No. _____

IN THE

Supreme Court of the United States

DAVID D'ADDARIO, MARY LOU D'ADDARIO KENNEDY, GREGORY S. GARVEY, RED KNOT ACQUISITIONS, LLC, SILVER KNOT, LLC, NICHOLAS VITTI,

Petitioners,

—v.—

VIRGINIA A. D'ADDARIO, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann. T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether a beneficiary of a probate estate can establish the direct injury necessary to bring a civil RICO claim when the alleged RICO violation harms the estate as a whole and any impact on beneficiaries of the estate is indirect and derivative.

2) Whether outside parties who are not members of the alleged RICO enterprise can nevertheless be liable under 18 U.S.C. § 1962(c) where they are alleged only to have "assisted" or acted as "necessary tools" to a single RICO defendant in his own operation or management of the RICO enterprise.

LIST OF PARTIES

Petitioners:

1) David D'Addario;
2) Mary Lou D'Addario Kennedy;
3) Gregory S. Garvey;
4) Red Knot Acquisitions, LLC;
5) Silver Knot, LLC; and
6) Nicholas Vitti.

Respondents:

7) Virginia A. D'Addario, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust;
8) Virginia A. D'Addario, Executrix, as Executrix of the Probate Estate of Ann T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust;

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners Red Knot Acquisitions, LLC and Silver Knot, LLC state that they have no parent companies, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

David D'Addario, Mary Lou D'Addario Kennedy, Gregory S. Garvey, Red Knot Acquisitions, LLC, Silver Knot, LLC and Nicholas Vitti, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit (App., at 1a-49a) is published at 901 F.3d 80 (2d Cir. 2018). The decision of the District Court (App., at 50a-105a) is unpublished and its disposition is reported at 2017 WL 1086772 (D. Conn. Mar. 22, 2017). The order of the Second Circuit denying a Petition for Rehearing was issued on October 10, 2018 (App., at 106a-107a).

STATEMENT OF JURISDICTION

The date of the decision sought to be reviewed is August 14, 2018. The Second Circuit denied Petitioners' Joint Petition for Rehearing on October 10, 2018.

Jurisdiction is conferred by 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §§ 1962 and 1964 are reprinted in the appendix to this petition (App., at 108a-110a).

INTRODUCTION

The Supreme Court should grant review of the Second Circuit's decision in this civil RICO case because that decision is directly contrary to precedent

of the Supreme Court and several circuit courts. If allowed to stand, the Second Circuit's decision will lead to inconsistent outcomes in the lower courts and significantly expand both the types of plaintiffs who can bring RICO claims and the outside parties who can be threatened with RICO liability.

First, in holding that the Plaintiffs, as beneficiaries of a probate estate, can bring a RICO claim for alleged misconduct that diminished the value of the Estate as a whole, the Second Circuit departed from this Court's precedent in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Hemi Grp. LLC v. City of N.Y., N.Y.*, 559 U.S. 1 (2010), and created a split with the Third, Fifth and Sixth Circuits. *Firestone v. Galbreath*, 976 F.2d 279 (6th Cir. 1992); *Schrager v. Aldana*, 542 Fed. Appx. 101 (3rd Cir. 2013) (per curiam); *Sheshtawy v. Gray*, 697 Fed. Appx. 380 (5th Cir. 2017) (per curiam), *cert. denied,* 138 S. Ct. 1298 (2018). Each of those circuit courts held under similar circumstances that an expected beneficiary of a probate estate cannot bring a RICO claim because the injury to the beneficiary's interest is indirect, being derivative of the primary injury to the Estate itself.

Second, the Second Circuit directly contradicted this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), when it held that outside parties, who merely "assist" a member of a RICO enterprise in his operation or management of the enterprise or act as a "necessary tool" thereof, have themselves "participated in the operation or management of the enterprise." The Second Circuit's significant expansion of RICO liability in this regard also conflicts with holdings from the Third, Seventh, and Eighth Circuits, all of which have held, consistent with *Reves*, that an outsider does not participate in

the operation or management of a RICO enterprise's affairs simply by providing assistance to the enterprise. *See, e.g.*, *Univ. of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993); *United States v. Swan*, 250 F.3d 495, 499 (7th Cir. 2001); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 399 (7th Cir. 2009); *Dahlgren v. First Nat. Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008).

Accordingly, review is warranted to align the precedent of the Second Circuit with the precedent of this Court, to resolve conflicts between the Second Circuit and other Circuits, and to bring much-needed clarity to the scope of RICO liabilty. This case provides an appropriate vehicle to achieve these ends.

STATEMENT OF THE CASE

This lawsuit is the latest salvo in Virginia D'Addario's longstanding effort to interfere with the administration of her father's estate. Even though she received a generous monetary settlement from the Estate in 1987, in exchange for which she waived her right to participate in estate deliberations and decisions going forward, she has persisted in filing numerous motions and lawsuits in the Connecticut Probate and Superior Courts attacking the actions of her brother and his co-executors. Her claims have consistently been rejected, both in the Probate Court and when she has appealed the Probate Court's decisions to the Connecticut Superior Court. On more than one occasion, the state courts have noted that her endless motions, applications and appeals have imposed unnecessary costs and delay on the Estate.

Unhappy with the decisions of the Probate and Superior Courts, Virginia D'Addario filed the action below, seeking to bypass the state courts and obtain a new forum for herself. In seeking to move her campaign to federal court, she has taken a dispute between siblings over a parent's estate and attempted to transform it into a RICO case in which she is accusing her brother, David, and sister, Mary Lou, as well as others, of being "racketeers." After the District Court properly dismissed Virginia's RICO claims, the Second Circuit issued a decision partially resuscitating those claims. The Second Circuit's decision is, in important respects, contrary to this Court's precedents and in direct conflict with the decisions of several other Circuit Courts.

A. Factual Background

Plaintiff Virginia D'Addario ("Virginia") is a beneficiary of the estate of her late father, F. Francis D'Addario (the "Estate"). She is the sister of defendants David D'Addario and Mary Lou D'Addario Kennedy. David D'Addario has served as one of the executors of the Estate since his father's death. The Estate is still open and the subject of ongoing proceedings in the Connecticut Probate Court.

In 1987, shortly after her father's death, Virginia was in severe financial difficulty due to a failed business venture and in Chapter 11 bankruptcy. She entered into a court-approved agreement with the Estate (the "Settlement") in which the Estate assumed $2,500,000 in debt that Virginia personally owed to several banks and advanced her approximately $1,400,000 in cash.

In exchange for the benefits she received, Virginia gave a promissory note to the Estate in the amount of $3,900,000. She also agreed not to "participate in or

take part in the Estate deliberations or decisions as regards the Estate or its property," and she waived "any and all rights in equity and in law which may now or hereafter exist in her favor against the Executors as regards their administration of the Estate and the validity of their decisions, including the rights to maintain a lawsuit of any nature against the Executors or the Estate . . . except for willful fraud, malfeasance or dishonesty."

Notwithstanding the terms of the Settlement, Virginia has spent the last twenty five years challenging (unsuccessfully) the actions of the Estate's executors at virtually every turn. In 1991, the executors obtained a permanent injunction against her that prohibited her from pursuing four different law suits she had pending against the Estate at the time. In 2008, Virginia filed a motion to unseal the Estate's interim accountings, which was denied by the Probate Court and then, on appeal, denied again by the Superior Court. In 2009, Virginia filed a complaint with the Probate Court Administrator's Office asking it to investigate the operations of the Probate Court. Her request was denied. Virginia also moved to have the Estate transferred to the Complex Probate Docket, which was likewise denied. Finally, in 2014, Virginia filed a motion to remove the executors. This motion was also denied.

Virginia filed all of these actions, including the lawsuit below, despite the terms of the Settlement and the Probate Court's repeated determination that the Settlement deprived her of standing to assert almost all of these claims. Virginia persisted in filing motions in the Probate Court, including her motion to remove the executors, even after the Probate Court made clear in its rulings that it would

hear her claims of alleged malfeasance by the executors once the final accounting for the Estate had been submitted. Thus, as the State courts have observed, the Estate has been delayed, in part, because of Virginia's own frivolous litigation.

The executors are now in the process of negotiating and completing sales of the remaining real estate properties and other assets of the Estate.[1]

B. Proceedings in the District Court

On January 22, 2016, Virginia commenced the action below in the District Court. She filed individually, on behalf of two testamentary trusts, and as executrix on behalf of the estate of her deceased mother (collectively, the "Plaintiffs"). With the consent of Defendants, the Plaintiffs filed an Amended Complaint on May 9, 2016. In their Amended Complaint, the Plaintiffs asserted six causes of action, including civil RICO claims against all Defendants pursuant to 18 U.S.C. § 1962, *et seq*. and various related state law claims. The Amended Complaint alleged that Defendants' misconduct had depleted the value of the Estate which, in turn, diminished the Plaintiffs' inheritable beneficial interest therein. In addition to those "lost debt" damages, the Plaintiffs also alleged injury in the form of so-called "collection expenses," consisting of the legal costs that Virginia voluntarily incurred bringing her multiple unsuccessful State court claims challenging the administration of the Estate.

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[1] In addition to the substantial delays occasioned by Virginia's litigiousness, the Estate has remained open for an extended period because its assets were always highly illiquid, consisting of numerous real estate holdings that were subject to tax liens and environmental issues. Resolving these environmental and tax issues has been a complex and lengthy process.

On July 21, 2016, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), Defendants jointly moved to dismiss the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted (the "Motion to Dismiss"). In a 44-page written decision issued on March 22, 2017, the District Court granted the Motion to Dismiss, holding: (1) Plaintiffs have standing to assert their claims under RICO; (2) Plaintiffs' alleged lost debt injury is not ripe; (3) Plaintiffs' alleged collection expenses injury is ripe; and (4) Plaintiffs failed to plead the requisite elements of a RICO violation. In holding that the Plaintiffs have standing to maintain a RICO claim, the District Court did not explain how the Plaintiffs' claim of indirect harm satisfies the proximate causation requirement established by this Court's precedents. Instead, the District Court was content to distinguish, on factual grounds, two Circuit Court opinions cited by Defendants in support of their motion to dismiss. In this regard, the court appeared to be swayed by the argument that, because the executors controlled the Estate, "there is no better party to bring the RICO suit"[2] and that David D'Addario's alleged looting of the Estate was motivated by a desire to harm Virginia by reducing her inheritance. (App., at 69a-71a).

Further, because the District Court concluded that the Plaintiffs failed to sufficiently allege an

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[2] The District Court appears to have overlooked that one of the Estate's executors, Lawrence D'Addario, is not named as a defendant in this action and that the Plaintiffs explicitly disclaim that he was involved in the alleged RICO violation. The District Court also failed to consider that the Probate Court has the authority to remove executors and replace them with individuals who would have every incentive to pursue a meritorious RICO claim on behalf of the Estate.

association-in-fact enterprise under 18 U.S.C. § 1962(c), it did not address the question of whether one or more of the Defendants could be liable under this Court's "operation or management" test. The Plaintiffs filed a Notice of Appeal on April 21, 2017.

C. The Second Circuit Opinion

On Appeal, the Second Circuit affirmed the District Court's finding that the Plaintiffs' primary claim for damages arising out of her alleged "lost debt" injuries is not ripe. (App., at 23a-29a). The Court reasoned that because the Estate had not yet closed, and the Probate Court retained various equitable powers to remedy any alleged wrongdoing, the Plaintiffs' claims for lost debt damages based on a diminution of her expected inheritance were not ripe. (*Id.*)

The Second Circuit then considered whether the Plaintiffs' RICO case could proceed solely on the basis of her alleged "collection expense" damages. (App., at 29a). The Second Circuit agreed with the District Court's conclusion that this subset of damages was ripe, even in light of the potential for the amount of damages to change during the pendency of the litigation. (*Id.* at 30a).

Despite acknowledging that the Plaintiffs' collection expense injuries were an "additional step" removed from the Defendants' alleged RICO violations, violations which allegedly injured the Estate itself and not the Plaintiffs directly, the Second Circuit also concluded these injuries were proximately caused by the Defendants' alleged RICO violations. (App., at 31a-32a). In so holding, the Second Circuit did not expressly address the Defendants' argument that, pursuant to this Court's holding in *Hemi Grp. LLC*, 559 U.S. 1 (1992), such injuries were too far removed from the alleged RICO violations to satisfy RICO's

"direct injury" requirement. Instead, the Second Circuit relied on its own precedent, holding simply that collection expenses were a valid basis for RICO damages.[3] (App., at 31a-32a).

The Second Circuit then addressed the substance of the Plaintiffs' RICO allegations and, reversing the District Court, held that the Plaintiffs had sufficiently alleged a cause of action under 18 U.S.C. §§ 1962(b) and (c). As to the Plaintiffs' § 1962(b) claim, the Second Circuit agreed with the District Court that a violation of § 1962(b) requires an injury caused by the Defendants' acquisition or maintenance of an interest in or control of the enterprise that is separate and distinct from the injuries caused by the predicate acts. (App., at 35a-36a). The Plaintiffs maintained throughout the proceedings that no such distinct injury was required and crafted their Complaint in accordance with such belief.

Although the Complaint alleged an "acquisition or maintenance injury" that was identical to the injury allegedly caused by the predicate acts, the Second Circuit nevertheless reversed the District Court and concluded that the injury allegedly caused by David's maintenance of control of the Estate was distinct from the injuries allegedly caused by the predicate acts. (App., at 36a). The opinion below offers little by way of reasoning as to how these alleged injuries are

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[3] Because the Second Circuit concluded that the Plaintiffs' lost-debt injuries were not ripe, it did not consider the Defendants' arguments that such injuries were not proximately caused by the Defendants' alleged RICO violations. Implicit in its holding that the Plaintiffs' collection expense damages were proximately caused by the alleged RICO conduct, however, is that the Plaintiffs' lost-debt damages—when ripe—would also satisfy the proximate causation requirement.

distinct. The Second Circuit also concluded that the Plaintiffs had adequately alleged a § 1962(b) claim against Garvey and Red Knot simply because Red Knot was a secured creditor of the Estate and, like all secured creditors, had the power to foreclose on the collateral of its debt, in this case, assets of the Estate. (App., at 36a-37a).

Turning to the Plaintiffs' § 1962(c) claim, the Second Circuit agreed with the District Court that the alleged "David D'Addario Control" enterprise, an association-in-fact enterprise consisting of all of the Defendants, was not sufficiently pled. (App., at 39a-43a). The Second Circuit concluded that the Plaintiffs failed to allege the requisite coordination amongst the Defendants to establish an association-in-fact RICO enterprise. (App., at 43a). The "David D'Addario Control" association-in-fact enterprise was the only enterprise the Plaintiffs alleged for their § 1962(c) claim, and was the only enterprise briefed and considered in connection with that claim at the District Court.

Nevertheless, despite acknowledging that courts "should not endeavor to replace the enterprise identified by the plaintiff with an alternative, differently constituted enterprise," the Second Circuit proceeded to consider an alternative enterprise. (App., at 38a-39a, n.9). While not alleged in the Complaint nor considered by the District Court, the Plaintiffs argued, for the first time, in a single paragraph of their appellate brief, that the Estate itself constituted a legal-entity-enterprise for purposes of their § 1962(c) claim. (Br. of Appellant at 87, *D'Addario v. D'Addario*, 901 F.3d 80 (2d Cir. 2018). Despite the Plaintiffs' own acknowledgement that such an argument "may have been waived for consideration on appeal," the court below

nevertheless considered this new theory. (Reply Br. of Appellant at 20, *D'Addario v. D'Addario*, 901 F.3d 80 (2d Cir. 2018). Ultimately, however, the Second Circuit concluded that under Connecticut law an Estate was "'not a legal entity. It . . . is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent'" and therefore the Estate did not meet the definition of an entity enterprise in 18 U.S.C. § 1961(4). (App., at 45a), quoting *Freese v. Dep't of Social Servs*., 169 A.3d 237, 251 (Conn. App. 2017)).[4]

The Second Circuit's reasoning did not end there, however. Instead, the Second Circuit, *sua sponte*, conceived of a new association-in-fact enterprise consisting of David D'Addario and Lawrence ("Larry") D'Addario associating in their roles as executors of the Estate. (App., at 45a-46a). Such an association-in-fact enterprise was never considered by the District Court, was never argued by the Plaintiffs, and was not alleged in the Complaint. To the contrary, Larry D'Addario is not named as a defendant in this action, and the Complaint specifically alleges that he played no part in any of the alleged wrongdoing.[5]

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[4] The definition of an enterprise under 18 U.S.C. § 1961(4) applies to both §§ 1962(b) and 1962(c). In analyzing the Plaintiff's § 1962(b) claim, the Second Circuit relied on the Plaintiff's allegation that the Estate was an entity enterprise. (App., at 33a-36a). The Second Circuit offered no explanation as to how its conclusion that the Estate was an entity-enterprise for purposes of the § 1962(b) claim was consistent with its later conclusion that an Estate could not be a legal entity enterprise for purposes of the § 1962(c) claim.

[5] Among other allegations, Paragraph 115 of the Complaint states that "none of Larry D'Addario's conduct relative to the Estate was actuated by malice or in the nature of

The Second Circuit concluded that its newly-crafted association-in-fact enterprise satisfied the requirements of RICO. Because the sole members of its newly-conceived enterprise were David and Larry D'Addario, the court then considered whether the other Defendants, Mary Lou D'Addario Kennedy, Nicholas Vitti, Gregory Garvey, Red Knot Acquisitions, and Silver Knot, LLC could also be liable under §1962(c). As outside parties, these Defendants could only be liable under §1962(c) if they associated with the "David and Larry" association-in-fact enterprise and conducted or participated in "the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The Second Circuit acknowledged that, pursuant to this Court's holding in *Reves*, 507 U.S. 170 (1993), liability required a showing that these individuals "participated in the operation or management" of the enterprise itself by playing some part in directing the enterprise's affairs. (App., at 46a).

Relying on its own inaccurate dicta from *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.,* 385 F.3d 159 (2d Cir. 2004), the Second Circuit concluded that RICO liability could attach to the individual Defendants Mary Lou, Vitti, and Garvey, simply because they were "alleged to have actively assisted David when he operated the Estate to effectuate his schemes, which directly affected his management of the Estate." (App., at 48a). The court below also held that the entity Defendants, Red Knot and Silver Knot, could be liable merely because they allegedly "assisted David in his conduct of the Estate's affairs simply by their formation and existence: they were

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fraud or willful misconduct." (Am. Compl. ¶115, *D'Addario v. D'Addario*, No. 3:16-cv-00099(JBA) (May 9, 2016).

necessary tools for the schemes' operation." (App., at 48a). Thus, despite the court's acknowledgment of the operation or management test, the Second Circuit's holding is contrary to this Court's precedent in *Reves*.

The Second Circuit vacated the District Court's judgment, and remanded the matter for further proceedings.

On September 14, 2018, the Defendants petitioned the Second Circuit for a Panel Rehearing and Rehearing En Banc. The Panel denied the petition on October 10, 2018.

REASONS FOR GRANTING THE PETITION

I. The Decision Below on Proximate Causation Conflicts With This Court's Decisions in *Holmes v. Securities Investor Protection Corp.* and *Hemi Group, LLC v. City of New York*, As Well As Decisions From Other Circuits

A. The Decision Below Conflicts With This Court's Precedent

Review is warranted because the Second Circuit's holding below—that a plaintiff who is *indirectly* injured by an alleged RICO violation has standing[6]

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[6] As noted by the Second Circuit in its decision below, the proximate cause requirement for a viable RICO claim "has sometimes been described as necessary to support 'statutory standing'[.]" (App., at 31a). Although using the term "standing" in this context may not be entirely accurate (*see id.*), it is occasionally used herein as a succinct means of describing the presence or absence of proximate cause and the consequences of such on the ability of a putative plaintiff to maintain a RICO claim.

to maintain a cause of action under 18 U.S.C. § 1964(c)—is flatly inconsistent with this Court's holdings in *Holmes*, 503 U.S. 258, and *Hemi*, 559 U.S. 1. Together, these cases stand for the proposition that, to have standing to pursue a claim under § 1964(c), a plaintiff must establish a *direct* causal relationship between the alleged injury and a defendant's RICO violation. To satisfy this requirement, the injury must not be "too remote, purely contingent, or indirect[.]" *Hemi*, 559 U.S. at 9; *see also Holmes*, 503 U.S. at 267–274 (RICO requires direct relationship between injury and injurious conduct).

In *Holmes*, the Securities Investor Protection Corporation ("SIPC") alleged that defendant Holmes had violated RICO by conspiring to manipulate stock prices, which caused two broker-dealers to default on their obligations to customers, which in turn triggered "SIPC's statutory duty to advance funds to reimburse the customers." *Id*. at 261. SIPC sought to recover the funds it advanced on behalf of the broker-dealers as damages caused by the defendants' RICO violation: the underlying stock manipulation that had rendered the broker-dealers insolvent and unable to cover their customers' claims.

This Court rejected SIPC's RICO claim, holding that its claim for damages was too far removed from the underlying RICO violation to satisfy RICO's statutory proximate causation requirement. The Court first concluded that § 1964(c) requires a "direct relation between the injury asserted and the injurious conduct alleged." *Id*. at 268. With reasoning that is equally applicable to the facts of the instant case, the Court then held that "the link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the

harm suffered by the broker-dealers. . . . The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by" the broker-dealers' customers and creditors. *Id.* at 271.

In 2010, this Court reiterated and reinforced its holding concerning the RICO proximate causation requirement. In *Hemi*, New York City sued an out-of-state cigarette seller for failing to submit information about its New York City customers to New York State. This omission, according to the plaintiff, violated RICO and caused the plaintiff to lose out on cigarette tax revenue. This Court found the RICO claim insufficient as a matter of law because New York City "cannot show that it lost the tax revenue 'by reason of' the alleged RICO violation . . . ." *Hemi*, 559 U.S. at 4. In so holding, this Court made clear that the causation inquiry for a RICO claim must cease at "the first step." *Id.* at 10. In other words, a plaintiff's alleged injury must not be more than one step removed from the defendant's injurious conduct. Because the chain of events leading to the city's injury in *Hemi* required the Court "to move well beyond the first step," it could not "meet RICO's direct relationship requirement." *Id.*

The Plaintiffs' claim for damages[7] in this case is based on a factual chain functionally identical to the

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[7] Some courts in the Second Circuit have recognized two related categories of civil RICO damages: lost debt damages and collection expenses. *See The Cadle Co. v. Flanagan*, 2006 WL 860063, at *8 (D. Conn. Mar. 31, 2006). "Lost debt" damages refer to the actual damages caused by the RICO violation, whereas "collection expenses" are attorney's fees and similar costs incurred in response to and as a direct result of such violation. *See id.*; *see also* App., at 69a.

circumstances this Court addressed in *Holmes* and *Hemi* and must likewise fail under the standard set forth in those cases because the alleged injury is at least two steps removed from the alleged predicate acts. The Plaintiffs' causal theory can be summarized as follows: (1) Defendants' committed RICO violations, (2) which harmed the Estate, rendering it insolvent, (3) which, in turn, reduced the value of the Plaintiffs' expected inheritance from the Estate, (4) which then caused Virginia to incur legal expenses attempting to stop the reduction in value of the Plaintiffs' expected inheritance from the Estate. This theory fails because, under *Holmes* and *Hemi,* the causation analysis cannot venture beyond the "first step" of a factual chain of events. *Id.* Because the Plaintiffs' injury—if any[8]—is entirely derivative of the injury allegedly visited on the Estate as a result of the Defendants' conduct, such injury is two steps removed from the alleged injurious conduct.[9] Thus, the Plaintiffs cannot satisfy the direct relationship requirement of §1964(c) as construed by this Court and cannot state a claim under that statute.

