable to Honda Motor are sufficient to establish violations by Honda Motor of the RICO provisions upon which plaintiffs rely. I find that plaintiffs' allegations are not sufficient as to the claims asserted under §§ 1962(a) and (b) because there are elements of those claims that the conduct of Amemiya, Chino, Munekuni, Okusa and Shinkai does not satisfy. Since no substantive allegations are made against Honda Motor other than those relating to the conduct [**24] of its directors, this is a fatal pleading defect. However, I find that the conduct of Messrs. Amemiya et al. satisfies each element of plaintiffs' §§ 1962(c) and (d) claims.

A.

[HN11]Section 1962(a) requires plaintiffs to demonstrate, *inter alia*, that Honda Motor (1) received income directly or indirectly from a pattern of racketeering activity, and (2) used or invested, directly or indirectly, any part of that income in the operation of an enterprise engaged in or affecting interstate commerce. *United States v. Vogt*, 910 F.2d 1184, 1194 (4th Cir. 1990). The income that Honda Motor is alleged to have received was the increase in the net profits it earned from American Honda, by virtue of the fact that American Honda allegedly had to pay its executives less compensation because of the benefits they derived from the kickback scheme. I remain of the view expressed in *Honda I* that this is a sufficient allegation of income indirectly received from the alleged unlawful activity. Plaintiffs fail, however, to allege sufficiently that Honda Motor, rather than its American subsidiary, used or invested this income in a RICO enterprise. [6] In this regard, plaintiffs improperly engage [**25] in the aggregated pleading I rejected in *Honda I*. 941 F. Supp. at 536.

> 6 The four representative complaints name several different enterprises in their § 1962(a) allegations. *Borman* and *Breakaway* describe the enterprise as a combination of Honda Motor, Honda North America, American Honda and the bribe-paying dealers. *Austin* alleges four different enterprises: (1) the "Honda Enterprise," composed of Honda Motor, Honda North America and American Honda; (2) the "Honda Dealer Network Enterprise"; (3) the "Honda Conspiracy Enterprise," consisting of the corrupt Honda employees and dealers; and (4) the "Honda Association-In-Fact Enterprise," consisting of the three Honda corporations and the conspiring dealers. Finally, *Trans-Oceanic* names each of the three Honda corporations as a separate enterprise. These pleading variations notwithstanding, as I discuss *infra* all of the complaints suffer from the same fundamental deficiency, negating plaintiffs' § 1962(a) claims.

Plaintiffs allege that [**26] corrupted American Honda executives used the income they derived from their illegal activities to obtain ownership interests in bribe-paying dealerships. However, it is not alleged that any of the Honda Motor directors were involved in this conduct. Plaintiffs further allege that "Honda" used the income that it derived from paying its executives reduced compensation to finance its sales and distribution network. Assuming this allegation to be true, it is not an allegation against Honda Motor, since it is undisputed that distribution and sales were exclusively within American Honda's corporate province. There is no allegation that Honda Motor invested the net profits it earned from American Honda back into American Honda. For these reasons plaintiffs have failed to state a claim against Honda Motor under § 1962(a).

They also have failed to state a claim against Honda Motor under § 1962(b). Only infrequently can one receive definitive guidance from the statutory language itself when engaging in the casuistry which analysis of RICO's provisions requires. This is such an occasion. [HN12]Section 1962(b) makes it "unlawful for any person through a pattern of racketeering activity . . . to acquire [**27] or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in . . . interstate or foreign commerce." The alleged "enterprise" identified for § 1962(b) purposes in two of the representative complaints (*Borman* and *Breakaway*) is American Honda. No reasonable basis whatsoever exists for inferring that Honda Motor has [*1055] maintained control over American Honda through the kickback scheme or any other pattern of racketeering activity. Honda Motor maintains control over American Honda by virtue of the fact that it is American Honda's sole stockholder and, as such, has ultimate power over it.

Austin alleges four different enterprises, the "Honda Enterprise," the "Honda Dealer Network Enterprise," the "Honda Conspiracy Enterprise" and the "Honda Association-In-Fact Enterprise," for the purpose of § 1962(b) just as it does for the purpose of § 1962(a). *See* note 6, *supra*. As Honda Motor properly argues, [HN13]the "Honda Conspiracy Enterprise" is not a valid RICO enterprise since it is alleged to exist solely to carry out the predicate acts alleged. *See United States v. Turkette*, 452

U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981). [**28] As for the other three enterprises, the *Austin* allegations are insufficient either because (1) (like the allegations in *Borman* and *Breakaway*) they ignore the fact that Honda Motor lawfully has control over American Honda, or (2) they fail to show that Honda Motor, as opposed to American Honda, actually controlled the dealer network.

B.

[HN14]Section 1962(c) provides that "it shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Honda Motor argues that plaintiffs have failed to state a claim against it under § 1962(c) because they have not sufficiently alleged that it committed any acts of "racketeering activity." [7]

> 7 Honda Motor also argues that it cannot be held liable under § 1962(c) because as a "person" alleged to have committed racketeering activity it is not sufficiently distinct from the "enterprise" through which the activity was conducted. In support of this contention, it cites *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987), *overruled on other grounds*, 896 F.2d 833, 841 (4th Cir. 1990), where the Fourth Circuit held that the person/enterprise distinction was not met when a franchisor was named as the person and its separately incorporated franchisees as the enterprise. Frankly, I question the precedential value of *Entre Computer*. The court reached its conclusion virtually without analysis and the underlying allegations concerning RICO misconduct were quite weak. In any event, *Entre Computer* is clearly distinguishable from the present case since, as Honda Motor emphasizes throughout its various arguments, it has an existence and function (vehicle manufacturing) entirely separate and apart from American Honda. American Honda, as the corporate entity responsible for vehicle distribution, is more analogous to the franchisor in *Entre Computer* than is Honda Motor.

[**29] Although plaintiffs originally alleged five categories of predicate acts sufficient to establish RICO liability - mail fraud, wire fraud, bribery, extortion and obstruction of justice - it is only the mail fraud allegations that effectively remain. [8] In their opposition memorandum plaintiffs concede that they are not relying upon a theory of commercial bribery, and they have not countered Honda Motor's argument that the wire fraud allegations lack sufficient specificity. Further, the only specific allegation made by plaintiffs concerning alleged obstruction of justice under 18 U.S.C. § 1503 by a Honda Motor director relates to false deposition testimony given by Okusa during the course of a state administrative proceeding. [HN15]Because § 1503 applies only to obstruction of federal judicial proceedings, Okusa's actions cannot constitute a predicate act under RICO. *See, e.g., O'Malley v. New York City Transit Auth.*, 896 F.2d 704, 707-08 (2d Cir. 1990). Similarly, although plaintiffs allege that Munekuni lied to the FBI during the course of a criminal investigation, that cannot constitute a predicate act since [HN16] 18 U.S.C. § 1510 requires [*1056] that obstruction of a criminal investigation [**30] be accomplished by bribery and no allegations of bribery of an FBI agent are made.

> 8 I focus on the mail fraud allegations because they are the only surviving predicate acts common to all of the complaints. *Austin* and *Breakaway* also contain allegations of extortion by the Honda Motor executives. Under plaintiffs' theory, the executives committed extortion by receiving gifts from dealers who feared adverse economic consequences if they did not comply, as well as directing other Honda employees to pressure dealers into complying. Discovery may demonstrate that the transactions at issue were not motivated by fear, and therefore extortion has not been made out. For the purposes of this motion, however, plaintiffs have adequately alleged extortion as a predicate act.

Plaintiffs' mail fraud allegations are, however, sufficient. It is true, as Honda Motor argues, that all of the fraudulent mailings alleged, e.g., dealer agreements which falsely represented that American Honda would deal with plaintiffs fairly [**31] and distribute Honda products to them in a fair and reasonable manner, were effected under the auspices of American Honda and related to sales and distribution, matters falling within American Honda's exclusive bailiwick. However, according to plaintiffs' allegations, when Amemiya, Chino, Munekuni, Okusa and Shinkai encouraged and concealed the fraudulent scheme pursuant to which the mailings were made, they were serving the interests not only of American Honda but of Honda Motor as well. If this is true, when they committed predicate acts, they were acting in a dual capacity for both corporations. [9]

> 9 At the very least, plaintiffs have sufficiently alleged that Amemiya, Chino, Munekuni, Okusa and Shinkai aided and abetted the commission of the predicate acts, which is sufficient to constitute a pattern of racketeering activity. *See* Section V, *infra*.

C.

The only specific challenge that Honda Motor makes to plaintiffs' § 1962(d) claim is that under *New Beckley Mining Corp. v. International Union,* [**32] *United Mine Workers*, 18 F.3d 1161 (4th Cir. 1994), an allegation of intracorporate conspiracy is insufficient as a matter of law. If plaintiffs had alleged simply that Honda Motor conspired with American Honda, this argument might have merit. However, plaintiffs have alleged that Honda Motor conspired with Honda dealers to further the illegal kickback scheme. There simply can be no doubt that Honda Motor and Honda dealers are separate entities capable of conspiring with one another.

IV.

I will now turn to plaintiffs' claims against Lyon & Lyon. According to plaintiffs' allegations, from 1977 through 1995 Lyon & Lyon was American Honda's general counsel, and Lyon & Lyon attorneys served as voting directors of the company. In addition, in the 1980s and early 1990s, Lyon & Lyon assumed two management responsibilities: (1) conducting regular training sessions at the national sales meetings on American Honda's conflict of interest policy and on dealer communications; and (2) handling all allegations of misconduct in the auto field sales division, including conflict of interest complaints involving dealers or potential dealers.

Plaintiffs assert that in this capacity between 1979 and [**33] 1991 Lyon & Lyon received numerous complaints about the kickback scheme. For example, in 1979 Cliff Schmillen, an American Honda director and its executive vice president, acquired a ten percent hidden interest in a Honda dealership. Before acquiring this interest, Schmillen allegedly consulted with Lyon & Lyon and was told that his hidden ownership interest "was acceptable as long as he did not tell anyone." In subsequent years Lyon & Lyon allegedly received at least four other credible complaints about the illegal kickbacks from J.D. Power, Don English, Cecil Proulx and Christiaan Walker. Lyon & Lyon allegedly took no action to end the corrupt activities reported to it.

Plaintiffs further allege that beginning in 1991, after various Honda dealers had filed civil actions, Lyon & Lyon took actions to conceal the kickback scheme that amounted to obstruction of justice. Plaintiffs focus particularly upon the seminal case instituted in the District of New Hampshire by Richard Nault against American Honda. *See Nault's Auto, Sales, Inc. v. American Honda Motor Co.*, 148 F.R.D. 25 (D.N.H. 1993). Factual issues as to plaintiffs' allegations of obstruction of justice abound, [**34] and the duty that plaintiffs apparently would impose upon Lyon & Lyon attorneys to disclose their own knowledge about illegal activities when a witness was asked about them on deposition is a highly questionable one (at least as to the [*1057] depositions of witnesses other than corporate designees). However, plaintiffs allege that Lyon & Lyon lawyers went further, counseling witnesses to give evasive or incomplete testimony, for example, by telling them that if they lied on the witness stand "a bolt of lightning wasn't going to come out of the sky and strike [them] dead." Further, plaintiffs allege that in response to increasing pressure from the plaintiffs and the court in the *Nault* litigation, Lyon & Lyon and American Honda conducted an investigation of the alleged kickback scheme but intentionally limited that investigation by not interviewing certain key players, including Amemiya, Chino, Munekuni and Okusa. Finally, Lyon & Lyon attorneys allegedly directed American Honda to make false and misleading assertions about the results of the investigation in an evidentiary hearing in the *Nault* case.

V.

Against the background of these allegations plaintiffs assert claims against [**35] Lyon & Lyon under §§ 1962(c) and (d). I will address the § 1962(c) claim first.

A.

There is one phrase of one sentence of § 1962(c) which is critical in analyzing this claim: [HN17]"it shall be unlawful for any person to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." Short though this phrase may be, for proper analysis it must be further parsed into two sub-phrases: (1) whether a person "participated, directly or indirectly, in the conduct of such enterprise's affairs," and (2) whether this participation was "through a pattern of racketeering activity."

The first of these two sub-phrases was interpreted by the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993). The Court held that [HN18]in order to be found "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs," a person must have had an operational or management role in the enterprise. *Id.* at 185. I have no difficulty in concluding that, assuming plaintiffs' allegations to be true, Lyon & Lyon played such a role in the enterprise here alleged. According [**36] to plaintiffs, for over ten years Lyon & Lyon took on the responsibility of pretending to enforce American Honda's conflict of interest policy and of not following up on dealer complaints in order to perpetuate the kickback scheme. [HN19]Concealment is a necessary element of any ongoing illegal activity, and a person who is in charge of the coverup plays an operational and

management role in the enterprise conducting that activity.

[HN20]It is not enough, however, for a defendant to have "conducted or participated directly or indirectly, in the conduct of [an] enterprise's affairs" in order for him to be held liable under § 1962(c). He also must have done so "through a pattern of racketeering activity." On the surface this prepositional phrase appears to present an insurmountable obstacle to plaintiffs' claim in this case, at least as to any allegation based upon Lyon & Lyon's alleged activities prior to the *Nault* litigation. [HN21]"Pattern of racketeering activity" is defined to mean the commission of at least two predicate acts of various federal crimes listed in § 1961(1), here mail fraud. [10] Plaintiffs do not allege that Lyon & Lyon mailed any of the fraudulent materials. Thus, unless [**37] aiding and abetting principles apply, Lyon & Lyon cannot be said to have engaged in "racketeering activity." And, [HN22]although there is some disagreement among the courts on the issue, *compare Department of Economic Development v. Arthur Andersen & Co.*, 924 F. Supp. 449, 477 (S.D.N.Y. 1996) *with 131 Main Street Associates v. Manko*, 897 F. Supp. 1507, 1529 n.20 [*1058] (S.D.N.Y. 1995), it is becoming conventional wisdom that aiding and abetting liability under § 1962(c) does not survive the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994), that there is no aiding and abetting liability in a civil action brought under § 10(b) of the Securities Act of 1934.

> 10 In addition, [HN23]the predicate acts must be related and there must be a threat of continuing activity in order to constitute a "pattern of racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). Because the predicate acts allegedly committed by Lyon & Lyon, discussed *infra*, had similar purposes and significantly contributed to a long-term criminal enterprise, I hold that these elements have been met.

[**38] There is a subtle but profound flaw in this logic. It lies hidden in the breadth of the statement of the premise that aiding and abetting liability does not survive *Central Bank*. I have no quarrel with that proposition to the extent it refers to applying 18 U.S.C. § 2 [11] directly to § 1962(c). Indeed, *Central Bank* aside, the proposition must be true in light of *Reves* itself. For if § 2 were held to apply directly to § 1962(c), the Supreme Court's painstaking analysis in *Reves* of the "participate, directly or indirectly, in the conduct of [an] enterprise's affairs" language would have been all for naught and the "operation or management" test the Court adopted would be drowned in a sea of aiding and abetting allegations. This does not mean, however, that aiding and abetting principles do not apply in considering whether a defendant has participated in the enterprise "through a pattern of racketeering activity," i.e., whether he has committed at least two predicate acts. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 270 (3d Cir. 1995). [HN24]Although 18 U.S.C. § 2 is not separately listed in § 1961(1), presumably when that section refers to various [**39] substantive criminal statutes it also encompasses within them § 2 which, by its terms and by long established case law, is sufficient to establish substantive liability. *See Manko*, 897 F. Supp. at 1529 n.20.

> 11 [HN25] 18 U.S.C. § 2, entitled "Principals," states, in full, that
>
> > (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> >
> > (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[HN26]The distinction I am drawing between finding direct application of § 2 to § 1962(c) (which I believe to be implicitly prohibited by *Reves*) and applying § 2 to the substantive offenses listed in § 1961(1) for the purpose of determining whether a defendant has committed a predicate act may seem sophistic, bringing through the back door that which *Reves* bars at the front. In my view, however, [**40] the distinction is key to a proper understanding of *Reves*, and it brings within the ambit of § 1962(c) precisely those defendants who belong there. Unless the distinction is recognized, in most cases there would be no principled basis for imposing § 1962(c) liability upon a class of defendants whom Congress surely intended should be within the statute's purview: leaders of enterprises who do not themselves commit predicate acts but who cause others to do so. [12] This is so because [HN27]the liability of such principals is created by § 2(b) just as aiding and abetting liability is created by § 2(a). Thus, if § 2 is read out of § 1961(1), the highest-level managers of a criminal enterprise who leave the hands-on [*1059] work to others would be excluded from liability under § 1962(c) by virtue of the "through a pattern of racketeering activity" phrase.

