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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3232

[Filed November 12, 2019]

STEVEN MENZIES,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
SEYFARTH SHAW LLP,	)
an Illinois limited liability	)
partnership, *et al.*,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:15-cv-3403 — **John Robert Blakey**, *Judge*.

ARGUED MAY 22, 2019 —
DECIDED NOVEMBER 12, 2019

Before HAMILTON, SCUDDER, and ST. EVE, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Insurance executive Steven Menzies sold over $64 million in his company's stock but did not report any capital gains on his 2006 federal income tax return. He alleges that his underpayment of capital gains taxes (and the related penalties and interest subsequently imposed by the Internal Revenue Service) was because of a fraudulent tax shelter peddled to him and others by a lawyer, law firm, and two financial services firms. Menzies advanced this contention in claims he brought under the Racketeer Influenced and Corrupt Organizations Act or RICO and Illinois law. The district court dismissed all claims.

Menzies's RICO claim falls short on the statute's pattern-of-racketeering element. Courts have labored mightily to articulate what the pattern element requires, and Menzies's claim presents a close question. In the end, we believe Menzies failed to plead not only the particulars of how the defendants marketed the same or a similar tax shelter to other taxpayers, but also facts to support a finding that the alleged racketeering activity would continue. To conclude otherwise would allow an ordinary (albeit grave) claim of fraud to advance in the name of RICO—an outcome we have time and again cautioned should not occur. In so holding, we in no way question whether a fraudulent tax shelter scheme can violate RICO. The shortcoming here is one of pleading alone, and it occurred after the district court authorized discovery to allow Menzies to develop his claims.

As for Menzies's state law claims, we hold that an Illinois statute bars as untimely the claims advanced against the lawyer and law firm defendants. The claims against the two remaining financial services defendants can proceed, however.

So we affirm in part, reverse in part, and remand.

I

The original and amended complaints supply the operative facts on a motion to dismiss. On appeal we treat all allegations as true, viewing them in the light most favorable to Steven Menzies. See *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 539 (7th Cir. 2005).

Menzies is the co-founder and president of an insurance company called Applied Underwriters, Inc. or AUI. In 2002 advisers from Northern Trust approached him to begin a financial planning relationship. In time these advisers pitched Menzies and his colleague and AUI co-founder Sydney Ferenc on a tax planning strategy (dubbed the Euram Oak Strategy) to shield capital gains on major stock sales from federal tax liability. Not knowing the strategy reflected what the IRS would later deem an abusive tax shelter, Menzies agreed to go along with the scheme. He conducted a series of transactions that, through the substitution of various assets and the operation of multiple trusts, created an artificial tax loss used to offset the capital gains he realized upon later selling his AUI stock.

Northern Trust worked with others in marketing and implementing the strategy. Christiana Bank, for example, served as trustee for some of Menzies's trusts while tax attorney Graham Taylor and his law firm, Seyfarth Shaw, provided legal advice. Taylor repeatedly assured Menzies and Ferenc of the tax shelter's legality, eventually opining that there was a "greater than 50 percent likelihood that the tax treatment described will be upheld if challenged by the IRS." Taylor stood by his more-likely-than-not opinion even after being indicted in 2005 for the commission of unrelated tax fraud—a development he never disclosed to Menzies.

In 2006 Menzies sold his AUI stock to Berkshire Hathaway for over $64 million. Nowhere in his 2006 federal income tax return did Menzies report the sale or any related capital gains. Nor did Christiana Bank, which filed tax returns on behalf of Menzies's trusts, report any taxable income from the stock sale. When the IRS learned of these developments, it commenced what became a three-year audit and found that the primary purpose of the Euram Oak Strategy was tax evasion. Facing large fines and potential adverse legal action, Menzies agreed in October 2013 to settle with the IRS, paying over $10 million in back taxes, penalties, and interest.

In April 2015 Menzies filed suit in the Northern District of Illinois, advancing a civil RICO claim and various Illinois law claims against Taylor, Seyfarth Shaw, Northern Trust, and Christiana Bank. The district court granted the defendants' motion to dismiss, but from there twice allowed Menzies to amend his complaint. Indeed, the district court afforded Menzies a full year of discovery to develop facts to support renewed pleading of the RICO claim that appeared in his second amended complaint in August 2017. On the defendants' motion, the district court dismissed that complaint for failure to state any claim. Menzies now appeals.

II

A. The RICO Bar for Actionable Securities Fraud

Before addressing the district court's dismissal of Menzies's RICO claim, we confront a threshold issue pressed by the defendants—whether an amendment to the RICO statute added by the Private Securities Litigation Reform Act of 1995 or PSLRA precluded Menzies from bringing a RICO claim in the first instance. We agree with the district court that the bar now embodied in 18 U.S.C. § 1964(c) did not prevent Menzies from pursuing a RICO claim on the facts alleged in his complaint.

In enacting the PSLRA, Congress did more than seek to curb abusive practices in securities class actions by, for example, imposing a heightened pleading standard, requiring a class representative to be the most adequate plaintiff, and limiting damages. See *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 475–76 (2013) (describing the PSLRA). The enactment also amended RICO to prohibit a cause of action based on "any conduct that would have been *actionable as fraud in the purchase or sale of securities*." 18 U.S.C. § 1964(c) (emphasis added).

Upon reviewing the allegations in Menzies's original complaint, the district court denied the defendants' motion to dismiss the RICO claim based on the bar in § 1964(c). The district court started with the observation that "nothing about the sale of his AUI stock itself was fraudulent." *Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1116 (N.D. Ill. 2016) ("*Menzies I*"). "By selling Plaintiff a bogus tax shelter plan," the court reasoned, "[d]efendants were attempting to hide the resulting income from Plaintiff's sale of stock from the IRS," and "[i]n both form and substance" this was a "case about tax shelter fraud, not securities fraud." *Id*.

The defendants urge us to reverse, contending that the RICO bar applies because the whole point of the Euram Oak Strategy was for Menzies to avoid realizing taxable gains from a stock sale. But for the stock sale, the tax shelter meant nothing, thereby easily satisfying, as the defendants see it, the requirement for the alleged fraud to be "in connection with" the sale of a security and thus actionable as securities fraud under section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

We see the analysis as more difficult. By its terms, the bar in § 1964(c), as the district court recognized, requires asking whether the fraud Menzies alleged in his complaint would be actionable under the securities laws, in particular under section 10(b) and Rule 10b-5. See *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 871 (9th Cir. 2010) (assessing the PSLRA bar and explaining that "[a]ctions for fraud in the purchase or sale of securities are controlled by section 10(b) of the Securities Exchange Act of 1934"); *Bixler v. Foster*, 596 F.3d 751, 759–60 (10th Cir. 2010) (adopting a similar approach); *Affco Investments 2001, LLC v.*

Proskauer Rose, LLP, 625 F.3d 185, 189–90 (5th Cir. 2010) (same).

Had he sought to plead a securities fraud claim under those provisions, Menzies would have had to allege a material misrepresentation or omission by a defendant, scienter, a connection between the misrepresentation or omission and the purchase or sale of a security, reliance, economic loss, and loss causation. See *Glickenhaus & Co. v. Household Int'l., Inc.*, 787 F.3d 408, 414 (7th Cir. 2015) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014)). The district court got it right in concluding that the allegations in Menzies's original complaint did not amount to actionable securities fraud under federal law.

The Supreme Court supplied substantial direction in *SEC v. Zandford*, 535 U.S. 813 (2002). The SEC brought a civil securities fraud action against a stockbroker who sold his elderly and disabled clients' securities and pocketed the proceeds. See *id.* at 815. The Court granted review to determine whether the stockbroker's theft, which the SEC alleged also constituted securities fraud, was sufficiently "in connection with" the sale of the clients' securities to fall within section 10(b) and Rule 10b-5. The Court answered yes, explaining that both provisions "should be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Id.* at 819 (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)). As a practical pleading matter, the Court continued, that meant a plaintiff need not allege any misrepresentation or omission about a security's value. Nor was it necessary to allege misappropriation or, even more generally, another form of manipulation of a security. What would be enough, the Court held, are allegations where "the scheme to defraud and the sale of securities coincide." *Id.* at 822.