The Plaintiffs' allegation that Defendant David D'Addario *intended* to harm Virginia indirectly—by keeping the Estate open and allegedly looting its

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[8] The court below correctly concluded that the Plaintiffs' "lost debt" damages are not ripe and upheld the District Court's dismissal of that aspect of the Plaintiffs' RICO claim. (App., at 29a).

[9] As discussed in Section I.C below, the estate-beneficiary context of the instant case is analogous to the corporation-shareholder context, in which numerous courts have held that a shareholder does not have standing to assert a civil RICO claim when the corporation is the principal victim of the RICO violation and the diminution in value of the shareholder's investment is derivative of the harm to the corporation.

assets to impair Virginia's expected inheritance—does not alter this result. In *Hemi*, this Court explicitly rejected the argument that the foreseeability of injuries which might be indirectly visited on third parties as a result of the alleged RICO violation—or even the defendant's intent to cause such indirect injuries—are relevant factors in the proximate causation analysis under § 1962(c). *See Hemi*, 559 U.S. at 12 ("Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm. Indeed, [the Court's relevant precedents] never even mention the concept of foreseeability"). To the extent that the decisions below suggest that the Defendants' intent is relevant to the RICO proximate causation requirement, such decisions are in further conflict with *Holmes* and *Hemi* and should be reversed on that ground as well.

The same reasoning applies with even greater force to the Plaintiffs' "collection expenses" claim. As the District Court below correctly noted, "if Plaintiffs do not have standing to pursue [lost debt] . . . damages, they would not have standing with regard to the related collection expenses." (App., at 69a). As demonstrated above, the alleged injury to the Plaintiffs' expected inheritance caused by Defendants' alleged RICO violations is too indirect to impart RICO standing. The Plaintiffs' alleged collection expense damages are an additional step removed from the alleged injurious conduct and, therefore, also cannot qualify as an "injury" for RICO purposes.

In its decision below, the panel acknowledged that the Plaintiffs' claim for collection expenses is separated by "an additional step [from] . . . the alleged RICO violation[.]" (App., at 31a-32a).

Although *Hemi* plainly requires the analysis to stop there, the panel asserted that it was bound by Second Circuit precedent to "recognize such expenses to be a valid basis for RICO damages." (App., at 31a-33a), citing *Bankers Tr. Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988) and *Stochastic Decisions, Inc. v. DiDomenico* 995 F.2d 1158, 1166-67 (2d Cir. 1993)] To the extent that these precedents require such a result in this case, they are inconsistent with *Hemi* and must be overruled. On closer inspection, however, it appears that the Second Circuit simply misapplied its precedents to this case, thereby running afoul of *Hemi*.

In *Stochastic*, for example, the RICO violation involved "defendants' illegal actions in impeding Stochastic's collection" of certain judgments obtained by plaintiff. Stochastic, 995 F.2d at 1166. Plaintiff argued that it was entitled to recover as RICO damages not only the attorney's fees directly caused by the defendants' efforts to impede its collection of the judgments, but also the attorney's fees it had incurred in *obtaining* the judgments in the first instance. The Second Circuit rejected this argument, first reiterating that collection expenses, like any other form of alleged RICO damages, "must stem from and be proximately caused by a RICO violation." *Stochastic*, 995 F.2d at 1167. The court concluded that the expenses incurred in Stochastic's attempt to *obtain* the judgments were unrecoverable because these expenses did not "stem from" and were not "proximately caused" by the alleged RICO violations, which were limited to the defendants' efforts to impede the collection of those judgments. In other words, the court drew a distinction—as required by *Hemi*—and only awarded collection expenses incurred by the first-step victim that were directly

caused by the RICO violations (and therefore recoverable).

The Second Circuit failed to draw any such distinction in this case. Here, the alleged RICO violation is defendant David D'Addario's "looting" of the Estate to enrich himself at the expense of the Estate's creditors and beneficiaries, including the Plaintiffs. The Plaintiffs seek to recover as "collection expenses" the attorney's fees they have incurred in connection with Virginia's attempts to intervene in the probate court and interfere with the administration of the Estate, in a purported effort to protect her inheritable interest in the Estate. Under both *Hemi* and *Stochastic*, such purported damages are too remote from the alleged RICO violation and cannot support the Plaintiffs' claim.

The Plaintiffs' claim for collection expenses is several steps removed from the alleged RICO violation and thus does not pass muster under *Holmes* and *Hemi*. Far from being proximately caused by the alleged RICO conduct, the Plaintiffs' collection expenses were undertaken entirely voluntarily and in violation of both Virginia's contractual covenants under the Settlement and various rulings of the State courts. In other words, Virginia's own conduct is an intervening cause of these collection expenses rendering them too remote from the alleged RICO violation and uncollectable under both *Holmes* and *Hemi* and the Second Circuit's own precedent.

B. The Decision Below Conflicts With The Decisions Of Other Circuits Holding That A Beneficiary Of A Probate Estate Does Not Have Standing To Assert RICO Claims Based On Alleged Harm To The Estate As A Whole

By holding that an expected beneficiary of a probate estate has standing to assert RICO claims despite the fact that such beneficiary's alleged damages are indirect and entirely derivative of the principal injury suffered by the estate itself, the Second Circuit has created a conflict of authority with the Sixth, Third and Fifth Circuits. Each of these Circuits has reached the opposite conclusion under identical circumstances. These courts have consistently held that, where the probate estate is the party principally injured by the alleged RICO violation, the resulting diminution in the value of a beneficiary's expected inheritance is too far removed from the RICO violation to satisfy *Hemi*'s proximate cause requirement.

In *Firestone*, 976 F.2d 279, the Sixth Circuit concluded that beneficiaries to a family trust, funded by the residuary assets in the decedent's estate, lacked standing to bring civil RICO claims because "[t]he estate suffered the direct harm; it, not the Family Trust, lost the property." 976 F.2d at 285. The plaintiffs in *Firestone* alleged that, by stealing from their legally incompetent grandmother during her lifetime, the defendants "decreased the size of [their grandmother's] estate, and consequently the size of their inheritance." *Id.* The Sixth Circuit rejected plaintiffs' claim that they had suffered an injury that could give them "standing" under Section 1964(c), stating that "the concept of direct injury refers to the relationship between the injury and the

defendants' actions, not the plaintiffs' pocketbooks." *Id.*

In *Schrager*, 542 Fed. Appx. 101 (per curiam), the Third Circuit was faced with circumstances identical to those in the instant case and concluded that an estate beneficiary could not satisfy the proximate causation requirement where the primary victim of the RICO violation was the probate estate itself. The plaintiff in *Schrager* alleged that the defendants conspired to defraud his deceased mother's estate of over $1 million, thereby reducing the value of his expected inheritance. The court noted that such an injury might provide a basis for Constitutional standing "so long as the additional criterion of proximate causation is met." *Id.* at 104. The court concluded that plaintiff could not satisfy the proximate causation requirement because "[t]he direct victim of Appellee's conduct was the Estate, not Schrager. It was the Estate that lost value due to the fraudulent activities of Appellee and her co-conspirators and therefore the Estate is in a better position to bring a civil RICO claim." *Id.*[10]

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[10] The District Court below appeared troubled by the fact that, in this case, one of the alleged RICO violators is still serving as the Estate's executor, and was thus concerned that the RICO claim might never be brought if it was found to belong only to the Estate. (App., at 70a). This is a distinction without a difference, however, because RICO standing turns on the identity of the *injured party*, not on the identity of the alleged wrongdoer or whether or not an independent administrator has been appointed to manage the affairs of the Estate. Moreover, applying the commonsense holdings in *Firestone* and *Schrager* will not leave the Plaintiffs without a remedy. If they are truly able to establish wrongdoing by the executors, they will be able to move for their removal in the Probate Court, and, once replaced, the newly-appointed executor would have standing to bring a RICO claim on behalf of the Estate. *See* Conn. Gen. Stat.

Finally, in *Sheshtawy*, 697 Fed. Appx. 380 (per curiam), *cert. denied,* 138 S. Ct. 1298 (2018), the Fifth Circuit dealt with the same issue, and followed the lead of the Sixth and Third Circuits. In *Sheshtawy*, plaintiffs alleged that "Defendants conspired to 'take over' Harris County Probate Court No. 1 through their racketeering schemes to unlawfully enrich themselves at Plaintiffs' expense." *Id*. at 381-82. Just as in the instant case, the plaintiffs in *Sheshtawy* asserted damages in the form of "financial losses to their property interests in their respective probate proceedings" resulting from Defendants RICO conduct. *Id*. at 382. The Fifth Circuit panel held that the plaintiffs' "alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative *and indirect* to satisfy RICO standing." *Id*. at 382 (emphasis added).

Like the claims in the preceding cases, the Plaintiffs here allege that Defendants conspired to misappropriate assets of the Estate. As a result of this conduct, the Plaintiffs similarly allege injuries in the form of the diminution of their expectancy interests in the Estate. As the Sixth, Third and Fifth Circuits held, this type of alleged injury, if true, would be the indirect and derivative result of injury to the business or property of *the Estate* and not the proximate result of any of Defendants' alleged RICO violations. Accordingly, the Second Circuit's decision below is an outlier in direct conflict with these other Circuits and this conflict should be addressed by this Court.

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§ 45a-242; *see also Firestone*, 976 F.2d at 284 (suggesting that defendant's position as executor is insignificant for standing analysis because executorship may change hands).

C. The Decision Below Would Vastly Expand The Reach Of 18 U.S.C. § 1964(c)

If allowed to stand, the Second Circuit's decision relaxing the standard for proximate causation will have significant public policy ramifications. The decision will vastly expand the universe of potential civil RICO plaintiffs, transforming family and corporate disputes that were once the province of state courts applying well-established standards and procedures into federal RICO cases bearing the threat of treble damages and attorney's fees. In the probate context—as the present case illustrates so well—almost any time a single potential beneficiary is unhappy with the administration of a trust or estate, she would be able to cobble together a civil RICO claim and thereby bypass long-established state law and procedure, ensnare the estate in burdensome discovery and protracted litigation, and use the threat of enhanced RICO damages to assert unwarranted control over the executors and meddle in the administration of the trust or estate, all without having to show any direct injury. This Court should weigh in on the issue before such a dramatic and fraught change in the law is allowed to take hold.

Nor is there any principle that would limit the Second Circuit's approach to disputes concerning probate estates. Indeed, applying the Second Circuit's approach to the analogous context of shareholder RICO claims would wholly undermine the well-established (and apparently unanimous) rule that a corporation's shareholders do not have standing to bring RICO claims for injuries sustained by the corporation. *See*, *e.g.*, *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) ("A shareholder generally does not have standing to bring an individual action under RICO to redress injuries to the corporation in

which he owns stock."); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d. Cir. 1986) (RICO action is a corporate asset which shareholder-plaintiffs lacked standing to pursue; injury of share devaluation was derivative of harm to corporation); *Warren v. Manufacturers National Bank of Detroit,* 759 F.2d 542, 544 (6th Cir. 1985) (same); *Stevens v. Lowder,* 643 F.2d 1078, 1080 (5th Cir. 1981) (same); *Carter v. Berger,* 777 F.2d 1173, 1176 (7th Cir. 1985) (same).

It is impossible to square the Second Circuit's decision with these precedents. If the Plaintiffs' alleged injuries are sufficiently direct in this case to satisfy *Hemi*'s proximate causation requirement despite being wholly derivative of the harm caused directly to the estate, then surely the devaluation of a shareholder's investment in a corporation will likewise pass muster under *Hemi* notwithstanding that such harm is clearly derivative of the injury to the corporation. It is not difficult to envision an aggrieved shareholder making such arguments in reliance on the Second Circuit's erroneous approach in this case, leading to a vast expansion of the pool of potential civil RICO plaintiffs. This Court should address the issue and reverse the Second Circuit on this point to avoid such an unintended—but certain—result.

II. The Second Circuit's Application Of The Operation Or Management Test Is In Direct Conflict With This Court's Holding In *Reves v. Ernst & Young* And Splits From The Holdings Of Other Circuits.

Review is also warranted because the Second Circuit's holding below is directly contrary to this Court's holding in *Reves*, 507 U.S. 170 (1993). The

court below held that outside parties who "assist" a member of a RICO enterprise in his operation or management of the enterprise or act as a "necessary tool" thereof, have themselves "participated in the operation or management of the enterprise" and can therefore be held liable under RICO. In *Reves*, however, this Court held that aiding and abetting the conduct of a RICO enterprise does not satisfy the "operation or management test" necessary to establish a claim under § 1962(c). *Reves*, 507 U.S. at 178-79. The Second Circuit's significant expansion of RICO liability also conflicts with holdings from the Third, Seventh, and Eighth Circuits, all of which have held that an outsider does not participate in the operation or management of a RICO enterprise's affairs simply by providing assistance to the enterprise. *See, e.g., Univ. of Maryland at Baltimore,* 996 F.2d at 1539; *Swan*, 250 F.3d at 499; *Crichton*, 576 F.3d at 399; *Dahlgren*, 533 F.3d at 690.

If left unreviewed, the Second Circuit's holding will render the "operation or management test" a nullity and expose a wide variety of legitimate business practices to RICO's severe penalties. This case provides a suitable vehicle for this Court to provide much-needed clarity as to the scope of the "operation or management test" which lower courts have applied inconsistently in the over twenty years since *Reves*.

A. *Reves v. Ernst & Young* And The "Operation Or Management" Test

Pursuant to 18 U.S.C. § 1962(c), it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). In *Reves*, this Court interpreted the

statutory language "conduct or participate, directly or indirectly in the conduct of such enterprises affairs" to require that a party "participate in the operation or management of the enterprise itself" in order for liability to attach under § 1962(c). *Reves*, 507 U.S. at 185. This Court further recognized, that "in order to 'participate directly or indirectly in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Id.* at 179. In so holding, the Court expressly rejected the Petitioner's argument that participation in the operation or management of the enterprises affairs includes simply aiding and abetting the conduct of the enterprise. *Id.* at 178-79.

Thus, the Court held that outsiders, who are not part of the enterprise, could only "be liable under § 1962(c) if they are 'associated with' an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise itself . . . ." *Id.* Conversely, complete outsiders cannot be liable under § 1962(c) because "liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their own affairs." *Id.* at 185.

Applying that interpretation, this Court concluded that an auditing firm that prepared financial statements for the RICO enterprise—financial statements that were central to the alleged fraud—could not be liable under § 1962(c), because such conduct did not amount to participation in the operation or management of the RICO enterprise itself. *Id.* at 186.

B. Circuit Courts' Application Of The "Operation Or Management" Test

In light of this Court's recognition that aiding and abetting does not constitute participation in the operation or management of a RICO enterprise, it appears that, with the exception of the Second Circuit below, every Circuit that has expressly addressed the issue has concluded that assisting a RICO enterprise or rendering services that were beneficial to the enterprise is insufficient to establish liability under § 1962(c). Specifically, the Third, Seventh, and Eighth Circuits have held that simply providing assistance to an enterprise does not amount to "participat[ing] in the operation or management" of the enterprise's affairs. *See, e.g.*, *Univ. of Maryland at Baltimore*, 996 F.2d at 1539 ("Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result."); *Swan*, 250 F.3d at 499 ("simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c)."); *Crichton*, 576 F.3d at 399 ("assisting" the RICO enterprise not sufficient); *Dahlgren*, 533 F.3d at 690 ("A bank's financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent 'operation or management' test of *Reves*.").

In addition, while applied in a different context, the D.C. Circuit has recognized that under *Reves*, aiding the affairs of an enterprise does not constitute participation in the operation or management of the enterprise. *See United States v. Papagno*, 639 F.3d 1093, 1098 (D.C. Cir. 2011) (describing the holding in *Reves* to mean "that 'participate' does not cast so

broad a net: Individuals do not 'participate . . . in the conduct of . . . affairs' simply because they 'aid and abet' the affairs."). Similarly, while not a precedential holding, the Eleventh Circuit's pattern jury instructions for RICO provide that: "'participating in conduct' doesn't include being an outsider and helping out in some way." Eleventh Cir. Pattern Jury Instr. (Criminal Cases) § O75.1 (2018).

Accordingly, the Second Circuit's holding below, that outsiders who "assist" a RICO defendant or acts as "a necessary tool" to his operation or management of a RICO enterprise have themselves participated in the operation or management of the enterprise itself, is contrary to this Court's holding in *Reves* as well as every Circuit Court that has addressed the issue.

C. The Second Circuit's Departure From *Reves v. Ernst & Young*

The Second Circuit initially applied the "operation or management test" in a manner that was consistent with the holding in *Reves*. In *United States v. Viola*, the Second Circuit held that under the "operation or management" test set forth in *Reves*, "simply aiding and abetting a violation is not sufficient to trigger liability" under § 1962(c). *United States v. Viola*, 35 F.3d 37, 40 (2d Cir. 1994) *abrogated in part on other grounds by Salinas v. United States*, 522 U.S. 52 (1997). The Second Circuit held that after this Court's holding in *Reves*, "it is plain that the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *Id.* at 41.

In the years immediately following *Reves* and *Viola*, the Second Circuit continued to apply the "operation or management" test in a manner consistent

with this Court's holding. *See United States v. Miller*, 116 F.3d 641, 671-72 (2d Cir. 1997) (holding that a jury instruction that participating in the conduct of the enterprise includes "the performance of acts, functions or duties that are necessary or helpful to the operation of the enterprise" was erroneous); *United States v. Workman*, 80 F.3d 688, 696 (2d Cir. 1996) (noting that merely performing acts that are "helpful" to the enterprise is not sufficient).

Beginning with the 2004 decision in *First Capital Asset Mgmt.,* 385 F.3d at 178 and culminating with its decision in this matter below, the Second Circuit has completely departed from the holding in *Reves* and extended liability under § 1962(c) to outside parties who do no more than assist a RICO enterprise, without playing any role in directing its affairs. In *First Capital*, the Second Circuit assessed whether a RICO defendant's mother, who was not a member of the RICO enterprise, could be liable under § 1962(c). The Second Circuit held that:

> [w]e have concluded that where a bankruptcy estate is a RICO enterprise, a debtor who engages in bankruptcy fraud conducts or participates in the conduct of the affairs of the enterprise; thus, it is no great leap to find that one who assists in the fraud also conducts or participates in the conduct of the affairs of the enterprise.

Id. at 178. In support of this reasoning, the Second Circuit cited to 18 U.S.C. § 2, the aiding and abetting statute. *Id.*

The court in *First Capital* did not offer any explanation as to how its reasoning could possibly be consistent with *Reves*, which definitively rejected the

proposition that participating in the conduct of an enterprise's affairs was analogous to aiding and abetting. Nor did the court acknowledge that this reasoning was inconsistent with its own prior precedent. Ultimately, however, the court upheld the dismissal of the RICO claim because the plaintiff had failed to allege a pattern of racketeering activity. *Id.* at 180-82. Thus, the holding in *First Capital*, as to the operation or management of the enterprise, was dicta.

In its opinion below in this matter, the Second Circuit solidified its departure from this Court's holding in *Reves*. The Second Circuit concluded that an association-in-fact enterprise existed consisting of David D'Addario and Larry D'Addario in their roles as Executors of the Estate. The court recognized that the remaining defendants, Mary Lou D'Addario Kennedy, Gregory Garvey, Nicholas Vitti, Red Knot, and Silver Knot, were therefore outsiders and not members of the court's newly-conceived RICO enterprise.

Nevertheless, the court concluded that Mary Lou, Garvey, and Vitti could be liable under § 1962(c) because they were "alleged to have actively assisted David when he operated the Estate to effectuate his schemes, which directly affected his management of the Estate." (App., at 48a). The Court further held that liability could attach to the entity defendants, Red Knot and Silver Knot, because "they were necessary tools for the schemes' operation." (App., at 48a). While the Second Circuit purported to be applying the "operation or management" test set forth in *Reves*, it relied entirely on the dicta from its own opinion in *First Capital*.

The Second Circuit's holding, that an outsider who "assists" a member of the enterprise in his operation of the enterprise or acts as a "necessary tool" thereof, has "participated in the operation or management of the enterprise itself" simply cannot be reconciled with this Court's holding in *Reves*. Indeed, the accounting firm in *Reves* no doubt assisted the wrongdoers in that case through its preparation of financial statements, which were a "necessary tool" to effectuate the RICO scheme. Nevertheless, this Court was clear: such conduct does not amount to participation in the operation or management of the enterprise itself. Review is therefore necessary to reconcile the Second Circuit's holding with the precedent of this Court and resolve the split the Second Circuit has now created with holdings from the Third, Seventh, and Eighth Circuits.

D. This Case Presents An Important Question And Provides An Appropriate Vehicle To Provide Much-Needed Clarification As To The Scope Of The "Operation Or Management" Test.

In *Reves* this Court expressed its belief that the "operation or management test" would be "easy to apply." *Reves*, 507 U.S. at 179. In the over twenty years since that decision, however, it has proved extremely difficult to apply. Scholars have routinely criticized the ambiguities left unresolved in *Reves* and lower courts have struggled to apply the test, leading to inconsistent rulings throughout the country. *See, e.g.*, Michael Levi Thomas, *How Does One Operate or Manage an Enterprise? Insights from Boyle v. United States*, 87 N.Y.U. L. Rev. 284, 293 (2012) ("Despite the majority's belief that the operation or management test was a 'formulation that is easy to apply,' the test left a number of

inconsistencies and open questions for lower courts to sort out."); Carrie J. Disanto, Reves v. Ernst & Young: *The Supreme Court's Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(c)*, 71 NOTRE DAME L. REV. 1059, 1079–80 (1996) (noting that commentators have been critical of the ambiguities in *Reves*, and "the lower federal courts are not being faithful in their application of the *Reves* test, and even within individual circuits apply the test inconsistently so that the scope of § 1962(c) is still a mystery."); Michael Vitiello, *More Noise from the Tower of Babel: Making "Sense" out of* Reves v. Ernst & Young, 56 OHIO ST. L.J. 1363 (1995) (Reviewing the inconsistencies in lower Courts' application of the operation or management test). Accordingly, this case provides an opportunity for this Court to resolve long-standing and widespread inconsistencies and end the confusion regarding the application of the "operation or management" test.