12 I say "in most cases" because some of the statutes listed in § 1961(1) themselves render culpable not only persons who commit the prohibited acts but also persons who cause the acts to be committed. For example, the principal predicate acts in this case are violations of [HN28]the mail fraud statute, 18 U.S.C. § 1341, which uses the words "causes to be deposited" and "causes to be delivered" within its own terms, as do several of the other offenses contained within § 1961(1) (e.g., 18 U.S.C. §§ 1343 (wire fraud), 1461 (mailing obscene material), and 2251(c) (printing or publishing child pornography)). Although it could be inferred that such language was intended to implicate those who direct or cause others to commit those criminal acts, it is at least equally likely that these phrases were included because those infractions frequently or necessarily involve innocent actors who actually do the delivering or printing. For example, it is the postal service that actually "delivers" a piece of mail--the sender only "causes" it to be delivered by dropping it in a mailbox. In any event, [HN29]several of the other predicate acts listed in § 1961(1) do not contain similar language, yet RICO is clearly intended to implicate persons who repeatedly direct others to commit such crimes (e.g., 18 U.S.C. §§ 1503 (obstruction of justice) and 1512 (witness tampering)). The only way for such persons to be prosecuted under § 1962(c) is to find that they are principals under § 2(b).

[**41] Of course, [HN30]it is the relatively rare case in which a person who can be held liable for a substantive offense only as an aider and abetter would meet the "operation or management" test of *Reves* for determining the necessary level of "participation." If plaintiffs' allegations are true, however, this is such a case. Although Lyon & Lyon may only have aided and abetted the commission of the predicate acts of mail fraud, as indicated above its management role in concealing the scheme is sufficient to meet the "operation and management" test of *Reves*. Plaintiffs have therefore stated a viable § 1962(c) claim against Lyon & Lyon.

B.

Plaintiffs also argue that, aside from Lyon & Lyon's alleged role as manager of the concealment aspect of the kickback scheme, Lyon & Lyon committed various predicate acts of racketeering during the course of the *Nault* litigation, primarily obstruction of justice. Lyon & Lyon argues that these allegations are insufficient in various respects, including (1) the failure of the factual allegations to make out a substantive offense, (2) the insufficiency of the allegations to meet § 1962(c)'s "pattern" requirement, and (3) the absence of any causative [**42] connection between Lyon & Lyon's alleged misconduct in *Nault* and the harm allegedly suffered by plaintiffs.

All of these are knotty issues; the sufficiency of the allegations concerning causation are particularly conclusory and weak. However, I need not decide these questions at the present time because, as I have indicated, I find the plaintiffs' allegations sufficient to state a § 1962(c) claim against Lyon & Lyon for its asserted management role in the concealment of the kickback scheme throughout the scheme's purported existence. Thus, plaintiffs' allegations concerning the *Nault* litigation need not separately and independently state a RICO claim. It is sufficient that, if true, they serve to prove the continuing management role played by Lyon & Lyon in the enterprise's affairs.

C.

In *Honda I*, I deferred ruling upon the question of "the interrelationship between *Reves* and § 1962(d) claims in the outside advisor context" until another day. 941 F. Supp. at 560-61 n.40. I will continue to do so since plaintiffs have made sufficient allegations to show that Lyon & Lyon was not simply an outside advisor. I did not, however, mean to suggest in *Honda I* that a [**43] defendant can escape a conspiracy claim simply by characterizing herself as an "outside advisor." [HN31]The ultimate issue in any § 1962(d) case is whether a defendant's knowledge of the nature, scope and operations of the illegal scheme are such that it can be inferred "that he agreed that another violate [§] 1962(c) by committing two acts of racketeering activity." *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir. 1990) (quoting *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986)). This is as true now as it was before *Reves* was decided, and plaintiffs have alleged sufficient facts from which it can be inferred that Lyon & Lyon for many years knew and agreed that acts of mail fraud would be committed in furtherance of the alleged kickback scheme.

VI.

Honda Motor has filed a motion asking that I certify my order denying its motions to dismiss for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The motion will be granted. I am satisfied that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the [**44] litigation." I also believe it appropriate that a ruling by a single judge on issues of far-ranging importance to a citizen of a foreign nation, such as Honda Motor, be subject to effective and prompt review to prevent the [*1060] appearance that power has been arbitrarily exercised.

Whether I should stay discovery against Honda Motor during the pendency of the appeal involves balancing conflicting interests. On the one hand, the type of discovery to which Honda Motor can be subjected turns upon whether it remains as a party defendant. Therefore, denial of a stay would deprive Honda Motor of substantial rights were it ultimately to prevail on appeal. On the other hand, this litigation is extremely complex and involves the rights and potential liability of numerous parties. The wrongs alleged are said to have begun more than 15 years ago, and it is time for them to be remedied if, in fact, they were committed. I have a duty to the litigants, the transferor courts, and the multidistrict panel to keep the litigation moving at a brisk pace and on a steady course.

Against this background I believe it appropriate that I enter a stay for the limited period of 45 days. This will provide sufficient [**45] time for the Fourth Circuit to decide after hearing from the parties whether the interlocutory appeal should be allowed and, if so, whether the stay of discovery should be extended. If the Fourth Circuit does not permit the appeal, or if it determines that discovery should not be stayed in any event, the depositions of Messrs. Munekuni, Okusa and Shinkai which have been scheduled for this spring (after considerable negotiations among the parties) can proceed.

A separate order effecting the rulings made in this opinion is being entered herewith.

Date: *March 11, 1997*

J. Frederick Motz

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 8

LEXSEE

Caution
As of: Jun 21, 2011

REV. FRED SHUTTLESWORTH, Plaintiff, v. HOUSING OPPORTUNITIES MADE EQUAL, et al., Defendants.

C-1-94-352

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

873 F. Supp. 1069; 1994 U.S. Dist. LEXIS 19085

December 8, 1994, FILED

CORE TERMS: malicious prosecution, racketeering activity, bribery, opposing, conspiracy, color, mail, predicate acts, tenants, state law, sexual harassment, seizure, abuse of process, summary judgment, harassment, immunity, artifice, housing, entity's, state action, mail fraud, fraudulent, requisite, state law claim, rental properties, civil rights, cause of action, indictable, articulate, purported

COUNSEL: [**1] For FRED L SHUTTLESWORTH, plaintiff: Arthur Charles Church, [COR LD NTC], Cincinnati, OH.

For HOUSING OPPORTUNITIES MADE EQUAL OF GREATER CINCINNATI INC, HOUSING ASSISTANCE LEGAL FUND INC, KARLA IRVINE, defendants: Frederick Mason Morgan, Jr., [COR LD NTC], Cincinnati, OH.

For MONICA R BOHLEN, MICHAEL J MOONEY, defendants: Wilson G. Weisenfelder, Jr., [COR LD NTC], Robert Frederic Brown, [COR LD NTC], Rendigs Fry Kiely & Dennis - 1, Cincinnati, OH.

For CHARLES JUNG, defendant: Jan Martin Holtzman, [COR LD NTC], Department of Justice - 1, Cincinnati, OH.

JUDGES: Carl B. Rubin, Judge, United States District Court

OPINION BY: Carl B. Rubin

OPINION

[*1072] *ORDER*

This matter is before the Court upon three motions to dismiss filed on behalf of Defendants Monica R. Bohlen and Michael J. Mooney (Doc. 2); Housing Opportunities Made Equal, Inc. ["HOME"], Housing Assistance Legal Fund, Inc. ["HALF"] and Karla Irvine [collectively, "the HOME Defendants"] (Doc. 4); and Charles Jung (Doc. 5), as well as upon a motion by the HOME Defendants for sanctions pursuant to Fed. R. Civ. P. 11. (Doc. 7). In the alternative, Defendant Jung also moves for summary judgment as to the claims against him. (Doc. 5).

Defendants Bohlen and Mooney [**2] also request oral argument on their motion. (Doc. 2). As this Court is not required to, nor does it, routinely grant oral argument on motions to dismiss, such request hereby is denied. The Court thus renders this decision based [*1073] upon the motions, memoranda and other supporting documentation of record.

Procedural History/The Parties' Claims

On May 9, 1994, Plaintiff filed a complaint in this Court, setting forth claims against the above-named movants and two other individuals, Patricia and Jonathan Patterson. (Doc. 1). Plaintiff alleges that all such Defendants conspired among themselves and with others to injure Plaintiff's reputation by falsely accusing him of sexually harassing female tenants of certain rental properties he owned. The complaint asserts federal claims

under both the Racketeer Influenced and Corrupt Organizations Act ["RICO"], 18 U.S.C. § 1961, *et seq.*, and 42 U.S.C. § 1983 *(see* Doc. 1, PP 18-27), as well as a state law claim that appeared to be for malicious prosecution. (Doc. 1, PP 28-35).

On July 8, 1994, Defendants Bohlen and Mooney, and Defendants HOME, HALF and Irvine, filed [**3] similar but separate motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Docs. 2, 4). On July 11, 1994, Defendant Charles Jung followed with his motion to dismiss, or alternatively, for summary judgment, echoing many of the same arguments. (Doc. 5). All argue that Plaintiff's complaint fails to state a claim upon which relief can be granted against them.

As to Plaintiff's RICO claim, Defendants separately and/or collectively argue that Plaintiff failed to adequately plead the existence of a RICO enterprise; failed to allege that certain individuals participated in the operation or management of any such enterprise; and failed to plead viable predicate acts or sufficient relationship and continuity, as is necessary in order to establish a pattern of racketeering activity. Specifically, they urge that Plaintiff's complaint fails to allege indictable fraud, bribery, wire fraud or mail fraud offenses. They also argue that the RICO claims are untimely.

With respect to Plaintiff's § 1983 claim, Defendants further contend that Plaintiff failed to identify any constitutionally protected right that was violated and failed to establish that Defendants acted under color of state law.

All [**4] Defendants likewise argue that Plaintiff's malicious prosecution claim is partially time barred, and otherwise must fail for lack of the requisite element of seizure of a person or property. In his memorandum opposing the motions to dismiss, Plaintiff suggests that his complaint also contains a viable state law claim for abuse of process. *(See* Doc. 10, p. 14). In replying, Defendants further claim that Plaintiff failed to raise a claim for abuse of process, and contend that such a claim would be both unsupportable and partially time barred.

Defendant Jung, however, also claims that Plaintiff cannot establish that he was responsible for instituting any civil action against Plaintiff -- another requisite element of a malicious prosecution claim -- and that Plaintiff's suit against Jung in his official capacity is in fact a suit against the United States, which is barred by sovereign immunity.

OPINION

Standard of Review on Motions to Dismiss

The federal rules permit a court to dismiss a complaint before trial for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In reviewing a Rule 12(b)(6) motion to dismiss, a court must take all of the [**5] plaintiff's allegations as true and must resolve all doubts in the plaintiff's favor. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489 (6th Cir. 1990). The complaint should be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

On a motion to dismiss, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). The Court in *Scheuer* continued:

> Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss . . ., the [*1074] allegations of the complaint should be construed favorably to the pleader.

Id.

Sufficiency of Plaintiff's RICO Claim

Plaintiff's complaint purports to [**6] set forth a claim under 18 U.S.C. § 1962(c), which provides in pertinent part as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

In addition to its criminal application, the RICO statute allows persons injured by racketeering activity to maintain private actions. 18 U.S.C. § 1964(c).

To establish a violation under 18 U.S.C. § 1962(c), a civil plaintiff must prove "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985) (footnote omitted). A complaint advancing a § 1962(c) claim must include

factual allegations supporting each element of the violation with reasonable specificity. *Jennings v. Emry,* 910 F.2d 1434, 1435 (7th Cir. 1990). [**7]

The "conduct" prong recently has been defined to require that a particular defendant "must participate in the operation or management of the enterprise itself" in order for § 1962(c) liability to attach. *Reves v. Ernst & Young,* U.S. , 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). As another court reasoned:

> Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise.

University of Maryland v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1539 (3d Cir. 1993).

"Enterprise" is defined within the RICO statute as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). No corporation can be "both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise." *Davis v. Mutual Life Ins. Co. of New York,* 6 F.3d 367, 377 (6th Cir. 1993), [**8] *cert. denied,* U.S. , 114 S. Ct. 1298, 127 L. Ed. 2d 650 (1994). The enterprise must be "a separate, ongoing" entity. *Hofstetter v. Fletcher,* 905 F.2d 897, 903 (6th Cir. 1988). The definition encompasses both illegitimate enterprises *and* legitimate enterprises involved in racketeering operations. *United States v. Qaoud,* 777 F.2d 1105, 1115 (6th Cir. 1985), *cert. denied,* 475 U.S. 1098, 106 S. Ct. 1499, 89 L. Ed. 2d 899 (1986).

A "pattern," as that term is used in the RICO statute, requires at least two qualifying acts occurring within 10 years of one another. 18 U.S.C. § 1961(5). But "while two acts are necessary, they may not be sufficient." *Sedima,* 473 U.S. at 496, n.14. As the Court there further explained:

> Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. . . "Continuity plus relationship . . . combine[] to produce a pattern."

Id. (quoting S. [**9] Rep. No. 91-617, p. 158 (1969)).

Finally, "racketeering activity" consists of any one of a lengthy list of indictable state and federal offenses, including but not limited to mail fraud and wire fraud, as enumerated in 18 U.S.C. § 1961(1). Pursuant to Fed. R. Civ. P. 9(b), "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Accordingly, allegations of fraud which are "merely bare assertions of legal conclusions" will not satisfy the requirements of a RICO claim. *Condor America, Inc. v. American Power Development, Inc.,* 128 F.R.D. 229, 232 (S.D. Ohio 1989) (Rubin, J.).

Defendants generally aver that Plaintiff's allegations are insufficient to support the [*1075] existence of *any* of the requisite RICO elements. Accordingly, the Court will address each separately.

A. *Enterprise*

All Defendants urge the Court to find that Plaintiff has failed to identify any entity that qualifies as an "enterprise" for purposes of the RICO statute. On that subject, Plaintiff's complaint avers as follows:

> The Defendants are collectively an enterprise engaged in activities [**10] which affect interstate commerce, to wit: individuals affiliated with corporations established under the law of the State of Ohio.

(Doc. 1, P 19). Beyond that bare allegation, however, the complaint sheds no further light on the nature or scope of the purported enterprise.

Despite the vagueness of the enterprise contention in his complaint, Plaintiff's memorandum opposing the motions to dismiss is somewhat more specific, arguing that he "has alleged the existence of an enterprise, to wit: HOME. It could also include individuals." (Doc. 10, p. 6). Although he acknowledges that HOME's "ascertainable structure" is "an enterprise designed to improve housing opportunities," Plaintiff suggests that Irvine, as the executive director of HOME, and Bohlen and Mooney, as attorneys employed by HOME, acted in concert with others to use the enterprise to advance frivolous lawsuits against Plaintiff. *(See* Doc. 10, pp. 6-7). In support of that contention, he offers the affidavits of various individuals, attesting that Mooney, Bohlen and/or Irvine, acting on behalf of HOME and/or with funds presumably made available through HALF, solicited Plaintiff's tenants to bring harassment complaints [**11] against him, and offered payment in exchange for any such complaints. *(See* exhibits to Doc. 23).

Although Plaintiff's complaint itself does not clearly delineate the scope or the nature of the "enterprise" that is the subject of Plaintiff's RICO claim, the "enterprise" alluded to in his opposing memorandum, as supported by affidavits, does not lend itself to easy characterization. Though vague, Plaintiff's complaint can be interpreted to imply that the "enterprise" was a nameless alliance among HOME, HALF, Irvine, Bohlen, Mooney and others, including those [such as the Pattersons] who lodged harassment complaints against Plaintiff.

In light of the difficulty implicit in describing any such intangible entity, the Court is reluctant to dismiss the complaint based upon Plaintiff's failure to better articulate the identity of the RICO enterprise. Under such circumstances, the preferable approach would be for Plaintiff to amend his complaint, to better apprise Defendants of the claims against them. Although the pending motions to dismiss apparently have not motivated Plaintiff to take advantage of the amendment option, the Court nonetheless determines that the allegations of Plaintiff's [**12] complaint, as further expanded upon through Plaintiff's memorandum and affidavits, sufficiently identify the enterprise to satisfy notice pleading requirements.