The SEC's allegations met this standard because the stockbroker defendant, alongside affirmatively misrepresenting how he intended to manage his clients' investments—he "secretly intend[ed] from the very beginning to keep the proceeds"—acted on that intent by engaging in unauthorized securities sales. *Id.* at 824. This misconduct "deprived [his clients] of any compensation for the sale of their valuable securities." *Id.* at 822. The "securities transactions and breaches of fiduciary duty coincide[d]," the Court explained, because the "[clients'] securities did not have value for the [stockbroker] apart from their use in a securities transaction and the fraud was not complete before the sale of securities occurred." *Id.* at 824–25. Put another way, the SEC's allegations left no daylight between the alleged fraud and the securities sale.

Measured by these *Zandford* standards, Menzies's allegations do not satisfy the "in connection with" requirement for an actionable claim under section 10(b) or Rule 10b-5. Start with the alleged fraud itself. Menzies's complaint focused not on the AUI stock sale, but instead on its tax consequences. He alleged that the defendants marketed a tax shelter that they knew was abusive—that would conceal capital gains from the U.S. Treasury—and caused him to incur not just unexpected taxes and related interest and penalties but also substantial professional fees. Yes, this may be enough to show that but for following the defendants' advice and selling his AUI stock he would not have incurred the taxes and related interest and penalties. Yet we know that such "but for" allegations do not satisfy section 10(b) under the teachings of *Zandford*. See *Ray v. Citigroup Global Mkts., Inc.*, 482 F.3d 991, 995 (7th Cir. 2007) (explaining that "[i]t is not sufficient [under section 10(b) and Rule 10b-5] for an investor to allege only that it would not have invested but for the fraud" and instead the investor must go further and "allege that, but for the circumstances that the fraud concealed, the investment … would not have lost its value") (quoting *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648–49 (7th Cir. 1997)).

If Menzies had tried to bring a securities fraud claim, he would have had to close this pleading gap. His complaint would have had to tether more directly the fraud to the stock sale by including allegations that went beyond any "but for" link and allowed a finding that the defendants' misrepresentations more closely coincided with Menzies's sale of his AUI stock. Menzies, in short, would have needed to plead facts demonstrating that he incurred his alleged losses as a more direct consequence of misrepresentations that closely touched the stock sale itself and not just its tax consequences. That the purpose of the tax shelter aimed to maximize the profits that Menzies realized from his stock sale cannot itself bridge this gap. See *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 791 (6th Cir. 2012) (affirming a district court's conclusion that the RICO bar did not apply because the plaintiffs' "fraud claim relates only to the tax consequences of the Benistar Plan, and it is merely incidental that the [insurance] policies happen to be securities"); *Rezner*, 630 F.3d at 872 (concluding the RICO bar did not apply where, in a tax shelter fraud, "the securities were merely a happenstance cog in the scheme").

We can come at the analysis another way. No aspect of the complaint challenged any term or condition on which Menzies sold his AUI shares to Berkshire Hathaway. The complaint all but says every aspect of the stock sale itself was entirely lawful. Even more generally, no portion of the complaint alleged that any defendant engaged in an irregularity that tainted or affected the stock-sale transaction, including, for example, by influencing the sales price or somehow causing the proceeds to be mishandled. Every indication is that Menzies received every last dollar he expected from the sale. The fraud Menzies alleged is at least one step removed—focused not on the sale of the AUI stock but on how and why he charted a particular course in his treatment of the sale for federal tax purposes and the losses he sustained by doing so.

Do not read us to say that Menzies failed to allege fraud. He plainly did when considered through the prism of common law standards. What we cannot say, though, is that—for purposes of applying the RICO bar in § 1964(c)—Menzies's allegations amounted to actionable securities fraud under the standards the Supreme Court has told us are required by section 10(b) and Rule 10b-5.

While not aligning with the defendants' view of the law, our holding does seem on all fours with what we see and do not see in the securities fraud case law. Our research, limited though it is to reported decisions, reveals no meaningful number of section 10(b) and Rule 10b-5 private federal securities fraud claims brought to challenge abusive tax shelters. Nor do we see an indication that the SEC has brought many enforcement proceedings alleging securities fraud to combat abusive tax shelters. None of this suggests that fraud perpetrated as part of a scheme to evade taxes can never be actionable under section 10(b). Our point is limited only to the observation that the federal reporters do not contain many examples of such actions, whether by private parties or the SEC. And perhaps that reality owes itself, at least in part, to the demanding requirements for pleading a federal securities law claim.

Unable to conclude that Menzies's allegations of fraud would be actionable under section 10(b) or Rule 10b-5, we turn, as did the district court, to his civil RICO claim.

B. Civil RICO Claims and the Pattern Element

Enacted in response to long-term criminal activity, including, of course, acts of organized crime, RICO provides a civil cause of action for private plaintiffs and authorizes substantial remedies, including the availability of treble damages and attorneys' fees. See 18 U.S.C. § 1964(c). Establishing a RICO violation requires proof by a preponderance of the evidence of "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex*

Co., 473 U.S. 479, 496–97 (1985) (interpreting § 1964(c)). It follows that a plaintiff must plead these elements to state a claim. Congress defined a "pattern of racketeering activity" to require "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5).

Satisfying the pattern element is no easy feat and its precise requirements have bedeviled courts. See *Jennings v. Auto Meter Prod., Inc.*, 495 F.3d 466, 472 (7th Cir. 2007) (emphasizing that "courts carefully scrutinize the pattern requirement"); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 820 (7th Cir. 1991) ("Satisfying the pattern requirements—that there be continuity and relationship among the predicate acts—is not easy in practice.").

The Supreme Court has considered the issue at least twice, and our case law shows many efforts to articulate what a plaintiff must plead to establish a pattern of racketeering activity. See, *e.g.*, *Sedima*, 473 U.S. at 496; *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237–38 (1989); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 779–80 (7th Cir. 1994); *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir. 1994). Over these many cases the law has landed on a pleading and proof requirement designed "to forestall RICO's use against isolated or sporadic criminal activity, and to prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law." *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1022 (7th Cir. 1992) (citing *H.J., Inc.*, 492 U.S. at 240–41).

To plead a pattern of racketeering activity, "a plaintiff must demonstrate a relationship between the predicate acts as well as a threat of continuing activity"—a standard known as the "continuity plus relationship" test. *DeGuelle v. Camilli*, 664 F.3d 192, 199 (7th Cir. 2011). The Supreme Court announced this test in *H.J., Inc.* and made plain that the relationship prong is satisfied by acts of criminal conduct close in time and character, undertaken for similar purposes, or involving the same or similar victims, participants, or means of commission. See 492 U.S. at 240. The relatedness of the predicate acts often does not yield much disagreement, and much more often the focus is on the continuity prong of the test. See *Vicom*, 20 F.3d at 780.

Just so here: the battleground in this appeal is whether Menzies adequately pleaded the continuity dimension of the continuity-plus-relationship test. Doing so requires "(1) demonstrating a closed-ended series of conduct that existed for such an extended period of time that a threat of future harm is implicit, or (2) an open-ended series of conduct that, while short-lived, shows clear signs of threatening to continue into the future." *Roger Whitmore's Auto Servs., Inc. v. Lake County, Ill.*, 424 F.3d 659, 673 (7th Cir. 2005).

Do not let the labels create confusion. The big picture question is whether Menzies adequately alleged that the challenged conduct occurred and went on long enough and with enough of a relationship with itself to constitute a pattern. Answering that question is aided by focusing on two, more particular, inquiries. One of those inquiries—designed to ascertain the presence of a so-called "closed-ended" series of misconduct—asks whether there were enough predicate acts over a finite time to support a conclusion that the criminal behavior would continue. See *Vicom*, 20 F.3d at 779–80. The focus, therefore, is on "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Id.* at 780 (quoting *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986)).