Moreover, this matter raises significant public policy concerns about the ever-expanding reach of RICO. The Second Circuit's expansive interpretation of outsider liability under § 1962(c) will have the effect of exposing any legitimate business or professional who happens to do business or provide a useful service to an alleged enterprise to the harsh penalties of RICO. As this Court has previously acknowledged, "RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985). In the over thirty-years since *Sedima*, that evolution has continued. Indeed, it is doubtful that when Congress enacted RICO to combat the scourge of organized crime on this Country, it could have possibly envisioned that it would one day be used by a litigious sibling in a probate dispute. By

disregarding this Court's holding in *Reves* and essentially eliminating the requirement that one participate in the operation or management of the RICO enterprise's affairs in order for liability to attach, the Second Circuit has paved the way for even further expansion of RICO beyond its intended purpose, and exposed countless legitimate outside parties to liability. Accordingly, public policy concerns militate in favor of review.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: January 8, 2019

Respectfully submitted,

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APPENDIX

17-1162-cv
D'Addario v. D'Addario, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017

(Argued: October 31, 2017
Decided: August 14, 2018)

Docket No. 17-1162-cv

VIRGINIA A. D'ADDARIO, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann. T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Plaintiffs-Appellants,

—v.—

DAVID D'ADDARIO, MARY LOU D'ADDARIO KENNEDY, GREGORY S. GARVEY, RED KNOT ACQUISITIONS, LLC, SILVER KNOT, LLC, NICHOLAS VITTI,

*Defendants-Appellants.**

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* The Clerk of Court is directed to amend the caption to conform to the above.

Before:

LYNCH and CARNEY, *Circuit Judges*, and Hellerstein, *District Judge*.†

Virginia D'Addario appeals the dismissal of her claim brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against her brother, David D'Addario; her sister, Mary Lou D'Addario Kennedy; Gregory Garvey; Nicholas Vitti; Red Knot Acquisitions, LLC; and Silver Knot, LLC. Virginia's claim, which she asserts both individually and as Executrix of her mother's estate, arises out of the management of her father's probate estate (the "Estate") over several decades by her brother David.

Virginia's father, Connecticut resident and entrepreneur F. Francis D'Addario, died unexpectedly in 1986 and bequeathed his fortune—once estimated to have a net value above $111 million—to his wife and their five children. Virginia's youngest brother, David, has been an Executor of the Estate since their father's death. Since then, she alleges, he has systematically looted the assets of the Estate, with the active assistance of their sister Mary Lou and David's friends Nicholas Vitti and Gregory Garvey, and by means of two corporate entities formed by David

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† Judge Alvin K. Hellerstein, of the United States District Court for the Southern District of New York, sitting by designation.

and Garvey. Virginia contends that the Estate—which has remained open in Connecticut Probate Court for more than thirty years—is now insolvent and that, because of Defendants' actions, neither she nor her mother's estate will receive any portion of the multi-million-dollar inheritance to which they were entitled. Virginia seeks damages based on two types of injury: the loss of the inheritance they would have received if not for David's fraudulent schemes and the approximately $200,000 in legal expenses that she has incurred in the course of Connecticut state court proceedings in which she sought to remove David as Executor. The United States District Court for the District of Connecticut (Arterton, *J.*) dismissed her complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and declined to exercise supplemental jurisdiction over related state law claims.

We conclude that: (1) Virginia's claim for distribution of her inheritance and that of her mother's estate is not ripe under RICO because the Estate is not closed and the amount of the lost inheritance is too speculative; (2) her claim under RICO for legal expenses incurred in pursuing her grievances against David and other defendants is ripe; (3) she has plausibly alleged that her legal expense injuries were proximately caused by Defendants' RICO violations; (4) she has adequately pleaded that David, Garvey, and Red Knot violated 18 U.S.C. § 1962(b); and (5) she has adequately pleaded that all six defendants violated 18 U.S.C. § 1962(c). Accordingly, we VACATE the District Court's judgment dismissing in full Virginia's

RICO claim and related state law claims both as brought on her own behalf and as Executrix, and we REMAND the cause for further proceedings in accordance with this opinion.

VACATED AND REMANDED.

F. DEAN ARMSTRONG (Edward C. Taiman, Jr., Sabia Taiman, LLC, Hartford, CT, *on the brief*), Armstrong Law Firm PC, Frankfort, IL, *for Plaintiffs-Appellants*.

ALFRED U. PAVLIS (Tony Miodonka, *on the brief*), Finn Dixon & Herling LLP, Stamford, CT, *for Defendants-Appellees David D'Addario, Mary Lou D'Addario Kennedy, Silver Knot, LLC, and Nicholas Vitti*.

NATHAN BUCHOK (Brian E. Spears, *on the brief*), Spears Manning LLC, Southport, CT, *for Defendants-Appellees Gregory S. Garvey and Red Knot Acquisitions, LLC*.

SUSAN L. CARNEY, *Circuit Judge*:

Virginia D'Addario appeals the dismissal of her claim brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against her brother, David D'Addario; her sister, Mary Lou D'Addario Kennedy; Gregory

Garvey; Nicholas Vitti; Red Knot Acquisitions, LLC; and Silver Knot, LLC. Virginia's claim, which she asserts both individually and as Executrix of her mother's estate, arises out of the management of her father's probate estate (the "Estate") over several decades by her brother David.

Virginia's father, Connecticut resident and entrepreneur F. Francis D'Addario, died unexpectedly in 1986 and bequeathed his fortune—once estimated to have a net value above $111 million—to his wife and their five children. Virginia's youngest brother, David, has been an Executor of the Estate since their father's death. Since then, she alleges, David has systematically looted the assets of the Estate, with the active assistance of her sister Mary Lou, David's friends Nicholas Vitti and Gregory Garvey, and by means of two corporate entities formed by David and Garvey. Virginia contends that the Estate—which has remained open in Connecticut Probate Court for more than thirty years—is now insolvent and that, because of Defendants' actions, neither she nor her mother's estate will receive any portion of the multi-million-dollar inheritance to which they were entitled. Virginia seeks damages based on two types of injury: the loss of the inheritance they would have received if not for David's fraudulent schemes and the approximately $200,000 in legal expenses that she has incurred in the course of Connecticut state court proceedings in which she sought to remove David as Executor. The United States District Court for the District of Connecticut (Arterton, *J.*) dismissed her complaint under Federal Rule of Civil Procedure

12(b)(6) for failure to state a claim, and declined to exercise supplemental jurisdiction over related state law claims.

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BACKGROUND[1]

I. Francis's death and David's management of the Estate

F. Francis "Hi Ho" D'Addario ("Francis"), a successful Connecticut businessman and the head of D'Addario Industries, died unexpectedly in early 1986, the victim of an airplane crash. At the time of his death, his net worth was estimated to exceed $111 million. He was survived by his wife, Ann, and their five children: in order of birth, Virginia, Larry, Mary Lou, Lisa, and David.

Shortly after the accident, Francis's will (the "Will") was filed for probate in the Probate Court of Trumbull, Connecticut. That court appointed Francis's two sons, David and Larry, to serve with three non-family members as Executors of the Estate.[2] At the time of his appointment, David, the youngest of the five D'Addario siblings, was 24 years old and had been working for his father's business. As an Executor, David was suddenly able to exert significant control over the entirety of the business empire known as D'Addario

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[1] In reviewing the District Court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "we accept as true all facts alleged in the Complaint, drawing all reasonable inferences in favor of the plaintiff." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). We therefore state the facts here as pleaded in the First Amended Complaint ("Complaint"). We express no view as to their accuracy.

[2] The appointments of the three non-family members ended over time. David and Larry have been the Estate's sole executors for roughly the last 15 years.

Industries: substantially all of his father's business assets lay within the Estate.

The Will provided that one-half of Francis's assets would be placed into a marital trust for the benefit of his wife, Ann D'Addario ("Ann"); the other half would be divided equally among their five children. The anticipated distributions, however, have never been made. When the District Court dismissed Virginia's Complaint in March 2017, more than thirty years after Francis's death, his Estate remained open in the Connecticut Probate Court, and the record before us reflects no change since then.

The extensive passage of time has had a significant impact on the siblings' respective expectations regarding their inheritances, both because of the extensive transactions undertaken by David, as described in the Complaint, but also because, under the terms of the Will, if any of the five children predeceases the others while the Estate is still open, the deceased child's interests return to the Estate for pro rata distribution to the remaining siblings. Thus, in 1990, when Lisa D'Addario died, her interest as legatee passed back to the Estate in accordance with the Will's provisions.[3]

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[3] Francis's wife, Ann, also died in the interim between Francis's death and the filing of this suit, but her interest by way of the marital trust has not devolved to the Estate; rather, Ann's own estate remains entitled to one-half of Francis's Estate. Virginia is Executrix of her mother's estate. In this suit, Virginia asserted identical RICO and state law claims on behalf of Ann's estate as well as on her own behalf as a legatee under Francis's Will and on behalf

In late 1987, Virginia obtained an advance from the Estate toward her distributional interest. The advance took the form of a non-recourse loan to her in the amount of $3.9 million, and was documented by a promissory note. In exchange for permitting the advance, David extracted a promise from Virginia (as Virginia acknowledges) that she would no longer "participate in or take part in Estate deliberations or decisions as regards the Estate or its property," and that she would waive "all rights . . . in her favor against the Executors as regards their administration of the Estate and the validity of their decisions, . . . except for willful fraud, malfeasance or dishonesty." App. 62 (Am. Compl. ¶ 17). David also vowed at the same time, Virginia charges, that Virginia "would never receive another penny from the Estate"—by which he meant that he did not intend for the Estate ever to pay out her distributional share. *Id.* at 63 (Am. Compl. ¶ 18). Because of the Will's provision with regard to the consequences of the death of a sibling, all understood that David would benefit financially if Virginia (but not David) died before the Estate closed. He told her, she says, on several occasions, "I'm 15 years younger than you, I'll outlive you,

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of several trusts. Thus, in its opinion dismissing the First Amended Complaint, the District Court uses "Plaintiffs," in the plural, to describe the parties seeking relief. In this opinion, we refer simply to "Virginia" when discussing the proponent of the claims at issue on appeal, as no party has asserted any material difference between Virginia individually, and Virginia as Executrix, as claimants and legatees.

and I can keep the Estate open until after you die." *Id.* (emphasis omitted).

In keeping with that threat, Virginia alleges, the Estate remains open. No distributions had been made as of 2016, when she filed suit (or, indeed, has been made to date). The Connecticut Probate Court has effected no meaningful oversight of David's activities, she charges. Rather, David and the Estate have successfully side-stepped enforcement of court orders requiring production of discovery related to the Estate's financial management. David has filed interim accountings of the Estate's assets with the Probate Court only infrequently, and, in any event, the accountings that he has filed have been both vague and inaccurate because they omitted "numerous" property transactions. *Id.* at 65 (Am. Compl. ¶ 24). Virginia also alleges that from 1986 until 2010 David made "substantial (but undisclosed)" contributions to the reelection campaigns of the Connecticut Probate Court judge who presided over the Estate. *Id.* at 93 (Am. Compl. ¶ 99). When these contributions came to light in 2010, she asserts, the probate judge recused himself from further supervision of the Estate. *Id.*

II. David's schemes for enrichment

The Complaint alleges that David "plunder[ed], pillage[d,] and loot[ed] the assets of the Estate to the extent that the Estate is now insolvent . . . ." App. 66 (Am. Compl. ¶ 27). David "ran the Estate as his personal piggy bank," conducting its affairs for his own financial benefit, both to the detriment

of his sister Virginia and his mother's estate and in violation of his fiduciary duties and RICO. *Id.* at 64 (Am. Compl. ¶ 21). In the Complaint, Virginia identifies and details several specific "schemes" through which David allegedly siphoned value from the Estate to himself. Virginia alleges that defendant Nicholas Vitti, David's "personal financial advisor and confidant for matters pertaining to the Estate," assisted and advised David in all matters related to the Estate, including many of the identified schemes. App. 60 (Am. Compl. ¶ 8.6). The remaining defendants (Mary Lou, David's friend Gregory Garvey, and the entities Red Knot Acquisitions, LLC and Silver Knot, LLC) were involved in only certain of the questionable transactions, as set forth below.[4] We describe these ventures in approximately the order of their inception, including here much of the narrative provided in the Complaint, as its detail bears on the sufficiency of the Complaint in fending off Defendants' Rule 12(b)(6) challenges.

A. The Honeyspot Road scheme

In 1986, the Estate owned a 16-acre undeveloped plot of real estate on Honeyspot Road in Stratford, Connecticut. The property was leased by Pace Motor Lines, Inc., a trucking company owned by the Pacelli brothers, friends of the D'Addario family. Shortly after Francis's death, the property was appraised and valued at $3.8

[4] Although Larry remains an Executor and was involved in (and would have benefited from) many of the schemes the Complaint describes, Virginia does not allege that he committed fraud or "willful misconduct," and does not name him as a defendant. App'x 100 (Am. Compl. ¶ 115).

million. In January 1989, the Estate accepted an offer to purchase the land for $3.2 million. This sale, however, never closed.

Instead, "[s]ometime after 1990," David stopped having the Estate pay real estate taxes on the property. App. 67 (Am. Compl. ¶ 32). In 1996, after the Estate had accrued a real estate tax deliquency of more than $149,000, the Town scheduled the property for a tax foreclosure sale. Rather than pay the overdue taxes—although the Estate was legally and financially able to do so—David allowed the foreclosure sale to occur. At that sale, in June 1996, the property was purchased by Dennis and William Miko, friends of Mary Lou, for just over $179,000.

Although the Estate could have redeemed the property by paying its tax bill and a penalty within one year of the sale, David elected not to do so. Instead, he set up a limited liability company, Honeyspot Ventures, LLC ("HSV"), co-owned by himself, Mary Lou, and Larry, and, in September 1997, HSV purchased the property from the Miko brothers for $250,000. Approximately one year after purchasing the parcel, HSV sold it for $1.1 million to an entity owned by the Pacelli brothers. David, Larry, and Mary Lou divided the $850,000 profit evenly, and David proceeded to partner with the Pacellis in a separate "very profitable" business venture. App. 69 (Am. Compl. ¶¶ 35-36).

B. The Red Knot forbearance scheme

When the Estate opened in March 1986, it reported liabilities totaling $41,363,977 and assets totaling $162,636,000. Of the Estate's

roughly $41 million in debt, more than half ($25,218,084) was owed to three banks: Connecticut National Bank, Connecticut Bank and Trust Company, and People's Bank (collectively, the "Bank Group"). In December 1990, the Bank Group, acting as one, loaned an additional $14 million to the Estate. As a condition of the 1990 loan, the Executors agreed to abide by a "stringent budget and strict reporting requirements," with the goal of selling assets to pay off the Estate's creditors, including the Bank Group, and timely closing the Estate. App. 73 (Am. Compl. ¶ 49).

The Executors breached these requirements and came nowhere near the stated goal. Accordingly, in July 1992, the Bank Group turned to the Probate Court for relief, filing a "Joint Application for Removal of Executors," and expressing "extreme[] concern[]" about the "negligent and improper manner in which the Executors have administered this Estate." App. 73-74 (Am. Compl. ¶¶ 50-51). They alleged that both David and Larry had "serious conflicts of interest" in light of their concurrent status as Executors and beneficiaries of the Estate. *Id*. For five years thereafter, the probate judge who oversaw the Estate at that time issued no ruling on the removal motion.

By the end of December 1997, the Estate owed the Bank Group more than $48 million on the loan, in principal, accrued interest, and penalties. Citing their own "substantial financial difficulties," the Bank Group offered to extinguish the entirety of the Estate's loan obligations to them, and release the liens it held on Estate assets, in exchange for a one-time cash payment of

$4,750,000. App. 75 (Am. Compl. ¶ 53). David declined the offer. Instead, at David's instance, his friend, defendant Gregory Garvey, created an entity called Red Knot Acquisitions, LLC ("Red Knot"), as a vehicle for purchasing the entirety of the Estate's debt to the Bank Group. It did so, paying the $4,750,000 amount proposed by the lenders.[5]

Red Knot and the Estate then also entered into a so-called Forbearance Agreement, prepared by David's attorney (who is not a defendant here). The Forbearance Agreement gave Red Knot a lien on "virtually all" assets of the Estate, and provided that, if David was ever removed as an Executor of the Estate, Red Knot would have the "immediate right" to foreclose on those assets and collect on the Estate's accumulated debts. App. 77 (Am. Compl. ¶ 59). This agreement has made it practically impossible to remove David as an Executor.

Unsurprisingly, although it succeeded to the Bank Group's rights in other respects, Red Knot did not pursue the Bank Group's pending motion to remove David and Larry as Executors. Red Knot also later opposed a Motion to Remove the Executors filed by another Estate creditor, The Cadle Company, citing Red Knot's position as "the Estate's largest secured creditor." In 2002, Vitti represented to the Connecticut Superior Court in related proceedings that, if David was removed as Executor, Red Knot would promptly foreclose on

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[5] Virginia alleges that the Red Knot entity is David's "alter-ego," although it is ostensibly owned by Garvey. App. 75 (Am. Compl. ¶ 54).

the Estate's assets, and thereby "destroy" the Estate. App. 82 (Am. Compl. ¶ 70).

With his position as an Executor secured, David flagrantly mismanaged the Estate, failing to pay its debts (which would have allowed him to close the Estate) and, instead, continuing to loot its assets and usurp its business opportunities. Egregiously, David failed to take advantage of a contractual provision in the Forbearance Agreement (the "Estate Purchase Option") that would have allowed the Estate to repurchase the Bank Group's loan position from Red Knot at a "steep discount," eliminating the largest portion of the Estate's overall debt, as long as the purchase was made by January 7, 2003. App. 78 (Am. Compl. ¶ 60). On August 31, 2000, for example, the Estate could have bought out Red Knot's position under the Estate Purchase Option for a mere $828,383, an amount that the Estate then had available in cash. Instead, David let the option lapse, and Red Knot's hold on the Estate grew in tandem with the size of the debt. By February 27, 2012, the Estate owed Red Knot (standing, in essence, in the Bank Group's stead) more than $100 million.

C. Wrongful transfers of residential properties

The Estate held title to several residential properties. These included furnished condominiums in New York City; San Francisco; Fort Lauderdale, Florida; and Quechee Lake, Vermont (along with a two-acre lot in that state). For approximately the first decade of the Estate's pendency—that is, until the late 1990s—siblings David, Mary Lou,

and Larry had "free and unfettered use" of these properties, while the Estate paid related expenses. App. 83-84 (Am. Compl. ¶ 73). In 1997, the New York City and Vermont condominiums were deeded to David, and the Vermont lot was deeded to Mary Lou. Neither David nor Mary Lou paid the Estate for these properties. In 1999, the San Francisco condominium was sold to an unrelated third party, and the proceeds of that sale were deposited—not into the Estate—but into a trust established in Larry's name.

D. The Frenchtown Road scheme

The Estate owned a 50% interest in a 34.4-acre parcel of undeveloped land in Trumbull, Connecticut, on Frenchtown Road. In a financial statement completed shortly before Francis's death, that interest was valued at $1.25 million. In the spring of 1998, David discovered that the Town of Trumbull was interested in purchasing the property to use as a location for a new elementary school. He proceeded to form a limited liability company, Sunny Spot Associates, LLC ("SSA"), and at summer's end that year, acting through SSA, David purchased the remaining 50% interest in the property from the then-owners, paying $450,000. In October 1999, the Town of Trumbull then purchased the entire parcel from SSA and the Estate for $6 million. Completing the transaction, it seems, the Estate then contributed $750,000 to the Town of Trumbull in exchange for the right to have the school that would be built on the land named after Ann D'Addario, the siblings' mother.

Virginia contends that, in this transaction, David breached his fiduciary duty by usurping a

business opportunity that rightfully belonged to the Estate. If the Estate had purchased the remaining 50% interest in the Frenchtown Road property in August 1998 on the same terms as SSA obtained, it would have earned a $2.55 million profit. Instead, David pocketed that profit himself.

E. The Silver Knot scheme

In early 1999, David and his friend Gregory Garvey created Silver Knot, LLC, ostensibly to acquire a controlling interest in a particular producer of aluminum can stock. Over several years, Silver Knot did just that. In 2014, fifteen years later, an international aluminum company, Constellium N.V., purchased Silver Knot for $1.4 billion, $455 million of which was in cash. Virginia asserts that David funded the venture with moneys misappropriated from the Estate, and accordingly, she argues, the Estate is entitled to an equitable interest in the proceeds of the sale.

F. The Cadle suit settlement scheme

On May 31, 2012, The Cadle Company ("Cadle")—a creditor of the Estate that tried unsuccessfully for decades to obtain payment on the $1 million promissory note it held—filed suit in the District of Connecticut against David, Garvey, Red Knot, and others, alleging a civil RICO conspiracy similar to that asserted here by Virginia. (Cadle had earlier pursued legal action against the Estate in state court, including, in 1997, by filing an unsuccessful motion to remove Larry and David as Executors of the Estate.)

The district court (Young, *J.*) "administratively closed" Cadle's suit in June 2013 for a period of nine months, expressing a desire to allow David the opportunity to close the Estate, App. 132, and ruling at the same time that either party would be free to move to reopen the case at the end of the nine-month period. When that time arrived, Cadle sought to reopen the case. *See The Cadle Co. v. D'Addario*, No. 3:12-cv-00816-WGY, Dkt. No. 154, (D. Conn. Mar. 17, 2014). That motion was granted, *id.* at Dkt. No. 155 (D. Conn. Apr. 2, 2014), but, citing concerns about the ripeness of Cadle's claim in light of the pendency of the Estate, the district court once again administratively closed the case without ruling on the defendants' pending motions to dismiss, *see The Cadle Co. v. D'Addario*, No. 12-00816-WGY, 2014 WL 12760747, at *4 (D. Conn. July 22, 2014).

Following these fruitless legal efforts, Cadle entered into a settlement agreement with Red Knot and Garvey in February 2015. In exchange for the assignment of its rights against the Estate to Red Knot and dismissal with prejudice of its RICO claims against David and others, Cadle accepted a payment of approximately $5.1 million, a sum significantly larger than the approximately $3.17 million it was then owed by the Estate. Red Knot, however, did not directly fund the settlement. Instead, the Estate transferred one of its assets (the Hi Ho Motel, in Fairfield, Connecticut) to Red Knot in exchange for a $4.5 million "credit" on the Estate's loan obligations. Red Knot then sold the motel to third parties for $3.7 million and used that money toward the Cadle settlement. David

personally contributed the additional $1.5 million in settlement funds.

III. Procedural history

In January 2016, after fruitless efforts in the Connecticut state courts, Virginia filed this suit in the United States District Court for the District of Connecticut (Arterton, *J.*) against her brother, David; her sister, Mary Lou; Gregory Garvey; Nicholas Vitti; Red Knot; and Silver Knot (together, "Defendants"). Her primary claim against Defendants rested on provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq*. Asserting a right to treble damages under section 1964(c), she alleged violations of RICO sections 1962(b), (c), and (d).[6] Virginia also alleged several Connecticut law claims related to David's alleged breach of his fiduciary duty to the Estate. In May 2016, Virginia filed an Amended Complaint—the 144-paragraph pleading at issue here. In it, she again

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[6] *Section 1962(b)* of title 18 prohibits "any person through a pattern of racketeering activity . . . [from] acquir[ing] or maintain[ing], directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Section 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, [from] conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

Section 1962(d) prohibits conspiracy to violate the other subsections of section 1962.

alleged a RICO-based claim; she also asserted new state law claims.