B. *Conduct*

Pleading the existence of a legally sufficient enterprise, however, does not end the Court's inquiry into the enterprise. Certain Defendants contend that even if an "enterprise" existed, they lacked sufficient powers of management or control over the enterprise's activities to be liable therefor.

Plaintiff has addressed that contention sufficiently as to Defendants Mooney and Bohlen. Said Defendants' efforts to characterize themselves as mere outside legal counselors with limited involvement in HOME's operations are undercut by affidavits which portray them as actively soliciting sexual harassment complaints against Plaintiff from his tenants. *(See* Doc. 23, Affidavits of Donna Gillard, Stephanie Weaver, Blanche Tangie Smith, Phillip Randle). Whether Plaintiff can *prove* those charges is another matter; for present purposes, the affidavits are sufficient to suggest that Defendants Mooney and Bohlen played a significant role in the operation of the enterprise as alleged. Ironically, the following excerpt [**13] from the *Reves* decision cited by Defendants themselves is particularly instructive on that point:

> An enterprise is "operated" not just by upper management but also by lower-rung [*1076] participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, *for example, by bribery.*

Id., 115 S. Ct. at (emphasis added).

Attempted bribery is precisely the nature of the racketeering activity in which Plaintiff alleges that Mooney and Bohlen engaged. Were the courts to treat such conduct as being outside of the scope of an enterprise's operation and management, low-level operatives responsible for carrying out much of a racketeering entity's "dirty work" could never be held responsible for their actions under the RICO statute. This Court does not believe that the *Reves* holding was intended to yield such a result.

Even under the broad latitude that the Court has allowed, however, Plaintiff's description of the RICO enterprise does *not* subject Defendant Jung to liability. Although Plaintiff's complaint identifies Defendant Jung as [**14] being affiliated with the United States Department of Housing and Urban Development ["HUD"], nowhere does it indicate Defendant Jung's supposed role in the RICO enterprise *(see* Doc. 1, p. 1 & P 9), except to suggest that Jung either "facilitated" or "furthered" the enterprise's activities.

In an affidavit offered to support his motion for summary judgment, Defendant Jung avers that his sole possible connections to this matter are: 1) that in 1984, he investigated two fair housing complaints filed with HUD, alleging sexual harassment by Plaintiff, and 2) that in 1992, he responded to an inquiry by Defendant Bohlen, on behalf of Defendants Patricia and Jonathan Patterson, by referring Bohlen to HUD's regional office or national headquarters for copies of files from HUD's 1984 investigations of the complaints against Plaintiff. (Doc. 5, Affidavit of Charles Jung, PP 3-4).

Like Plaintiff's complaint, Plaintiff's memorandum in opposition to Defendant Jung's motion provides no insight into Defendant Jung's supposed role in the RICO enterprise. *(See* Doc. 10, pp. 6-7). Plaintiff's gratuitous reference to an unpublished appellate opinion critical of Jung's handling of other, unrelated [**15] Fair Housing Act matters is simply irrelevant to the issue of Jung's role in the enterprise alleged in this matter. *(See* Doc. 10, p. 12). Moreover, the affidavits that Plaintiff has produced make only passing, non-incriminatory references to Jung. [1] Plaintiff thus has come forward with nothing to refute Defendant Jung's affidavit regarding his limited role in this matter, and nothing of record would support an inference that Defendant Jung was an active participant with the power to manage or control any RICO enterprise as described by Plaintiff.

1 Of the three affidavits that mention Defendant Jung, two aver that the affiants provided information to Jung regarding certain tenants' actions in bringing sexual harassment charges against Plaintiff (Doc. 23, Affidavits of Michael Pearcill and Jeanette Bullock), and the third states that the affiant appeared with Plaintiff before Defendant Jung to testify regarding his knowledge of certain tenants' actions in the same context. (Doc. 23, Affidavit of Rev. Morris W. Fleming).

[**16] Accordingly, while the enterprise allegations of Plaintiff's complaint are minimally sufficient to survive a motion to dismiss as to Defendants Mooney, Bohlen, Irvine, HOME and HALF, such allegations will *not* support a RICO claim against Defendant Jung. Defendant Jung's motion for summary judgment on that basis therefore is well taken.

C. *Pattern*

Defendants also contend that Plaintiff has failed to demonstrate either the continuity of or the relationship between any alleged acts of racketeering activity, as is necessary in order to establish a *pattern* of such activity. Plaintiff's complaint alleges that "beginnning [sic] in 1984 and continuing thereafter," Defendants sought to injure Plaintiff through a pattern of conduct involving the pursuit false allegations of sexual harassment against Plaintiff. (Doc. 1, P 13). Defendants do not deny that HOME has played some role in four sexual harassment actions brought against Plaintiff, two in 1984 and two in 1992. Additionally, Plaintiff has submitted affidavits suggesting that certain Defendants also solicited other complaints from other tenants, in an effort allegedly aimed at depriving [*1077] Plaintiff of his rental properties. [**17] *(See* affidavits attached to Doc. 23).

As such allegations imply that Defendants' purported actions were continuing in nature *and* were interconnected as part of a persistent effort to take possession of Plaintiff's rental properties, the allegations are sufficient for purposes of the present motions to support the existence of a "pattern" of activity, Again, however, the Court at this time is not called upon to judge either the merit of or Plaintiff's ability to prove those allegations. Additionally, the "pattern" thus established must be one of "racketeering activity" -- the next element that the Court will address -- in order to support a RICO claim.

D. *Racketeering Activity*

Plaintiff's complaint identifies Defendants' "predicate acts" allegedly constituting racketeering activity as follows:

> A. A systematic scheme or artifice to bribe individuals to give false testimony against the Plaintiff in violation of law.
>
> B. A systematic scheme or artifice to use the United States mail to violate the law.
>
> C. A systematic scheme or artifice to obtain $ 600,000.00 of property by means of false or fraudulent pretenses, representations and promises.
>
> D. A systematic scheme [**18] or artifice of corruption through the abuse of the judicial process to violate the civil rights of the Plaintiff.

(Doc. 1, P 21). Again, Plaintiff's opposing memorandum and the affidavits offered in support thereof elaborate somewhat upon those sketchy contentions, describing a scheme whereby Defendants allegedly collaborated to take possession of Plaintiff's rental properties by bribing tenants to advance false sexual harassment complaints and lawsuits against Plaintiff. *(See* Docs. 10, 23).

The RICO statute enumerates an explicit and exhaustive list of "predicate acts" that may constitute racketeering activity for purposes of RICO liability. 18 U.S.C. § 1961(1). Nowhere does that list mention anything resembling two of Plaintiff's proffered "predicate acts -- abuse of the judicial process in order to violate civil rights, or scheming to deprive another of property by means of false or fraudulent pretenses, representations and promises -- as recognized forms of racketeering activity violative of RICO. Indeed, at least one federal appellate court has stated specifically that "violations of civil rights and constitutional law . . . are not [**19] predicate acts under RICO," and that allegations of such violations therefore are "irrelevant" in the context of RICO. *Jennings,* 910 F.2d at 1438. This Court finds that reasoning persuasive. Accordingly, even assuming that Plaintiff could prove that Defendants had conspired to violate Plaintiff's recognized civil rights, such conspiracy would not constitute a predicate act for purposes of RICO liability. Similarly, the nebulous fraud alleged to have been intended to deprive Plaintiff of property does not amount to racketeering activity that will support a civil RICO action.

Plaintiff's remaining allegations of "predicate acts" are less easily dismissed. Mail fraud, for example, *is* a recognized predicate act as defined by RICO. *See* 18 U.S.C. § 1961(1)(B) (citing 18 U.S.C. § 1341). The United States Code defines mail fraud as follows, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing [**20] such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1341. The prohibition thus encompasses nearly any use of the U.S. mails intended to further a fraudulent scheme.

Aside from his conclusory allegation that Defendants engaged in mail fraud, however, [*1078] Plaintiff has provided no details *(i.e.,* who, where, when or how) regarding Defendants' supposed use of the mails in furtherance of their purported scheme. As previously noted, the Federal Rules of Civil Procedure specifically require that "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). This Court previously has held that "at a minimum," a plaintiff [**21] must identify "the time, the place, or the content of any fraudulent statement made via wire or mail" in order to maintain a RICO claim. *Condor,* 128 F.R.D. 229 (S.D. Ohio 1989). Plaintiff simply has failed to meet that threshold in his complaint.

Additionally, Plaintiff has failed to demonstrate or even intimate that he relied upon any falsity that Defendants communicated by mail. Some cases suggest that such reliance likewise is a prerequisite to a RICO mail fraud claim. *See Blount Fin. Servs., Inc. v. Walter E. Heller & Co.,* 819 F.2d 151, 152 (6th Cir. 1987); *Central Distribs. of Beer, Inc. v. Conn,* 5 F.3d 181, 184 (6th Cir. 1993).

Although this Court already has granted Plaintiff substantial leeway to flesh out his skeletal pleadings through information provided in response to Defendants' motions to dismiss *(see* supra), nothing set forth in Plaintiff's opposing memorandum or supporting affidavits provides any further insight into his conclusory mail fraud averment. As Plaintiff's mail fraud allegation is no more than a "mere[] bare assertion[] of [a] legal conclusion[]," *see Condor America,* 128 F.R.D. at 232, [**22] Defendants' motion to dismiss must be granted as to that particular claim.

Finally, Plaintiff contends that Defendants violated RICO by scheming to bribe individuals to give false testimony against him. RICO recognizes several forms of racketeering activity consisting of bribery: 1) any act or threat involving bribery which is chargeable under State law and punishable by imprisonment for more than one year; 2) any act which is indictable under 18 U.S.C. § 201 (relating to bribery); and 3) any act which is indictable under 18 U.S.C. § 224 (relating to sports bribery). 18 U.S.C. § 1961(1)(A), (B).

Clearly, 18 U.S.C. § 224's prohibition on bribery in sporting contests is inapplicable to Plaintiff's allegations. Section 201, however, proscribes bribery of public officials and *witnesses* in the following pertinent language:

> (c) Whoever --
>
> * * *
>
> (2) directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness [**23] upon a trial, hearing, or other proceeding, before any court, . . . or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony. . .
>
> * * *
>
> shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2).

Plaintiff's complaint, coupled with his memorandum opposing the motions to dismiss and his supporting affidavits, contends that Defendants offered rent allowances or other material incentives to induce Plaintiff's tenants to make false accusations of sexual harassment against Plaintiff. Although Plaintiff does not explicitly so state,

the materials he has produced are sufficient to imply that such inducements were intended to evoke testimony before federal agencies *(e.g.,* HUD) and/or state or federal courts, where various harassment complaints against Plaintiff in fact were brought. Moreover, although Plaintiff's existing allegations arguably could be insufficient to suggest that Defendants sought to elicit *false* testimony against Plaintiff, under 18 U.S.C. § 201(c)(2), Defendants apparently could [**24] commit an offense even if they offered rental assistance only to secure *truthful* testimony against Plaintiff. Plaintiff's bribery contentions therefore allege a RICO predicate act sufficient to survive a motion to dismiss. [2]

> 2 The Court notes in passing that the conduct described in Plaintiff's bribery allegations also might suffice to establish other recognized predicate acts, including bribery in violation of state law *[see* 29 Ohio Rev. Code § 2921.02(C), (E) and 29 Ohio Rev. Code § 2929.11(B)(6), (C)3)]. *See* 18 U.S.C. § 1961(1)(A).

[*1079] Accordingly, as to all Defendants except Defendant Jung, the Court concludes that Plaintiff has stated a RICO claim legally sufficient to survive a motion to dismiss. In so holding, however, the Court passes no judgment on the merit of that claim, and indeed reminds Plaintiff that all such legal assertions must be supported by competent factual evidence in order to avoid a directed verdict and the possible consequences of Fed. R. Civ. [**25] P. 11.

Timeliness of Plaintiff's RICO Claim

The statute of limitations applicable to civil RICO actions is four years. *See Caproni v. Prudential Sec., Inc.,* 15 F.3d 614, 619 (6th Cir. 1994). Defendants contend that Plaintiff's cause of action against them accrued no later than late 1984 or 1985, and that the relevant statutory period therefore had run before Plaintiff filed this action. Defendants acknowledge, however, that the running of the limitations period is tied to the Plaintiff's *discovery* of the scheme against him. *See Agristor Fin. Corp. v. VanSickle,* 967 F.2d 233, 240-41 (6th Cir. 1992); *Hofstetter v. Fletcher,* 905 F.2d 897, 904 (6th Cir. 1988).

While the Court agrees that Plaintiff must have been aware in 1984 of the harassment actions then pending against him, we cannot conclude that Plaintiff also realized at that time that such harassment actions were the product of the RICO conspiracy that he now alleges. The issue of when plaintiff discovered that this purported conspiracy was responsible for instigating the complaints against him implicates a factual question not [**26] appropriate for resolution on a motion to dismiss.

In addition, Defendants find themselves in the dubious position of arguing that in 1984, plaintiff should have recognized a "pattern" of behavior attributable to Defendants, although Defendants themselves contend that even the 1984 complaints and 1992 complaints combined are insufficient to constitute a "pattern" for purposes of RICO liability. This Court declines to conclude from the evidence now before it that the incidents of 1984 alone were enough to put Plaintiff on notice of the existence of a RICO conspiracy. Defendants' motion to dismiss the RICO claims as untimely therefore is denied.

Sufficiency of Plaintiff's 42 U.S.C. § 1983 Claim

In order to maintain a cause of action under 42 U.S.C. § 1983, a plaintiff must establish the following two elements:

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or [**27] usage, of any State or Territory. This second element requires that the plaintiff show that the defendant acted "under color of law."

Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970) (footnote and citations omitted).

In pleading a claim under 42 U.S.C. § 1983, Plaintiff avers that Defendants acted "in consort [sic] . . . under the color of state law to violate [his right to] life, liberty and the pursuit of happiness." (Doc. 1, P 26). As with Plaintiff's RICO claim, the complaint provides no further details regarding the nature of the supposed violation, although it does suggest that use of the courts and of Defendants Mooney's and Bohlen's licenses to practice law constituted the state action necessary to invoke § 1983. (Id.). In his memorandum opposing the motions to dismiss, however, plaintiff advances a different approach, arguing that Defendants' alleged conspiracy with Defendant Jung, a HUD employee, was sufficient to establish that even the private defendants acted under color of state law for purposes of § 1983 liability. (Doc. 10, pp. [**28] 10-11).

The moving Defendants argue that none of them are subject to liability under 42 U.S.C. § 1983. They first argue that Plaintiff has failed to articulate how he was deprived of any right secured by the Constitution or fed-

eral law, instead referring to guarantees enunciated in the non-statutory Declaration of Independence. They further argue that [*1080] as private individuals and a federal employee [Jung], they could not have acted under color of state law with respect to any action that they took.

Defendants correctly observe that Plaintiff has failed to identify any legally cognizable federal constitutional or statutory right that Defendants are alleged to have denied him. Even assuming that such defect could be corrected by more artful pleading, however, Plaintiff cannot overcome his inability to demonstrate that these Defendants acted under color of state law.

The status of Bohlen and Mooney as attorneys does not render their conduct "state action." The Supreme Court has determined that even court-appointed public defenders paid by the state do not act under color of state law for purposes of § 1983 liability. *Polk County v. Dodson,* 454 U.S. 312, 325, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981). [**29] This Court likewise has recognized that "privately-retained attorneys do not act 'under color of state law' pursuant to § 1983, and their acts do not constitute 'state action' for purposes of the Fourteenth Amendment." *Border City Sav. & Loan Ass'n v. Kennecorp Mortgage & Equities,* 523 F. Supp. 190, 193 (S.D. Ohio 1981) (Rice, J.). Similarly, a private party's use of the state judicial system does not constitute state action under 42 U.S.C. § 1983. *See Dunwoody Homeowners Ass'n v. DeKalb County,* 887 F.2d 1455, 1461 (11th Cir. 1989); *Tunstall v. Office of Judicial Support,* 820 F.2d 631 (3d Cir. 1987).

Apparently recognizing the futility of the arguments thus suggested in his complaint, Plaintiff in his opposing memorandum instead urges that Defendant Jung is the state actor whose participation in the alleged conspiracy implicates § 1983. This Court already has found that Plaintiff's complaint insufficiently identifies Defendant Jung's role in any RICO conspiracy, a defect which also plagues his § 1983 conspiracy allegations. However, even if Plaintiff was [**30] to adequately articulate Jung's part in the alleged § 1983 conspiracy, and was able to surmount Jung's claimed immunity as well, plaintiff still would confront the problem of Jung's position as a *federal* rather than state actor.