The alternative continuity inquiry—applicable to an "open-ended" series of misconduct—focuses not on what acts occurred in the past but on whether a concrete threat remains for the conduct to continue moving forward. See *id.* at 782. This can be done by showing that a defendant's actions pose a specific threat of repetition; that the predicate acts form part of the defendant's ongoing and regular way of doing business; or that the defendant operates a long-term association for criminal purposes. See *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 828 (7th Cir. 2016). On these fronts, it is not enough to base an open-ended continuity theory on just one prior predicate act and an otherwise unsupported assertion that criminal activity will continue into the future. See *Gamboa v. Velez*, 457 F.3d 703, 709 (7th Cir. 2006) (explaining that when "a complaint explicitly presents a distinct and non-recurring scheme with a built-in termination point and provides no indication that the perpetrators have engaged or will engage in similar misconduct, the complaint does not sufficiently allege continuity").

Added complexity enters where, as here, a plaintiff seeks to plead RICO's pattern element through predicate acts of mail or wire fraud. When that occurs the heightened pleading requirements of Fed. R. Civ. P. 9(b) apply and require a plaintiff to do more than allege fraud generally. See *Jepson v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994) ("Of course, Rule 9(b) applies to allegations of mail and wire fraud and by extension to RICO claims that rest on predicate acts of mail and wire fraud."). Rule 9(b) requires a plaintiff to provide "precision and some measure of substantiation" to each fraud allegation. *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016). Put more simply, a plaintiff must plead the "who, what, when, where, and how" of the alleged fraud. *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738 (7th Cir. 2019).

Given these heightened pleading standards and Congress's insistence that a RICO claim entail a clear pattern of racketeering activity, we have cautioned that "we do not look favorably on many instances of mail and wire fraud to form a pattern." *Midwest Grinding*, 976 F.2d at 1024–25 (quoting *Hartz v. Friedman*, 919 F.2d 469, 473 (7th Cir. 1990)); see also *Jennings*, 495 F.3d at 475 (explaining that this court "repeatedly reject[s] RICO claims that rely so heavily on mail and wire fraud allegations to establish a pattern"). We can leave for another day a more fulsome articulation of the interrelationship of RICO's pattern requirement and mail and wire fraud as predicate acts. Our focus here is whether Menzies, within the four corners of his complaint, alleged with sufficient particularity the acts of mail and wire fraud he believes demonstrate a pattern of racketeering activity.

C. Menzies's Allegations of Racketeering Activity

In his second amended complaint, Menzies detailed chapter and verse the fraud the defendants allegedly perpetrated on him. He told of the defendants approaching and pitching him the tax benefits of the Euram Oak Strategy. Reassured multiple times of the shelter's legality, Menzies relied on the defendants' representations, executed the strategy's component steps through transactions with trusts and the like, and ultimately sold his AUI stock for over $64 million to Berkshire Hathaway. Again relying on the defendants' assurances, he then filed his 2006 tax return without reporting his AUI stock sale as a taxable event.

Menzies sought to plead RICO's pattern element by including allegations that the defendants marketed the identical or a substantially-similar tax shelter to three others—his business partner and co-founder of AUI, Sydney Ferenc, and two other investors, one in North Carolina and another in Arizona.

Menzies alleged that Northern Trust contacted him and Ferenc at the same time to develop a financial advisory relationship. See SAC ¶¶ 25, 42, and 43. The complaint provides substantial detail on the defendants' interactions with Ferenc, including the dates and content of phone calls, emails, and meetings geared toward selling and advancing the scheme. See SAC ¶¶ 58, 62, 63, 76, 81, 86, 88, and 115. By way of example, consider these two factual allegations detailing the timing and substance of Ferenc's interactions with attorney Graham Taylor:

- "On September 30, 2003, Taylor provided Ferenc with an outline of the pre-arranged steps of the Euram Oak Strategy via email, assuring Ferenc that the strategy was legitimate tax planning." SAC ¶ 81.
- "On or about August 5, 2004, August 11, 2004 and August 18, 2004, Taylor sent Ferenc a revised version of the tax opinion letter via e-mail assuring Ferenc (and Menzies) that the Euram Oak Strategy was legitimate tax planning." SAC ¶ 115.

From there Menzies alleged that Ferenc ultimately "entered into a transaction substantially similar" to the one undertaken by Menzies, including by receiving a loan from Euram Bank, establishing a grantor trust, and maneuvering various assets in anticipation of a major stock sale—all in accordance with the instructions supplied by Taylor and others. SAC ¶ 91.

While the complaint clearly alleges the defendants marketed the same fraudulent tax shelter to Ferenc, Menzies stopped short of alleging whether Ferenc followed through with his sale of AUI stock and incurred substantial capital gains tax liability and related penalties and interest as a result of subsequent IRS scrutiny. The absence of such allegations in no way meant that Menzies failed to plead a predicate act of mail and wire fraud involving Ferenc, however. See *United States v. Koen*, 982 F.2d 1101, 1106 (7th Cir.

1992) (explaining that mail fraud under 18 U.S.C. § 1341 requires not actual and successful deception but only "(1) a scheme to defraud and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme to defraud").

Menzies further alleged an Arizona investor fell victim to the defendants' scheme. The second amended complaint alleged that the Arizona investor received legal opinions from Taylor and Seyfarth Shaw regarding the Euram Oak Strategy sometime in 2004. From there, though, the complaint says little more, alleging only that it is "reasonable to assume that any such opinion letter asserts the legality of the [Euram Oak] Strategy." SAC ¶ 162. On "information and belief," the complaint then alleges that the Arizona investor incurred unspecified damages from the tax deficiency that resulted from the scheme, penalties and interest, professional and attorneys' fees, and the lost opportunity to invest in a legitimate tax planning vehicle. See SAC ¶ 165.

In much the same way, Menzies included similar allegations of fraud against a North Carolina investor. According to the complaint, the defendants approached this investor not with the Euram Oak Strategy but with a different abusive tax shelter of the same nature called the Euram Rowan Strategy. See SAC ¶¶ 166, 167. With the exception of Northern Trust, the other defendants pushed the Euram Rowan Strategy, which "involved a series of integrated, pre-arranged, and scripted steps designed to provide a taxpayer who had significant ordinary or capital gain with a non-economic ordinary or capital loss." SAC ¶ 167. Here too, however, the second amended complaint adds few details. In 2003 the North Carolina investor received legal opinions from Taylor and Seyfarth Shaw—leaving Menzies to allege that "it is reasonable to assume that any such opinion letter asserted the legality of the transaction." SAC ¶ 177. From there the complaint alleges that the North Carolina investor, as a result of the scheme, owed a tax deficiency of $17.5 million to the IRS, along with nearly $1 million in penalties. SAC ¶ 180.

The second amended complaint also included broad allegations of future harm. On this score, Menzies alleged that "[t]here is a threat of continued racketeering activity in that Defendants' predicate acts of mail and wire fraud were part of their regular way of conducting business." SAC ¶ 183. This future threat, the complaint added, is clear from the "manner in which the Euram products were presented as products, with a preexisting team that could execute and support the tax shelter for other taxpayers and from the regular manner in which this enterprise did business with Menzies, Ferenc, [the Arizona and North Carolina investors] and other investors in the fraudulent Euram strategies." SAC ¶ 184.

D. The District Court's Opinion

The district court dismissed Menzies's RICO claim for failing to adequately plead a pattern of racketeering under either the closed- or open-ended theories of continuity. See *Menzies v. Seyfarth Shaw LLP*, No. 15C3403, 2018 WL 4538726 (N.D. Ill. Sept. 21, 2018) ("*Menzies II*").