From the start, Virginia has sought RICO treble damages based on two types of injuries: first, loss of the inheritance she contends that she (and her mother's estate) would have received from the Estate had David not rendered it insolvent (the parties refer to these as "lost debt" damages); and, second, the more than $200,000 in legal expenses that she incurred in the four years before filing this suit, in her efforts to oppose David's mismanagement of the Estate and unseat him as Executor (the parties refer to these as "collection expenses") through various actions pursued in the courts of Connecticut. (David appears to have blocked Virginia's attempted legal interference on at least one earlier occasion by invoking the promise she made in exchange for the 1987 loan. *See D'Addario v. D'Addario*, No. 27 86 23, 1991 WL 59744, at *4 (Conn. Super. Ct. Mar. 14, 1991).)

The District Court granted Defendants' motion to dismiss the Amended Complaint. *D'Addario v. D'Addario*, No. 3:16cv99 (JBA), 2017 WL 1086772 (D. Conn. Mar. 22, 2017) (Arterton, *J.*). In a detailed ruling, it determined that Virginia's claim for "lost debt" damages was not ripe for adjudication under applicable RICO case law because it remained uncertain whether Virginia would receive any distribution from the Estate to offset her claimed damages. This uncertainty made the amount she would ultimately be owed too speculative for recovery and trebling under RICO. The court ruled, in contrast, that her claim for collection expenses already incurred was ripe.

As to those expenses, however, the District Court concluded that the Complaint's allegations were insufficient to state a civil RICO claim. It explained that Virginia had failed to identify a distinct "acquisition and maintenance" injury, as required to make out a claim based on a violation of section 1962(b). And it explained further that Virginia had failed sufficiently to identify an "enterprise" to support a theory for recovery under section 1962(c). Because the Complaint laid an inadequate basis for finding a violation of either of these subsections, the District Court also rejected Virginia's claim under section 1962(d) for RICO conspiracy. Having dismissed the only federal claim presented in the Complaint, the District Court declined to exercise supplemental jurisdiction over Virginia's state law claims.

This appeal followed.

DISCUSSION

Virginia contends that several aspects of the District Court's ruling are flawed. She identifies error in the court's determination that her lost debt damages were not yet ripe. She also argues that, contrary to the District Court's conclusion, the facts set forth in the Complaint are sufficient to establish that she suffered an "acquisition or maintenance injury" as required by section 1962(b), and that Defendants were associated with an "enterprise" as required to pursue recovery under section 1962(c). Defendants, for their part, defend the District Court's ruling on ripeness as to the lost debt injury, and, predictably, if cursorily,

attack it as to collection expense damages. They further adopt the District Court's analysis of the Complaint's insufficiency with respect to claims based on sections 1962(b) and (c), and they maintain in addition, in a ground rejected by the District Court, that Virginia's asserted injuries were not proximately caused by their actions, making dismissal correct in their view for several independent reasons.

We review the District Court's ruling de novo, construing the facts alleged in the Complaint in the light most favorable to Virginia, and drawing all reasonable inferences in her favor. *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 118 (2d Cir. 2013). On such review, we conclude that the District Court correctly determined that Virginia's claim for her share of the Estate's assets is unripe and that her claim for collection expenses is ripe. We also determine that Virginia has sufficiently alleged that her collection expense injuries were proximately caused by the claimed RICO violations. In contrast to the District Court, we rule that Virginia has sufficiently identified a distinct acquisition and maintenance injury under section 1962(b) to support her collection expenses claim with regard to David, Gregory Garvey, and Red Knot, but not with regard to the other defendants. We further conclude that Virginia has also sufficiently alleged a section 1962(c) "enterprise" with regard to all six defendants, supporting her claim for collection expenses on this theory of recovery as well. For these reasons, we vacate the District Court's dismissal as to Virginia's RICO claim on her own behalf and on behalf of her mother's estate for collection expenses and

remand that claim and her state law claims for further proceedings consistent with this opinion.

I. Ripeness of private actions brought under RICO

Our Circuit's statutory ripeness jurisprudence in the RICO context grows from the Supreme Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in which the Court ruled-in the context of a private action for treble damages recovery under the Sherman Act-that a cause of action has not accrued when "the fact of [future damages] is speculative or their amount and nature unprovable." *Id.* at 339; *see also* David B. Smith & Terrance G. Reed, *Civil RICO*, ¶ 6.04[5][a] (Matthew Bender 2017). We have concluded that no civil RICO cause of action treble damages accrues "until the amount of damages becomes clear and definite." *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994); *see also id.* at 767 (noting that "injury to business or property" is one of three "conditions a plaintiff must meet to satisfy RICO's [statutory] standing requirements").

A. Distribution of Estate assets: claim for "lost debt" injuries

We agree with the District Court that Virginia's RICO claim for her rightful share of the Estate is not yet ripe. Our Circuit has consistently ruled in the RICO context that claims for "lost debt" injuries—that is, for damages in the form of an owed, but as-yet-uncollected, amount—are unripe when parallel proceedings to collect the amount owed are ongoing in another forum. We have

reasoned that, since "RICO [treble] damages are netted against recovery obtained from collateral and other sources," the outcome of the parallel proceedings could significantly affect the total amount owed in the case at bar, and that this fundamental uncertainty renders the claim not ready for adjudication. *Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135-36 (2d Cir. 2003) (finding unripe plaintiffs' RICO claim for injury based on unpaid loans where plaintiffs had not yet foreclosed on loan security and related arbitrations were pending). Although some other courts have taken a different approach, *see, e.g.*, *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), our jurisprudence on this point is long- and well-established. *See, e.g.*, *First Nationwide Bank*, 27 F.3d at 769 (finding unripe RICO claims for injury arising from plaintiffs' loans to defendant where, though information from defendants provided as a basis for the loans was alleged to be false, no default had yet occurred); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1165-66 (2d Cir. 1993) (finding unripe a RICO claim for injury in amount of two state court judgments entered against defendant where (1) one judgment was satisfied after initiation of RICO suit, and (2) second judgment was "likely to be fully satisfied"); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105-06 (2d Cir. 1988) (RICO claim for lost debt injury unripe because fraudulently transferred assets might yet be recovered during bankruptcy proceedings).

Proceedings regarding the Estate are underway in Connecticut Probate Court, as we have described. That they have been ongoing for more than thirty

years, however, and that the Forbearance Agreement is in place (*see* Background Part II.B, *supra*), unavoidably raises the question whether they will ever end, and whether their pendency can reasonably be treated as we have treated parallel proceedings in the cases just cited: that is, as grounds to preclude the related RICO suit.

Nonetheless, the problem identified by the District Court and recognized in our case law remains: the amount of Virginia's ultimate distribution from the Estate—and, thus, the amount of her damages, as measured by the difference between any distribution she actually receives and the distribution she should have received—is remarkably uncertain. The value of the Estate is not static: David and Larry are still authorized, as co-executors, to conduct the Estate's business, to buy and sell its real estate and businesses, and thereby to control the Estate's net value. In fact, many of the "schemes" identified in the Complaint are examples of David's misappropriating for himself lucrative business opportunities that should have been treated as belonging to the Estate and the legatees. We have held in the civil RICO setting that defendants are "not liable for all losses that *may occur*, but only for those *actually suffered*." *Motorola Credit Corp.*, 322 F.3d at 136 (quoting *First Nationwide Bank*, 27 F.3d at 768) (emphasis in *Motorola*). Applying this standard, we cannot escape the conclusion that Virginia's lost debt claim is not ripe because she cannot even estimate with reasonable certainty the amount of her anticipated distributional share.

Virginia argues that there is no "realistic" possibility that the amount of her damages will fluctuate in light of circumstances described in the Complaint, Appellant's Br. 67, because these have rendered the Estate "hopelessly insolvent," App. 66 (Am. Compl. ¶ 27). In her view, the likelihood that she will receive *any* distributional share when the Estate closes is nil, no matter what interim fluctuations in value the Estate's assets might experience.

The argument has some force, but we are skeptical that the law requires us to accept at face value the claim that the Estate's alleged insolvency is "hopeless[],"given the variability of the Estate's assets and liabilities and the unpredictability of the market forces at play. For example, Virginia has pleaded that the Estate's liabilities outstrip its assets, but she also alleges that David himself—through Red Knot—holds $100 million of the Estate's debt. That liability, accordingly, seems amenable to decrease or even elimination. Moreover, Virginia asserts that the Estate has an equitable interest in Silver Knot, because the latter was funded with moneys stolen from the Estate. A balance sheet that takes into account the Estate's entitlement to some portion of the $455 million cash payment that Silver Knot received in 2014 might reflect a more accurate assessment of the Estate's solvency.

Virginia's assessment of the Estate's condition also does not recognize that the Connecticut Probate Court is empowered to alter the Estate's balance of assets and liabilities in at least two potentially effective ways. First, the Probate

Court may assess a significant surcharge against David for any fiduciary breaches that the court identifies. *Gaynor v. Payne*, 261 Conn. 585, 596-97 (2002). Virginia's allegations suggest that David would have access to assets sufficient to satisfy such a surcharge. Second, that court is authorized in certain circumstances to declare prior asset transfers null and void, and to impose a constructive trust on assets wrongfully transferred from an estate. *See In the Matter of Edwin A. Jarmoc*, 29 Quinnipiac Prob. L. J. 443, 451-52 (2016).[7] These powers raise the possibility that some of the asset transfers identified by Virginia as "plundering" could be revoked and the assets returned to the Estate, increasing its net value and Virginia's proportionate share upon distribution. Accordingly, even those particular schemes for which a loss amount is theoretically calculable—such as the Honeyspot Road scheme—do not yet give rise to clear and definite damages. Such acts of rectification by the Connecticut Probate Court would doubtless not be easy to accomplish, but because "[t]hese contingencies, and other conceivable contingencies, remain," our precedent teaches that Virginia's RICO claim for triple the value of her distributional share of the Estate is not ripe for adjudication. *Motorola Credit Corp.*, 322 F.3d at 136.

Virginia has also alleged that final assessments of the Estate's value and distributions to legatees will simply never come to pass. She asserts that

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[7] Virginia suggests that a constructive trust claim would be time-barred, but points to no legal authority suggesting that such a bar would bind the Probate Court's hands.

David intends, and is likely able, to keep the Estate open until her death (at 70, she is David's elder by 15 years), and that the bona fides of his threat are evidenced by David's undeniable success in keeping the Estate open for more than thirty years so far. Abiding by our RICO ripeness jurisprudence under these circumstances will, in effect, improperly enable David to carry out his unlawful plan, she insists: that is, he will keep the Estate unresolved until Virginia's death, at which point her share will devolve to the Estate and be divided equally among her surviving siblings.

We are not enabled by these pleas to depart from our precedent. Unfortunate as Virginia's situation might be, the RICO statute as construed in our Circuit simply does not provide a remedy before a plaintiff has suffered reasonably ascertainable damages. Nor may a RICO plaintiff, through predictions of a defendant's future plans, artificially ripen a claim that is unripe under our jurisprudence. *Cf. Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 516 (2d Cir. 2014) (endorsing application of ripeness inquiry that governs Fifth Amendment takings claims to due process claims as well to "prevent[] evasion of ripeness test by artful pleading"). Moreover, even accepting Virginia's allegations as true, we are not convinced that—barring something unexpected—the Estate is sure not to close until after Virginia's death. Although Virginia alleges that David has kept the Estate open without significant interference by the Connecticut Probate Court, the appointment of a new Probate Judge in 2010 and the Connecticut legislature's substantial reform of the Connecticut

Probate Court system in 2011 raise the possibility that closure will now in fact occur. *See generally* Margaret E. St. John, *The Connecticut Probate Court System Reform: A Step in the Right Direction*, 24 Quinnipiac Prob. L. J. 290, 301-02 (2011). For instance, the new judge appears to have been more active in managing the Estate than was his predecessor in earlier years, as demonstrated by his 2012 order directing the Executors to file quarterly updates reporting on their steps toward finalizing the administration of the Estate.

For these reasons, we conclude that Virginia's RICO claim for "lost debt" damages based on the amount of her expected inheritance (and that of her mother's estate) is unripe.

B. RICO claim for collection expenses

Virginia's claim for RICO damages based on the amount of collection expenses that she has incurred to pursue a legal remedy to David's alleged wrongdoing does not suffer from the same infirmity. Virginia contends that she has incurred legal expenses in excess of $200,000 in connection with her state-court legal attempts, albeit unsuccessful, to enforce her rights and halt David's despoiling of the Estate. We have long recognized that a plaintiff may recover legal fees, including expenses incurred in one or more attempts to combat a defendant's RICO violations through the legal system, as damages in a civil RICO action. *See Bankers Trust Co.*, 859 F.2d at 1105. Virginia's claimed legal expenses fall squarely within that category of cognizable damages.

Defendants mount only a cursory challenge to that conclusion: they assert by way of a footnote that the collection expenses claim is not ripe since the full extent of the expenses that she will ultimately have incurred—including, presumably, from this litigation—is yet unknown. The law of our Circuit does not support their contention. Unlike her claims with respect to her future distributional interest, as to which collateral proceedings are pending, Virginia has already suffered a "clear" and "definite" loss in the form of her legal expenses. Although the amounts may increase over time, the past expenses will not disappear when the Estate is closed. *See First Nationwide Bank*, 27 F.3d at 768. The "collection expenses" damages Virginia claims in this litigation—that is, the $200,000 that she allegedly incurred over the four years before she filed the Complaint (as allowed by the RICO statute of limitations)—are thus neither "speculative" nor "unprovable." *Bankers Trust Co.*, 859 F.2d at 1106. The possibility that Virginia will bear additional related legal expenses has no bearing on this conclusion. Her RICO claim based on the legal expenses she has incurred is therefore ripe.

II. Proximate causation of Virginia's legal expenses

Section 1964(c) of title 18 authorizes a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." To make out a claim under this section, Virginia must prove not only (1) that Defendants violated section 1962 and (2) that she suffered an injury to her "business or property,"

but also (3) that her injury was caused "by reason of" the RICO violation-a standard that we have equated to the familiar "proximate cause" standard. *See Sergeants Benevolent Ass'n Health and Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 86 (2d Cir. 2015).[8] Defendants contend that the Complaint sets forth allegations suggesting at best that their alleged RICO violations proximately caused injury to the *Estate*, not to Virginia as a legatee. For this reason, they urge, Virginia has no viable civil RICO claim even if some portion of her damages are ripe, as we have determined that they are.

As we have commented elsewhere, "proximate cause requires . . . some direct relation between the injury asserted and the injurious conduct alleged, and excludes . . . those links that are too remote, purely contingent, or indirect." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 323 (2d Cir. 2011) (internal quotation marks and alterations omitted). Here, the causal relationship between Defendants' conduct and Virginia's collection expenses injury is easily identifiable: Defendants (chiefly David), through their violations of 18 U.S.C. § 1962(b) and (c), are alleged to have

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[8] Although this causation requirement has sometimes been described as necessary to support "statutory standing," we think it is better understood as an element essential to the viability of a plaintiff's claim. *See Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358-59 (2d Cir. 2016) (noting that "what has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff 'has a cause of action under the statute'" (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014))).

destroyed the value of the Estate, in which Virginia, as a beneficiary, has an identifiable interest under Connecticut law. Virginia took steps and incurred related legal expenses to halt that wrongdoing. *Gaynor*, 261 Conn. at 592 ("It is well settled that a person's right of inheritance vests at the moment of the decedent's death . . . ."). To the extent that an additional step may separate the alleged RICO violations and Virginia's claim for collection expenses incurred, we are bound by Circuit precedent recognizing such expenses to be a valid basis for RICO damages. *See, e.g.*, *Bankers Trust Co.*, 859 F.2d at 1105; *Stochastic Decisions, Inc.*, 995 F.2d at 1166-67. These expenses were incurred in an attempt to protect both the Estate and Virginia's share of that Estate, and, for purposes of our causation inquiry here, the two are reasonably treated as indivisible.

Defendants cite primarily to the Sixth Circuit's decision in *Firestone v. Galbreath*, 976 F.2d 279 (6th Cir. 1992), in their effort to divorce these interests, but it is not to the contrary. The *Firestone* court found that beneficiaries of an estate had not suffered a "direct injury" cognizable under RICO from the defendants' alleged wrongdoing. *Id.* At 285. There, the testator's grandchildren, beneficiaries of her estate, brought various fraud and RICO claims against certain relatives and former associates of the testator, *id.* at 281-82, alleging that the defendants had "looted [the testator's] estate as she lay dying," diminishing their inheritances when she later died. *Id.* at 282. Here, in contrast, the alleged looting took place after Francis died, when the Estate already existed and Virginia's interest in the Estate had vested, aligning her

interest and that of the Estate temporally and conceptually. *See Gaynor*, 261 Conn. at 592.

Accordingly, we conclude that Virginia's injuries are not so removed from Defendants' misdeeds as to place them outside the reach of the proximate causation chain as a matter of law. The expenses that she has incurred to stop the incursion are sufficiently proximate to the identified RICO violations support a claim under section 1964(c).

III. Section 1962(b) theory of recovery

Section 1962(b) makes it unlawful for a 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, or the activities of which affect, interstate or foreign commerce." Our Circuit, like many others, requires a plaintiff who brings a civil RICO claim for a 1962(b) violation to demonstrate an injury arising from the defendants' acquisition of an interest in, or maintenance of control over, an alleged enterprise. *See* Jed S. Rakoff and Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 3.03[2], 28-29 & n.23 (2011) (noting that, as of 2011, all circuits but the Fourth and Eighth require plaintiffs alleging a section 1962(b) violation to identify an "acquisition or maintenance" injury).

The "acquisition or maintenance" requirement in our Circuit stems from our decision in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds by NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). In that case, plaintiff Discon, a telephone equipment removal

company, alleged that the defendants had committed certain racketeering acts in connection with their control of NYTel, a local telephone service provider. *Id.*at 1057-58. We ruled that Discon failed to state a RICO claim arising out of a violation of section 1962(b), primarily because it did not allege that defendants' acquisition or control over NYTel was obtained through a pattern of racketeering activity. *Id.* at 1063. At the same time, we observed that the section 1962(b) claim was also flawed because Discon had failed to allege that its injuries were caused by the defendants' acquisition or maintenance of NYTel, rather than by the defendants' various racketeering acts. *Id.* This alternative holding has taken on significance over time.

Virginia has certainly alleged in some detail that her collection expense injuries are traceable to Defendants' control over the Estate, and that Defendants' control was maintained through a pattern of racketeering activity. Although David is not alleged to have "acquire[d]" his position as an Executor through racketeering acts, the facts as stated in the Complaint provide a more than sufficient basis from which to infer that David *maintained* his position (and its attendant control of the Estate) through the Red Knot forbearance scheme.

When David and Garvey created Red Knot, the Estate's largest secured creditors had sought to remove David as an Executor. By replacing those creditors with an entity that he is alleged to control, David neutralized a threat that could have led to his removal as an Executor and

fortified his position through the Forbearance Agreement, purportedly making his position impervious to attack. And, later, when Cadle sought a court order removing him as an Executor, Red Knot opposed that motion, invoking its status as the Estate's major secured creditor to give weight to its support of David. Several of the schemes—including two sets in particular (the allegedly wrongful transfers of residential property from the Estate to David, Larry, and Mary Lou, and the Cadle suit settlement scheme, all of which directly removed assets from the Estate)—occurred after the Red Knot forbearance scheme had cemented David's hold on the Estate. The expense collection losses attributable to those alleged breaches can reasonably be attributed to David's "maintenance" of control over the Estate.

Relying on *Discon*, however, the District Court concluded that the expense injuries attributable to Defendants' alleged acquisition or maintenance of control over the Estate were insufficiently "separate and distinct" from the injuries that resulted from the predicate acts alleged in the Complaint. *D'Addario*, 2017 WL 1086772, at *18. We disagree. To successfully plead a RICO claim, a plaintiff must indeed allege distinct damages arising from the acquisition or maintenance of control of the enterprise. In other words, those damages must be different from the damages that flow from the predicate acts themselves. For example, a racketeer might use a pattern of physical threats and violence, including an act of arson against the plaintiff's property, to extort an interest in the plaintiff's business. The cost of

replacing or repairing property damaged in the fire is a loss caused by the predicate act, the arson, not by the ultimate acquisition of an interest in the plaintiff's business. The "separate and distinct" damages caused by the RICO violation, as opposed to by the predicate acts, is the value of the share of the plaintiff's business that the owner turned over to the defendant.

Similarly, in this case, Virginia alleges losses specifically attributable to the predicate acts of fraud, such as the loss of the estate assets that were turned over to Red Knot. But that scheme also maintained David's control of the Estate, by making his position as Executor impregnable. At a minimum, that entrenchment of control contributed to Virginia's collection damages, because David's enhanced position meaningfully complicated her efforts to unseat him. We conclude, therefore, that Virginia sufficiently pleaded a separate and distinct "acquisition or maintenance" injury.

The question remains, however, whether Virginia has adequately pleaded such an injury as to *each* of the six defendants: David, Mary Lou, Garvey, Vitti, Red Knot, and Silver Knot. Of these defendants, only David as an Executor had a formal position through which he exerted control over the Estate. (Recall that Virginia did not name Larry, her brother and now the other Executor, as a defendant in this suit.) We accept Virginia's argument that the Complaint plausibly asserts that, along with David, Red Knot and Garvey also exerted significant control over the Estate, helping to perpetuate David's control and each contributing thereby to the requisite

"acquisition or maintenance" injury. For example, the Complaint alleges that by purchasing the Estate's loans from the Bank Group, Red Knot gained not only a standard secured creditor's interest in the Estate's assets, but also the contractual right under the Forbearance Agreement to initiate potentially disastrous wholesale foreclosure proceedings upon David's removal. Red Knot's power to foreclose on "virtually all" of the Estate's assets in the event of a management change plausibly represents a meaningful form of "control" over the Estate. App. 77 (Am. Compl. ¶ 59). And it would be imprudent to conclude, at this early stage in the proceedings, that Gregory Garvey—as Red Knot's nominal owner—lacked any power or control over Red Knot, or, through Red Knot, the Estate. Accordingly, Virginia has pleaded a viable claim under section 1962(b) against Red Knot and Garvey, as well as against David.

The remaining defendants, however, are not themselves alleged to have exerted any direct control over the Estate's management, much less control that was acquired or maintained through any alleged racketeering acts. Virginia alleges generally that Mary Lou, Silver Knot, and Vitti took part in (or, in Vitti's case, advised David regarding) one or more of the various schemes by which David looted the Estate. Without more, however, participation as a third party in a business transaction with the Estate does not constitute either maintenance of an "interest in" or exercise of "control over" the Estate for purposes of section 1962(b). Accordingly, Virginia failed sufficiently to allege that Mary Lou, Silver Knot, or Vitti violated section 1962(b).