In his affidavit, Defendant Jung avers that any action he took with respect to Plaintiff was taken in his official capacity as an investigator for HUD. (Doc. 5, Jung Affidavit). Plaintiff has offered nothing to refute that claim, which otherwise appears to be credible. As § 1983 does not apply to actions taken under *federal* law, *see District of Columbia v. Carter,* 409 U.S. 418, 429-30, 34 L. Ed. 2d 613, 93 S. Ct. 602 (1973); *Sorrells v. Gattison,* 644 F. Supp. 124 (N.D. Ohio 1986), Plaintiff cannot rely upon Defendant Jung's alleged participation in the conspiracy to impute "state action" to Defendants. *See also Walber v. United States Dep't of Hous. & Urban Dev.,* 897 F.2d 530 (unpublished), 1990 U.S. App. LEXIS 3202 (6th Cir. 1990) ["HUD, of course, is a federal agency, operating under color of federal rather than [**31] state law; section 1983 hence is unavailable on these facts."). Plaintiff therefore has failed to state a claim under 42 U.S.C. § 1983, and such claim should be dismissed.

Sufficiency of Plaintiff's Malicious Prosecution Claim

Under Ohio law, a claim of malicious prosecution consists of four elements: 1) malice in instituting or continuing to prosecute the underlying action; 2) lack of probable cause; 3) termination of the underlying action in favor of the plaintiff; and 4) arrest of the plaintiff or seizure of his property in the underlying action. *Trussell v. General Motors Corp.,* 53 Ohio St. 3d 142, 144, 559 N.E.2d 732 (1990). Although the Court in *Trussell* conceded that arrest or seizure would not be required to prove malicious *criminal* prosecution, it observed that the requirement of an arrest or seizure in *civil* actions for malicious prosecution had been preserved in *Crawford v. Euclid Nat'l Bank,* 19 Ohio St. 3d 135, 139, 483 N.E.2d 1168 (1985). *Trussell,* 53 Ohio St. 3d at 144.

Plaintiff [**32] unquestionably prevailed in the civil sexual harassment actions instituted against him, and the issues of malice and probable cause clearly implicate factual questions to be resolved by the trier of fact. Defendants nonetheless argue that Plaintiff [*1081] cannot establish the requisite element of arrest or seizure.

In response to Defendants' motions, Plaintiff argues that a "seizure" of his property occurred when "rents otherwise due to Plaintiff were withheld." (Doc. 10, p. 14). Once again, Plaintiff fails to provide the other parties or the Court with minimally adequate information regarding his allegations. This Court therefore is unable to determine whether any such rents were withheld pursuant to court order; merely at the discretion of individual tenants, as Defendants suggest *(see* Doc. 19, p. 10); or as a result of some other action attributable to Defendants. Given that Plaintiff has suggested some obscure indicia of a "seizure," however, the Court is reluctant to summarily conclude that Plaintiff has failed to establish that requisite element of his malicious prosecution claim. The Court therefore holds that Plaintiff's malicious prosecution claim is sufficient, however marginally, [**33] to survive a motion to dismiss at this juncture. Plaintiff must be prepared to come forward with competent factual evidence of a seizure of property, however, to avoid a later adverse judgment on that claim.

As to Defendant Jung, however, Plaintiff's failure to refute Defendant Jung's affidavit regarding his limited

role in this matter is as fatal to Plaintiff's malicious prosecution claim as it was to his RICO claim. Nowhere does Plaintiff even attempt to explain how Jung, as a federal employee of HUD, was or could have been responsible for the allegedly malicious prosecution of actions against him. Accordingly, summary judgment is appropriate as to the malicious prosecution claim against Defendant Jung.

Timeliness of Plaintiff's Malicious Prosecution Claim

Ohio Rev. Code § 2305.11(A) provides that an action for malicious prosecution must be initiated within one year after the cause of action accrues. Case law establishes that a malicious prosecution cause of action accrues when the underlying legal proceeding terminates in favor of the plaintiff. *Francis v. City of Cleveland,* 78 Ohio App. 3d 593, 597, 605 N.E.2d 966 (Cuyahoga Cty. 1992). [**34]

As Plaintiff's complaint reveals, two of the actions on which his malicious prosecution claim is based were resolved in his favor on October 17, 1984, and March 14, 1985, respectively. (Doc. 1, P 34). By Plaintiff's own admission, then, any cause of action thereon accrued more than one year before the May 9, 1994 filing of this action. *(See* Doc. 1). Accordingly, Plaintiff's malicious prosecution claim must be dismissed as time barred as to those two incidents. Only the sexual harassment proceedings that terminated in this Court and in the Hamilton County Municipal Court in April 1994 may serve as the basis for malicious prosecution claims.

Sufficiency of Plaintiff's Abuse of Process Claim

Abuse of process is defined under Ohio law as including: 1) the use of legal process with an ulterior motive; and 2) the intentional or willful commission of some further act in the use of process that would not be proper in the regular conduct of the proceeding initiated. *Clermont Environmental Reclamation Co. v. Hancock,* 16 Ohio App. 3d 9, 11, 474 N.E.2d 357 (Clermont Cty. 1984).

In the "Third Claim for Relief" of his complaint, Plaintiff [**35] sets forth what appears to be a claim purely for malicious prosecution. *(See* Doc. 1, PP 28-35). The claim is couched in terms of "probable cause," "malice" and "prosecuting" *(see* Doc. 1, PP 32, 33, 34. 35), and includes no references to such concepts as "ulterior purpose," "intent," "willfulness," "abuse" or even "process."

In his memorandum opposing Defendants' motions to dismiss, however, Plaintiff defended the viability of his "abuse of process" claim. *(See* Doc. 10, pp. 13-14). None of Defendants had moved to dismiss any such "abuse of process" claim. *(See* Docs. 2, 4, 5). Indeed, the Court concludes that a fair reading of Plaintiff's third claim for relief would interpret such claim to be one for malicious prosecution and not for abuse of process, and that no other portion of Plaintiff's complaint can be fairly read to set forth an abuse of process claim. Under such circumstances, the Court can only conclude that Plaintiff is attempting to raise an abuse of process claim [*1082] for the first time in his memorandum opposing the motions to dismiss. That the Plaintiff cannot do.

Although this Court thus far has granted Plaintiff wide latitude to use his opposing memorandum [**36] as a device to expand upon and even salvage the sketchy allegations of his complaint, we draw the line at allowing Plaintiff to employ that memorandum to *introduce* claims not even intimated at in his pleading. Having had the benefit of Defendants' coaching regarding defects inherent in the sole state law claim he raised, Plaintiff cannot now stave off dismissal and contravene the amendment procedure by construing his own words in a way that defies logic.

Defendants need not move to dismiss a claim that has never been properly raised; Plaintiff cannot raise a claim by insisting that his allegations support a cause of action that is not readily apparent from the face of his pleading. Accordingly, while the Court determines that Plaintiff has not pleaded a proper abuse of process claim, that determination is without prejudice to Plaintiff's right to move for leave to amend his complaint in order to add such a claim, as the Court cannot address the merits of a claim not properly before it.

Immunity of Defendant Jung

Having determined that Plaintiff's complaint fails to state a claim upon which relief can be granted against Defendant Jung as to all claims, the Court is spared [**37] the necessity of exploring the more complex question of whether and/or the extent to which Defendant Jung is entitled to immunity from Plaintiff's claims. The Court nonetheless observes that Plaintiff's complaint does not appear to adequately articulate a Bivens-type action against Defendant Jung individually, *see Bivens v. Six Unknown Agents,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), and that the judgment in favor of Defendant Jung might be supportable on a sovereign immunity as well. *See, e.g., Atkins v. O'Neill,* 867 F.2d 589, 590 (10th Cir. 1989) ("It is well settled that the United States and its employees, sued in their official capacities, are immune from suit unless sovereign immunity has been waived").

Defendants Bohlen's and Mooney's Motion for Sanctions

Finally, the Court must address Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11. (Doc. 7).

Rule 11 provides that a court may sanction an attorney or a law firm for presenting a pleading that contains claims or other legal contentions that are not "warrranted [sic] by existing law or by a nonfrivolous [**38] argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2), (c). Despite that broad authority, this Court has long subscribed to the notion that sanctions should be imposed for *persisting* in a claim after its meritlessness becomes obvious, rather than for merely pleading a claim that eventually proves to be meritless.

In this matter, although Defendants have succeeded in having certain of Plaintiff's claims stricken, significant portions of Plaintiff's complaint have survived Defendants' motions to dismiss. Given that the parties apparently have not yet had an opportunity to engage in meaningful discovery regarding the remaining claims, the Court finds that sanctions would be premature at this juncture. This denial of Defendants' motion, however, is without prejudice to their right to renew such motion should Plaintiff subsequently appear to be pursuing claims which he should be aware lack merit.

IT THEREFORE IS ORDERED that Defendant Jung's motion for summary judgment (Doc. 5) hereby is GRANTED in its entirety; and that Defendants Bohlen's and Mooney's and Defendants Irvine's, HOME's and HALF's motions to dismiss [**39] (Docs. 2, 4) hereby are GRANTED IN PART and DENIED IN PART. Said motions are GRANTED to the extent that they seek dismissal of Plaintiff's 42 U.S.C. § 1983 claim and portions of Plaintiff's RICO and malicious prosecution claims, as further identified *supra,* and are DENIED to the extent that they seek dismissal of the remaining portions of Plaintiff's RICO and malicious prosecution claims, as further identified herein.

IT FURTHER IS ORDERED that Defendants Mooney's and Bohlen's motion for sanctions (Doc. 7) hereby is DENIED, without [*1083] prejudice to said Defendants' right to resubmission.

IT IS SO ORDERED.

Carl B. Rubin, Judge

United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 9

Formal Opinion 2011-2: THIRD PARTY LITIGATION FINANCING

TOPIC: Third-party litigation financing

DIGEST: It is not unethical *per se* for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender. Nevertheless, when clients contemplate or enter into such arrangements, lawyers must be cognizant of the various ethical issues that may arise and should advise clients accordingly. The issues may include the compromise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment.

RULES: 1.2(d); 1.6(a); 1.7(a); 1.8(e), (f); 2.1; 2.2; 5.4(c)

QUESTION: What ethical issues may arise when a lawyer represents a client who is contemplating or has entered into a non-recourse litigation financing agreement?

OPINION

I. Background

Third party litigation financing first emerged as an industry in the United States in the early 1990s, when a handful of small lenders began providing cash advances to plaintiffs involved in contingency fee litigation. Within a decade, as many as one hundred companies were offering financing to lawyers, their clients, or both.[1] As of 2011, this industry has continued to grow, both as to the number and types of lawsuits financed and financing provided. The aggregate amount of litigation financing outstanding is estimated to exceed $1 billion.[2]

This opinion addresses non-recourse litigation loans, *i.e.*, financing repaid by a litigant only in the event he or she settles the case or is awarded a judgment upon completion of the litigation. Under these arrangements, financing companies advance funds that will be reimbursed, if at all, solely from any proceeds of the lawsuit. As compensation, the financing companies are entitled to receive specified fees, often calculated as a percentage of any settlement or judgment.

Non-recourse loans are extended most often to plaintiffs in personal injury cases. These loans may be used to pay the costs of litigation, but also may be used to cover the plaintiff's living expenses during the pendency of the lawsuit.

Non-recourse financing of commercial claims is a more recent development, although it has become increasingly common.[3] The providers of this financing typically undertake an analysis of the merits of the contemplated claim that is more rigorous than the analysis employed in personal injury cases. If the claim appears meritorious, the financing company will advance amounts to cover attorneys fees and the other costs of the litigation.[4] These advances typically are made to the claimant or its outside litigation counsel, in return for a percentage of any eventual recovery.

The growing use of non-recourse litigation financing recently has attracted increasing attention, both within and outside the legal profession,[5] in part because the arrangements are largely unregulated, and, in the view of some critics, may require the payment of relatively exorbitant financing fees that appear usurious, create the potential for expanding the volume of litigation, and raise the specter of reviving the historically reviled practice of champerty, defined broadly as the support of litigation by a stranger in return for a share of the proceeds.

From the legal ethics perspective, perhaps the greatest concern stems from a financing company's involvement in the details of a claimant's case. Because a financing company's decision to fund will hinge on the company's analysis of the merits of the lawsuit, i.e., the likelihood and size of the expected return, the availability of financing necessarily depends on the company's ability to obtain access to information relevant to its assessment of risks of its investment,

both before and after a decision to fund has been made. As part of this process, a financing company may contact the claimant's lawyer to obtain confidential and privileged information regarding the case before making any loan commitment. And even after funding has been provided, the financing agreements may require litigation counsel to periodically update the financing company with developments in the case and/or provide the company with direct access to the claimant's file.

Providing financing companies access to client information not only raises concerns regarding a lawyer's ethical obligation to preserve client confidences, it also may interfere with the unfettered discharge of the duty to avoid third party interference with the exercise of independent professional judgment. While litigation financing companies typically represent that they will not attempt to interfere with a lawyer's conduct of the litigation, their financial interest in the outcome of the case may, as a practical matter, make it difficult for them to refrain from seeking to influence how the case will be handled by litigation counsel.

II. Analysis

Against this backdrop, we discuss below the ethical issues potentially implicated by non-recourse financing arrangements and examine how lawyers may properly address these issues as they arise.

A. Legality of the Agreement

Whether a particular financing arrangement comports with the law will depend on its terms and governing law, matters outside the scope of this opinion. Nevertheless, under Rule 1.2(d) of the New York Rules of Professional Conduct, if the arrangement is unenforceable under applicable laws, such as those governing champerty and usury, or is otherwise unlawful, an attorney should so advise the client and refrain from facilitating a transaction that is unlawful.

1. Usury

A financing company generally makes its funding determination based on the "merits" of the lawsuit, *i.e.*, on the likelihood of success and the amount of any anticipated recovery. In the same vein, it will seek to set the fee it collects for providing funds based on its assessment of the likelihood of recovery. Fee arrangements vary widely as a result.

Critics have focused on fee arrangements that ultimately require litigants to pay financing companies a substantial portion of any recovery, noting that if the advances made in exchange for these fees were characterized as "loans," the fees could be deemed usurious.**[6]** While financing companies generally characterize non-recourse financing arrangements as a "purchase" or "assignment" of the anticipated proceeds of the lawsuit (and therefore not subject to usury laws),**[7]** lawyers should be aware that in certain circumstances, courts have found that non-recourse litigation financing agreements violate usury laws.**[8]**

2. Champerty

Champerty is a form of maintenance in which a nonparty furthers another's interest in a lawsuit in exchange for a portion of the recovery. The law of champerty varies by jurisdiction.**[9]** While we are aware of no decision finding non-recourse funding arrangements champertous under New York law, lawyers should be mindful that courts in other jurisdictions have invalidated certain financing arrangements under applicable champerty laws.**[10]**

B. Attorney as Advisor

A lawyer may be asked by a client to recommend a source of third party funding or to review or negotiate a non-recourse financing agreement for a client. If the lawyer does so, Rule 2.1 requires the lawyer to provide candid advice regarding whether the arrangement is in the client's best interest.**[11]**

In providing candid advice, a lawyer should advise the client to consider the costs and the benefits of non-recourse financing, as well as possible alternatives.**[12]** With respect to costs, a common criticism of non-recourse financing is

that the fees charged to clients may be excessive relative to other financing options, such as bank loans, thereby significantly reducing the client's recovery.[13] A lawyer thus should bear in mind the extent to which non-recourse financing will limit a client's recovery. And before recommending financing companies, a lawyer should conduct a reasonable investigation to determine whether particular providers are able and willing to offer financing on reasonable terms.[14] In addition, if a lawyer assists a client with non-recourse financing, the lawyer may wish to make clear that such assistance itself is not an endorsement of the financing company.[15]

With respect to benefits, a lawyer should advise the client to consider whether, absent funding, the client would be unable to cover litigation or living expenses, or prematurely could be forced into a relatively disadvantageous settlement, effectively limiting his or her access to seek redress through the legal system. Commercial claimants also may lack the resources to pursue a claim absent funding, or may be able to deploy resources more effectively for their business needs by financing some or all of their litigation costs.