As to the closed-ended approach, the court focused on Menzies's allegations of fraud against Ferenc and the North Carolina and Arizona investors. Relying on *Emery v. American Gen. Fin., Inc.*, 134 F.3d 1321 (7th Cir. 1998), the district judge assessed whether these additional allegations showed the other victims were "actually deceived" by the defendants' communications regarding the scheme. *Menzies II*, 2018 WL 4538726, at *4. The district court read Menzies's complaint to lack particularity about statements any defendant made to the Arizona investor about the Euram Oak Tax Strategy and, even more specifically, whether any misrepresentation led to the investor being deceived and suffering adverse tax consequences. The same deficiency plagued Menzies's allegations about the North Carolina investor, as the complaint was silent as to whether and how the defendants marketed the Euram Rowan Strategy in a way that resulted in actual deception and related losses. As to Ferenc, the district court emphasized that Menzies "does not allege that Ferenc was deceived, how he was deceived, or even that he suffered any injury in the way of IRS penalties or disallowances." *Id*. at *5.

In summing these pleading shortcomings, the district court reasoned that they were "particularly problematic in a case, like this one, where the purported victims knowingly entered into tax shelters, which by their nature are designed to avoid taxes." *Id*. The district court was unwilling to afford Menzies additional leeway to develop a potential RICO claim because he had already filed two prior complaints and had over a year to conduct discovery before filing his second amended complaint. See *id*. at *9.

Turning to whether that complaint adequately alleged an open-ended theory of continuity, the district court likewise concluded that Menzies came up short. The court emphasized that the complaint identified no specific threat of the tax avoidance strategy repeating, in no small part because the attorney responsible for orchestrating the scheme, Graham Taylor, had been indicted for tax fraud in 2005 and convicted in 2008. See *id.* at *6. These facts, without some alternative explanation from Menzies, undermined any meaningful possibility that Graham and the other defendants would continue to perpetuate the alleged fraud. See *id.* What is more, the district court was unwilling—without supporting facts appearing somewhere in Menzies's complaint—to permit an inference that the alleged fraud reflected any of the institutional defendants' regular way of doing business. On Menzies's pleading, the district court saw any such conclusion as reflecting rank speculation. See *id.* at *7.

E. Menzies's Insufficient Pleading of the Pattern Element

We agree with the district court that Menzies failed to allege a pattern of racketeering based on mail and wire fraud predicates. The proper analysis begins by returning to Menzies's second amended complaint, and it is there that the details—or lack thereof—matter. This is so because of the combined demands of RICO's pattern element and Rule 9(b)'s particularity mandate.

Menzies is right that he pleaded enough to support a conclusion that what Sydney Ferenc experienced qualifies as a predicate act of racketeering activity for pattern purposes. The second amended complaint is replete with details describing how the defendants used phone calls, e-mails, and meetings to assure Ferenc that the Euram Oak Strategy reflected lawful tax minimization. Those allegations speak directly to the nature and substance of the mail and wire fraud allegedly perpetrated on Ferenc and are advanced with the specificity necessary to clear Rule 9(b)'s particularity hurdle. And this is so even though Menzies's complaint does not allege that Ferenc went through with AUI stock sales and the Euram Oak Strategy tax treatment. See *Koen*, 982 F.2d at 1107.

Menzies's complaint is night and day different, though, when it comes to the allegations regarding the Arizona and North Carolina investors. The details of the defendants' interactions with both investors are few and far between. The second amended complaint says little more than that one or more of the defendants targeted these investors and sought to sell them either the Euram Oak or Rowan Strategies. Nowhere, though, does the complaint spell out the specifics of any defendant's communications with either investor and instead resorts to saying "on information and belief" that each of the two investors received an opinion letter from defendant Graham Taylor and furthermore that "it is reasonable to assume that any such opinion letter asserted the legality of the transaction." SAC ¶¶ 162, 177.

These allegations meet neither Rule 9(b)'s particularity requirement nor the demands of our RICO case law. In *Emery,* we emphasized that RICO's pattern element requires more than a plaintiff pointing to others and saying, on information and belief, that those persons received mailings about an allegedly fraudulent loan scheme. See 134 F.3d at 1322. The plaintiff needed to come forward, not with general statements about what others may have received, but with particular allegations detailing the content of the communications with others allegedly defrauded by the defendant's conduct. See *id.* at 1323. Without those alleged facts there was no way to conclude that the plaintiff had advanced with particularity the predicate acts of mail or wire fraud against anyone other than himself. The complaint, in short, failed to plead the requisite pattern of racketeering activity. See *id.*

We see Menzies's second amended complaint in much the same way. He did not plead enough about what transpired with the Arizona and North Carolina investors for us to know what any defendant represented, misrepresented, or omitted. *Emery* teaches that the pleading bar requires more than positing that he believes these two investors received similar opinion letters from Graham Taylor. Resorting to that level of generality sidesteps what Rule 9(b) requires. What Menzies needed to do—drawing perhaps on what he learned in the year of discovery afforded by the district court—was allege at least some particulars about the precise communications with each investor. See *Kaz v. Household Int'l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996) (explaining the demands of Rule 9(b) are relaxed only if discovery is unavailable to a plaintiff). Without such allegations, we have no way to determine whether multiple predicate acts of mail or wire fraud occurred in a manner that satisfies RICO's pattern requirement.

Without predicate acts of fraud covering the Arizona and North Carolina investors, Menzies is left only with the allegations of what he and Sydney Ferenc experienced with the defendants. That falls short of pleading a pattern of racketeering under the closed-ended approach to the continuity-plus-relationship test that the Supreme Court announced in *H.J., Inc*. We need to look at the number and variety of predicate acts, the length of time over which they were committed, the number of victims, the presence of separate schemes, and the occurrence of distinct injuries. *Vicom*, 20 F.3d at 780; see also *Roger Whitmore's Auto Servs.*, 424 F.3d at 673 (explaining that, in this analysis, "[n]o one factor is dispositive"). In doing so, we keep foremost in mind a "natural and commonsense approach to RICO's pattern element," which requires enforcing "a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amount to, or threatened the likelihood of, continued criminal activity." *H.J., Inc.*, 492 U.S. at 237.

But here we only have two individuals (Menzies and Ferenc)—two business partners and indeed co-founders of AUI—who allegedly fell victim to the same fraudulent scheme (the Euram Oak Strategy) at the same time. While the scheme lasted from 2003 to 2006, the complaint alleges only that Menzies went through with the strategy and suffered adverse tax consequences. The second amended complaint says not a word about whether Ferenc followed through on the strategy or suffered financial harm of any kind. Given

Menzies's close business relationship with Ferenc, the absence of particular factual allegations about how and to what degree Ferenc was defrauded is noteworthy.

On the whole, though, Menzies alleged enough with respect to Ferenc to establish a predicate act of mail or wire fraud. And with those allegations he advanced, in total, at least two such predicates (against himself and Ferenc). But RICO's pattern element is not just quantitative; it includes qualitative components designed to ascertain the presence of a pattern of racketeering activity. And it is on this precise point—whether Menzies alleged enough, quantitatively and qualitatively, to show a qualifying pattern of racketeering activity—that we determine his pleading was deficient.

To conclude that Menzies has failed to plead closed-ended continuity is not to say that he has failed to plead fraud. He clearly has and indeed he uses those precise allegations of fraud as the basis for his state law claims against the defendants. But what we are not permitted to do is allow a plaintiff to shoehorn a state-law fraud claim into a civil RICO claim. See *Jennings*, 495 F.3d at 472. It is the statute's pattern element that separates the viable RICO wheat from the common-law chaff, and, despite substantial effort, Menzies has come up short.

Our analysis of the open-ended theory of a pattern of racketeering is more straightforward. Only a few lines of the second amended complaint even hint at any threat of continued fraud by the defendants, and even then Menzies presents only conclusory assertions to support those allegations. He urges us to infer a future threat of repetition because the Euram Oak Strategy was developed for marketing to many taxpayers and thus inherently presented a "threat of repetition" capable of defrauding others.

But "[a] threat of continuity cannot be found from bald assertions." *Vicom*, 20 F.3d at 783. The law requires us to examine Menzies's complaint for allegations of "predicate acts, [which] by their very nature, pose 'a threat of repetition extending indefinitely into the future,' or 'are part of an ongoing entity's regular way of doing business.'" *McDonald*, 18 F.3d at 497 (quoting *H.J., Inc.*, 492 U.S. at 242).