IV. Section 1962(c) theory of recovery

Section 1962(c) of title 18 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." The existence of an "enterprise"—one existing "separate and apart from the pattern of activity in which it engages"—is a necessary element of a section 1962(c) violation. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

All six Defendants claim that, even accepting the Complaint's allegations, they were not associated with an "enterprise" within the meaning of the statute and, thus, that Virginia has not adequately pleaded that they violated section 1962(c). Virginia identifies two possible "enterprises" with which all Defendants purportedly associated: an "association-in-fact" consisting of all six Defendants, and (2) the Estate itself.[9]

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[9] We do not opine here on the question whether Virginia could plausibly allege a series of more limited associations-in-fact, consisting of the participants in particular schemes pursuing more limited purposes than David D'Addario's wholesale looting of the Estate. Although our recitation of the narrative above might be read to suggest any number of such associations, we decline to construct associations-in-fact that Virginia has not identified. We agree with the Third Circuit that, where a plaintiff has "conspicuously refrained, throughout the district[ ]court proceedings and on appeal, from asserting alternative [multi-entity,] bilateral[,] or single-entity enterprises," we should not endeavor to replace the enterprise identified by the

A. Association-in-fact of the six Defendants

The RICO 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).[10] The Supreme Court has observed in this regard that "[t]he term 'any' ensures that the definition has a wide reach, and the very concept of an association in fact is expansive." *Boyle v. United States*, 556 U.S. 938, 944 (2009) (internal citations omitted). It has further instructed that, in accordance with the law's purposes, the RICO statute is to be "liberally construed," giving a broad and flexible reach to the term "association-in-fact." *Id.*

In line with this general approach, the Supreme Court has rejected attempts to graft onto the statute formal strictures that would tend to exclude amorphous or disorganized groups of individuals from being treated as RICO "enterprises." Accordingly, it has explained, RICO associations-in-fact need exhibit only three structural features: (1) a shared purpose; (2) relationships among the associates; and (3) "longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 946.

Defendants do not meaningfully contest that the Complaint adequately alleges longevity, inasmuch

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plaintiff with an alternative, differently constituted enterprise with a different purpose. *See In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 375 (3d Cir. 2010).

[10] This definition applies to the term "enterprise" as used in both sections 1962(b) and (c).

as Defendants' charged association in connection with the Estate has persisted for decades (and indeed, several of the individual schemes were carried out over a period of years). They argue, however, that Virginia has failed to allege sufficiently the existence of relationships among the Defendants or a common purpose. Rather, for example, they highlight David's alleged purpose—to enrich himself—and contrast it with each defendant's self-regarding, and separate, individual purpose in individual transactions: for example, Mary Lou's desire to obtain a particular residential property and Garvey's profit-oriented investment in the aluminum can company through Silver Knot. Although not in the end dispositive, *see infra* Discussion Part IV.B, we find Defendants' argument on this point persuasive.

The concept of an association-in-fact is protean, and, as such, variability is invited by the statutory language and the Supreme Court's construction of that language. District Courts and Courts of Appeals have taken various paths towards providing some predictable shape for the notion, often drawing on established conspiracy law for analogy and contrast. A number of courts—although not our court—have found that a group of individuals related by a structure that mimics so-called "rimless hub-and-spoke" conspiracies cannot be considered a RICO association-in-fact. *See, e.g.*, *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 374-75 (3d Cir. 2010); *Moss v. BMO Harris Bank, N.A.*, 258 F. Supp. 3d 289, 302-03 (E.D.N.Y. 2017); *Cedar Swamp Holdings, Inc. v. Zaman*, 487 F. Supp. 2d 444, 451-52 (S.D.N.Y. 2007). In other

words, when each defendant is alleged to have a relationship with a central figure, but the defendants are not all alleged to be connected in some overarching way (such as by "an agreement to further a single design or purpose"), these courts have found no RICO association-in-fact. *See* Gregory P. Joseph, *Civil RICO: A Definitive Guide* 105-07 (3d ed. 2010). Without such a limitation, as commentators have observed, one malefactor's series of independent frauds could be cast as a RICO conspiracy, sweeping numerous other individuals into a net of heightened liability under RICO, and doing so even if each fraud was perpetrated quite independently of the others. Such a sweep would seem to run afoul of the principle adopted by the Supreme Court in *Boyle* that individuals who act "independently and without coordination" may not be treated as part of a RICO association-in-fact. *Boyle*, 556 U.S. at 947 n.4.

We agree further with Defendants that, if proven, the facts alleged in the Complaint would establish that David engaged in a series of separate frauds involving different sets of individuals. This, they say, is insufficient to make out relationships among "the defendants as a whole" that would satisfy even *Boyle*'s relaxed test for an association-in-fact. *D'Addario*, 2017 WL 1086772, at *19. That each defendant agreed to join forces with David to defraud the Estate in a particular way does not support an inference that they all agreed to join forces with each other to pursue a goal of defrauding the Estate over decades in a variety of ways. Rather, at most, it suggests that Defendants (and in a few cases,

perhaps, a small subgroup of Defendants) each agreed with David to engage in individual schemes.

Proof that "several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates, . . . [is] not . . . enough to show that the individuals were members of an enterprise." *Boyle*, 556 U.S. at 947 n.4; *see also In re Insurance Brokerage*, 618 F.3d at 374 (rejecting allegations that defendants took similar actions because they "do not plausibly imply concerted action—as opposed to merely parallel conduct"); *Rao v. BP Products N. Am., Inc.*, 589 F.3d 389, 400 (7th Cir. 2009) (finding complaint did not make out an "enterprise" where it alleged "different [groups of] actors for each event" and "d[id] not indicate how the different actors are associated" or "act[ed] together for a common purpose"); *cf. Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 355 (8th Cir. 2011) (explaining that RICO enterprise is not adequately alleged where "the only common factor that linked the individually named defendants and defined them as a distinct group was their direct or indirect participation in the engineered investment scheme to defraud the plaintiff" (internal quotation marks and alteration omitted)).

Nor does the allegation that the various Defendants and subgroups agreed at different times to engage in various fraudulent schemes plausibly support the inference, essential to a RICO association-in-fact enterprise, that they acted with a sufficiently common purpose. The Complaint does not allege, for example, that Mary

Lou was even aware of the Red Knot forbearance scheme, or that Garvey knew of David's residential property transfers from the Estate to himself, Mary Lou, and Larry. And the schemes themselves are not sufficiently similar in method or aim to suggest that Defendants were acting in coordination: in some (the Honeyspot Road scheme and transfers of residential property, for example), participants funneled assets directly out of the Estate into their own pockets; in others (the Red Knot and Cadle suit settlement schemes, for example), the participants protected David's position as Executor, but did not directly profit-at least, insofar as the Complaint alleges; and in still others (the Frenchtown Road and Silver Knot schemes), David allegedly usurped business opportunities that, under fiduciary principles, rightfully belonged to the Estate.

For these reasons, we conclude that the Complaint's allegations do not plausibly make out the association-in-fact enterprise proposed by Virginia, in which the six Defendants together were "devoted to . . . allowing David . . . to acquire an interest in, and then maintain control over, the affairs of the Estate," App. 200 (Amended RICO Case Statement), under her section 1962(c) theory of recovery.

B. The Estate as association-in-fact RICO enterprise

As adverted to above in our discussion of Virginia's proposed enterprise among the six defendants, however, another potential section 1962(c) enterprise emerges from the facts alleged:

that is, the Estate itself.[11] As explained above, section 1961(4) provides that any "legal entity" may qualify as a RICO enterprise, whether it is an 'individual, partnership, corporation, association," and also that, in the alternative, "any union or group of individuals associated in fact although not a legal entity" may qualify as well.

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[11] Defendants contend that Virginia forfeited the argument that the Estate is the actionable enterprise under section 1962(c) by failing to raise it in the District Court. In fact, Virginia's attorney raised this argument in the District Court at oral argument regarding Defendants' Motion to Dismiss the Amended Complaint. See App. 264 ("[T]here is enough evidence . . . alleged in the Complaint for us to prove the existence of an association [in] fact enterprise. But . . . also the probate estate, under *Gunther v*[.] *Dinger* [547 F. Supp. 25 (S.D.N.Y. 1982)], the probate estate in and of itself . . . is a sufficient enterprise. So there's two enterprises here."). That mention was the first, however, and Virginia acknowledges that the issue was not briefed in that court and the District Court did not have an opportunity to rule on the theory. Although on appeal we rarely consider arguments so undeveloped at the district court level, they are not irretrievably forfeited, and, in view of the complexity of this matter and the purely legal nature of this argument, we elect to exercise our discretion on appeal to address this contention. *See United States v. Gomez*, 877 F.3d 76, 95 (2d Cir. 2017) ("[W]e have discretion to consider arguments waived or forfeited below because our waiver and forfeiture doctrine is entirely prudential." (internal quotation marks and alterations omitted)). As explained above, Virginia's claim will be remanded to the extent that it involves a violation of section 1962(b). In our court, her counsel has represented that, on remand, she will seek leave to amend her complaint further to identify the Estate as the actionable "enterprise" under section 1962(c). With efficiency goals in mind, we therefore address this argument now.

Connecticut law holds that an estate is "not a legal entity. It . . . is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent." *Freese v. Dep't of Social Servs.*, 169 A.3d 237, 251 (Conn. App. Ct. 2017) (quoting *Isaac v. Mount Sinai Hosp.*, 490 A.2d 1024, 1026 (Conn. App. Ct. 1985)). Unlike the somewhat eclectic group of defendants Virginia attempts to join together with David as an association-in-fact, however, the individuals who were formally associated with the (inchoate) Estate—that is, David and Larry, the Executors—indisputably comprise an "association-in-fact." They have a shared purpose, in fact one prescribed by law: settling the Estate by paying off its debts and distributing its assets among the heirs. As co-Executors, they have a legal relationship with each another and a shared responsibility of fulfilling that purpose. And, as the Estate is now in its fourth decade of existence, this association of the Executors has the requisite longevity: it has certainly existed long enough to allow its members to pursue their purpose.[12] We therefore conclude that the Estate—

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[12] We recognize that the import of this analysis is that probate estates, even those that are not recognized as legal entities under applicable law, may comprise associations-in-fact for RICO purposes. We have suggested as much with regard to bankruptcy estates. *See, e.g., First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 175 (2d Cir. 2004) ("[U]nder certain circumstances, a bankruptcy estate may qualify as a RICO enterprise."). This result should not be surprising. A probate estate, "although not a legal entity," 18 U.S.C. § 1961(4), would appear to be exactly the kind of "enterprise" that Congress intended to protect from infiltration or exploitation by criminal elements. *See* Gerard E. Lynch, *Rico: The Crime of Being A Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 669-89 (1987) (recounting legislative history).

an association-in-fact of David and Larry—comprises an "enterprise" under section 1961(4).[13]

A person violates section 1962(c), and may thus be liable in an action brought under section 1964, only if he "conduct[ed]" the enterprise's affairs or participated in that conduct. 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, the Supreme Court interpreted the operative language to require a RICO defendant charged with violating section 1962(c) to have had "some part in *directing* [the enterprise's] affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis added). A RICO defendant will not be liable for mere participation in a racketeering act, but will sustain liability under the statute for participation in the "operation or management of an enterprise through a pattern of racketeering activity." *Id.* at 184; *see also First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004).

Virginia's allegations as to David easily satisfy the *Reves* "operation or management" test. Taking the facts alleged in the Complaint as true, David went far beyond merely *participating* in the management of the Estate: he was a "dictatorial" Executor of the Estate. App. 62 (Am. Compl. ¶ 15). Whether Defendants other than David, however, may be said to satisfy the test by their alleged participation in the Estate's operation or management, despite not having an official position within it, is less clear. *See Reves*, 507 U.S.

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[13] We refer to the association-in-fact consisting of David and Larry as the "Estate," to distinguish it from the purported association-in-fact consisting of the six defendants discussed above.

at 184; *see also First Capital Asset Mgmt., Inc.*, 385 F.3d at 178 ("[O]utsiders, like all other people, will be liable under RICO . . . if their actions satisfy the operation or management test.") (alteration omitted). While the "operation or management" test presents a "relatively low hurdle for plaintiffs to clear, . . . especially at the pleading stage," RICO plaintiffs must plausibly allege that each defendant played "*some* part in directing the enterprise's affairs" if the RICO claim is to survive a motion to dismiss. *First Capital Asset Mgmt.*, 385 F.3d at 176 (internal citations and alterations omitted).

In *First Capital Asset Management*, we explained that a RICO plaintiff adequately pleaded that a defendant parent had participated in the operation or management of the defendant's son's bankruptcy estate, despite not having a formal position within that estate. *Id.* at 178. The defendant had aided her debtor son in defrauding the Bankruptcy Court in various material ways that adversely affected the administration of the bankruptcy estate: for example, she accepted his transfer of assets to her (so that the money would not be included in his bankruptcy estate), sent him monthly payments from those fraudulently transferred assets, and made various false statements and misrepresentations to the Bankruptcy Court. *Id.* at 177-78. Based on these actions, we concluded that the defendant parent "participated in the conduct of the affairs" of the enterprise sufficient to sustain section 1962(c) liability, *id.* at 178, treating the bankruptcy estate as the enterprise. (That we ultimately affirmed dismissal of the claim based on the plaintiff's

failure sufficiently to plead a pattern of racketeering acts lessens the precedential force of this conclusion, it is true, but we nonetheless find the *First Capital Asset Management* court's detailed analysis persuasive for present purposes.)

The same analysis applies to the remaining defendants here. The individual defendants (Mary Lou, Garvey, and Vitti) are alleged to have actively assisted David when he operated the Estate to effectuate his schemes, which directly affected his management of the Estate. Although the entity defendants (Silver Knot and Red Knot) were used simply to effectuate David's schemes, they also can be understood to have sufficiently assisted David in his conduct of the Estate's affairs simply by their formation and existence: they were necessary tools for the schemes' operation. Such assistance may fairly be considered "participation" in the operation or management of an enterprise, at least in the circumstances alleged here.[14]

We bear in mind that the "operation or management" test is "essentially one of fact." *Id.* at 176. Accordingly, at this early pleading stage in

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[14] Section 1962(c) prohibits *both* "conduct[ing]" an enterprise's affairs and "participat[ing]" in the conduct of an enterprise's affairs, while section 1962(b) prohibition centers on "acquir[ing] or maintain[ing] . . . control of any enterprise." Although Virginia has not pleaded that Mary Lou, Vitti, or Silver Knot "acquire[d] or maintain[ed]" control over the Estate for section 1962(b) purposes, *see* Part III, above, we conclude that her allegations are sufficient to make out a claim that those defendants "participate[d]" in the conduct of the Estate's affairs under section 1962(c). We identify an important difference between the two.

the suit, we conclude that Virginia's allegations suffice to support her claim that each Defendant participated in the operation or management of the Estate as enterprise, in violation of section 1962(c). Thus, Virginia has sufficiently stated a civil RICO claim against all Defendants arising out of their alleged violation of section 1962(c). Our legal conclusions as to the adequacy of the Complaint's pleadings of the theories under sections 1962(b) and (c) reanimate Virginia's RICO conspiracy theory under section 1962(d), as well.

CONCLUSION

For the reasons stated above, we conclude that Virginia has adequately pleaded a RICO claim under 18 U.S.C. § 1964(c), and that her claim is ripe insofar as she seeks damages in the amount of the collection expenses that she has incurred through the filing of the Complaint. Whether she will be entitled to collect those expenses from Defendants, of course, will depend on whether she is able to prove her claims. Because Virginia pleaded a cognizable federal RICO claim, we also conclude that the District Court on remand should revisit the question whether to exercise supplemental jurisdiction over Virginia's state law claims.

We therefore VACATE the District Court's judgment and REMAND the cause for further proceedings in the District Court.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:16cv99 (JBA)

March 22, 2017

VIRGINIA A. D'ADDARIO, Individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia A. D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Plaintiffs,

—*v.*—

DAVID D'ADDARIO; MARY LOU D'ADDARIO KENNEDY; GREGORY S. GARVEY; RED KNOT ACQUISITIONS, LLC; SILVER KNOT, LLC; and NICHOLAS VITTI,

Defendants.

RULING GRANTING DEFENDANTS' MOTION TO DISMISS

Virginia D'Addario ("Virginia") individually, on behalf of two testamentary trusts and in her capacity as Executrix of the probate estate of her deceased mother, Ann T. D'Addario (collectively, "Plaintiffs"), filed this suit against Defendants David D'Addario ("David"), Mary Lou D'Addario Kennedy ("Mary Lou"), Gregory S. Garvey ("Garvey"), Red Knot Acquisitions, LLC ("Red Knot"), Silver Knot LLC ("Silver Knot") and Nicholas Vitti ("Vitti") (collectively, "Defendants") alleging: RICO violations by all Defendants (Count One); breach of fiduciary duties by David D'Addario as Executor of the Estate (Count Two); breach of fiduciary duties by David D'Addario as Trustee of the Testamentary Trust, the Marital Trust and the Virginia Trust (Count Three); aiding and abetting breach of fiduciary duties by all Defendants (Count Four); conspiracy to breach fiduciary duties by all Defendants (Count Five); and unjust enrichment by David D'Addario (Count Six). Defendants move [Doc. # 37] to dismiss Plaintiffs' First Amended Complaint ("Am. Compl.") [Doc. #25] in its entirety. Oral argument was held on November 15, 2016.

In summary, and for the reasons discussed in the Ruling that follows, the Court grants Defendants' Motion to Dismiss because Plaintiffs fail to adequately plead substantive RICO violations, there is no diversity of parties, and the Court will not exercise supplemental jurisdiction over the state law claims. In granting this Motion, the Court finds that Plaintiffs' interest in the Estate is sufficient to confer RICO standing upon them, but that their lost

debt injury remains uncertain and speculative and is therefore not ripe. Nonetheless, Plaintiffs' independent claim for collection expenses associated with their lost debt injury is ripe and therefore the Court addresses the sufficiency of Plaintiffs' substantive RICO allegations. Although Plaintiffs pied a pattern or practice of racketeering behavior, and with respect to their Section 1962(b) claim, adequately linked Defendants' racketeering to the maintenance of the enterprise, Plaintiffs failed to allege the necessary separate acquisition and maintenance injury, resulting in dismissal of their Section 1962(b) claim. Plaintiffs' section 1962(c) claim fails due to the hub-and-spoke nature of the alleged association-in-fact enterprise and Plaintiffs' RICO conspiracy claim under Section 1962(d) must also be dismissed, as Plaintiffs have not sufficiently alleged any substantive RICO violation. Given the dismissal of Plaintiffs' only federal claim, and in the absence of diversity jurisdiction, the Court will not exercise supplemental jurisdiction over Plaintiffs' state law claims and the Complaint will be dismissed in its entirety.

I. Facts Alleged

A. Background

On March 5, 1986 F. Francis D'Addario ("Mr. D'Addario") died in an airplane crash, leaving behind a will directing the manner in which his estate, worth over $120,000,000,[1] was to be divided. (Am. Compl. ¶¶12, 13, 26.) Mr. D'Addario left behind

[1] Plaintiffs contend that in today's dollars, this is the equivalent to a net worth of approximately $360,000,000 (*Id.* ¶ 47.)

his wife, Ann T. D'Addario, as well as five children: Virginia, the oldest; Lawrence; Mary Lou; Lisa; and David, the youngest, who is 15 years younger than his oldest sister, Virginia. (*Id.* ¶ 11.) The will created "a revocable testamentary trust (the "Testamentary Trust"), which provided for approximately one-half of Mr. D'Addario's net assets to go into a marital trust (the "Marital Trust") for the benefit of his wife, Ann, and the other half into separate trusts for the benefit of his five children in equal shares, including a trust for the benefit of his oldest daughter, Virginia (the "Virginia Trust")." (*Id.* ¶ 12.) Mr. D'Addario appointed his two sons, David and Larry, as well as three non-family members, Executors of the Estate. (*Id.* ¶ 13.)

Shortly after Mr. D'Addario's death the will was filed for probate in the Probate Court of Trumbull, Connecticut, with the Honorable John P. Chiota presiding. (*Id.*) "On March 11, 1986, David D'Addario accepted his appointment as an Executor of the Estate, and, on that date, was charged with the duty of administering and settling the affairs of the Estate in a prompt and efficient manner." (*Id.*) At that time, David D'Addario was 24 years old and living at his mother's house in Trumbull, Connecticut. (*Id.* ¶ 14.) He did not have any significant assets to his name, and his only source of income was from working as an employee for his father's business, D'Addario Industries. (*Id.*) "As of today, and for the last 15 years, David D'Addario and Larry D'Addario are the sole remaining Executors of the Estate. While David and his brother are technically Co-Executors, David exercises dictatorial control over the management and operation of the Estate." (*Id.* ¶ 15.)

Virginia fell on difficult financial times and on November 30, 1987 she obtained an advance on her distributional interest in the Estate (in the form of a $3,900,000 non-recourse promissory note) to allow her to emerge from Chapter 11 bankruptcy. (*Id.* ¶ 17.) In return for this advance, David "required that his sister, Virginia, no longer participate in or take part in Estate deliberations or decisions as regards the Estate or its property, and waive all rights . . . in her favor against the Executors as regards their administration of the Estate and the validity of their decisions . . . except for willful fraud, malfeasance or dishonesty." (*Id.* (internal quotation marks omitted.)) After executing this agreement, David, cognizant of the fact that should his mother and his older sister, Virginia, predecease him before the Estate closed, their interests in his father's Estate would be distributed on a pro rata basis to himself and his remaining siblings, vowed that Virginia would never receive another penny from the Estate. (*Id.* ¶ 18.) "In fact, on a number of occasions, David told his sister, Virginia, that 'I'm 15 years younger than you, I'll outlive you, and I can keep the Estate open until after you die.'" (*Id.*)

On May 18, 1990 Lisa D'Addario, one of the five siblings, passed away. (*Id.* ¶ 19.) Her interest in her father's will passed to her siblings in equal shares, making Virginia a 12.5% beneficiary of Mr. D'Addario's will. (*Id.*)

According to Plaintiffs, "[f]rom and after the November 20, 1987 agreement with Virginia D'Addario, David D'Addario ran the Estate as his personal piggy bank, and did everything within

his power to transfer the significant assets of the Estate for his personal financial benefit." (*Id.* ¶ 21.) David has consistently refused to provide detailed information to Virginia about the operations of the Estate, despite repeated attempts by Virginia to obtain this information. (*Id.*) Moreover, after filing a few initial accountings with the Probate Court, after May 31, 1991 David had the Estate stop filing interim accountings and for over four years none were filed without judicial intervention, until July 18, 1995 when the Probate Court ordered the Estate to resume filing these interim accountings. (*Id.* ¶ 22.) Still, despite this order, David "did not file any additional interim accountings for the Estate until some six years later, when, in 2001, some additional accountings finally were filed, but which only covered the period up to November 30, 1996." (*Id.*) "In 2006, after another unauthorized and extended hiatus, some post-1996 interim accountings were finally filed with the Probate Court, but David D'Addario had those additional accountings filed under seal so that neither Virginia D'Addario, nor any other interested party, could have access to the accountings covering the period from 1996 through 2006." (*Id.*) Probate Court Judge Chiota never reviewed the interim accountings and refused Virginia D'Addario's repeated requests to review those accountings. (*Id.*)

On October 3, 2011 a new Probate Court Judge, Honorable Joseph A. Egan, Jr., unsealed the interim accountings, giving Virginia the ability to review them. (*Id.* ¶ 23.) However, the vague and confusing nature of the interim accountings raised more questions regarding the management of the

Estate than they answered, as they "consisted mainly of line-item entries that were devoid of meaningful information to assess the propriety of the transactions reported." (*Id.* ¶¶ 23, 24.) Over the past 30 years David, through the Estate, has resisted all discovery and appealed every order entered by the Probate Judge. (*Id.* ¶ 24.) David has refused to produce any documents pertaining to his "self-dealing and systematic looting of the Estate." (*Id.* ¶ 25.)