C. Conflicts of Interest

Within the parameters discussed above, a lawyer may refer a client to a litigating financing company. When making a referral, the lawyer is barred from accepting a referral fee from the company if the fee would impair the lawyer's exercise of professional judgment in determining whether a financing transaction is in the client's best interest and would compromise the lawyer's ethical obligation to provide candid advice regarding the arrangement; even where the fee is permitted, the lawyer may be required to remit the fee to the client.[16] A conflict also may arise in the event the lawyer is asked to advise the client about financing when the client cannot afford to commence or continue litigation absent a third party advance of the lawyer's fees. And the conflict rules may prohibit a lawyer, or possibly a company in which the lawyer has a substantial ownership interest, from extending financing to a client that the lawyer represents in litigation.[17] Lawyers should carefully evaluate these and other potential conflicts when initiating or continuing the representation of a client who contemplates the use of financing for the conduct of litigation.

D. Privilege and Confidentiality

Non-recourse financing arrangements also may result in waiver of the attorney-client privilege or other protection from disclosure. This risk arises from provisions requiring a claimant or his or her lawyer to disclose documents and information to financing companies to enable them to evaluate the strength of the claims in the litigation to be financed.[18] In addition, financing arrangements may require a lawyer to inform the financing company of developments in the case and/or allow periodic reviews of the case file.[19] And for very large claims, some financing companies reserve the right to share information regarding a matter with other companies that may participate in the financing.

This opinion does not address whether such communications between the client or lawyer and a financing company result in a waiver of the attorney-client privilege or other applicable protection. We note, however, that the argument has been made that the common interest privilege does not apply to such communications because the financing company's interest in the outcome of a litigation is commercial, rather than legal.[20]

With the foregoing in mind, a lawyer may not disclose privileged information to a financing company unless the lawyer first obtains the client's informed consent, including by explaining to the client the potential for waiver of privilege and the consequences that could have in discovery or other aspects of the case.[21] In making disclosures to the financing company, a lawyer should take care not to disclose any more information than is necessary in his or her judgment.[22]

E. Control Over the Legal Proceeding

Non-recourse financing agreements often require the claimant's lawyer to keep the financing company apprised of any developments in the litigation or to seek the company's consent when taking steps to pursue or resolve the lawsuit, such as making or responding to settlement offers. These notice provisions raise the specter that a financing company, armed with information regarding the progress of the case, may seek to direct or otherwise influence the course of the litigation.[23] For example, to protect its own interest in maximizing the fee it may earn, a financing company may

object to steps calculated to advance the client's interests, such as pursuing a promising line of additional discovery at a cost the company would prefer to avoid, or accepting a settlement offer that does not meet the company's expectations regarding the return on its investment. While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement.[24]

III. Conclusion

Non-recourse litigation financing is on the rise, and provides to some claimants a valuable means for paying the costs of pursuing a legal claim, or even sustaining basic living expenses until a settlement or judgment is obtained. It is not unethical *per se* for a lawyer to advise on or be involved with such arrangements. However, they may raise various ethical issues for a lawyer, such as the potential waiver of privilege and interference in the lawsuit by a third party. A lawyer representing a client who is party, or considering becoming party, to a non-recourse funding arrangement should be aware of the potential ethical issues and should be prepared to address them as they arise.

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[1] *See* Terry Carter, *Cash Up Front: New Funding Sources Ease Strains on Plaintiffs Lawyers*, ABA Journal 34-36 (Oct. 8, 2004), *available at* http://abajournal.com/magazine/article/cash_up_front/.

[2] *See* Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, New York Times (Nov. 14, 2010), *available at* http://www.nytimes.com/2010/11/15/business/15lawsuit.html.

[3] *See* Holly E. Loiseau, Eric C. Lyttle, and Brianna N. Benfield, *Third-Party Financing of Commercial Litigation*, ABA In-House Litigator (2010), http://www.weil.com/files/Publication/17c770d9-514d-426d-aalf-bbc4c7547c0c/Presentation/PublicationAttachment/cacabd85-lea5-46ac-8657-40ffd9eac8be/IHL_2010_ThirdPartyFinance.pdf.

[4] *See* Louis M. Solomon, *Third-Party Litigation Financing: It's Time to Let Clients Choose*, N.Y.L.J. (Sept. 13, 2010).

[5] For articles (in addition to those cited elsewhere herein), *see, e.g.,* Steven Garber, Alternative Litigation Funding in the United States: Issues, Knowns and Unknowns (Rand Corp. 2010); Susan Lorde Martin, The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed, 10 Fordham J. Corp. & Fin. L. 55 (2004); Douglas R. Richmond, Other People's Money: The Ethics of Litigation Funding, 56 Mercer L. Rev. 649 (Winter 2005); Julie H. Mclaughlin, Litigation Funding: Charting a Legal and Ethical Course, Vermont Law Review, Vol. 31, No. 3 615-662 (Spring 2007). For ethics opinions, *see, e.g.,* N.Y. State 666 (1994); Utah State Bar Op. 97-11(1997); State Bar of Mich. Op. RI-321 (2000); FL. Bar Op. 00-3 (2002); Virginia Legal Ethics Op. 1764 (2002); N.Y. State 769 (2003); State Bar of Nevada Standing Comm. On Prof'l. Responsibility, Formal Op. 29 (2003).

[6] *See generally* Appelbaum, *supra* note 2; Garber, *supra,* note 3 at 10; *see also* Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, New York Times, (Jan. 16, 2011), *available at* http://www.nytimes.com/2011/01/17/business/17lawsuit.html?pagewanted=1&emc=eta1. Usury laws in New York set a maximum allowable rate of interest per annum. *See* N.Y. Banking Law § 14-a (McKinney 2008); *see also* N.Y. Gen. Oblig. Law § 5-501 (McKinney 2001 & Supp. 2011).

[7] *See, e.g.*, in the personal injury context, Frequently Asked Questions: What percentage of the proceeds do we purchase?, FastFunds, http://www.fastfunds4u.com/pages/faqs.html (last visited Apr. 19, 2011) ("We provide funds by purchasing a small portion of the anticipated proceeds. It is not a loan, so there is no interest, no matter how long it takes for the case to be resolved. Like the claimant and the attorney, we take the risk of a successful resolution. If the case is lost, we lose our money.").

[8] *See, e.g.*, *Echeverria v. Estate of Lindner*, 2005 N.Y. Slip Op. 50675(u), at 4-5 (Sup. Ct. Nassau County 2005) (finding non-recourse agreement was "loan" because recovery was certain under strict liability statute and interest rate was usurious); *Lawsuit Fin. v. Curry*, 683 N.W.2d 233, 236 (Mich. Ct. App. 2004) (finding same because judgment had already been entered in favor of plaintiff when she entered into financing agreement).

[9] Twenty-eight states reportedly no longer prohibit champerty. *See* Ashby Jones, *The Next National Investment Craze: Lawsuits!*, The Wall Street Journal Law Blog (June 4, 2010), *available at* http://blogs.wsj.com/law/2010/06/04/the-next-national-investment-craze-lawsuits/. The Court of Appeals of New York has recently clarified the law of champerty in New York. *See Trust for Certificate Holders of Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp.*, 13 N.Y.3d 190, 192 (2009).

[10] *See, e.g., Johnson v. Wright*, 682 N.W.2d 671 (Minn. Ct. App. 2004).

[11] *See* N.Y. State 666 (1994) (attorney may refer client to financing company for living expenses); *see also* Fla. Bar, Op. 00-3 (Mar. 15, 2002) (same). In addition to Rule 2.1's duty of candor, a lawyer may have other obligations. For example, several financing companies doing business in New York State have entered into a Stipulation with the Attorney General that requires the companies to follow certain guidelines, such as procuring an attorney certification that the lawyer has reviewed the financing agreement with the client. *See* American Legal Finance Association, ALFA Agreement (Feb. 17, 2005), *available at* http://www.americanlegalfin.com/alfasite2/documents/ALFAAgreementWithAttorneyGeneral.pdf. Signatories to the Agreement include Plaintiff Support Services, Pre-Settlement Finance, QuickCash, Magnolia Funding, BridgeFunds Limited, Plaintiff Funding Corp. d/b/a LawCash, Oasis Legal Finance, The Whitehaven Group, and New Amsterdam Capital Partners. *Id* at 9-18. The Stipulation is posted on the website of the American Legal Finance Association (AFLA). Currently, 21 companies belong to the Association nationwide. *See* American Legal Finance Association, *available at* http://www.americanlegalfin.com/index.asp (last visited Apr. 19, 2011).

[12] *See* N.Y. State 769 (2003) (attorney should advise the client of costs and benefits of the transaction as well as alternative courses of action); *see also* Fla. Bar, Op. 00-3 (Mar. 15, 2002).

[13] *See* Garber, *supra* note 3, at 10; Appelbaum, *supra* note 2.

[14] *See* Nev. State Bar Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 29 (Aug. 7, 2003).

[15] *See* N.Y. State 769.

[16] *See* N.Y. Rules of Prof'l Conduct R. 1.7(a), 1.8(f), 5.4(c) (2010); N.Y. State 682 (1996) (lawyer must offer client any referral fee the lawyer receives for standard products and services); N.Y. State 671 (1994) (lawyer "absolutely forbidden" from receiving referral fee where amount of product or service purchased depends on attorney advice); ABA Formal Op. 331 (1972).

[17] *See* N.Y. Prof'l Conduct R. 1.8(e); N.Y. State 753 (2002) (reiterating that lawyer may not ethically represent a client in a real estate transaction if the lawyer acts as a principal in the title insurance agency that has been engaged for the transaction and that is performing non-ministerial tasks); *see also* N.Y. State 769; 666; Fla. Bar, Op. 00-3 (Mar. 15, 2002); Ohio Sup. Ct. Op. 2000-01 (2000) available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2000/Op%2000-001.doc (last visited Apr. 20, 2011); Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 91-9 (May 1991); cf. S.C. Bar Ethics Advisory Op. 92-06 (1992) (an attorney may own interest in a non-recourse financing company that provides funding to non-clients).

[18] *See, e.g.,* Frequently Asked Questions: Will my case qualify for an advance?, LawMax Legal Finance, http://www.fundmycase.com/en/FAQ.php4 .") (last visited Apr. 19, 2011) ("LawMax considers each request for an advance on a case-by-case basis. We will thoroughly review your case, and our underwriters will make a decision within 48 hours of receiving the required documentation from your attorney."); Frequently Asked Questions: Do we get involved in the case?, FastFunds, http://www.fastfunds4u.com/pages/faqs.html (last visited Apr. 19, 2011) ("Our only

involvement is to initially review the attorney's file so we can evaluate the claim."); Case Documents for Plaintiff Funding, LawLeaf, www.lawleaf.com/lawsuit-funding/case-documents-for-plaintiff-funding.html (requiring certain documents for evaluation of the claim).

[19] *See, e.g.*, The Funding Process, LawMax Legal Finance, http://www.litigationfinancing.com/FundingProcess.htm (last visited Apr. 19, 2011) ("We . . . ask . . . that we be kept aware of any developments in the case."); *see also* Del. State Bar Ass'n Comm. On Prof'l Ethics, Op. 2006-2 (Oct. 6, 2006) ("Th[e] information [requested] includes police/accident reports, medical records, witness statements, expert reports, and information relating to the defendant's insurance carrier and its policy limits."); Complaint, *S&T Oil Equip. & Mach. Ltd. v. Juridica Invests. Ltd.*, (S.D. Tex. Filed Feb. 14, 2011) (alleging that claimant's counsel "was required to place all information regarding the strategy, public profile, factual or legal developments regarding the [arbitration] on [the] internal website [of the law firm associated with the funding company]. This included key substantive pleadings, key documents, settlement documents and any scheduling orders.").

[20] *See, e.g., Leader Techns., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (compelling disclosure of documents shared with financing companies during discussions about potential financing); *see also Abrams v. First Tenn. Bank Nat'l Ass'n*, No. 3:03-cv-428, 2007 WL 320966, at *1 (E.D. Tenn. Jan. 30, 2007); *see also* Nate Raymond, *Litigation Funders Face Discovery Woes*, Nat'l L.J., Feb. 21, 2011 (reporting that in at least one case, the initial conversations between a funding company and the client were not protected from disclosure by the attorney client privilege).

[21] *See* N.Y. Prof'l Conduct R. 1.6(a) (2009).

[22] *See* N.Y. State 769.

[23] *See* Garber, *supra* note 3, at 18.

[24] *See* N.Y. Rules of Prof'l Conduct 1.7(a), 1.8(f), 5.4(c) (2010). After a settlement or judgment has been obtained, a lawyer may turn over to a funding company a portion of a client's recovery pursuant to the terms of that client's non-recourse financing agreement. *See* N.Y. State 666; Fla. Bar, Op. 00-3 (Mar. 15, 2002); S.C. Bar Ethics Advisory Op. 92-06 (1992); Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 91-9 (May 1991). We do not reach the issue, but note the potential conflict, where a lawyer is a signatory to a financing agreement and is instructed by the client not to pay over to the financing company the contractually-specified portion of the settlement or judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 07- 1532 (EGS)**
	:	
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY ANIMALS, et al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Exhibit 10

CA Form 1

Superior Court of the District of Columbia

CIVIL DIVISION
500 Indiana Avenue, N.W., Room JM-170
Washington, D.C. 20001 Telephone: 879-1133

Edmondson & Gallagher, et al.

Plaintiff

vs.

Civil Action No. 15426-92

Alban Towers Tenants Association, et al.
Vera Ruser

Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have 60 days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the party palintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the adddress stated on this Summons.

You are also required to file the original Answer with the Court in Room JM 170 at 500 Indiana Avenue, N.W. between 9:00 a.m. and 4:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 Noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within five (5) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

Clerk of the Court

David J. Branson, Esq.
Name of Plaintiff's Attorney

Kaye, Scholer, et al.
Address
901 15th Street, N.W. Ste. 1100
Washington, D.C. 20005

(202) 682-3500
Telephone

By _____ Deputy Clerk

MAY 3 1993

Date: _____

PUEDE OBTENERSE COPIAS DE ESTE FORMULARIO EN ESPANOL EN EL TRIBUNAL SUPERIOR DEL DISTRITO DE COLUMBIA, 500 INDIANA AVENUE, N.W., SALA JM 170

YOU MAY OBTAIN A COPY OF THIS FORM IN SPANISH AT THE SUPERIOR COURT OF D.C., 500 INDIANA AVENUE, N.W., ROOM JM 170

Form CV(6)-456/Dec. 91
2-0885-1 wd 375

NOTE: SEE IMPORTANT INFORMATION ON BACK OF THIS FORM.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

EDMONDSON & GALLAGHER,
Thomas Gallagher, 4101 Military Road, N.W., Washington, D.C. 20015, and
James Edmondson, 7804 Ariel Way,
McLean, Virginia 22101

Plaintiff,

v.

ALBAN TOWERS TENANTS ASSOCIATION,
3700 Massachusetts Avenue, N.W.
Washington, D.C. 20016,

Vera Ruser
3700 Massachusetts Avenue, N.W.
Washington, D.C. 20016,

Richard A. Gross, Charles J. Beard, Richard W. Benka, Stanley B. Bernstein, Robert L. Birnbaum, Deborah B. Breznay, James K. Brown, John L. Burke, Jr., Philip Burling, Laurie Burt, Stefanie D. Cantor, William J. Cheeseman, Mark F. Clark, Peter W. Coogan, Stephen B. Deutsch, David B. Ellis, Peter B. Ellis, H. Kenneth Fish, Kevin J. Fitzgerald, Edward N. Gadsby, Jr., Louis P. Georgantas, David R. Geiger, Kenneth L. Grinnell, Dean F. Hanley, Thomas M. S. Hemnes, John H. Henn, Christian M. Hoffman, Wendy B. Jacobs, Dennis R. Kanin, Michael B. Keating, Henry M. Kelleher, Bruce A. Kinn, William B. Koffel, Sandra L. Lynch, Paul V. Lyons, Paul Randolph Murphy, John D. Patterson, Jr., Steven W. Phillips, David R. Pierson, Jr., Jacob N. Polatin, Hanson S. Reynolds, Peter M. Rosenblum, Robert S. Sanoff, Leonard Schneidman, Sandra Shapiro, James A. Smith, Adam Sonnenschein, Sandra L. Spalletta,

Civil Action No. 15426-92
Calendar #10
Judge Morrison

Doc. #12083196

John M. Stevens, Jr., Cathleen Douglas Stone, Robert W. Sweet, Jr., Arthur G. Telegen, Marc K. Temin, Paul Tsongas, Verne W. Vance, Jr., David W. Walker, Donald R. Ware, David L. Weltman, Barry B. White Brandon F. White, Deborah A. Willard Toni G. Wolfman, and Arnold M. Zaff, 1615 L Street, N.W., Washington, D.C. 20036, and One Post Office Square, Boston, MA 02109

Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs Edmondson & Gallagher, Thomas Gallagher, and James Edmondson (herein collectively referred to as "Plaintiff"), for their complaint against defendants hereby allege as follows:

PARTIES

1. Plaintiff Edmondson & Gallagher is a real estate development company with its principal business address at 1350 Beverly Road, Suite 108, McLean, Virginia 22101. Plaintiffs James Edmondson and Thomas Gallagher are general partners of Edmondson & Gallagher. Mr. Gallagher resides at 4104 Military Road, Washington, D.C. 20015. Mr. Edmondson resides at 7804 Ariel Way, McLean, Virginia 22101. Plaintiffs are herein sometimes referred to collectively as "Edmondson & Gallagher."