What we see is insufficient. Even if we credit Menzies's contention that the development and marketing of the Euram Oak Strategy foretold future offenses, the claim still would fail to measure up to the standard of alleging open-ended continuity. That the tax shelter scheme was, as our dissenting colleague puts it, an "of-the-rack product" capable of distribution to other victims does not alone threaten continuity. We cannot conclude as a legal matter—altogether without regard to what a plaintiff alleges in a complaint—that all fraudulent tax shelters designed for use by multiple taxpayers satisfy open-ended continuity for purposes of RICO's pattern element.

A close look at the complaint shows allegations suggesting that any risk of future fraud was drying up. As the district court highlighted, a grand jury indicted Graham Taylor for tax fraud in 2005, and he was convicted in 2008. With Taylor out of the factual equation it is unclear how Menzies's complaint supports any inference that the alleged scheme would continue. Menzies's complaint is full of indications that the scheme was running its course—reaching its "natural ending point," *Roger Whitmore's Auto Servs.,* 424 F.3d at 674—and was not being shopped to new targets:

- In 2007, Euram Bank divested from its subsidiary, Pali Capital, which made integral contributions to the implementation of the Euram Oak and Rowan strategies. SAC ¶ 19.
- In 2008, Seyfarth Shaw forced one of Taylor's colleagues who had helped with the opinion letters to resign for himself promoting illegal tax shelters. SAC ¶ 122.
- As early as 2003, Christiana Bank and Euram Bank were conducting internal investigations with the assistance of outside counsel "regarding the possibility that the Euram Oak Strategy might be a reportable transaction to the IRS." SAC ¶ 94.

Nowhere does Menzies counterbalance these allegations with facts suggesting the schemes promoted by the defendants presented any meaningful prospect of continuing. Instead, the thrust of Menzies's complaint conveys that the defendants were taking action to move away from the promotion of the fraudulent tax shelters challenged here.

The dissent sees our analysis as falling prey to "hindsight error" by considering these intervening events. Not so. All we have done is reach a conclusion about the sufficiency of Menzies's RICO pleading by assessing the totality of his factual allegations. We cannot stop halfway by, for example, over-looking what Menzies chose to plead about Taylor's indictment and what did (and did not) happen in its wake. The open-ended continuity inquiry requires more than pinpointing a moment in time where it looked like a scheme may entail continuity but then disregarding facts supplied by the plaintiff that point in the opposite direction. What is missing from Menzies's second amended complaint is any factual allegation supporting his conclusion that, following Taylor's arrest and indictment, there existed a threat of the defendants fraudulently marketing the tax shelter into the indefinite future.

Because Menzies did not plead a pattern of racketeering under either an open- or closed-ended theory of continuity, we agree with the district court's dismissal of his RICO claim.

III

In closing we turn to Menzies's state law claims. Beyond his federal RICO claim, Menzies advanced claims under Illinois law for fraudulent misrepresentation, conspiracy, joint enterprise liability, negligent misrepresentation, breach of fiduciary duty, and unjust enrichment. Exercising supplemental jurisdiction, the district court addressed each of these claims in one broad stroke. The court determined each claim was untimely under the five-year statute of repose formerly found in Illinois Securities Law, 735 ILCS 5/12 *et seq.*, and in effect during the relevant period—in particular, during the five years after Menzies's May 2006 sale of his AUI stock. (In August 2013, the Illinois legislature amended the Securities

Law to remove this provision.) While we disagree with that conclusion, we nonetheless find that a separate limitations period in Illinois law operates to preclude some—but not all—of Menzies's state law claims.

A

The Illinois Securities Law's (former) statute of repose provided that "[n]o action shall be brought under this Section or upon or because of any of the matters for which relief is granted by this Section" after five years from the securities transaction at issue. 815 ILCS 5/12(D). Illinois courts have emphasized the provision's breadth, explaining that the five-year time bar applies to *any* claim—whether brought under the Illinois Securities Law or otherwise—that fits within the statute's substantive prohibitions. See, *e.g., Tregenza v. Lehman Bros., Inc.*, 678 N.E.2d 14, 15 (Ill. App. Ct. 1997) (concluding that the Illinois Securities Law's statute of repose barred common law claims, including for fraud, because those claims were "reliant upon matters for which relief is granted by the Securities Law"); see also *Klein v. George G. Kerasotes Corp.*, 500 F.3d 669, 671 (7th Cir. 2007) (recognizing that the Illinois Securities Law's limitations periods apply to common law claims that otherwise could have been brought as securities fraud claims under the statute). So the controlling question is whether Menzies could have brought his state law claims as securities fraud claims under the Illinois Securities Law.

Section 12(F) of the Illinois law prohibits any person from "engag[ing] in any transaction, practice or course of business in connection with the sale or purchase of securities which works or tends to work a fraud or deceit upon the purchaser or seller thereof." 815 ILCS 5/12(F). For its part, section 12(I) disallows any person from "employ[ing] any device, scheme, or artifice to defraud in connection with the sale or purchase of any security, directly or indirectly." 815 ILCS 5/12(I).

If these provisions sound like the prohibitions in the federal securities laws, that is the right reaction. The Illinois legislature modeled sections 12(F) and 12(I) after parallel provisions in section 17(a) of the Securities Act of 1933. See *Tirapelli v. Advanced Equities, Inc.*, 813 N.E.2d 1138, 1142 (Ill. App. Ct. 2004). Not surprisingly, then, "Illinois courts look to federal securities fraud case law in interpreting [that section] of the Illinois Securities Law." *Id.*

After outlining this same framework, the district court evaluated Menzies's state law claims by asking whether the alleged fraud fell within the ambit of sections 12(F) and 12(I) of the Illinois Securities Law. More to it, the district court asked whether the allegations in Menzies's second amended complaint reflected fraud "in connection with" the sale of his AUI stock. This, of course, was the same question at the center of the inquiry as to whether the RICO bar in 18U.S.C. § 1964(c) precluded Menzies from bringing a civil RICO claim.

For reasons unexplained by the record, however, the district court gave two different answers to this same question. In its July 2016 opinion the district court concluded that Menzies had not alleged "an 'actionable' securities claim [within the meaning of the § 1964(c) bar], because nothing about the sale of his AUI stock itself was fraudulent in this case." *Menzies I*, 197 F. Supp. 3d at 1116. But then two years later, in its September 2018 opinion, the court determined that the five-year statute of repose in the Illinois Securities Law barred each of Menzies's state law claims because those claims met the "in connection with" requirement by alleging the "entire purpose of the tax shelter was to shield the proceeds of [Menzies's AUI] stock sale." *Menzies II,* 2018 WL 4538726, at *8. We cannot square these answers.

Regardless, our review of the district court's order dismissing Menzies's state law claims proceeds *de novo*, and, based on our own fresh look at the allegations in his second amended complaint, we cannot conclude he pleaded claims within the scope of sections 12(F) and 12(I) of the Illinois Securities Law.

We are aware of no substantive differences between the "in connection with" requirements in sections 12(F) and 12(I) of the Illinois statute and either section 17(a) of the federal 1933 Act or section 10(b) and Rule 10b-5 of the federal 1934 Act. And accepting that the Illinois courts look to the federal securities laws to interpret the Illinois Securities Law, see *Tirapelli*, 813 N.E.2d at 1142; *People v. Whitlow*, 433 N.E.2d 629, 633–34 (Ill. 1982), we see no reason to depart from our prior conclusion that Menzies's original complaint did not contain allegations sufficient to constitute actionable securities fraud under section 10(b) and Rule 10b-5. See *Schaefer v. First Nat'l Bank of Lincolnwood*, 509 F.2d 1287, 1295 (7th Cir. 1975) (explaining that section 12 of the Illinois Securities Law "closely parallels Rule

10b-5 and a study of [the statute] reveals a nearly identical aim").