B. The Alleged Fraudulent Schemes[2]

Plaintiffs allege Defendant David D'Addario, with the assistance of the other Defendants and several others not named in the Complaint, engaged in several fraudulent schemes involving property owned by the Estate and debts it owed.

i. The Honeyspot Road Scheme

The first of these schemes is known in the Complaint as "The Honeyspot Road Scheme." (*Id.* § C.) The Honeyspot Road Property, owned free and clear by the Estate, was appraised in December of 1986 as having a fair market value of $3,800,000. (*Id.* ¶ 30.) The most likely candidate to purchase was the lessee of the property, Pace Motor Lines, Inc., which was owned by the Pacelli brothers, friends of the D'Addario family. (*Id.* ¶¶ 29, 30.) In fact, on January 5, 1989 the Estate accepted an offer to purchase the Honeyspot Road

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[2] None of the transactions related to these schemes were disclosed to Virginia, the creditors of the Estate, or the Probate Court before being undertaken. (Id. ¶¶ 36, 44, 60).

Property for $3,200,000. That sale, however, did not close." (*Id.* ¶ 31.)

Instead, at the direction of David, the Estate consciously chose not to pay real estate taxes on the Property, nor did it pay the $149,112.38 owed in delinquent taxes, despite having ample notice and assets to do so. (*Id.* ¶ 32.) Thus, David decided to "let this multi-million dollar Estate asset be lost at the tax foreclosure sale. As a consequence, on June 28, 1996 the Honeyspot Road Property was sold at the tax foreclosure sale for $179,323.84 to Dennis and William Miko, who were friends of Mary Lou D'Addario." (*Id.* ¶ 33.) Meanwhile, David directed his attorney, Paul Berg ("Berg"), who was also an attorney for the Estate, to set up a Connecticut limited liability company, Honeyspot Ventures, LLC ("HSV"), which was owned by David, Larry, and Mary Lou. (*Id.* ¶ 34.)

On September 30, 1997, rather than having the Estate redeem the Honeyspot Road Property,[3] David had the tax sale purchasers, the Miko brothers, quit-claim the Property to his new company, HSV, for $250,000. (*Id.* ¶ 35.) Subsequently, "on October 6, 1998 David had HSV sell the Honeyspot Road Property to Honeyspot Investors, LLP – an entity owned by the Pacelli brothers – for $1,100,000, which was a price far below the approximately $3,000,000 fair market value of that property." (*Id.*) This resulted in a profit of $850,000, none of which went to the

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[3] Under Connecticut law, the Estate had a period of one year—until June 29, 1997—to redeem the property from the tax foreclosure sale by paying the amount owed plus 18% interest. (*Id.* ¶ 34.)

Estate, but which was instead divided among David, Larry, and Mary Lou D'Addario. (*Id.* ¶ 36.)[4]

ii. The Frenchtown Road Scheme

The Estate also owned a 50% ownership interest in 34.4 acres of undeveloped real estate on Frenchtown Road in Trumbull, Connecticut (the "Frenchtown Road Property"). (*Id.* ¶ 41.) The remaining 50% interest was owned by the family of Joseph Rosenberg. Mr. D'Addario's interest in the Property, according to Mr. D'Addario's 1985 financial statement, was worth $1,250,000, with no mortgage indebtedness. (*Id.*) Upon learning in the spring of 1989 that the Town of Trumbell wanted to purchase the Property for a new school, David and Attorney Berg formed Sunny Spot Associates, LLC ("SSA"), with David as owner and manager, and acquired the Rosenberg 50% interest in the Property for $450,000. (*Id.* ¶¶ 42, 43.) This was done without affording the Estate the opportunity to acquire the Rosenberg interest in the Property, which the accountings make clear it could have afforded, and in fact the opportunity was concealed from Virginia, the Estate's unsecured creditors, and the Probate Court. (*Id.* ¶ 43, 45.)

Then, on May 15, 1999 David directed Attorney Berg to form Old Town Land Partners, a

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[4] Neither the interim accounts nor the Executors' status reports contain any mention of having lost the Honeyspot Property in a foreclosure sale, let alone that Co-Executors David and Larry, along with their sister Mary Lou, had made a $850,000 profit by flipping the Property. (Am. Compl. ¶ 36.)

partnership between David's company, SSA, and the Estate. (*Id.* ¶ 44.) David, through Berg, subsequently had SSA and the Estate transfer their 50% interests in the Frenchtown Road Property to Old Town Land Partners, which proceeded to sell to the Town of Trumbell the Property for $6,000,000. (*Id.*) Pursuant to this scheme, David's company SSA, made a $2,550,000 profit on the sale, which should have gone to the Estate. (*Id.*) Moreover, the Estate contributed $750,000 to the Town of Trumbull for the right to name the new school on Frenchtown Road after David's mother, Ann D'Addario. (*Id.*)

iii. The Red Knot Forbearance Agreement Scheme

When the Estate was opened in March 1986, the Executors reported that it had total liabilities in the amount of $41,363,977, secured by some of Mr. D'Addario's assets. (*Id.* ¶ 47, 48.) The majority of this debt ($25,218,084) was owed to three different banks (the "Bank Group"). (*Id.* ¶ 48.) As a result of the Estate defaulting on some of the obligations in connection with the previous loans made to Mr. D'Addario, on December 13, 1990 "the Bank Group and the Estate entered into an omnibus agreement governing the continuing credit relationship between the parties (the 'Definitive Agreement'). Under the Definitive Agreement, approximately $14,000,000 in additional funds were loaned by the Bank Group to the Estate, but certain limitations were imposed on the Executors' management and operation of the Estate." (*Id.* ¶ 49.) By the end of December, 1997, the debt owed to the Bank Group had grown to over $48,000,000. (*Id.* ¶ 53.)

However, because of "inner turmoil," the Bank Group offered to extinguish this debt if the Estate paid them only $4,750,000 (a $43,250,000 discount). (*Id.*)

David claimed the Estate could not come up with the $4,750,000, while the recently unsealed interim accountings reveal that the Estate did in fact have "plenty of cash, liquid assets and other free and clear assets to come up with the $4,750,000 necessary to extinguish the $48,000,000 in secured loan obligations." (*Id.* ¶¶ 54, 55.) Instead of paying the Bank Group, David had Attorney Berg establish Red Knot, an entity that was supposedly owned and controlled by long-time friend and business partner, Garvey, but in reality was the mere alter-ego of David D'Addario. (*Id.* ¶ 54.) Red Knot, in turn, acquired the Bank Group's loan position and then entered into a so-called "Forbearance Agreement" for the debtor-creditor relationship between the Estate and the purchasing entity-Red Knot." (*Id.* ¶ 54.)

Under the Forbearance Agreement, signed December 30, 1997,

> the Estate granted Red Knot a lien on virtually all of the Estate's assets, and also provided that, should David D'Addario ever be removed as an Executor of the Estate, Red Knot [which Plaintiffs allege is simply David's alter-ego] had the immediate right to engage in collection efforts on the over $48,000,000 allegedly owed to Red Knot, including the right to foreclose on all of the Estate's assets.

(*Id.* ¶ 59.) This "Executor for life" clause was inserted in the Forbearance Agreement despite the fact that the Bank Group had previously filed a Motion to Remove David D'Addario as an Executor of the Estate, which listed as grounds for removal: negligence, mismanagement, malfeasance and serious conflicts of interest. (*Id.*) Additionally, the Forbearance Agreement provided the Estate with a "purchase option" that, on paper, allowed the Estate an option to purchase the Bank Group's loan position (now held by Red Knot) at a steep discount, with the option price increasing at a rate of over 20% per year until January 7, 2003, at which time the purchase option was set to expire (the "Estate Purchase Option"). (*Id.* ¶ 60.)

The recently unsealed accountings reveal that the Estate had paid Red Knot $6,650,000 leaving a balance of $828,383, which the Estate could have purchased (and had the funds to do so) at a discount pursuant to the Estate Purchase Option. (*Id.* ¶ 64.) However, rather than exercise the Estate Purchase Option, thus ridding the Estate of an additional $55,000,000 of debt, "David let the Estate Purchase Option at the $828,383 buy-out price expire, with the amount thereafter allegedly owed by the Estate to Red Knot exceeding $100,000,000, and with a purported lien by Red Knot on all of the Estate's assets." (*Id.* ¶ 65.) In Plaintiffs' view:

> [T]he only real use of the Forbearance Agreement was as a threat to (a) the unsecured creditors, (b) the beneficiaries under Mr. D'Addario's Will (such as David D'Addario's older sister, Virginia), and (c)

> the Probate Court (including the Superior Court upon de novo appeal) that if David was pushed too hard or was ever removed as an Executor, Red Knot (as the alter-ego of David D'Addario) would exercise its 'rights' under the Forbearance Agreement to commence collection proceedings on its alleged $55,000,000 in secured indebtedness, and thus annihilate the Estate. That club, however, would be lost should the Estate ever pay off the supposed Red Knot indebtedness at the steeply discounted price in accordance with the Estate Purchase Option.

(*Id.* ¶ 69.) Therefore, Plaintiffs conclude that the Red Knot Forbearance Agreement was, and continues to be, a fraud on the court used by David as a means of staying in control of the Estate. (*Id.* ¶ 70.)

iv. The Wrongful Use and Transfer of Estate Owned Residential Properties for the Benefit of David, Larry, and Mary Lou D'Addario

Plaintiffs allege that David rewarded his brother and sister, Larry and Mary Lou, for their willingness not to question his management and operation of the Estate. (*Id.* ¶ 73.) He did this by giving them "free and unfettered use of" several different properties owned by the Estate, with the Estate continuing to pay all costs and expenses associated with the use and maintenance of these properties. (*Id.*) David also enjoyed this benefit. (*Id.*) Moreover, several of these properties (the San Francisco condo, Vermont condo, Vermont lot,

and New York condo) were either sold to a third party or transferred to David or his siblings, without any indication that funds were ever paid to the Estate for these transactions. (*Id.*)

v. The Silver Knot/Wise Metal Scheme

"Silver Knot is a corporation that was set up by David D'Addario and Garvey in early 1999 to acquire a controlling interest in Wise Metals, which was a producer of aluminum can stock for the beverage industry." (*Id.* ¶ 74.) In 2001, David, through his ownership interest in Silver Knot, acquired a majority interest in Wise Metals. (*Id.*) Plaintiffs contend that David D'Addario used assets, proceeds and business opportunities of the Estate to acquire a controlling interest in Wise Metals through Silver Knot, which interest equitably belonged to the Estate. (*Id.* ¶ 75.) Then, in October of 2014 a Dutch company "acquired Wise Metals, through its purchase of Silver Knot, for $1.4 billion, comprised of a cash payment to David D'Addario's company, Silver Knot, of $455,000,000, and the assumption of $945,000,000 in debt. (*Id.*) David's ownership interest in Silver Knot and the proceeds resulting from the sale of Wise Metals belonged to the Estate, but David has converted it for his own personal benefit. (*Id.* ¶ 77.)

vi. Red Knot/David D'Addario Settlement Scheme

Finally, Plaintiffs detail a series of lawsuits, beginning with one brought against David and Larry as Executors of the Estate by The Cadle Company ("Cadle"), which was owed in excess of $810,000 on a promissory note Mr. D'Addario

executed prior to his death. Final judgment was entered on March 1, 2010 by the Superior Court, awarding Cadle $810,245.59 as the principal amount due under the $1,000,000 Note, along with interest and costs, for a total judgment against the Estate in the amount of $2,580,470.23. (*Id.* ¶ 83.) David made no effort to pay the amount due by the Estate to Cadle. (*Id.*) Consequently, "after unearthing evidence of David's systematic and long-term looting of the Estate," Cadle filed suit against David D'Addario, Garvey, Red Knot and others for engaging in a RICO conspiracy to denude the assets of the Estate. *See The Cadle Company v. David D'Addario, et al.,* United States District Court, District of Connecticut, No. 3: 12-cv-00816-WGY (Hon. William G. Young, J., Dist. of Mass., sitting by designation) (the "Cadle RICO Suit"). (Am. Compl. ¶ 84.) Judge Young administratively closed the case for a period of nine months in order to allow David, as Executor, the opportunity to bring the Estate to a close and pay Cadle the amount owed, after which it could be reopened upon motion by either party. (*Id.* ¶ 85.)

David and Garvey devised a plan, using his alter-ego, Red Knot, to prevent the Cadle RICO Suit from reopening, which would allow Cadle to conduct discovery (thus revealing the sham Red Knot Forbearance Agreement and David's systemic looting of the Estate). (*Id.* ¶ 86.) Essentially, an Estate asset – the Hi Ho Motel – was transferred to Red Knot for a $4,500,000 credit on an amount supposedly owed to Red Knot, and Red Knot subsequently sold that Motel and used the proceeds to buy Cadle's judgment against the Estate,

thereby settling Cadle's RICO Suit claims without any discovery ever occurring. (*Id.* ¶ 87.)

Plaintiffs contend that "[t]he transfer of the Motel from the Estate to Red Knot for the purpose of funding the settlement of a multi-million dollar claim against David D'Addario contributed to the insolvency of the Estate, and eventually left Plaintiffs unable to receive their promised inheritable beneficial interests from the net assets of the Estate." (*Id.* ¶ 90.)

C. Breach of Fiduciary Duty to Trusts

As an Executor of the Estate, David D'Addario never properly funded the Testamentary Trust, the Marital Trust, or the Virginia Trust, and as Trustee of those trusts, never diligently pursued the full funding of those trusts with assets from the Estate. (*Id.* ¶ 92.) Instead, "David conspired with the other Defendants named herein to keep the assets of the Estate out of those trusts such that those assets would stay within the control of David as the chief Executor of the Estate, which would, in turn, allow David to deal with those assets as he chose for his personal financial benefit." (*Id.*) Plaintiffs claim that David systematically manipulated the Testamentary Trust, the Marital Trust and Virginia Trust from November 30, 1987 to the present, so that they became his alter-egos, and were simply used by him to perpetuate the fraudulent and other wrongful conduct set forth in their complaint. (*Id.* ¶ 93.)

D. Probate Court

According to Plaintiffs, the Connecticut Probate Court has permitted David D'Addario, an interested

party, to preside over the "liquidation and winding-up of the affairs of an $162,000,000 probate estate, with virtually no supervision over [his] conduct, and no accountability for [his] wrongful conduct." (*Id.* ¶ 96.) Without any true judicial supervision, the Estate has sold or otherwise disposed of approximately 75 assets or businesses since March of 1986. (*Id.*) Even when accountings were finally filed, they were under seal and were not reviewed by the Probate Court Judge. (*Id.*) David D'Addario has no intention of closing the Estate. (*Id.* ¶ 100.)

On September 25, 2012 Judge Egan ordered the Executors to report to the Court as to what steps have or are being taken to finalize the administration of this Estate beginning January 1, 2013 and quarterly thereafter. (*Id.* ¶ 101.) The Executors never provided to the Probate Court such a report. (*Id.*) On July 16, 2013 the Probate Court again ordered the Executors to submit a report detailing what steps the fiduciaries have taken or are going to take to satisfy all outstanding creditors and asking when they anticipate the Estate will be closed. (*Id.*) To date the Executors have failed to provide the Probate Court with the required information. (*Id.*)

Although David has represented to the Probate Court on numerous occasions that the Estate is solvent, Plaintiffs aver that these misrepresentations were at best misleading, if not knowingly false.[5]

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[5] On September 3, 2015 David D'Addario represented that Mr. D'Addario's Probate Estate was valued at $11,857,816 and in the November 25, 2014 Verified Status Update of the Decedent's Estate he listed numerous real estate holdings of the Estate with a purported net value of $13,958,140.58. (*Id.* ¶¶ 108-09.)

(*Id.* ¶¶ 108-09.) Put simply, Plaintiffs allege that the Estate is currently insolvent. (*Id.* ¶ 113.)

II. Discussion[6]

Plaintiffs contend that Defendants' conduct constitutes violations of 18 U.S.C. §§1962(b), (c) and (d) of RICO.[7] Defendants move to dismiss the entire Complaint, focusing in substance on Plaintiffs' RICO claims (Count One), which they contend are the only valid basis for federal jurisdiction. Defendants' Motion offers the following grounds for dismissing Plaintiffs' RICO claims: 1) Plaintiffs do not have standing to pursue their RICO action; 2) Plaintiffs' claims are unripe; and 3) Plaintiffs have failed to plead the requisite elements of a RICO claim under either §§ 1962(b), (c), or (d). Defendants argue that because Plaintiffs' RICO claims must be dismissed, the Court lacks subject matter jurisdiction over the remainder of the claims and thus that the entire case must be dismissed. The Court takes each argument in turn.

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[6] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although detailed allegations are not required, a claim will be found facially plausible only if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Conclusory allegations are not sufficient. *Id.* at 678-79; *see also* Fed. R. Civ. P. 12(b)(6).

[7] As indicated in the introductory paragraph, the Complaint also contains various state law claims, the substance of which are not the focus of this Ruling.

A. Plaintiffs Have Standing to Bring Their RICO Claims

Defendants assert that Plaintiffs lack standing to pursue their RICO claims because the Estate, and not Plaintiffs, was the direct victim of the Defendants' alleged long-term pattern of wrongful conduct, and therefore the Estate is "the [only] party with standing to bring a civil RICO claim." (Def.'s Mot. to Dismiss at 7.) Plaintiffs respond that they have adequately alleged causation of injury to their business or property, especially given that Virginia D'Addario was the primary target of David's actions.[8]

In order to establish a civil RICO violation, Plaintiffs must meet the following standing requirements: "(l) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation." *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 767 (2d

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[8] Plaintiffs correctly note that "the mere fact that the Defendants' wrongful conduct also caused harm to the Estate does not strip Plaintiffs of standing to pursue the Defendants for the injury that they caused to Plaintiffs' business or property." (Pl.'s Opp'n at 7.) For example, the plaintiffs in *Bankers Trust*, creditors of a bankrupt corporation, sought recovery for acts of bankruptcy fraud and bribery that concealed a corporate asset during reorganization. 859 F.2d at 1098. Because the creditors suffered injuries "directly," we allowed them to pursue their civil RICO claim notwithstanding the possibility that the bankrupt corporation "might also have suffered an identical injury for which it has a similar right of recovery." *Id.* at 1101; see also *GICC Capital Corp.*, 30 F.3d at 293 ("When a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, those creditors have standing.").

Cir. 1994). Plaintiffs "must prove not only that the acts of [D]efendant constitute a RICO violation, but also that [P]laintiff suffered injury as a result of that violation. Until such injury occurs, there is no right to sue for damages . . . " *Bankers Trust* Co. *v. Rhoades,* 859 F.2d 1096, 1102 (2d Cir. 1988). Thus, a plaintiff alleging a civil RICO violation must "demonstrate a direct relation between the injury suffered [to his/her business or property] and the alleged injurious conduct." *Holmes v. Sec. Inv'r Prat. Corp.,* 503 U.S. 258, 268 (1992).[9] In *Holmes,* the Supreme Court held that a court must examine the following three factors to determine whether an alleged RICO violation proximately caused injury to the plaintiffs business or property as required by the RICO statute: (1) the degree of directness of the injury; (2) the difficulty of apportioning damages among others affected by the alleged RICO violations; and (3) the possibility that other more directly injured victims could better vindicate the policies underlying RICO. 503 U.S. at 269-70.

Defendants' two primary authorities for claiming that "Plaintiffs, as beneficiaries to an estate . . . lack standing to bring a civil RICO suit

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[9] Here, Plaintiffs claim two distinct injuries – lost debt and collection expenses. Lost debt damages refer to Plaintiffs' vested interest in the assets of the Estate of which they have been deprived, while collection expenses include attorneys' fees and other expenses incurred in their prior unsuccessful efforts to recover the amounts due to them (*See* Am. Compl. ¶ 142.) The analysis regarding standing focuses on the lost debt injury, because if Plaintiffs do not have standing to pursue those damages, they would not have standing with regard to the related collection expenses.

based on any alleged injury to their expected inheritable interests" are two unpublished, out-of-circuit cases: *Schrager v. Aldana,* 542 F. App'x 101 (3d Cir. 2013) and *Firestone v. Galbreath,* 976 F.2d 279 (6th Cir. 1992). (Def.'s Mot. to Dismiss at 7.) However, neither of these cases require finding Plaintiffs lack standing under the facts of the instant case.

In *Schrager,* the plaintiff alleged that the aim of the defendants' conspiratorial conduct was to defraud the probate estate of the decedent and that as a beneficiary of that estate she suffered a direct injury proximately caused by the defendant.[10] 542 Fed. App'x. at 102-03. Applying the *Holmes* factors, the court concluded that the direct victim of the defendant's conduct was the estate, not the plaintiff and that the estate was in a better position to sue for the alleged injury. This was especially true because a Public Administrator, who had already taken action to recover the defrauded funds, had assumed control of the estate. *Id.* at 103-04. In so ruling, the Third Circuit noted that "plaintiff has alleged a financial loss due to the diminution of the estate of which he is a beneficiary. *This loss can serve as the basis for standing* so long as the additional criterion of proximate causation [set forth in *Holmes*] is met." *Id.* at 104 (emphasis added). Therefore, while the Third Circuit panel concluded that the plaintiff beneficiary lacked standing, it did not preclude the possibility that

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[10] Here, however, Plaintiffs allege in their Complaint that Defendant David D'Addario's wrongful conduct was directed primarily at his sister, Plaintiff Virginia D'Addario, not simply at the Estate. (Am Compl. ¶¶ 18, 27, 107, 121.)

under different facts a beneficiary to an estate might have standing to bring a civil RICO claim. Plaintiffs here have alleged that the executors of the Estate are fraudulently maintaining control over the Estate and thus there is no better party to bring the RICO suit.

Moreover, the facts of *Firestone* are readily distinguished from those in this case. There, the plaintiffs alleged that by stealing from their legally incompetent grandmother during her lifetime, Defendants "decreased the size of [their grandmother's] estate, and consequently the size of their inheritance." 976 F.2d at 285. Accordingly, the plaintiffs, as potential beneficiaries under a will that the decedent could have changed prior to her death, had no vested interest in the decedent's assets prior to her death and suffered no tangible loss at the time the decedent's assets were misappropriated by the defendants. *Id.* at 284-85. In contrast, in this case Plaintiffs have vested, enforceable rights of inheritance. *See Gaynor v. Payne,* 261 Conn. 585, 592 (2002) ("[u]pon the decedent's death . . . the [will beneficiaries'] rights of inheritance are vested [, and] those vested rights are enforceable."). Thus, Plaintiffs' injury is significantly more direct than the plaintiffs' in *Firestone,* rendering that case inapposite.