2. Defendant Alban Towers Tenants Association (the "Tenants Association") is a District of Columbia non-profit corporation located at 3700 Massachusetts Avenue, N.W., Washington, D.C.

3. Defendant Vera Ruser is an individual residing at 3700 Massachusetts Avenue, N.W., Washington, D.C.

4. Defendant Richard A. Gross is an attorney practicing with and a partner in the law firm of Foley, Hoag & Eliot located at 1615 L Street, N.W., Washington, D.C. 20036. The law firm's home office is in Boston, Massachusetts.

5. The other individual defendants are partners in the firm of Foley, Hoag & Eliot, a general partnership organized and existing under the laws of the Commonwealth of Massachusetts with its principal place of business at One Post Office Square, Boston, MA 02109, and with a law office located at 1615 L Street, N.W., Washington, D.C. 20036.

FACTUAL BACKGROUND

6. On or about 1986, Edmondson & Gallagher, real estate developers, retained James P. Byrd as a broker to assist Edmondson & Gallagher in locating multi-family property suitable for redevelopment.

7. Edmondson & Gallagher is a general partnership with its principal place of business in McLean, Virginia. As a result of Mr. Byrd's brokerage efforts, Edmondson & Gallagher entered into a contract with Alban Towers Limited Partnership, a partnership organized and existing under the laws of the District of Columbia, to purchase a multi-unit apartment building known as Alban Towers at 3700 Massachusetts Avenue, N.W. (Lot 12 in Square

1929) and its adjacent real property (Lots 803, 804, 805 and 810 in Square 1929). For convenience, the apartment building and adjacent land will hereinafter be referred to as "Alban Towers." The stated effective date of the contract was July 1, 1986. Alban Towers was and is ultimately owned by the President and Directors of Georgetown University.

8. Georgetown University holds record title to Alban Towers and its adjacent real property as trustee for the benefit of Alban Towers Limited Partnership, and Alban Towers Limited Partnership is the beneficial owner of Alban Towers. For convenience, Alban Towers Limited Partnership and its general partners, the President and Directors of Georgetown University, are referred to collectively as "Georgetown."

9. Edmondson & Gallagher's and Georgetown's contract provided the following:

(a) The apartment building (the "Apartment Parcel") purchase price is $14,500,000.

(b) The adjacent parcel (the "R-2 Parcel") purchase price is $1,500,000.

(c) The purchase price for the apartment building increases by $35,000 per month starting from December 1, 1986, until closing.

(d) Edmondson & Gallagher will acquire all of the furniture, fixtures, appliances and other personal property of Georgetown on the property.

(e) Edmondson & Gallagher expressly, in the contract, agreed to pay James P. Byrd a commission on completion of the sale.

(f) All of these contract terms, specifically including the express term that James P. Byrd was entitled to a commission on completion of the contract, were stated in the contract.

10. The amount of the commission was agreed between Edmondson & Gallagher and Mr. Byrd to be 2 percent of the purchase price, which yields a commission due on completion of $320,000.

11. Edmondson & Gallagher, as required by its contract with Georgetown, tendered an earnest money deposit to Georgetown concurrently with execution of the contract in the following manner: (a) an irrevocable letter of credit in the amount of $500,000 for the Apartment Parcel and (b) an irrevocable letter of credit in the amount of $150,000 for the R-2 Parcel. Edmondson & Gallagher tendered these deposits contemporaneously with the execution of the contract.

12. The sale of Alban Towers was subject to the requirements of the District of Columbia Rental Housing Conversion and Sale Act of 1980, D.C. Code § 45-1631 et seq. (hereinafter the "Act"). The Act required, inter alia, (a) that Georgetown provide the tenants with an "Offer of Sale" (§ 45-1632); (b) that the tenants and Georgetown bargain in "good

faith" for the purchase and sale of Alban Towers (§ 45-1634) for at least 120 days (§ 45-1640(2)); and (c) that the tenants were to be afforded an additional 15-day "right of first refusal" period (§ 45-1637).

13. On or about July 14, 1986, Georgetown mailed to each tenant of Alban Towers, by first-class mail, an "Offer To Sell & Tenant Opportunity To Purchase With Third Party Contract" as required by D.C. Code § 45-1632 (emphasis in original).

14. On or about August 12, 1986, the Tenants Association filed with the Government of the District of Columbia Articles of Incorporation and an Application for Registration, and delivered copies of these documents to Georgetown. Pursuant to D.C. Code § 45-1640, these actions commenced the 120-day period during which the Tenants Association might negotiate with Georgetown to purchase Alban Towers.

15. Defendant Tenants Association retained defendant Richard Gross as counsel. Gross was and is a partner in the law firm of Foley, Hoag & Eliot whose partners also are defendants. Although the Tenants Association had a statutory duty to bargain in good faith (see D.C. Code § 45-1634) with Georgetown for the purchase of Alban Towers, the Tenants Association and its counsel, Richard A. Gross, engaged in a series of fraudulent and wrongful acts which were undertaken to intentionally interfere with Edmondson & Gallagher's ability to purchase Alban Towers.

16. Defendants negotiated with Georgetown toward a contract to purchase Alban Towers between August 18 and December 12, 1986.

17. ATTA, through its counsel, found a development company, HDS, Inc., willing to enter into a Joint Venture with ATTA to purchase Alban Towers. However, HDS had no money of its own, and thus needed to locate someone with the financial capability of a) posting a $650,000 earnest money deposit in the form of cash or a letter of credit; and b) financing the entire project, including the purchase and rehabilitation of Alban Towers.

18. The deadline for compliance with the Act was 5:00 p.m. on December 30, 1986. Gross sent counsel for Georgetown a copy of defendants' contract on December 30, 1986 after 5:00 p.m. It was accompanied by a letter from defendant Gross stating that the required deposit was being forwarded under separate cover. Defendants knew this was a false statement as defendants knew they did not have $650,000 in cash or a letter of credit in that amount. Defendant Gross did not in fact send any deposit to Georgetown; and Georgetown, of course, did not receive the required deposit on December 30, 1986.

19. Counsel for Georgetown, on December 31, 1986, inquired of Real Title Company, Inc. ("Real Title"), the title company designated by the defendants, whether a deposit had been received by Real Title from or on behalf of the Tenants

Association. Advised that Real Title had not received such a deposit, counsel for Georgetown, in a hand-delivered letter dated December 31, 1986, informed defendant Gross that (a) the defendant Tenants Association had not satisfied the requirements and conditions for purchasing Alban Towers as set forth in the contract within the statutory time period, (b) Georgetown had terminated negotiations with the Tenants Association, and (c) Georgetown would now honor its obligations under its contract with Edmondson & Gallagher.

20. Later that day Real Title informed counsel for Georgetown that it received a check for $650,000 drawn on an account in the name of Argyle Associates Limited Partnership ("Argyle Associates") signed by George Van Wagner but that the check was not certified and indeed that it contained a written instruction that the check was not to be deposited but was to be held until replaced by a letter of credit. Further, on January 2, 1987, Real Title reported to Georgetown's counsel that, upon inquiry, it had ascertained that there were no funds in the account on which the check was drawn to pay the amount of the check. In sum, the check was worthless.

21. Neither Argyle Associates nor Mr. Van Wagner, its general partner, (later convicted a felon and sent to jail) had previously been associated with the Tenants Association's efforts to purchase Alban Towers. Defendants' use of the phony, worthless Argyle check was wrongful and done for the illegal

purpose of interfering with the contractual relations between Georgetown and Edmondson & Gallagher. Tendering the worthless check was in furtherance of defendants' illegal and intentional scheme to interfere with the contract.

22. In a further fraudulent and wrongful effort to interfere with Georgetown's ability to complete the sale of Alban Towers, defendant Gross, without giving notice to or receiving the consent of either Georgetown or Edmondson & Gallagher, but after having received notice from Georgetown's counsel that the Tenants no longer had any statutory right, filed with the District of Columbia Recorder of Deeds on or about January 5, 1987, documents entitled "Notice of Exercise of Right of First Refusal." The Recorder of Deeds filed these documents among the land records of the District of Columbia pertaining to Alban Towers as Instrument Nos. 401 and 402. The defendants filed these fraudulent claims with the Recorder of Deeds for the fraudulent, wrongful and illegal purpose of stopping Georgetown from completing the sale of Alban Towers to Edmondson & Gallagher. Defendants sought to and did cloud title to Alban Towers, knowingly and wrongfully, without legal justification, to prevent its sale.

23. Defendants purposely, willfully and intentionally filed these documents with the Recorder of Deeds without any lawful purpose or justification, but rather solely to wrongfully interfere with the completion of the Georgetown contract. The

defendants' conduct was an illegal and wrongful attempt to extort money from Georgetown by blocking the sale of Alban Towers unless and until defendants were paid off with large sums of money to clear title and to allow the sale.

24. The title company, as defendants knew, because of defendants' wrongful illegal conduct clouding title as described above, would not write title insurance for the sale of Alban Towers, preventing the completion of the sale to Edmondson & Gallagher. Therefore, on February 2, 1987, Georgetown was compelled to file a complaint to clear title in the Superior Court of the District of Columbia. Georgetown sought declaratory relief against the Tenants Association on the following basis: (a) that Georgetown complied with all relevant provisions of the District of Columbia Rental Housing Conversion and Sale Act of 1980, D.C. Code §§ 45-1631 et seq; (b) that the Tenants Association had failed to validly exercise their rights under the Act within the prescribed time period; and (c) that Georgetown should be permitted to complete its contract with Edmondson & Gallagher.

25. On February 24, 1987, Gross signed and filed an Answer on behalf of ATTA that falsely stated that Van Wagner's check would have been funded if only Georgetown had signed the contract and the escrow agreement. This statement was false and Gross knew it was false, because Van Wagner would not agree to raise cash unless HDS and ATTA signed the guarantee agreement,

which they refused to do. The Answer, did, however, truthfully admit that the check was in fact delivered on December 31, 1986.

26. During the summer of 1988, Gross was conducting settlement negotiations with Edmondson & Gallagher. As of August 1988, Edmondson & Gallagher had offered $1.6 million in exchange for ATTA's agreement to release its claim in the 1987 Litigation, clear title to Alban Towers, and allow Edmondson & Gallagher to perform its contract with Georgetown and purchase Alban Towers.

27. Gross was unwilling to accept $1.6 million. Rather, Gross made a counteroffer of $2 million, of which $400,000 - $450,000 was to be divided among Gross and ATTA's development associates, Ronald Cohen and HDS. Gross and Edmondson & Gallagher were thus $400,000 apart.

28. At that point, in August or September 1988, Gross set a scheme in motion to thwart summary judgment in order to force Edmondson & Gallagher to pay Gross large sums of money to clear title and allow the sale. However, Gross had no intention of pursuing the case to trial or obtaining the right to purchase Alban Towers for his client ATTA; rather, be simply sought to abuse the court's process in order to extort money from Edmondson & Gallagher.

29. On August 16, 1988, Richard Gross was deposed. In his deposition, Gross knowingly made at least two false statements while under oath:

a. That the check had been delivered on December 30, 1986; and

b. That HDS had told Gross that the check was funded at the time it had been delivered.

30. In or about August or September 1988, Vera Ruser spoke to George Van Wagner by telephone. Ms. Ruser was in the District of Columbia, while Mr. Van Wagner was in Fort Lauderdale, Florida. Ms. Ruser told Van Wagner that ATTA needed Van Wagner's testimony. Van Wagner told her he would not help ATTS unless there were something in it for him. Vera Ruser told Van Wagner that she thought that ATTA could accommodate him.

31. In or about August or September 1988, Gross spoke to George Van Wagner by telephone. Gross was in the District of Columbia, while Van Wagner was in Fort Lauderdale, Florida. Gross told Van Wagner that he needed Van Wagner's affidavit to forestall summary judgment. Van Wagner told Gross that he would not provide an affidavit unless there were something in it for him, namely the right to do the construction on the building if ATTA won the right to buy the building. Gross said that he did not foresee any problems with that.

32. On September 23, 1988, after Van Wagner had agreed to come to the District of Columbia from Florida, Brian Benninghoff was deposed a second time. Gross defended him at his deposition. When Benninghoff was asked if he had any further information concerning Van Wagner's whereabouts, Gross

interjected remarks intended to obstruct counsel from receiving a truthful answer, i.e., that Benninghoff (as well as Gross) knew exactly where Van Wagner was. Benninghoff nevertheless proceeded to falsely state that he had no knowledge of Van Wagner's whereabouts, other than that he was in Florida.

33. On or about September 18, 1988, Van Wagner flew to the District of Columbia from his home in Fort Lauderdale, Florida to attend a meeting with Gross. On Sunday, September 25, 1988, Van Wagner attended such a meeting with at least the following people: Richard Gross, Vera Ruser of ATTA, and Van Wagner's lawyer, Steven Skalet.

34. Gross told Van Wagner that if Van Wagner would provide an affidavit, and if Van Wagner would have his associates Thomas Church and Max Chaikin provide affidavits, then Gross could stall summary judgment, and could get the deal back. Van Wagner stated that he would only provide the affidavits if they gave him the right to do the construction on the building. Richard Gross agreed to this.

35. At least Vera Ruser and Dean Phelus of the ATTA Board of Directors knew that Gross had agreed to give Van Wagner a construction contract in return for Van Wagner's affidavit.

36. On September 26, 1988, Gross met with Brian Benninghoff and Ronald Cohen. Cohen was also the financial backer for ATTA, and was thus crucial to the tenants' ability to develop Alban Towers. When asked at that meeting whether he

would agree to Van Wagner's participation in the project as contractor, Cohen categorically refused.

37. On September 27, 1988, Benninghoff and Gross signed a contract granting George Van Wagner the right to perform all construction on Alban Towers, with the provision that Van Wagner was to be paid on a cost-plus-twenty-percent basis. Gross signed the cost-plus contract on behalf of ATTA and on behalf of Ronald Cohen, his clients; the signature blocks indicate that Gross was "Attorney-in-Fact" for both of these parties. Benninghoff also signed the Agreement on behalf of the Urban Group, which, according to the Agreement, is the successor-in-interest to HDS. HDS had disbanded by September 1988.

38. Despite outstanding document requests from Edmondson & Gallagher and Georgetown that called for the production of all documents relating in any way to ATTA's contemplated purchase of the Alban Towers property or the contemplated condominium conversion or other development of that property, Richard Gross never produced the cost-plus contract. It was knowingly and affirmatively concealed by Gross until December 18, 1992, when counsel for FHE in this litigation produced it.

39. On the same day, September 27, 1988, Van Wagner, Church, and Chaikin signed affidavits drafted by Gross concerning the time of delivery and the negotiability of the check submitted as a deposit to Real Title Company. The affidavits stated that

the $650,000 check was delivered by 5:00 p.m. on December 30, 1986 and that, if Georgetown had signed the contract and escrow agreement, Van Wagner would have funded the check. These statements were false.

40. On September 27, 1988, Gross submitted the affidavits to the court. Gross further submitted to the Court on the same day a signed pleading, a statement of material facts in dispute, which reiterated the false statements made in the Van Wagner, Church and Chaikin affidavits.

41. In the declaratory judgment proceedings, Georgetown put forth evidence showing that defendants presented the check for $650,000 to the title company on December 31, 1986; that the check was written on an account which contained only $433.16 on the date the check was tendered; that the account had been overdrawn several times during this period; and that the account did not have a balance during the relevant time period that exceeded $2,300.