As we explained when evaluating whether Menzies's allegations fell within the RICO bar of 18 U.S.C. § 1964(c), we see an insufficient link between the alleged fraud—deception about the tax consequences of a sale of AUI stock—and the securities transaction itself. To be sure, while a "but for" connection is there, we know the law requires more. See *Ray*, 482 F.3d at 995. And Menzies's complaints do not supply the more because nowhere does he allege any misconduct that coincided with his sale of his AUI stock. See *Zandford*, 535 U.S. at 824. What this means for purposes of the RICO bar is that Menzies's allegations do not amount to actionable federal securities fraud and thus he was able to proceed with his civil RICO claim. And so, too, for purposes of the Illinois Securities Act: Menzies's state law claims are not barred by the statute's five-year period of repose.

B

The question then becomes whether any other Illinois law bars Menzies's claims. The answer turns out to be yes as to the state law claims brought against defendants Graham Taylor, the attorney who provided legal advice to Menzies about the Euram Oak tax shelter, and his firm, Seyfarth Shaw.

The Illinois statutory provision addressing attorney misconduct contains a two-year statute of limitations and a six-year statute of repose. See 735 ILCS 5/13-214.3. The Illinois General Assembly provided that:

> (b) An action for damages based on tort, contract, or otherwise against an attorney arising out of an act or omission in the performance of professional services … must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.
>
> (c) [A]n action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

Id.

By its terms, the statute covers the claims against Taylor, as the second amended complaint plainly alleges that he provided fraudulent legal advice and opinion letters, all of which fell within his role as Menzies's counsel. The Illinois statute likewise covers Menzies's claims against Seyfarth Shaw. See *Blue Water Partners, Inc. v. Edwin D. Mason, Foley and Lardner*, 975 N.E.2d 284, 297 (Ill. App. Ct. 2012) (applying the statute of limitations in 735 ILCS 5/13-214.3 to claims against a law firm).

All that remains is a question of timing. On this score, the math is straightforward and does not compute in Menzies's favor. Even on the most generous framing of the facts—that Menzies did not discover the alleged attorney misconduct until he received his deficiency notice from the IRS and settled in December 2012—he would still be beyond the two-year limitations period in Illinois law by filing his lawsuit in federal court as he did in April 2015. Under any timeline, then, we conclude that this provision of Illinois law bars each of the state law claims Menzies brought against Taylor and Seyfarth Shaw.

The same is not true as to the state law claims advanced against the remaining financial services defendants, Northern Trust and Christiana Bank & Trust Company. On remand the district court will retain subject matter jurisdiction over those claims under 28 U.S.C. § 1367. We leave the consideration of those claims to the district court in the first instance.

* * *

Therefore, the judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED for proceedings consistent with this opinion.

HAMILTON, *Circuit Judge*, dissenting in part. We should reverse the dismissal of plaintiff's RICO claims. The complaint alleges multiple acts of racketeering showing the "continuity and relationship" needed to establish a "pattern of racketeering activity." Plaintiff has alleged in detail how the defendants created an off-the-shelf tax-shelter scam—one that was easily replicable for other, similarly situated taxpayers facing substantial tax bills on large capital gains. The defendants marketed the scam to plaintiff and others. They were positioned to keep the fraud going unless and until they were stopped.

The majority errs by finding insufficient plaintiff's allegations of a "pattern" of racketeering activity. The most fundamental mistake is the majority's use of the distorting lens of hindsight. The majority relies on intervening events to find no genuine threat that the defendants would have continued indefinitely with their profitable scheme. That mistake weakens RICO for both civil *and criminal* enforcement. The mistake is also contrary to substantial case law and has no apparent support in the case law. My colleagues also demand far too much from a complaint that is already quite detailed, and they fail to give plaintiff the benefit of plausible inferences from his complaint. I respectfully dissent from the dismissal of plaintiff's RICO claims.

I. *Points of Agreement*

I agree with my colleagues on some important points, however. We agree that the securities-fraud bar to civil RICO claims, which was added to 18 U.S.C. § 1964(c) by the Private Securities Litigation Reform

Act of 1995, does not apply to plaintiff's claims. We also agree on the dispositions of the defendants' various statute of limitations defenses to plaintiff's state-law claims. I concur with the portions of the judgment that address the state-law claims.

II. *The RICO "Pattern" Requirement*

Turning to the RICO claims: Because defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, I use harsh language to describe the actions of a well-known law firm and two otherwise-legitimate banks. I do not vouch for the truth of plaintiff's allegations. I only apply the standard of appellate review that defendants themselves have invoked: assume the factual allegations in the complaint are true, and give plaintiff the benefit of reasonable, favorable inferences that can be drawn from those allegations.

A. *The Fraudulent Scheme*

Attorney Graham Taylor (later convicted for another tax fraud) and other attorneys at Seyfarth Shaw teamed up with bankers from Euram Bank (The European American Investment Bank), Northern Trust Corporation, and later Christiana Bank to devise a fraudulent scheme for concealing a taxpayer's receipt of a large capital gain. The defendants pitched the scheme to Menzies, his business partner Ferenc, and others.

The scheme involved a series of carefully designed paper transactions among the taxpayer, the banks, and nominally independent trusts established on the defendants' instructions, all blessed with fraudulent legal opinion letters. The strategy took several years to set up and execute just for Menzies himself, beginning about three years before he actually sold his stock in AUI to Berkshire Hathaway.

The complaint describes the scheme in great detail. A brief description of the "Euram Oak Strategy," must be incomplete but can help show its complexity and why plaintiff characterizes the scheme as a "product" that defendants used at least several times and threatened to continue to repeat.

The scheme used a network of trusts and a dizzying array of sham transactions to disguise the ownership of AUI stock and to enable Menzies to obscure a large capital gain upon the eventual sale of the stock. See Second Amended Cplt. (SAC) ¶¶ 65–97 (detailing the 2003 and 2004 transactions). Menzies began to execute defendants' fraudulent "Euram Oak Strategy" in 2003. First, defendants had him borrow $19 million from Euram and deposit those funds in another Euram account in the name of a trust that the defendants had just set up for him. SAC ¶ 74. The trust reinvested the proceeds with Euram itself, in return for a promissory note. The defendants then set up another trust for Menzies and orchestrated a series of sham transactions among Menzies and the trusts. SAC ¶ 79.

Menzies then swapped assets with the original trust, accepting the Euram promissory note in exchange for an equal value of AUI stock, and used the note to pay off his original loan obligation. SAC ¶¶ 83–85. After another series of transactions involving the movement of assets and the termination of the first trust, the second trust held $19 million of AUI stock and owed Menzies $19 million. SAC ¶ 90. Throughout all of this, the funds from the original loan never left Euram.

In 2004, the defendants led Menzies through another series of similar transactions with a new $54 million loan from Euram. SAC ¶¶ 95–96. After these transactions, another $54 million of AUI stock was in the second trust, with a corresponding obligation from the trust to Menzies.

The payoff came in 2006, when Menzies and Ferenc agreed to sell their business to Berkshire Hathaway. As part of the deal, Berkshire Hathaway paid the remaining trust more than $64 million for the shares that Menzies had placed there. SAC ¶ 132. The trust then used the proceeds from the sale to repay Menzies the amount it owed him.

Pursuant to advice from the defendants, when Menzies filed his 2006 tax return, he did not report his capital gain of more than $44 million. SAC ¶ 143. In 2009, the IRS began an audit of Menzies, finding that the key transfers of stock were not arms-length transactions and that the scheme constituted an abusive tax shelter SAC ¶¶ 138–40. In 2012, Menzies settled with the IRS, paying $6.7 million in capital gains tax, $1.3 million in penalties, and $2.4 million in interest.

B. *Allegations of a "Pattern"*

The complaint includes detailed allegations about the scope of the defendants' scheme, their efforts to market it and its variations, and the threat of continued criminal activity. See SAC ¶¶ 25–27, 50–55, 69, 82, 89, 122, 157–58, 180–84. The defendants' scheme was not like a custom-designed suit, cut just for Menzies. It was more like an of-the-rack suit: it would fit a specific class of taxpayers with just a few individual alterations at minimal effort and cost. With repetition, costs per taxpayer-client would drop and the defendants' profits from fees would rise, adding to the incentive for and the threat of repetition. The potential for repeated use of the fraudulent tax shelter helps show why plaintiff has alleged a pattern of racketeering activity. See SAC ¶ 157 ("it is the very nature of a tax shelter product, such as the Euram Oak Strategy, to be created once and then replicated multiple times to multiple taxpayers").