Defendants attempt to substantiate their standing argument by contending that Plaintiffs have only "an intangible right to the property of the Estate," arguing that "any injury to the Estate has not caused them actual monetary loss, i.e., an out-of-pocket loss as required to create RICO standing for a lost debt claim." (Def.'s Reply at 2

(internal quotation marks omitted) (citing *In re Avandia Mktg.,* 804 F.3d 633, 638 (3d Cir. 2015); *Angermeir v. Cohen,* 14 F. Supp. 3d 134, 151 (S.D.N.Y. 2014))). However, the Second Circuit has not required an out-of-pocket loss in order for a RICO plaintiff to have standing. As Plaintiffs highlight, the very case Defendants cite for this proposition, *In re Avinda Marketing,* states, "proof of a concrete financial loss, and not mere injury to a valuable intangible property interest . . . *can be satisfied by* allegations and proof of actual monetary loss, i.e., an out-of-pocket loss." *Id.* at 638 (emphasis added). This language does not mean that a plaintiff must *per se* demonstrate out-of-pocket loss, but rather that this is one way in which concrete financial loss may be established.

"The requirement that the injury be to the plaintiff's business or property means that the plaintiff must show a proprietary type of damage." *Bankers Trust,* 741 F.2d at 515. Moreover, "damages as compensation under RICO . . . for injury to property must, under the familiar rule of law, place [the injured parties] in the same position they would have been in but for the illegal conduct." *In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 122 (2d Cir. 2013) (internal quotation marks and citations omitted) (alterations in original). The *U.S Foodservice* court found that the plaintiffs, who had a protectable interest in a contract with the defendant at the time the fraud occurred, suffered an injury cognizable under RICO. *Id.* at 123. Similarly, Plaintiffs here had a protectable interest in the Estate at the time Defendants engaged in their alleged wrongful conduct and therefore suffered a proprietary type

of damage. To the extent Defendants are found liable for diminishing the value of the Estate, they can be made to make it whole again, which in turn would permit distribution to Plaintiffs of their rightful interest in the Estate had Defendants not perpetuated these frauds.[11]

B. Plaintiffs' RICO Lost Debt Injury is not Ripe

Although the Court concludes that Plaintiffs have standing to bring their RICO claims, there remains the question of whether their injuries are sufficiently ripe at this time. Defendants argue that Plaintiffs' lost debt claims are not yet ripe because the Estate is still open, making any injury to Plaintiffs' promised inheritable beneficial interests purely speculative. (Def.'s Mot. to Dismiss at 11.) In opposition, Plaintiffs respond that "[u]nder the facts as alleged in this case . . . any supposed future ability of Plaintiffs to collect from the Estate . . . is not a realistic possibility because the Estate, as alleged, is now hopelessly insolvent" and therefore their RICO claims are ripe because there is "no 'real possibility that the debt, and therefore the [lost debt] injury, may be eliminated or significantly reduced."' (Pl.'s Opp'n at 16 (quoting *In re Merrill Lynch Ltd. P'ship Litig.*, 154 F.3d 56, 59 (2d Cir. 1998))). The question for this Court then is whether Plaintiffs' injury, i.e., the loss of their "promised inheritable beneficial interests in the net assets of the Estate," is ripe

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[11] Because Plaintiffs have standing to pursue lost debt, they also have standing to pursue the claimed accompanying collection expenses.

for review while the Estate remains open in Connecticut Probate Court.

i. A Survey of Relevant Second Circuit Case Law

Several Second Circuit cases provide the backdrop for determining whether Plaintiffs' civil RICO claims are ripe. First, in *Bankers Trust,* the defendant owners of a major corporation, in an effort to avoid liabilities to the creditor plaintiff, agreed to seek a reduction of the corporation's debts through a Chapter 11 bankruptcy proceeding. 859 F.2d at 1098. However, in so doing, they fraudulently concealed from the plaintiff a major asset with net assets in excess of $3 million, thus inducing the plaintiff to consent to the reorganization plan. *Id.* Upon realizing the fraud, the plaintiff successfully moved in bankruptcy court to revoke the plan, resulting in the reinstatement of the bankruptcy proceedings. *Id.* at 1099. While the bankruptcy proceedings were still pending, the plaintiff brought a civil RICO action in the Southern District of New York, which the district court dismissed, finding in part that the plaintiff lacked standing. *Id.* at 1100. On appeal, the Second Circuit reversed, finding the plaintiff did have standing, but holding in relevant part that its lost debt damages "are unrecoverable, at least at this time, because their accrual is speculative and their amount and nature unprovable." *Id.* at 1106 (internal quotation marks and citations omitted).

Bankers Trust clarified that "civil RICO actions are subject to a rule of separate accrual" – "each time plaintiff discovers or should have discovered

an injury caused by defendant's violation of § 1962, a new cause of action arises as to that injury, regardless of when the actual violation occurred." *Id*. at 1103. The court found that "a cause of action for a new and independent injury does not accrue until the plaintiff actually suffers that injury," reasoning that "[C]ongress intended the basic award under civil RICO to compensate the plaintiff for injury to his property or business," meaning the damages awarded must be "sufficient to place the plaintiff in the same financial position he would have occupied absent the illegal conduct." *Id*. at 1106. Under the facts of that case, the court held

> [I]t is impossible to determine the amount of damages that would be necessary to make plaintiff whole, because it is not known whether some or all of the fraudulently transferred funds will be recovered by the corporation. Should they be recovered, [the plaintiff] would benefit along with [the corporation's] other creditors and its injury would decrease. As a result, the damages in this area are speculative and unprovable; any claim for relief based on the lost-debt injury must therefore be dismissed without prejudice.

Id.

The *Stochastic Decisions, Inc. v. DiDomenico* panel reaffirmed *Bankers Trust,* reasoning that "a RICO claim does not accrue until it is established that collection of the claim or judgment has been successfully frustrated." 995 F.2d 1158, 1166 (2nd Cir. 1993). The plaintiff judgment creditor in that

case brought a civil RICO action charging the defendants with conspiracy to commit bankruptcy, wire, and mail fraud for the purpose of preventing the plaintiff from collecting outstanding state court judgments against the defendants for unpaid insurance premiums. *Id.* at 1162-63. The plaintiffs argued that because their lost debt was definitively determined by entry of the New Jersey judgments, that amount should have been considered part of its RICO injury. *Id.* at 1165. The Second Circuit though, citing *Bankers Trust,* held that the amount of the lost debt remained unprovable. It noted:

> [A]lthough [the plaintiff] . . . obtained judgments for specific amounts, the amount of its lost debt [could not] be determined at [that] time because of the ongoing efforts to collect those judgments. As *Bankers Trust* recognized, a debt is lost and thereby becomes a basis for RICO trebling only if the debt (1) cannot be collected (2) by reason of a RICO violation.

Id. (internal quotation marks omitted).

In *First Nationwide Bank v. Gelt Funding Corporation,* the Second Circuit specifically focused on whether the plaintiffs RICO claims were ripe for review. 27 F.3d 763 (1994). There, the court rejected the plaintiffs argument "that its claims with respect to all fraudulent loans were ripe for suit the moment the loans were made, regardless of whether the borrowers presently were in default or whether [the plaintiff] completed efforts to foreclose on the collateral

properties." *Id.* at 767 (internal quotation marks omitted). As in *Bankers Trust,* the court reasoned that "[b]ecause the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained-for remedies available to it can the lender assert that it was damaged by the fraud, and then only to the extent of the deficiency." *Id.* at 768. Therefore, the court found that the plaintiffs claims are ripe for suit only when its loss becomes "clear and definite" but until that time plaintiff lacks standing to bring those claims. *Id.* at 769.

Ripeness was again at issue in *In re Merrill Lynch,* in which the plaintiff investors asserted that the defendant made fraudulent representations and omissions to induce investors to invest in several real estate limited partnerships. 154 F.3d at 57-59. The Second Circuit found that both *Bankers Trust* and *First Nationwide* were inapplicable, explaining that those cases

> [H]old that when a creditor has been defrauded[,] RICO injury is speculative when contractual or other legal remedies remain which hold out a real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced. The RICO claim is, thus, not ripe until those remedies are exhausted and the damages are clear.

Id. at 59. The court differentiated the *In re Merrill Lynch* facts, finding the plaintiffs alleged "that the partnerships were fraudulent at the outset because they could never achieve the promised objectives"

and therefore "the investors sustained recoverable out-of-pocket losses when they invested; namely, the difference between the value of the security they were promised and the one they received which could not meet those objectives." *Id.* Critical to the court's decision was that the investor plaintiffs had no other remedies which could mitigate or alleviate the injury, meaning that the amount of damages was "clear and definite[] and the injury was ripe[] at the time of investment." *Id.*

Finally, *Motorola Credit Corporation v. Uzan* involved plaintiff corporations that entered into several agreements whereby they loaned a corporation in Turkey hundreds of millions of dollars to set up cell-phone and communications networks, and as collateral were promised 51% of that corporation's outstanding shares. 322 F.3d 130, 133 (2nd Cir. 2003). "[F]ollowing a series of non-payments and serious concern that the loans would not be repaid [the plaintiffs] sued persons who are alleged to control the third party corporation . . . and to have impaired collateral by diluting the . . . corporation's stock and other maneuvers." *Id.* at 132. Arbitrations concerning the underlying financing transactions were initiated in Switzerland, but were subsequently stayed by the Southern District of New York. *Id.*

The Second Circuit, citing *First Nationwide,* held that the plaintiffs' claims were not ripe because the RICO damages sought might "be abated to the extent that: Plaintiffs realize value on the collateral; Plaintiffs recover in the Swiss arbitrations; or the size of the debt on the underlying contracts, or the obligation to pay it, is

affected by any ruling . . . in the Swiss arbitration that is binding and enforceable." *Id.* at 136. Because these contingencies remained, the plaintiffs' loss suffered on unforeclosed past-due loans could not yet be determined and thus they lacked standing under RICO to assert claims as to those unripe loans. *Id.* The court went on to explain that although

> It may be that the arbitration is a forlorn hope for [the plaintiffs], and that, in any event, the collateral will yield little of value . . . the arbitration does not cease to be a possible influence . . . on the amount of loss simply because the district court has stayed it. Certainly, the district court cannot in that way force the RICO claim to ripen.

Id. at 137.[12]

These decisions make clear that an injury must be "clear and definite," *First Nationwide Bank,* 27 F.3d at 769; *In re Merrill Lynch,* 154 F.3d at 59, and that where damages are "speculative and their amount and nature unprovable" *Bankers Trust*, 859 F.2d at 1105, a RICO claim is not ripe.

ii. Plaintiffs' Lost Debt Injury is not "Clear and Definite" as Required by Second Circuit Law

Even if the Court takes Plaintiffs' allegation in the Complaint that the Estate is insolvent as true,

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[12] The *Motorola* court distinguished its case from *In re Merrill Lynch*, noting that there, the plaintiff "was unsecured, so there was no collateral on which to foreclose, or any other contractual remedy" available. *Id.* at 136.

this does not render their lost debt injury ripe.[13] When an estate is insolvent its "assets are insufficient to cover its debts, taxes, and administrative expenses." Black's Law Dictionary (10th ed. 2014); *accord Zanoni v. Lynch,* No. CV95 0546174S, 1995 WL 645978, at *3 (Conn. Super. Ct. Oct. 26, 1995), *affd,* 79 Conn. App. 309 (2003) (Citing Black's Law Dictionary 5th ed. 1979 for definition of "insolvency" in probate context.). Therefore, the fact that Plaintiffs have alleged the Estate is insolvent is not the same as alleging that it has no assets at all.

Accordingly, while the Estate may not have sufficient assets to cover its expenses, the Probate Court can still afford priority to Plaintiffs' claims in distributing its assets. *See Appeal of Vail,* 37 Conn. 185, 195 (1870) ("If there are trusts connected with the property, or liens upon it, or priorities enforceable in equity, if through fraud, accident or mistake, a class of creditors or beneficiaries are entitled of right to relief as against other creditors or beneficiaries, he may marshal or distribute the

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[13] Defendants argue that because the question is whether the Court has subject matter jurisdiction, it is not required to accept as true Plaintiffs' allegations that the Estate is insolvent. *See e.g., State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007) ("in adjudicating a motion to dismiss for lack of subject-matter jurisdiction, a district court may resolve disputed factual issues by reference to evidence outside the pleadings"). They therefore contend that because only the probate court has the authority to declare the Estate insolvent, and has not, this Court cannot treat it as insolvent for purposes of this Motion. The Court does not need to resolve this factual matter at this stage because even taking it as true that the Estate is not solvent, Plaintiffs' lost debt claims are not ripe.

assets so as to enforce or satisfy the right."); *Gaynor,* 261 Conn. at 596 ("[Connecticut] General Statutes § 45a-175 (a) invests probate courts with jurisdiction over the interim and final accounts of certain fiduciaries, inducting testamentary trustees and executors. In exercising the jurisdiction afforded by this statute, probate courts shall determine the rights of the fiduciaries or the attorney-in-fact rendering the account and of the parties interested in the account.") (internal quotation marks and citations omitted). Plaintiffs therefore might still recover some portion of their lost debt should the probate court afford them priority over David or Mary Lou D'Addario and/or creditors of the Estate.

Moreover, the Probate Court has the ability to enforce the parties' rights by surcharging the fiduciary for breach of trust.[14] *Gaynor,* 261 Conn. at 596-97. Defendants therefore maintain that the

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[14] The probate court also has the power to:

> [l] Charge the fiduciary with property and income received but not accounted for;
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> [2] Charge the fiduciary with property and income which he or she neglected to get;
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> [3] Eliminate credit for claims allowed but not legally due;
>
> [4] Eliminate credit for claims paid in the wrong order of priority;
>
> [5] Eliminate credit for expenses improperly incurred, or chargeable to the fiduciary personally;
>
> [6] Eliminate credit for legacies improperly paid or paid to the wrong person or in the wrong amount or by the wrong medium; and
>
> [7] Establish provision for claims or legacies legally due but not provided for in the account

Gaynor, 261 Conn. at 597 n. 8.

probate court has available to it effective legal remedies that might "eliminate[ ] or significantly reduce[]" Plaintiffs' injury, i.e., the alleged diminution in value of Plaintiffs' promised inheritable beneficial interests, rendering that injury speculative. *See In re Merrill Lynch,* 154 F.3d at 59. Plaintiffs respond that "Defendants' argument presupposes that there are, in fact, net proceeds left within the Estate to distribute. The hard work of Defendant D'Addario, however, has insured that there are none." (Pl.'s Opp'n at 18.) As discussed above, the fact that the Estate is alleged to be insolvent does not mean that it has no assets at all, leaving open the possibility that whatever assets it does have might be reprioritized and distributed to Plaintiffs in lieu of other creditors and beneficiaries. Between this and the potential for additional funds becoming available for distribution by way of the Probate Court imposing a surcharge on the Executors, Plaintiffs' lost debt injury is not "clear and definite," *First Nationwide Bank,* 27 F.3d at 763, and therefore, although any recovery in the probate court proceedings might be a "forlorn hope" through Plaintiffs' lens, *Motorola Credit Corp,* 322 F.3d at 137, their lost debt damages are not yet ripe.[15]

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[15] Plaintiffs attempt to avoid this ripeness problem by alleging any remedy in probate court is futile and that David D'Addario intends to keep the Estate open until after Virginia's death, making it impossible for Plaintiffs to recover. First, the fact that the Probate Court has repeatedly rejected Virginia D'Addario's claims does not indicate that the Probate Court cannot, and has not, adequately protected her rights. *See Lefkowitz v. Bank of N.Y.*, 676 F. Supp. 2d 229, 275-76 (S.D.N.Y. 2009) ("[A]lthough plaintiff has repeatedly

Plaintiffs attempt to distinguish their circumstances from *Bankers Trust* because there is no reasonable prospect they will obtain a substantial recovery on their lost debt claims, as the Estate is "hopelessly insolvent." Nowhere in *Bankers Trust,* however, does the Second Circuit require that there be a "high probability" that the plaintiff would obtain a "substantial recovery." (Pl.'s Opp'n at 17.) Rather, it stated, "[s]hould [some or all of the fraudulently transferred funds] be recovered, [the plaintiffs] would benefit . . . and its injury would decrease. As a result, the damages in this area are speculative and unprovable." *Bankers Trust,* 859 F.2d at 1106 (internal quotation marks and citations omitted). The Court is mindful of the language in *In re Merrill Lynch* that "when . . . legal remedies remain which hold out a *real possibility* that the debt, and therefore the injury, may be eliminated or *significantly reduced,*" a lost

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complained about her treatment in state court, the history of her extensive and extremely persistent involvement in the various probate proceedings . . . and the extraordinarily extensive court rulings and explanations for their decisions amply demonstrate that plaintiff has been given, and continues to be given, ample opportunity to be heard in state court. The fact that most, though not all, of plaintiffs complaints have been rejected does not itself reflect a failure by the state courts to protect her rights."). Second, while David D'Addario may have threatened to keep the Estate open past Virginia D'Addario's death, the conclusion that the Probate Court will permit the Estate to remain open indefinitely does not automatically follow. In fact, Plaintiffs' Complaint even acknowledges that this is not a certainty. (*See* Am. Compl. ¶ 97 ("There is also a serious question as to whether the Estate will close within the foreseeable future.")). This Court will not assume that any remedy through Connecticut's probate system is futile.

debt injury remains speculative. 154 F.3d at 59 (emphasis added). *Motorola Credit Corp* clarifies that even where a legal remedy provides just a "forlorn hope" that will "yield little of value," the possibility of recovery through available legal remedy renders a RICO claim unripe. 322 F.3d at 137.

Consequently, Plaintiffs' RICO claims for lost debt based on their promised inheritable beneficial interests are not ripe and must be dismissed.

C. Plaintiffs' Collection Expenses are Ripe

Plaintiffs also claim separate and independent injury as a result of Defendants' RICO violations in the form of "attorneys' fees and other expenses incurred . . . in connection with their unsuccessful efforts to enforce their claims against the Estate." (Am. Compl. ¶ 142(b).)[16] It is well settled that legal fees may constitute RICO damages when they are the proximate consequence of a RICO violation. *See Stochastic,* 995 F.2d at 1167; *Bankers Trust,* 859 F.2d at 1105. "For collection expenses damages, the plaintiffs must show by a preponderance of the evidence the amount of legal fees and other expenses that they incurred in their unsuccessful attempts to collect [on their interests in the Estate] which were proximately caused by the defendant(s)' alleged RICO

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[16] Plaintiffs pursue only those expenses within the four-year statute of limitations, which they allege constitute expenses exceeding that which would have been necessary absent Defendants' deliberate wrongful conduct (i.e., the Estate should have closed many years before Plaintiffs made these expenditures). Plaintiffs claim this amount to be in excess of $200,000. (Am. Compl. ¶ 142(b).)

violations." *The Cadle Co. v. Flanagan,* No. CIV. 301CV531AVC, 2006 WL 860063, at *8 (D. Conn. Mar. 31, 2006); *see also Stochastic,* 995 F.2d at 1166-67 (citing *Holmes v. Securities Investor Protection Corp.,* 503 U.S. at 269-70).

For instance, the defendants in *Bankers Trust* had initiated fraudulent lawsuits against the plaintiffs and allegedly bribed one of the judges, all in an effort to frustrate collection of the debt owed the plaintiff. 859 F.2d at 1099. The Second Circuit held that the plaintiff could recover as RICO damages (1) legal fees and other expenses incurred in fighting the frivolous lawsuits in New York, (2) legal fees and other expenses spent in overcoming bribe-induced decisions in the South Carolina action, and (3) legal fees and other expenses incurred in obtaining a revocation of the initial reorganization plan. *Id.* at 1105. Similarly, the *Stochastic* court held that the plaintiff could recover legal fees and other expenses incurred in its attempt to collect on state court judgments against the defendants for unpaid insurance premiums where the alleged RICO violation involved the defendants' efforts to prevent the plaintiff from collecting on those judgments. 995 F.2d at 1167; *see also Flanagan,* 2006 WL 860063, at *7 (Finding that plaintiffs were "entitled to pursue RICO claims for damages incurred in collecting outstanding debts where the defendants had frustrated collection through fraud."). On the other hand, the court in *Stochastic* rejected the plaintiffs argument that it was also entitled to recover fees and expenses incurred in originally obtaining the state court judgments. *Id.* at 1166-67 ("[I]t cannot plausibly be contended that efforts

to impede the collection of the . . . judgments proximately caused [the plaintiffs] prior expenditure of legal fees in obtaining the judgments.").

Clinging to this latter aspect of *Stochastic*'s holding, Defendants contend that "Plaintiffs' expenses are not recoverable because they represent prejudgment litigation costs that Plaintiffs voluntarily elected to incur, as opposed to expenses that Plaintiffs were forced to incur by virtue of a RICO violation aimed at frustrating the collection of a judgment or other sum." (Def.'s Reply at 7.) Furthermore, they argue the very cases Plaintiffs cite demonstrate why Plaintiffs' collection expenses are not recoverable, singling out *Angermeir v. Cohen,* 14 F. Supp. 3d 134 (S.D.N.Y. 2014) and *Cadle v. Flanagan,* 2006 WL 860063, as illustrative of this point. Attempting to distinguish these cases, Defendants maintain that in *Angermeir* "the legal fees that the court concluded were recoverable were expended in response to allegedly fraudulent lawsuits that were instituted by *the defendants* to harass plaintiffs as part of the defendants' alleged racketeering activity" and in *Flanagan* "the plaintiffs had previously obtained a judgment against one of the defendants . . . [and the] plaintiffs' collection efforts were precisely what were frustrated by the defendant's alleged RICO violations in that case." (Def.'s Reply at 7 (emphasis in original) (internal citations omitted.)

Contrary to Defendants' position, the Court finds that Plaintiffs' claimed collection expenses are indeed analogous to those whose recovery was permitted in *Stochastic, Angermeir* and *Flanagan.* First, the fact that there is no judgment against

Defendants does not distinguish this case–the only difference where there is a judgment is that consequently there is also a sum certain, whereas Plaintiffs' interests will not be apportioned definitively until the Estate closes. That they have an interest though, is certain. Furthermore, characterizing Plaintiffs' expenses as "voluntary" ignores the fact that at this stage the Court accepts as true the allegations in the Complaint-that Defendants are intentionally keeping the Estate open through fraudulent means, while simultaneously looting it, to prevent Plaintiffs from ever recovering their interest in the Estate.

The Court finds it plausible that Defendants' alleged RICO violations (maintaining control of the Estate in order "to plunder, pillage and loot" its assets) proximately caused Plaintiffs to incur expenses in Probate Court in an effort to collect on their interest. (Am. Compl. ¶ 121.) Construing Plaintiffs' interest in the Estate as an outstanding debt, albeit for an unknown amount at this time, and Defendants' conduct as efforts to frustrate collection of that debt, Plaintiffs may pursue RICO claims for damages incurred attempting to close the Estate and collect their promised inheritable beneficial interest. *See Flanagan,* 2006 WL 860063 at *7 ("although [the defendant's] bankruptcy case [was] . . . still pending at the time of trial . . . the plaintiffs were nevertheless entitled to pursue RICO claims for damages incurred in collecting outstanding debts where the defendants had frustrated collection through fraud.").