42. Furthermore, although the check defendants tendered to the title company on December 31, 1986 was signed by a Mr. George Van Wagner, III, Mr. Van Wagner stated under oath that the check was not signed by him but that he allegedly authorized a Mr. Thomas Church, who was not authorized to sign checks on the Argyle Associates Limited Partnership account, to sign the $650,000 check. Affidavit of George H. Van Wagner, III, filed September 27, 1988 at 12. Both Mr. Van Wagner and

Mr. Church were convicted in 1989 in the United States District Court for the Eastern District of Virginia for laundering drug money. Defendants knew or should have known they were dealing with persons who had written an unauthorized check on an account with no funds.

43. The defendants wrongfully, intentionally contended that their Notice of Exercise of Right of First Refusal, filed with the District of Columbia Deputy Recorder of Deeds, was not a "cloud on title" and did not prevent Georgetown from conveying the property to Edmondson & Gallagher. Transcript of Hearing, March 17, 1988. The Superior Court recognized the obvious falsity of this assertion and rejected it, stating that Georgetown was not free to sell the property once the Tenants Association made the filing until Georgetown obtained a declaratory judgment holding that the filing was improper.

44. After a delay of almost two years, on October 6, 1988, the Honorable Henry F. Greene granted summary judgment in favor of Georgetown and Edmondson & Gallagher and held that "Georgetown and Edmondson & Gallagher were free to close on their third-party contract for the purchase of Alban Towers." Among other things, the court held that the Tenants Association's tender of a check written on an account with insufficient funds and containing instructions that the check was "to be held for deposit until it is replaced with a letter of credit" failed to meet the condition precedent of a "cash" earnest money deposit.

October 6 Opinion 12-14. Similarly, because of the absence of a deposit, the court found that the Tenants Association had failed to validly exercise its statutory right of first refusal. Having previously ruled that the Edmondson & Gallagher contract was still valid, Order March 23, 1988, the court therefore ruled that "Georgetown and Edmondson & Gallagher were free to close on their third-party contract for the purchase of Alban Towers." October 6 Opinion at 18. The title company would not however, agree to issue title insurance until the litigation, including all appeals, was finally completed. That did not occur until the time to petition for certiorari to the Supreme Court of the United States expired sometime in 1990.

45. In response to the Superior Court's decision, defendants engaged in a series of wrongful, intentional maneuvers to prevent the trial court's decision from going into effect. On October 19, 1988, defendants filed a motion for reconsideration and a stay of Judge Greene's decision pending consideration of the Tenants Association's motion. On October 27, 1988, the court denied the motion for reconsideration and held that the motion to stay was moot. On November 3, 1988, defendants filed in the Superior Court a Notice of Appeal and on November 4, 1988, a motion to stay the trial court's order pending appeal without bond. On November 29, 1988, the court denied the motion. On December 28, 1988, defendants moved for recusal or disqualification of Judge Greene. This motion was denied on

January 27, 1989. Defendants also moved, on January 11, 1989, to the Court of Appeals for a stay pending appeal.

46. On February 3, 1989, the Court of Appeals granted a stay conditioned on ATTA's posting, by February 8, 1989, a $2 million bond. On February 9, 1989, the Tenants Association, without posting any bond, moved for clarification or reconsideration of the Court of Appeals' order. This motion was denied by the Court of Appeals on April 17, 1989. On May 1, 1989, the Tenants Association filed a petition for a rehearing en banc of the Court of Appeals' April 17, 1989 order. The Court of Appeals denied this motion on June 26, 1989. The Tenants Association never posted the bond.

47. Throughout the period when the case was on appeal, defendants relied on the suborned affidavits as grounds for reversal, i.e., that the affidavits created a material issue of fact. Defendants deliberately designated the affidavits in the record for appeal for this purpose.

48. The Court of Appeals heard oral arguments on the Tenants Association's appeal on November 21, 1989 and, ten days later, on December 1, 1989, unanimously affirmed the trial court's order granting summary judgment to Edmondson & Gallagher and Georgetown. Thus, after almost three years of delay caused by defendants, the Court of Appeals made the following findings:

> The agreement between the parties called for a "cash" earnest money deposit. It was undisputed that when the check was tendered, it was not covered by sufficient funds.

> While the Association argued that "arrangements" were in place to fund the check had Georgetown presented it, such arrangements were contingent upon Georgetown first executing an escrow agreement. Even more, the writing on the stub effectively instructed the escrow agent not to cash the check until it was replaced by a letter of credit.
>
> We agree with the trial court that it borders on the frivolous to assert that this check met the requirement of "cash" deposit. See Modern Engineering and Services Corp. v. McCrea, 46 A.2d 767, 769 (D.C. 1946) (check "need not be accepted by a creditor entitled to cash. This is true particularly when, as here, the check on its face contains a condition unacceptable to the payee"); Rawcliffe v. Aguayo, 438 N.Y.S.2d 697, 699 (N.Y. Sup. Ct. 1981) (check without sufficient funds is not valid payment).
>
> We also agree with the trial court that the Association failed to exercise its right of first refusal within the statutory time period. The right of first refusal does not excuse the Association from providing an earnest money deposit. D.C. Code § 45-1637, after establishing a 45-day right of first refusal, provides that, in the exercise of this right, "all rights specified in this subchapter shall apply except the minimum negotiation periods . . . ." This provision includes the owner's right to require up to a 5% deposit "in order to make a contract." D.C. Code § 45-1634(b). Thus, the Association's failure to supply a "cash" earnest money deposit within the statutory time period was fatal to the exercise of its rights of first refusal.

December 1 Opinion at 2 (1989) (footnote omitted).

49. Once it became clear to defendants that the Tenants Association could not execute a valid contract backed by $650,000 in cash required to buy Alban Towers within the

established statutory deadline, defendants intentionally and maliciously interfered with Georgetown's ability to sell Alban Towers by acquiring a worthless check from strangers to the transaction; by sending that worthless check to the title company; by making false representations to the Recorder of Deeds and to the Superior Court about the Tenants Association's ability to finance the purchase; by filing a vexatious and meritless counterclaim; and by wrongfully and intentionally, without justification, delaying Georgetown's ability to obtain a final declaratory judgment by delaying tactics in the court proceeding. The defendants so acted for the purpose of extorting from Georgetown and from Edmondson & Gallagher a money settlement to vacate the building, to remove the cloud on title and to allow completion of the sale.

50. The delay created by defendants' wrongful actions resulted in Edmondson & Gallagher's inability to complete their contract with Georgetown. The wrongful, illegal and intentional conduct delayed the closing for over three years. During this time, the contract price rose $35,000 per month and the financial markets took a dramatic turn for the worse, and Edmondson & Gallagher was, therefore, unable to complete the purchase of Alban Towers. But for defendants' wrongful, malicious, illegal and intentional interference with contractual relations, Edmondson & Gallagher would have been able to complete the contract performance.

51. As of early 1990, after the litigation had ended but while Edmondson & Gallagher was still negotiating with ATTA to secure its cooperation in purchasing Alban Towers, Georgetown filed a motion for sanctions against ATTA and FHE. Gross and ATTA made it clear that ATTA would refuse to settle with Edmondson & Gallagher so long as Georgetown continued to press its Motion for Sanctions against ATTA and FHE. Because of ATTA's and Gross's position, Edmondson & Gallagher refrained from taking action against ATTA and FHE, and Georgetown stayed its Motion for Sanctions during the period in which Edmondson & Gallagher negotiated with ATTA and/or Georgetown.

52. Many of defendants' activities were fraudulently concealed. Despite due diligence on the part of Edmondson & Gallagher, many documents were undiscovered and undiscoverable, due to defendants' deliberate concealment, until discovery in the instant action. The following activities and documents fall into this category:

(a) The September 27, 1988 cost-plus contract. This was identified in general terms by Van Wagner at his deposition on November 1, 1989, but it was not produced despite an outstanding document request requesting its production. Further, due to Gross's actions as described in paragraph 51 above, plaintiff was forestalled from pursuing its production. This document demonstrates that Gross purchased testimony.

This document was produced by defendants' counsel in the instant action on December 18, 1992;

(b) The Guarantee and Indemnity dated January 13, 1987 (unsigned). This document demonstrates that Gross knew that various pleadings he submitted were false and frivolous, and that Gross knew that Van Wagner's affidavit was false. This document was produced by Van Wagner in the instant litigation in March 1993;

(c) The Relocation Expense Agreement. This document demonstrates that Gross knew that the $650,000 earnest money deposit was a condition precedent to forming a contract with Georgetown. Gross knowingly and fraudulently took a contrary position with the Court throughout the 1987 Litigation. This document, although created by Gross's office in December 1986, was not produced in this litigation by ATTA or FHE. It was finally produced in April 1993 by William Becker, Esq., counsel to HDS in December 1986;

(d) Further, discovery with Van Wagner and others in the instant litigation demonstrates that Gross concealed Van Wagner's whereabouts from opposing counsel and the Court until at least September 26, 1987;

COUNT I

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS
(ALL DEFENDANTS)

53. Plaintiff reasserts and realleges paragraphs 1 through 52 as if fully set forth herein.

54. Defendants had in their possession at all times the Georgetown contract with Edmondson & Gallagher.

55. Because Edmondson & Gallagher was unable to purchase the Alban Towers property, due to defendants' tortious conduct, plaintiff lost over $1,600,000 in costs and expenses and lost over $4,400,000 in lost profits.

56. Georgetown still owns Alban Towers as of the time this complaint is filed.

57. The aforesaid conduct of the defendants constitutes wrongful intentional interference with the contract between Georgetown and Edmondson & Gallagher.

58. Defendants knew of the existence of the contract between Edmondson & Gallagher and Georgetown and of Edmondson & Gallagher's economic interest in the contract. Defendants knowingly and wrongfully interfered with Georgetown's and Edmondson & Gallagher's economic interests.

59. Defendants' conduct was and is the proximate cause of damages that Edmondson & Gallagher has sustained, and continues to sustain, including, but not limited to, loss of revenue and that damage was reasonably foreseeable when

defendants committed their wrongful conduct. The amount of these damages remains to be determined, but is at least $6,000,000.

COUNT II

ABUSE OF PROCESS
(ALL DEFENDANTS)

60. Plaintiff reasserts and realleges paragraphs 1 through 59 as if fully set forth herein.

61. Defendants, at all relevant times, used the wrongful, dilatory and fraudulent tactics alleged herein in furtherance of an unlawful ulterior purpose, viz., to extort money from Georgetown and Edmondson & Gallagher by blocking the sale of Alban Towers unless and until defendants were paid off with large sums of money to clear title and allow the sale.

62. To further this ulterior purpose, defendants knowingly, maliciously, and without legal justification filed documents entitled "Notice of Exercise of Right of First Refusal." These documents were filed five days after the Tenants Association's statutory right of first refusal had expired, and with full knowledge that such period had expired. This use of legal process was not proper in the regular prosecution of the proceedings.

63. Defendants knowingly, maliciously, and without legal justification filed a counterclaim for declaratory judgment, injunction, and statutory damages against Georgetown

and Edmondson & Gallagher. This counterclaim was filed with full knowledge that it was vexatious and without merit, and that it would prevent Georgetown and Edmondson & Gallagher from consummating their deal and performing their contract. This use of legal process was not proper in the regular prosecution of the proceedings.

64. These abusive uses of legal process were maliciously intended to, and did, have the effect of clouding title to Alban Towers and rendering it impossible for Georgetown and Edmondson & Gallagher to consummate their deal and perform their contract.

65. Defendant's conduct was and is the proximate cause of damages that Edmondson & Gallagher has sustained, and continues to sustain, including, but not limited to, loss of revenue, and that damage was reasonably foreseeable when defendants committed their wrongful conduct. The amount of these damages remaining to be determined, but is at least $6,000,000.

COUNT III

ABUSE OF PROCESS -- SEPTEMBER, 1988
(ALL DEFENDANTS)

66. Plaintiff reasserts and realleges paragraphs 1 through 65 as if fully set forth herein.

67. In September of 1988, defendant Gross knowingly procured false affidavits from George Van Wagner and Thomas

Church. Defendant Vera Ruser knew of the purchase of the affidavits, authorized Gross to give Van Wagner some kind of inducement to sign his affidavits, and assisted in obtaining Van Wagner's testimony. Vera Ruser assisted Gross in obtaining the affidavits by contacting Van Wagner.

68. Gross and the FHE Defendants affirmatively and fraudulently concealed these activities in a number of ways:

(a) By giving false testimony at Richard Gross's deposition as to the whereabouts of George Van Wagner;

(b) By obstructing counsel's legitimate questions concerning George Van Wagner's whereabouts at Brian Benninghoff's deposition;

(c) By deliberately failing to produce the cost-plus contract, even though there were outstanding document requests that called for its production;

(d) By lying to Judge Greene on September 29, 1988 about Van Wagner's whereabouts, about the circumstances of his presence in Washington, D.C., and about the efforts that Gross had made to locate Van Wagner;

(e) By cancelling Van Wagner's deposition in 1988 so that the was not deposed until November 1, 1989; and

(f) By demanding in March 1990 that Georgetown cease pursuing claims against Gross, FHE and ATTA as a condition for continuing to negotiate to allow Georgetown to sell to Edmondson & Gallagher.

69. As a result of defendants' deliberate concealment, these activities were not discovered until December 18, 1992 and thereafter.

70. Defendants did not submit the September 1988 Van Wagner and Church affidavits to the Court for the purpose for which they were intended. Defendants had no intention of prevailing in litigation. Rather, defendants intended to extort money from Edmondson & Gallagher and Georgetown by wrongfully preventing Judge Greene from entering summary judgment against them, and thereby prolonging the litigation.

71. There was no legal justification for altering the facts of the litigation.

72. These abusive uses of legal process were maliciously intended to, and did, have the effect of clouding title to Alban Towers and rendering it impossible for Georgetown and Edmondson & Gallagher to consummate their deal and perform their contract.

73. Defendants' conduct was and is the proximate cause of damages that Edmondson & Gallagher has sustained, and continues to sustain, including, but not limited to, loss of revenue. That damage was reasonably foreseeable when defendants committed their wrongful conduct. The amount of these damages remaining to be determined, but is at least $6,000,000.

COUNT IV

MALICIOUS PROSECUTION
(ALL DEFENDANTS)

74. Plaintiff reasserts and realleges paragraphs 1 through 73 as if fully set forth herein.

75. In September of 1988, Gross, without legal justification, took affirmative steps to wrongfully, maliciously continue the 1987 Litigation by suborning three affidavits, by making misrepresentations to the Court, and by filing false affidavits with the Court. Gross falsified the factual presentation he made in filings with the Court on September 27, 1988 solely to attempt to forestall, by fraud, the summary judgment he feared the Court would enter against ATTA on September 29, 1988. Vera Ruser assisted and substantially aided Gross by telephoning Van Wagner in Florida and attending the meeting where Van Wagner and Gross discussed the exchange of the contract for the affidavit.

76. Richard Gross did not have probable cause for continuing the lawsuit against Edmondson & Gallagher, and Gross knowingly, willfully submitted false pleadings and false affidavits so that he could delay an inevitable judgment against ATTA.

77. Gross continued the lawsuit in 1988 for the wrongful purpose of delaying the litigation and thereby extorting money from Georgetown and Edmondson & Gallagher. Gross intended

to extract several hundred thousand dollars in fees for himself and his partners through this scheme. Even after Judge Greene granted summary judgment to Georgetown, Gross filed an appeal in the Court of Appeal relying upon the suborned affidavits. This continued the litigation for approximately another eighteen months.

78. Despite Gross's illegal and tortious attempts to indefinitely delay the proceedings, the 1987 Litigation terminated in favor of plaintiff Edmondson & Gallagher by the unanimous decision of the District of Columbia Court of Appeals on December 1, 1989. The mandate issued on December 22, 1989.

79. Gross and the FHE Defendants affirmatively and fraudulently concealed these activities in a number of ways:

(a) By giving false testimony at Richard Gross's deposition as to the whereabouts of George Van Wagner;

(b) By obstructing counsel's legitimate questions concerning George Van Wagner's whereabouts at Brian Benninghoff's deposition;

(c) By deliberately failing to produce the cost-plus contract, even though there were outstanding document requests that called for its production;

(d) By lying to Judge Greene on September 29, 1988 about Van Wagner's whereabouts, about the circumstances of his presence in Washington, D.C., and about the efforts that Gross had made to locate Van Wagner;

(e) By cancelling Van Wagner's deposition in 1988 so that the was not deposed until November 1, 1989; and

(f) By demanding in March 1990 that Georgetown cease pursuing claims against Gross, FHE and ATTA as a condition for continuing to negotiate to allow Georgetown to sell to Edmondson & Gallagher.