The complaint does not rely on conclusions to show a pattern. It includes specific factual allegations showing the replicable nature of the fraudulent tax shelter and the threat of continued fraud with other taxpayers. For example, defendants presented plaintiff with slick marketing materials for the tax shelter—prepared with Euram—that came with a disclaimer addressed generally to "investors."[1] Before defendants would discuss the details of their proposed tax shelter, they required Menzies to sign a confidentiality agreement, which the complaint describes as "typical in the presentation of purportedly proprietary tax shelter products," SAC ¶ 36, indicating that defendants saw their ingenuity as a proprietary secret from which they could continue to profit by repetition. One can also reasonably infer that the

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[1] The Power-Point slides, labeled as Euram products, are an appendix to the complaint.

confidentiality agreement had the effect of deterring or preventing targets from seeking truly independent legal and tax advice.

Other paragraphs of the complaint show that the defendants marketed to Menzies and Ferenc an off-the-rack product that they were adapting from previous applications for other clients. The defendants themselves noted the similarity between Menzies's transactions and the transactions carried out for these other clients, referred to in the briefs as "the Arizona investor" and "the North Carolina investor." When the other defendants recruited Christiana Bank to act as a supposedly independent trustee for Menzies and Ferenc, they told Christiana that the proposed transactions would be "very similar" to previous transactions carried out for the Arizona investor. SAC ¶ 50. When later sending documents to Christiana, the other defendants said the documents "should be familiar to you from the [Arizona] transaction," and were "very similar" to those used in the Arizona transaction. SAC ¶ 78. When the other defendants sent more documents to Christiana for the proposed Menzies and Ferenc transactions, they said the transaction would be "in essence identical to that for" the Arizona investor. SAC ¶ 82. Another email to Christiana described the Menzies and Ferenc transactions as "two new trades involving the Oak structure." SAC ¶ 89.

Thus, the defendants themselves described the tax shelter strategy as a template that they had used before, were adapting to Menzies and Ferenc, and could continue replicating and adapting for other taxpayers.

As the complaint alleges, these sorts of communications helped demonstrate "a continued threat that the Euram Oak strategy could later be replicated for other taxpayers." *Id.*

C. *"Continuity Plus Relationship"*

These detailed allegations easily satisfy pleading requirements for a civil RICO claim, including the required "pattern of racketeering activity." To start with RICO basics, "racketeering activity" is defined with a long list of specific crimes and categories of crime. 18 U.S.C. § 1961(1). That list includes mail fraud and wire fraud under 18 U.S.C. §§ 1341 & 1343. As a matter of general federal criminal law, each individual mailing or interstate wire transmission in furtherance of a scheme to defraud can count as a separate act of mail or wire fraud.[2]

RICO provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity'" that occur within ten years of each other. 18 U.S.C. § 1961(5). The Supreme Court has interpreted this to require that the predicate acts of racketeering

[2] E.g., *United States v. Bush*, 522 F.2d 641, 649 (7th Cir. 1975) ("Each of the eleven counts of the indictment charges only one offense—a mailing in furtherance of one multifaceted scheme in violation of the mail fraud statute."); *United States v. Brighton Building & Maintenance Co.*, 435 F. Supp. 222, 229 n.10 (N.D. Ill. 1977) (Flaum, J.), citing *United States v. Joyce*, 499 F.2d 9, 18 (7th Cir. 1974), quoting in turn *Badders v. United States*, 240 U.S. 391, 394 (1916); see also *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 648 (2008) (observing that each individual mailing in furtherance of single scheme to defraud is predicate act of mail fraud under RICO).

activity show "continuity plus relationship." See *Roger Whitmore's Auto Services, Inc. v. Lake County*, 424 F.3d 659, 672 (7th Cir. 2005), quoting *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989), quoting in turn 116 Cong. Rec. 18940 (1970) (Sen. McClellan), quoting S. Rep. No. 91–617, at 158. The majority's restrictive approach to the pattern requirement here has lost sight of the point the Supreme Court emphasized in *H.J., Inc.*: the statutory language shows that "Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." 492 U.S. at 238.

Our decisions have long recognized this need for flexibility in applying the pattern requirement. In *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), we anticipated the holding of *H.J., Inc.* and rejected a rigid requirement of "separate schemes." In applying the "continuity plus relationship" standard, we recognized that many factors would be relevant, including "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Id.* We cautioned, however, that having one overall scheme or even just one victim would not automatically defeat the pattern requirement: "The doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative." *Id.* at 976. *Morgan* reversed dismissal in a case with a much weaker claim of a pattern than we see here. The plaintiffs alleged that defendants committed several acts of mail fraud over several years in furtherance of one overall scheme to defraud plaintiffs through foreclosure sales: "While these acts can be viewed as part of a single grand scheme, they were ongoing over a period of nearly four years in addition to being distinct acts. Under the facts of this case, plaintiffs have satisfied both the continuity and relationship aspects of the pattern requirement." *Id.*[3]

Finding both continuity and relationship here is consistent with our decisions that have recognized the generality and flexibility of the standard, eschewing rigid rules in both criminal and civil RICO cases. See, e.g., *United States v. Horak*, 833 F.2d 1235, 1240 (7th Cir. 1987) (affirming RICO conviction; defendants' three bribes to local officials with monthly payments

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[3] The flexibility of the pattern standard is evident in this circuit's pattern criminal jury instructions, which suggest the following general explanation for charges under 18 U.S.C. § 1962:

> Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way, [or have other similar distinguishing characteristics] [or are part of the affairs of the same enterprise].
>
> There is continuity between acts if, for example, they are ongoing over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

Under this instruction, a jury that heard proof of plaintiff's allegations here could easily find a pattern.

were sufficient to show pattern under flexible standard aimed at ongoing crimes); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278–79 (7th Cir. 1989) (affirming jury verdict for plaintiffs on pattern issue where defendants' fraud and theft injured four victims in separate transactions over a period of months); *Olive Can Co. v. Martin*, 906 F.2d 1147, 1152 (7th Cir. 1990) (describing *Ashland Oil* activity as open-ended scheme that threatened continued crime, and confirming that *Morgan* test is consistent with *H.J., Inc.*); *DeGuelle v. Camilli*, 664 F.3d 192, 202–04 (7th Cir. 2011) (reversing dismissal of RICO claim; pattern shown where defendant corporation and its agents allegedly carried out tax fraud scheme over several years and retaliated against plaintiff-whistleblower); *United States v. Maloney*, 71 F.3d 645, 661 (7th Cir. 1995) (affirming RICO conviction of corrupt judge; bribes and criminal acts to conceal them showed sufficient pattern under "relatively broad standard" of *H.J., Inc.*); see also *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688–89 (7th Cir. 2008) (reversing dismissal of RICO claim for scheme to defraud Wal-Mart and its customers; pattern *conceded* where defendants sold 50,000 stolen and/or repackaged cameras as new). With such plausible and detailed allegations of a pattern as we have here, especially when made on the basis of quite limited discovery, the better course is to let the case go forward, let the case develop, and decide the pattern issue on a full record.[4]

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[4] Plaintiff will be entitled to further discovery from defendants on his surviving state-law claims. What will the federal courts do if that discovery turns up more detailed evidence of additional attempts by defendants to sell the Euram Oak and Euram Rowan

As the majority acknowledges, the relationship prong of "continuity and relationship" test can be satisfied by criminal acts close in time and character, undertaken for similar purposes, or involving the same or similar victims, participants, or means of commission. See *H.J., Inc.*, 492 U.S. at 240. The majority and I agree that the relationship prong is satisfied here. Plaintiff has alleged very similar efforts by the defendants to carry out the tax-shelter scam with him and with his partner Ferenc, who received a similar large capital gain in 2006. In those two episodes of the fraudulent scheme, we have multiple acts of mail and wire fraud, and we have similar victims, the same criminal participants, and the same means of commission, all undertaken for similar purposes at around the same time.