D. Plaintiffs Have Failed to Plead the Required Elements of a RICO Claim

To state a claim that a defendant has violated the substantive RICO statute, 18 U.S.C. § 1962, Plaintiffs must allege the existence of seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.,* 719 F.2d 5, 17 (2d Cir. 1983) (quoting 18 U.S.C. § 1962 (a)-(c)). Courts have warned that "each subpart [of Section 1962] requires distinct elements and fact patterns and rarely can a defendant simultaneously violate all four." *Lesavoy v. Lane,* 304 F. Supp. 2d 520, 532 (S.D.N.Y. 2004), *aff'd* in relevant part and *rev'd* in part on other grounds, *Lesavoy v. Gattullo-Wilson*, 170 F. App'x 721 (2d Cir. 2006). Plaintiffs must also allege they were "injured in [their] business or property *by reason of* a violation of section 1962." *Moss,* 719 at 17 (internal quotation marks and citations omitted) (emphasis in original).

i. Plaintiffs Have Alleged a Pattern of Racketeering Activity

In order to establish a claim under either Section 1962(b) or (c), the plaintiff must demonstrate that the defendants engaged in a "pattern of racketeering activity." 18 U.S.C. §§ 1962(b) and (c); *see also GICC Capital Corp.*, 67 F.3d at 465 ("Under any prong of § 1962, a plaintiff in a civil

RICO suit must establish a pattern of racketeering activity."). Defendants' first substantive attack of Plaintiffs' RICO claims focuses on this requirement. To establish a "pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Essentially, a plaintiff "must provide some basis for a court to conclude that defendants' activities were neither isolated nor sporadic." *GJCC Capital Corp.*, 67 F.3d at 467 (internal quotation marks and citations omitted).

Continuity 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." *Id.* at 241. Defendants maintain that Plaintiffs have not properly pled the continuity requirement for a RICO pattern of racketeering activity because the alleged conduct was undertaken by a "discrete set of actors" and was directed at "a small group of victims" for a "limited purpose." (Def.'s Mot. to Dismiss at 17.)[17] In opposition,

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[17] Defendants cite a series of district court cases they argue so hold. (Def.'s Mot. to Dismiss at 17.) Notably, one ofthose cases, *Weizmann Inst. of Sci. v. Neschis*, 229 F. Supp. 2d 234, 255-56 (S.D.N.Y. 2002), upon which others also rely, was later held to properly allege continuity upon repleading. *See Weizmann Inst. of Sci. v. Neschis*, 421 F. Supp. 2d 654, 689 (S.D.N.Y. 2005) (Continuity found where scheme to obtain control over estate assets took place over seven years and involved 24 predicate acts and two participants.). To the extent the factual patterns of Defendants' cited cases are similar to this one, the Court agrees with Plaintiffs that they are not consistent with the Second Circuit law articulated above.

Plaintiffs contend they have adequately alleged both open-ended and closed-ended continuity.[18] "At the pleading stage, the hurdle [for showing continuity] is relatively low." *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.,* 530 F. Supp. 2d 486,497 (S.D.N.Y. 2007), *aff'd,* 328 F. App'x 695 (2d Cir. 2009).

To satisfy closed-ended continuity Plaintiff must allege "a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months . . . do not satisfy this requirement." *H.J. Inc.*, 492 U.S. at 242. The Second Circuit has "never found a closed-ended pattern where the predicate acts spanned fewer than two years." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004); *see also Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, 282 F. App'x 94, 98-99 (2d Cir. 2008); *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229,242 (2d Cir.1999); *GICC Capital Corp.*, 67 F.3d at 467. "Although closed-ended continuity is primarily a temporal concept, other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes

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[18] Because the Court finds Plaintiffs' Complaint to allege closed-ended continuity, it need not decide whether it also meets the requirements for open-ended continuity. *See GICC Capital Corp. v. Tech. Fin. Grp., Inc.*, 67 F.3d 463,466 (2d Cir. 1995) ("[A] plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (*i.e.*, past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (*i.e.*, past criminal conduct extending over a substantial period of time.") (internal quotation marks omitted).

are also relevant in determining whether closed-ended continuity exists. *Cofacredit, S.A.,* 187 F.3d at 242; *accord GICC Capital Corp.,* 67 F.3d at 467.

Here, Plaintiffs have alleged over 47 predicate acts, including six different types of act[19] and six different schemes,[20] with over seven participants and 12 victims, extending over a period of at least 19 years, from 1996-2015. By comparison, in *Procter & Gamble Co. v. Big Apple Industrial Buildings., Inc.* involving the construction and lease of a commercial building, the court found that continuity was established despite there being only two victims and four participants in the RICO scheme, which lasted approximately three years. The court held there was a pattern of racketeering behavior where the plaintiff alleged that the defendants' fraudulent schemes included:

> (1) inducing execution of the ten-year studio lease by fraudulently misstating their experience, expertise, and construction cost estimates; (2) inducing plaintiffs to continue with the project, and inducing P & G to guarantee construction financing by fraudulently misrepresenting and concealing costs; (3) fraudulently diverting

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[19] These are: mail fraud, wire fraud, money laundering, monetary transactions with unlawful proceeds, interstate racketeering, and interstate transport of misappropriated funds. (Am. Compl. ¶ 122.)

[20] These are: the Honeyspot Road Scheme, the Frenchtown Road Scheme, the Red Knot Forbearance Agreement Scheme, the Estate Real Estate Schemes, the Silver Knot/Wise Metals Scheme, and the Red Knot/David D'Addario Settlement Scheme. (*Id.* ¶¶ 28-71.)

> construction funds and charging excessive professional and other fees; (4) improperly escrowing construction loan funds to build a "cushion" against discovery of the alleged fraud; and (5) fraudulently scheming to collect "interim rent" for delays primarily caused by defendants.

879 F.2d 10, 18-19 (2d Cir. 1989); *see also, Metromedia Co. v. Fugazy*, 983 F.2d 350, 368-69 (2d Cir. 1992) (affirming the jury finding of civil RICO violations where a single plaintiff alleged four varieties of predicate acts committed by just two participants over the span of two years); *Jacobson v. Cooper,* 882 F.2d 717, 720 (2d Cir. 1989) (closed-ended continuity sufficiently pied despite a narrow scheme to steal from one person, where a single victim alleged six varieties of predicate acts committed by two participants over "a matter of years"). In fact, *H.J. Inc.* itself held that racketeering activities occurring with some frequency over a six year period may be sufficient to establish continuity. 492 U.S. at 250.

In accordance with these Second Circuit decisions the Court finds that dismissal based upon too few participants, victims, or schemes is unwarranted here.

ii. Section 1962(b)

Section 1962(b) prohibits "any person through a pattern of racketeering activity or through collection of an unlawful debt [from] acquir[ing] or maintain[ing], directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign

commerce." 18 U.S.C. § 1962(b). To state a claim under Section 1962(b), a plaintiff must allege that:

> (1) the purpose of the defendants racketeering activity was to acquire an interest or to maintain control of the enterprise; (2) that the defendants in fact acquired an interest or maintained control of the enterprise through their pattern of racketeering activity; and (3) that the plaintiff suffered injury as a result of the acquisition of the enterprise.

DeFazio v. Wallis, 500 F. Supp. 2d 197,208 (E.D.N.Y. 2007). "The purpose of Section 1962(b) is to prohibit the takeover of a legitimate business through racketeering, typically extortion or loansharking." *United States Fire Ins. Co. v. United Limo. Serv. Inc.*, 303 F. Supp. 2d 432, 450 (S.D.N.Y. 2004) (internal quotations omitted). Defendants focus on the first and third of these requirements as grounds for dismissing Plaintiffs' 1962(b) claim.

a. Plaintiffs Sufficiently Link Racketeering to the Acquisition/ Maintenance of the Enterprise

Defendants argue that because as Executor, David D'Addario's interest or control of the alleged enterprise predates the racketeering activity and would have continued despite the alleged racketeering activity, Plaintiffs have failed to plead the necessary link between the racketeering activity and the acquisition or maintenance of an interest or control of the enterprise. *See, e.g., Black Radio Network v. NYEX Corp.*, 44 F. Supp. 2d 565, 579 (S.D.N.Y.

1999) (dismissing Section 1962(b) claim because "the defendants did not need to engage in the alleged racketeering activity to maintain control of the alleged enterprise").[21] In response, Plaintiffs contend that David D'Addario's object was to engage in a pattern of racketeering activity in order to maintain control over the affairs of the Estate for much longer than he would have absent his misconduct, and therefore they have sufficiently pled the link between Defendants' racketeering activity and maintaining control over the enterprise.

Plaintiffs direct the Court to the Red Knot Forbearance Agreement, which they allege was used as a "club" to convince the probate and state courts that David should remain in control of the Estate. (Am. Compl. ¶ 63.) According to Plaintiffs' Complaint, David D'Addario essentially created a new entity, Red Knot, through his attorney, which was ostensibly owned and controlled by longtime friend of David D'Addario and co-defendant, Garvey, but in reality was "the mere alter-ego of David D'Addario and was used by David as a vehicle to maintain control over the affairs of the Estate as he continued to plunder, pillage and loot" it. (*Id.* ¶ 54.) This was made possible because in the Red Knot Agreement

> the Estate granted Red Knot a lien on virtually all of the Estate's assets, and

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[21] Defendants concede that for purposes of Plaintiffs' §1962(b) claim the Estate constitutes a RICO enterprise. *See Gunther v. Dinger*, 547 F. Supp. 25, 27 (S.D.N.Y. 1982) (Were the definition of an enterprise to include any legal entity or group is purposely broad, the court found "no reason why this reasoning should not extend to include an estate within RICO's definition of an enterprise.").

> also provided that, should David D'Addario ever be removed as an Executor of the Estate, Red Knot (say, "David") had the immediate right to engage in collection efforts on the over $48,000,000 allegedly owed to Red Knot, including the right to foreclose on all of the Estate's assets.

(*Id.* ¶ 59.)

Thus, although courts have dismissed Section 1962(b) claims where the defendant's control of the enterprise predated the racketeering activity, as is true here, those courts also determined that the defendant's control over the enterprise was not furthered by the defendant's conduct. *See Neiman Marcus Grp., Inc. v. Dispatch Transp. Corp.*, No. 09 CV 6861 NRB, 2011 WL 1142922, at *9 (S.D.N.Y. Mar. 17, 2011); *Black Radio Network,* 44 F. Supp. 2d at 579. Here, the facts plausibly allege that it was only through David D'Addario's fraudulent acts that the Estate remained open for such a long period of time (and continues to remain open today), and importantly, that the object of Defendants' racketeering activity, as evidenced by the Red Knot Forbearance Agreement, was to maintain control over the Estate. Consequently, the Court will not dismiss Plaintiffs' 1962(b) claim for failing to allege the link between the racketeering activities and maintaining control over the enterprise.

b. Plaintiffs Failed to Allege a Separate Acquisition and Maintenance Injury

In order to state a cause of action under Section 1962(b), Plaintiff must allege "a distinct acquisition

injury" other than "injuries resulting from the commission of predicate acts." *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998) (internal quotation marks and citations omitted); *see also United States Fire Ins. Co. v. United Limousine Serv., Inc.*, 303 F. Supp. 2d 432, 450 (S.D.N.Y. 2004) ("the plaintiff must allege an acquisition or maintenance injury separate and apart from the injury suffered as a result of the predicate acts of racketeering." (internal quotations omitted). It is "not sufficient merely to allege an injury caused by the predicate acts themselves . . . ." *Dornberger v. Metro. Life Ins. Co.*, 961 F. Supp. 506, 525 (S.D.N.Y. 1997) (citing *Quaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990)). "The rationale for this acquisition injury requirement is . . . [that] the essence of a § 1962(b) violation is not the commission of predicate acts, but rather the acquisition or maintenance of an interest in or control of an enterprise." *Id.* (internal quotation marks omitted). Accordingly, "a plaintiff cannot recover under § 1962(b) unless he alleges a distinct injury caused not by predicate acts but by the defendant's acquisition or maintenance of an interest in or control of an enterprise." *Id.*[22]

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[22] Plaintiffs argue that there is no such requirement, relying on *European Community v. RJR Nabisco, Inc.*, 764 F.3d 149 (2d Cir. 2014), *rev'd and remanded*, ___ U.S. ___, 136 S.Ct. 2090 (2016). However, that case to the extent it remains good law, does not appear to make any mention of whether § 1962(b) requires a showing of an acquisition or maintenance injury. Moreover, Defendants cite a case decided after *European Community* where the court continued to hold that in order to establish a § 1962(b) claim, a plaintiff must establish an injury caused by the acquisition or maintenance of an interest or control in the enterprise. *See Wood v. Gen. Motors Corp.*, No. 08 CV 5224 PKC AKT, 2015 WL 1396437, at *9 (E.D.N.Y. Mar. 25, 2015).

Plaintiffs' Amended RICO case statement alleges that

> While the individual Predicate Acts drained assets and income out of the Estate, it was the other wrongful conduct of the Defendants, such as the sham Red Knot Forbearance Agreement, that allowed David D'Addario to maintain, directly or indirectly, control over the affairs of the Estate, and extended the term of his control over the affairs of the Estate, which, in turn, allowed David D'Addario to continue to plunder, pillage and loot the assets of the Estate, and which eventuall[y] led to the insolvency of the Estate.

(Am. RICO Stmt. ¶ 15.) However, they also assert:

> Defendants engaged in a pattern of wrongful conduct involving mail fraud, wire fraud, money laundering, monetary transactions with unlawful proceeds, interstate racketeering, and interstate transport of misappropriated funds (the "Predicate Acts") to allow David D'Addario to acquire an interest in, and then maintain control over, the affairs of the Estate . . . and thus allow David D'Addario to plunder, pillage and loot the assets of the Estate over the last 29 years.

(Am. RICO Stmt. ¶ 5.) These two statements each allege the same injury: Defendant D'Addario's continued control over the Estate and his draining of its assets.[23] Thus, Plaintiffs' own Complaint and

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[23] That Plaintiffs' RICO statement concludes "the pattern of racketeering activity and the enterprise are separate" does not save their failure to provide facts supporting this allegation. (Am. RICO stmt. ¶ 7.)

RICO statement belie their claim of a separate and distinct maintenance injury.

iii. Section 1962(c)

Section 1962(c) makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). "To establish a violation of 18 U.S.C. § 1962(c) . . . a plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001) (internal quotations omitted). "The requirements of section 1962(c) must be established as to each individual defendant." *Id.* Thus, to state a claim under Section 1962(c), a plaintiff must separately allege the existence and the conduct of an enterprise through which the defendants committed their racketeering activity. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994).

A RICO "enterprise" includes "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). To establish an association-in-fact enterprise, a plaintiff must allege that the enterprise exhibited "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." *Boyle v. United States*, 556 U.S. 938, 946 (2009). So, "[a]n association-in-fact enterprise is a group of persons associated together

for a common purpose of engaging in a course of conduct." *Id.* (internal quotation marks omitted).

To determine whether a complaint has adequately alleged an association-in-fact enterprise, the Second Circuit has directed that courts "look to the hierarchy, organization, and activities of the association to determine whether its members functioned as a unit." *First Capital,* 385 F.3d at 174-75 (internal quotation marks omitted) (court found no enterprise where plaintiff alleged it was comprised of the family members, associates, and attorneys for a single lead defendant and organized for the purpose of "conceal[ing] [the defendant's] assets from his creditors."). "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The enterprise is not the pattern of racketeering activity; it is an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette,* 452 U.S. 576, 583 (1981) (cited with approval in *Boyle,* 556 U.S. at 947) (internal quotation marks omitted); *see also D. Penguin Bros. v. City Nat. Bank,* 587 F. App'x 663, 667-68 (2d Cir. 2014).[24]

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[24] The Court rejects Plaintiffs' argument that "the Supreme Court in Boyle clarified that . . . there is no need that a plaintiff allege that the enterprise existed separate and apart from the alleged racketeering acts." (Pl.'s Opp'n at 38.) Rather, *Boyle* reaffirmed its holding in *Turkette*, 452 U.S. at 583, that "the existence of an enterprise is an element distinct from the pattern of racketeering activity and proof of one does not necessarily establish the other" but that "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise may in particular cases coalesce." 566 U.S. at 947.

Plaintiff points to the following facts in the Amended Complaint as alleging an association-in-fact enterprise: Mary Lou D'Addario's refusal to complain about David D'Addario's failure to close the Probate Estate; Greg Garvey/Red Knot's refusal to foreclose under the sham Forbearance Agreement when they were aware of David D'Addario's systematic depletion of Estate assets; and the fact that Greg Garvey worked with David D'Addario to divert the profits from the sale of Wise Metals out of the Estate to David D'Addario. (Pl.'s Reply at 37.)

Defendants maintain that although Plaintiffs describe allegations of conduct by various defendants, each of these examples involve discreet conduct between David D'Addario and a single defendant, not a relationship between the defendants as a whole. Thus, Defendants contend that Plaintiffs describe a "hub-and-spoke" structure that courts have deemed insufficient to support a claim under 18 U.S.C. § 1962(c). *See Cedar Swamp Holdings, Inc. v. Zaman*, 487 F. Supp. 2d 444, 450-51 (S.D.N.Y. 2007) ("courts have held that allegations of a hub-and-spokes structure—that is, allegations that a common defendant perpetrated various independent frauds, each with the aid of a different co-defendant—do not satisfy the enterprise element of a RICO claim" but rather "a plaintiff must allege that the defendants operated symbiotically and played necessary roles in the achievement of a common purpose."); *Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 135 (E.D.N.Y. 2010) ("Plaintiff alleges that Newsday, its employees, and various independent contractors engaged in a series of independent

frauds that somehow benefitted Newsday. These 'hub and spokes' allegations are insufficient to support a conclusion that the various defendants were associated with one another for a common purpose."); *see also McDonough v. First Am. Title Ins. Co.*, *N*o. 10-CV-106-SM, 2011 WL 285685, at *5 (D.N.H. Jan. 28, 2011) (citing *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 370 (3rd Cir.2010)).

Significantly, the Second Circuit cases Plaintiffs claim support their having pled an association-in-fact enterprise involve facts that stand in stark contrast to the allegations in this Complaint. *See United States v. Pierce*, 785 F.3d 832, 838-39 (2d Cir. 2015); *United States v. Applins,* 637 F.3d 59, 73, 77-78 (2d Cir. 2011). In *Pierce,* the Second Circuit affirmed the jury's findings of an association-in-fact enterprise based on evidence that the organization had a base of operation, carried guns to protect them from "beefs with other crews," members had tattoos and signs that signified their membership in the organization, and committed various crimes to further the enterprises goals. 785 F.3d at 838-39. Similarly, in *Applins,* the Second Circuit affirmed a jury's finding that an association-in-fact enterprise existed, known as the "Elk Block Gang," based on evidence that the organization had a set territory of operation, members had tattoos and signs that signified membership in the organization, members pooled their money to purchase narcotics and firearms, members "graduated" into senior membership in the enterprise. 637 F.3d at 65-71. The Court fails to see how the facts in Plaintiffs'

Complaint are analogous to *Pierce* and *Applins* and finds that there are not sufficient factual allegations supporting any mutual purpose, nor relationships among Defendants and others associated with the enterprise, to constitute an association-in-fact enterprise. *See Boyle,* 556 U.S. at 946.

Because Plaintiffs' Complaint cannot be plausibly read to allege the existence of an association-in-fact enterprise, their 1962(c) claim fails.[25]

iv. Due to Deficiencies in Substantive claims, Section 1962(d) Must Also be Dismissed

"To establish the existence of a RICO conspiracy, a plaintiff must prove "the existence of an agreement to violate RICO's substantive provisions." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.,* 187 F.3d 229, 244 (2d Cir. 1999). "'Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.'" *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 353 (E.D.N.Y. 2000) (quoting *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993)); *see also, First Capital*, 385 F.3d at 182 (dismissing plaintiffs conspiracy claim under 1962(d) because they did not "adequately allege a substantive violation of RICO").

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[25] The Court therefore will not address Defendants' additional arguments for dismissing Plaintiffs' section 1962(c) claim.

E. Dismissal of Plaintiffs' RICO Claim

Because Plaintiffs fail to allege a separate and distinct maintenance injury and fail to allege an association-in-fact enterprise, their RICO claim fails and Count One is dismissed.

F. Lacking Federal Question or Diversity Jurisdiction, Supplemental Jurisdiction is Declined

Dismissal of Plaintiffs' RICO cause of action (Count One), leaves no basis for federal question jurisdiction. Moreover, the Court lacks diversity jurisdiction over Plaintiffs' remaining state law claims notwithstanding Plaintiffs' contrary contention.[26] Virginia D'Addario has sued not only on behalf of herself individually but also as Executrix of her mother's Estate and she therefore must establish the citizenship of herself both in her individual capacity and in her official capacity as Executrix. *See e.g., Coello v. Conagra Foods, Inc.*, No. 3:15-CV-83 (CSH), 2015 WL 507580, at *2 (D. Conn. Feb. 6, 2015). As Executrix, Virginia D'Addario is deemed a citizen of Connecticut. *See*

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[26] Plaintiffs concede that diversity jurisdiction does not exist for the claims asserted against the Defendants by Virginia D'Addario, Executrix, but argue that because diversity jurisdiction under 28 U.S.C. §1332 exists for the claims against the Defendants asserted by Virginia D'Addario individually the Court retains jurisdiction over the case. This is an incorrect statement of the law. *See e.g., Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978) (Section 1332 "require[s] complete diversity of citizenship. That is, diversity jurisdiction does not exist unless each defendant is a citizen of a different State from each plaintiff.").

28 U.S.C. § 1332(c)(2) ("the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."). Because Defendants Silver Knot, LLC and Nicholas Vitti are also citizens of Connecticut, complete diversity is destroyed and the Court has no diversity jurisdiction over the remaining state law claims.

The Court may decline to exercise supplemental jurisdiction where it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims. *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *see also Baylis v. Marriott Corp.*, 843 F.2d 658, 665 (2d Cir. 1988) ("[W]hen all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise jurisdiction over the remaining state-law claims."). Since no claims conferring original jurisdiction remains, the Court dismisses Plaintiffs' remaining state law claims.

III. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED. The Clerk is requested to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut
this 22nd day of March 2017.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 17-1162

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of October, two thousand eighteen.

VIRGINIA A. D'ADDARIO, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann. T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Plaintiff - Appellant,

—v.—

DAVID D'ADDARIO, MARY LOU D'ADDARIO KENNEDY, GREGORY S. GARVEY, RED KNOT ACQUISITIONS, LLC, SILVER KNOT, LLC, NICHOLAS VITTI,

Defendants - Appellees.

ORDER

Appellees, David D'Addario, Mary Lou D'Addario Kennedy, Gregory S. Garvey, Red Knot Acquisitions, LLC, Silver Knot, LLC, and Nicholas Vitti, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/

Catherine O'Hagan Wolfe, Clerk

[SEAL]

18 U.S.C.A. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any pa1t of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

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

(c) 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.

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

18 U.S.C.A. § 1964

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the cou1i may at any time enter such restraining orders or prohibitions, or

take such other actions, including the acceptance of satisfactory perfonnance bonds, as it shall deem proper.

(**c**) Any person injured in his business or property by reason of a violation of sec tion 1962 of this chapter may sue therefor in any appropriate United States district coUJi and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.