80. As a result of defendants' deliberate concealment, these activities were not discovered until December 18, 1992 and thereafter.

81. Defendant's conduct was and is the proximate cause of damages that Edmondson & Gallagher has sustained, and continues to sustain, including, but not limited to, loss of the ability to acquire the real property, and to develop it to earn revenue and that damage was reasonably foreseeable when defendants committed their wrongful conduct. The amount of these damages remains to be determined, but is at least $6,000,000.

COUNT V

RACKETEERING
VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO), 18 U.S.C. § 1962(C)
(ALL DEFENDANTS)

82. Plaintiff reasserts and realleges paragraphs 1 through 81 as if fully set forth herein.

83. Defendants were associated in fact and formed an enterprise within the meaning of 18 U.S.C. § 1961(4), consisting of:

(a) ATTA and its officers and directors, acting individually, in their official capacity, or in any combination, and Richard Gross; or, in the alternative,

(b) ATTA, its officers and directors, Richard Gross, HDS, Brian Benninghoff, Patricia Daniels and George Van Wagner, acting individually or in any combination; or, in the alternative,

(c) ATTA, its officers and directors, Richard Gross, HDS, Brian Benninghoff, Patricia Daniels, Thomas Church, and George Van Wagner, acting individually or in any combination.

84. The enterprise has undertaken activities which affect interstate commerce, including the following:

(a) Preventing the sale and rehabilitation of commercial real property worth over $16,000,000, which had an

effect on the rental housing and commercial real property markets in Maryland, Virginia, and the District of Columbia;

(b) Inducing or attempting to induce a flow of capital from Van Wagner's financial sources in Maryland to the District of Columbia which affected or would have affected interstate commerce; and

(c) Granting or purporting to grant George Van Wagner, who lived in Florida, the right to perform construction activities in the District of Columbia through the September 27, 1988 cost-plus construction contract, which influenced or had the potential to influence commerce in Florida and in the District of Columbia.

85. Defendants have conducted the affairs of the above-stated enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), which has included multiple acts of extortion and bribery, chargeable under the penal laws of the District of Columbia and punishable by imprisonment for more than one year, as well as multiple acts which are indictable under the following provisions of title 18, United States Code: § 201 (relating to bribery), § 1341 (relating to mail fraud), § 1343 (relating to wire fraud), and § 1952 (relating to interstate travel in aid of racketeering activities).

86. This pattern of racketeering activity has included, without limitation, the following acts:

(a) (Gross, HDS, Benninghoff, Daniels and Van Wagner) Devising a scheme to defraud Georgetown by delivering to an escrow agent a check drawn on insufficient funds which would misrepresent to Georgetown the ability of ATTA to purchase Alban Towers and cause Georgetown, in reliance thereupon to set aside its contract with Edmondson & Gallagher and enter into a contract with ATTA for the sale of Alban Towers; actually delivering such a check to an escrow agent in Virginia on or around December 31, 1986, drawn knowingly upon an account containing insufficient funds; and using a telephone to facilitate these acts, including phone calls from Gross in the District of Columbia to the escrow agent in Virginia on or around December 1986, in violation of 18 U.S.C. § 1343 (wire fraud);

(b) (Gross, HDS, Benninghoff, Daniels and Van Wagner) Devising a scheme to defraud Georgetown by delivering to an escrow agent a check drawn on insufficient funds which would misrepresent to Georgetown the ability of ATTA to purchase Alban Towers and cause Georgetown, in reliance thereupon to set aside its contract with Edmondson & Gallagher and enter into a contract with ATTA for the sale of Alban Towers; actually delivering such a check to the escrow agent in Virginia on or around December 31, 1986, drawn knowingly upon an account containing insufficient funds; placing letters in the mail on December 31, 1986 for the purpose of executing or attempting to execute this fraudulent scheme, in violation of 18 U.S.C. § 1341 (mail fraud);

(c) (Gross and Ruser) Attempting to obtain a contractual right to purchase Alban Towers, with Georgetown's consent, by wrongful threat of economic injury, including threats conveyed by Gross to Georgetown in or around December 1986 and January 1987, that AlTA would cloud title upon Alban Towers, in violation of D.C. Code § 22-3851 (extortion), which conduct is punishable under the laws of the District of Columbia by imprisonment for more than one year;

(d) (Gross, Church and Van Wagner) Traveling in interstate commerce and using facilities in interstate commerce, with intent to commit extortion, and thereafter performing or attempting to perform extortionist acts, including traveling from the District of Columbia to Virginia in or around December 1986, in order to deliver to the escrow agent a check drawn on insufficient funds as part of a scheme to extort money or property from Georgetown by threatening to cloud title on Alban Towers, as well as using the telephone to call the escrow agent in Virginia from the District of Columbia in or around December 1986, in violation of 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises);

(e) (Gross and Ruser) Devising a scheme to defraud Van Wagner by obtaining an affidavit from him by means of false representations or pretenses, including the false representation or pretense that Van Wagner would be able to remodel Alban Towers, when in fact ATTA was simultaneously attempting to settle

their claims with Georgetown through an agreement which would prevent Van Wagner from conducting the remodeling, and transmitting sounds through wire for the purpose of executing this scheme, including phone calls from Gross and Ruser in the District of Columbia to Van Wagner in Florida and from Van Wagner back to Gross and/or Ruser, in or around August or September 1988, in violation of 18 U.S.C. § 1343 (wire fraud);

(f) (Gross and Ruser) Using a facility in interstate commerce with intent to encourage or facilitate the carrying on by Van Wagner of the unlawful activity of bribery, by using a telephone in or around August or September 1988 to call Van Wagner in Florida from the District of Columbia, to encourage him to accept from Gross and Ruser a purportedly valuable contract in return for an agreement or understanding that Van Wagner's testimony would be influenced in an affidavit which would be submitted to this Court, which act of bribery Van Wagner thereafter performed or attempted to perform, in violation of 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises);

(g) (Gross and Ruser) Corruptly offering, agreeing to give and giving a purportedly valuable contract to Van Wagner in exchange for an agreement or understanding that Van Wagner's testimony would be influenced in an affidavit to be filed in this Court in or around September 1988; certifying the veracity of this testimony; and relying upon this testimony in numerous

briefs filed in this Court and the Court of Appeals of the District of Columbia over the course of the next year, in violation of D.C. Code § 22-713 (bribery of a witness), which conduct is punishable under the laws of the District of Columbia by imprisonment of over one year;

(h) (Gross and Ruser) Directly or indirectly giving, offering or promising something of value to Van Wagner on or around September 27, 1988, for or because of the testimony under oath or affirmation to be given by Van Wagner in affidavit testimony to be submitted to this Court in civil litigation then pending, and relying upon this testimony in numerous briefs filed in this Court and the Court of Appeals of the District of Columbia over the course of the next year, in violation of 18 U.S.C. § 201 (bribery);

(i) (Gross and Ruser) Corruptly offering, agreeing to give and giving a purportedly valuable contract to Van Wagner in exchange for an agreement or understanding that Van Wagner's testimony would be influenced in a deposition taken on or around November 1, 1989, in violation of D.C. Code § 22-713 (bribery of a witness), which conduct is punishable under the laws of the District of Columbia by imprisonment of over one year;

(j) (Gross and Ruser) Directly or indirectly giving, offering or promising something of value to Van Wagner on or around September 27, 1988, for or because of the testimony under oath or affirmation to be given by Van Wagner in a

deposition taken on or around November 1, 1989, in violation of 18 U.S.C. § 201 (bribery);

(k) (Gross and Ruser) Corruptly offering, agreeing to give and giving a purportedly valuable consideration to Church in exchange for an agreement or understanding that Church's testimony would be influenced in an affidavit to be filed in this Court in or around September 1988; certifying the veracity of this testimony; and relying upon this testimony in numerous briefs filed with this Court and the Court of Appeals of the District of Columbia over the course of the next year, in violation of D.C. Code § 22-713 (bribery of a witness), which conduct is punishable under the laws of the District of Columbia by imprisonment of over one year;

(l) (Gross and Ruser) Directly or indirectly giving, offering or promising something of value to Church on or around September 27, 1988, for or because of the testimony under oath or affirmation to be given by Church in affidavit testimony to be submitted to this Court in civil litigation then pending, and relying upon this testimony in numerous briefs filed in this Court and the Court of Appeals of the District of Columbia over the course of the next year, in violation of 18 U.S.C. § 201 (bribery);

(m) (Van Wagner) Using facilities in interstate commerce, with intent to promote or encourage the unlawful activity by Church of corruptly accepting or agreeing to accept

from ATTA something of value in exchange for an agreement or understanding that Church's testimony would be influenced in affidavits to be submitted to this Court in connection with civil litigation then pending before the Court, including telephone calls by Van Wagner from Florida and/or the District of Columbia to Church in Maryland, and thereafter committing or attempting to commit the act of promoting or facilitating this bribery, in or around August or September, 1988, in violation of 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises);

(n) (Van Wagner) Traveling in interstate commerce and using facilities in interstate commerce, with intent to solicit, demand, accept, or agree to accept from Gross and Ruser a purportedly valuable contract, and thereafter performing or attempting to perform this act of bribery, by traveling from Florida to the District of Columbia, in or around August or September 1988, in violation of 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises);

(o) (Van Wagner) Inducing Church in or around August or September 1988 to travel across state lines from Maryland to the District of Columbia, on or around September 27, 1988, with intent to commit the unlawful activity of bribery, and thereafter to perform or attempt to perform that act of bribery, by corruptly accepting or agreeing to accept from Gross and Ruser

something of value in exchange for an agreement or understanding that his testimony would be influenced in affidavit testimony to be submitted to this Court, in violation of 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises);

87. All named defendants were associated with or employed by the enterprise.

88. Defendants all participated in the conduct of the enterprise. Richard Gross, although nominally an agent for ATTA, was actively involved in the operation and management of the enterprise; indeed, Richard Gross was its driving force. Vera Ruser worked with Gross to develop and implement the scheme and directed many of Gross's activities. Gross and Ruser each participated in interstate telephonic communications with Van Wagner.

89. The racketeering activities conducted by defendants or by other parties employed by or associated with the enterprise were closely related in that they were all intended to delay or prevent the sale of Alban Towers to extort money from Edmondson & Gallagher and Georgetown.

90. The racketeering activities conducted by defendants or by other parties employed by or associated with the enterprise were continuous in that they took place over an extended period of time and indicated an intent to continue into the future. The activities began no later than December 1986,

when defendants induced Van Wagner to deliver to Georgetown a check drawn on insufficient funds in an effort to defraud and extort money from Edmondson & Gallagher and Georgetown. The activities continued through at least November 1, 1989, when Van Wagner gave false and wrongfully procured deposition testimony in furtherance of the scheme. Moreover, the false affidavits purchased by bribery in 1988, were relied upon repeatedly by defendants, who certified their veracity knowing them to be false, in briefs submitted to this Court and the Court of Appeals of the District of Columbia in 1988 and 1989, including briefs submitted in support of the following motions: Motion for Stay of Judgment Pending Appeal Without Bond (November 2, 1988), Motion for Stay of Judgment Pending Appeal Without Bond (November 2, 1988), and Motion for Stay of Judgment Pending Appeal Without Bond (January 11, 1989).

91. Defendants' criminal and fraudulent scheme and activities undertaken in furtherance thereof were and are the actual and proximate cause of damages that Edmondson & Gallagher sustained in its business or property, and continues to sustain, including, but not limited to, costs and loss of revenue. The amount of these damages remains to be determined, but is at least $6,000,000. Edmondson & Gallagher is entitled to threefold the damages it has sustained and the cost of the suit, including reasonable attorney's fees, pursuant to 18 U.S.C. § 1964(c).

92. Gross and the FHE Defendants affirmatively and fraudulently concealed these activities in a number of ways:

(a) By giving perjured testimony at Richard Gross's deposition as to the whereabouts of George Van Wagner;

(b) By attempting to obstruct counsel's legitimate questions concerning George Van Wagner's whereabouts at Brian Benninghoff's deposition;

(c) By deliberately failing to produce the cost-plus contract, even though there were outstanding document requests that called for its production;

(d) By lying to Judge Greene on September 29, 1988 about Van Wagner's whereabouts, about the circumstances of his presence in Washington, D.C., and about the efforts that Gross had made to locate Van Wagner;

(e) By cancelling Van Wagner's deposition in 1988 so that he was not deposed until November 1, 1989; and

(f) By demanding in March 1990 that Georgetown cease pursuing claims against Gross, FHE and ATTA as a condition for continuing to negotiate to allow Georgetown to sell to Edmondson & Gallagher.

93. As a result of defendants' deliberate concealment, these activities were not discovered until December 18, 1992.

COUNT VI

CONSPIRACY TO COMMIT RACKETEERING VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO), 18 U.S.C. § 1962(D) (ALL DEFENDANTS)

94. Plaintiff reasserts and realleges paragraphs 1 through 93 as if fully set forth herein.

95. Defendants agreed and conspired together to carry out the illegal scheme set forth in Count V herein, in violation of 18 U.S.C. § 1962(d).

96. ATTA and Vera Ruser joined the conspiracy through the agreement of its president, Ruser, to participate, individually as well as in her capacity as an officer of the organization, in each of the predicate acts set forth in Count V herein in which she is named.

97. Richard Gross and the FHE defendants joined the conspiracy through the agreement of Gross, an FHE general partner, acting individually and in his capacity as an FHE partner, in the ordinary course of his practice, to participate in each of the predicate acts set forth in Count V herein in which he is named.

98. Defendants' conspiracy and activities undertaken in furtherance thereof was and is the actual and proximate cause of damages that Edmondson & Gallagher sustained, and continue to sustain, including, but not limited to, costs and loss of

revenue. The amount of these damages remains to be determined, but is at least $6,000,000.

99. Gross and the FHE Defendants affirmatively and fraudulently concealed these activities in a number of ways:

(a) By giving perjured testimony at Richard Gross's deposition as to the whereabouts of George Van Wagner;

(b) By attempting to obstruct counsel's legitimate questions concerning George Van Wagner's whereabouts at Brian Benninghoff's deposition;

(c) By deliberately failing to produce the cost-plus contract, even though there were outstanding document requests that called for its production;

(d) By lying to Judge Greene on September 29, 1988 about Van Wagner's whereabouts, about the circumstances of his presence in Washington, D.C., and about the efforts that Gross had made to locate Van Wagner;

(e) By cancelling Van Wagner's deposition in 1988 so that he was not deposed until November 1, 1989; and

(f) By demanding in March 1990 that Georgetown cease pursuing claims against Gross, FHE and ATTA as a condition for continuing to negotiate to allow Georgetown to sell to Edmondson & Gallagher.

100. As a result of defendants' deliberate concealment, these activities were not discovered until December 18, 1992.

WHEREFORE, plaintiff demands judgment against defendant as follows:

A. That the Court enter judgment on Counts I through Count III in favor of plaintiff Edmondson & Gallagher and against the defendants, jointly and severally, and award plaintiff Edmondson & Gallagher compensatory damages in an amount of $6,000,000, plus punitive damages in an amount of $20,000,000, plus the costs of this suit including reasonable attorney's fees, plus prejudgment interest; and

B. That the Court enter judgment on Count IV against defendants, jointly and severally, and award plaintiff Edmondson & Gallagher compensatory damages in an amount of $6,000.000, plus punitive damages in an amount of $20,000,000, plus the cost of the litigation captioned Alban Towers Limited Partnership v. Alban Towers Tenants Association; Edmondson & Gallagher, Civil Action No. 822-87 RP, including reasonable attorney's fees, plus the costs of this suit, including reasonable attorney's fees, plus prejudgment interest; and

C. That the Court enter judgment on Counts V and VI in favor of Edmondson & Gallagher and against Richard Gross, the FHE Defendants and Vera Ruser, jointly and severally, and award plaintiff Edmondson & Gallagher treble damages in an amount of $18,000,000, plus the cost of bringing this suit, including reasonable attorney's fees, plus prejudgment interest; and

D. That the Court award Edmondson & Gallagher such other and further relief as the Court deems just and fair.

JURY DEMAND

Plaintiff demands a trial by jury.

April 30, 1993

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