The majority correctly finds that plaintiff has alleged with sufficient specificity the defendants' fraudulent efforts to target both him and his partner Ferenc through criminal mail and wire fraud, so that both episodes add up to racketeering activity. Ante at 19–20. The majority also correctly recognizes that the allegations about Ferenc are sufficient even though he apparently did not go through with the proposed scam. *Id.*, citing *United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992).[5]

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strategies such that the scheme would satisfy even the majority's restrictive view of the pattern requirement? Will we reconsider our premature dismissal?

[5] See also *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 648 (2008) (civil RICO plaintiff alleging mail fraud need not prove it relied on defendant's misrepresentations), citing *Neder v. United*

Thus, the majority agrees that plaintiff has sufficiently alleged two distinct but related episodes in which the defendants carried out their fraudulent scheme. The remaining requirement of "continuity" is what divides us.

D. *Open-Ended Continuity*

The two fraudulent episodes aimed at Menzies and Ferenc should be sufficient to establish a pattern. By design, each episode lasted several years. Each episode required numerous acts of mail and wire fraud and elaborate sequences of otherwise-useless financial transactions. Each episode produced hundreds of thousands of dollars in fees for the defendants. This should be sufficient. See *Ouwinga v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783, 795–96 (6th Cir. 2012) (reversing dismissal of civil RICO claim based on marketing of fraudulent tax shelter; pattern alleged adequately where defendants marketed shelter over period of five years); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 962–64 (7th Cir. 1996) (affirming civil RICO conspiracy verdict for plaintiff; scheme to

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States, 527 U.S. 1, 24–25 (1999) (common-law requirement of justifiable reliance has no place under mail, wire, or bank fraud statutes); *United States v. Bucey*, 876 F.2d 1297, 1311 (7th Cir. 1989) ("this court has reiterated on numerous occasions that the ultimate success of the fraud and the actual defrauding of a victim are not necessary prerequisites to a successful mail fraud prosecution"); *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988). The majority does not say so forthrightly, but its description of the district court's decision, see ante at 18, shows that the district court erred by focusing on whether Ferenc and the Arizona and North Carolina investors actually followed through all the way with the fraudulent strategy.

defraud all limited partners to sell interests established pattern; even though evidence appeared to point to only one scheme, "an inference can be drawn that the various defendants certainly had the means to conduct similar schemes"); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 396–97 (6th Cir. 1989) (reversing dismissal of civil RICO claim based on marketing of fraudulent tax shelter; defendants alleged to have acted in concert over five years, defrauding hundreds of taxpayers); *Durham v. Business Management Associates*, 847 F.2d 1505, 1512 (11th Cir. 1988) (affirming denial of summary judgment; plaintiffs offered evidence of pattern with two related schemes to market fraudulent tax shelters, and schemes' similarity presented jury question; "use of business instructional video cassette tapes" deemed significant); *United Energy Owners Committee, Inc. v. U.S. Energy Management Systems, Inc.*, 837 F.2d 356, 360–61 (9th Cir. 1988) (reversing dismissal of civil RICO claim based on marketing of fraudulent tax shelter; pattern alleged adequately where defendants engaged in multiple fraudulent acts involving multiple victims over more than one year; no rigid requirement for plaintiff to allege or prove more than one criminal "episode").

The complaint easily satisfies the "pattern" requirement when the Menzies and Ferenc episodes are combined with the detailed allegations of a reasonably foreseeable threat of continued efforts to repeat the scheme with still more similarly situated taxpayers. In the rubric of RICO patterns, plaintiff has alleged "open-ended continuity," that is, "past conduct that by its nature projects into the future with a threat of repetition." *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 782 (7th Cir. 1994), quoting *H.J., Inc.*, 492 U.S. at 241.

The majority, however, rejects open-ended continuity, saying: "Only a few lines of the second amended complaint even hint at any threat of continued fraud by the defendants, and even then Menzies presented only conclusory assertions to support those allegations." Ante at 23. With respect, that description is just wrong. The majority's rejection of open-ended continuity is based on two related errors: relying on hindsight and failing to give the plaintiff the benefit of his detailed allegations.

1. *Hindsight Error*

First, the majority makes the basic error of giving the defendants the benefit of hindsight rather than considering the threat of continued fraud as it was happening. The majority (like the district court) emphasizes the 2005 indictment and 2008 conviction of attorney Taylor for an unrelated tax fraud: "With Taylor out of the factual equation it is unclear how Menzies's complaint supports any inference that the alleged scheme would continue." Ante at 24. This is wrong as a factual matter. According to the complaint, Taylor's indictment in 2005 most certainly *did not deter him* and the other defendants from *continuing* the effort to defraud Menzies in 2006 and 2007 with respect to his 2006 tax return. There is also no reason the other defendants could not have continued the scheme with another Seyfarth Shaw lawyer or two.

More fundamental, though, is the legal error. Taylor's 2008 conviction was an intervening event that at most interrupted the ongoing scheme. Extensive RICO case law shows that such an intervening event is not relevant to the threat of repetition. The same is true of the other events from 2007 and 2008 that the majority suggests are "indications that the scheme was running its course … and was not being shopped to new targets." Ante at 24. (Affirming dismissal based on "indications" and "suggestions" in a complaint is not consistent, of course, with the more generous reading of complaints required in deciding Rule 12(b)(6) motions, but I digress.)

To see the problem with determining continuity based on hindsight, consider how we and other federal courts would consider this same defense to a RICO charge against members of a street gang. Suppose the evidence showed that after two profitable episodes of robbery, each time following the same careful plan, the gang's leader was arrested and later convicted on unrelated charges. In a RICO prosecution alleging a pattern of robberies, the other gang members then argue they must be acquitted because there was no pattern: "We stopped committing crimes after our leader was indicted, arrested, and later convicted." In a criminal case, that argument would be laughed out of court. E.g., *United States v. Aulicino*, 44 F.3d 1102, 1113–14 (2d Cir. 1995). Yet the "pattern of racketeering activity" standard is the same for both civil and criminal RICO. The majority's error in this civil case will unduly narrow criminal applications of RICO where ongoing schemes are interrupted by arrests, indictments, convictions, or other events.

The majority's reliance on hindsight runs contrary to *Aulicino* and numerous other RICO precedents, which establish that courts do not rely on hindsight and intervening events to show the absence of a threat of repetition. In *Aulicino*, the defendants operated a kidnapping ring that carried out about seven kidnappings over a period of three and a half months. 44 F.3d at 1105. The kidnappings ended after one leader was murdered and another was arrested on other charges. The defendants argued that the government had failed to prove a pattern, but the Second Circuit affirmed the RICO convictions. The Second Circuit did not use hindsight to find that the intervening events (the murder and arrest of two leaders) had defeated a threat of continued crimes. Instead, the Second Circuit found a sufficient threat of continued racketeering activity. The kidnappings were successful and profitable. 44 F.3d at 1113. "The ring's activities were abandoned; they were not a discrete and finite project that came to a natural end." *Id*. at 1114. The same description fits these defendants' fraud.

The Sixth Circuit rejected a similar argument based on hindsight in *United States v. Busacca*, 936 F.2d 232 (6th Cir. 1991). A pension official was convicted under RICO for embezzling funds to pay for his defense in an earlier prosecution. He had obtained money illegally over only three months. *Id.* at 236. He argued that there was no threat of continuity because his opportunity for embezzlement ended with his earlier conviction and his removal from office, much as defendants here and the majority argue that Taylor's indictment and conviction ended the threat of continuity.

The Sixth Circuit rejected that argument based on hindsight and found open-ended continuity: "The manner in which the embezzlements occurred was capable of repetition indefinitely into the future, as long as there were either legal fees or other expenses which Busacca wanted paid." *Id.* at 238. In words that apply directly here, the "analysis of the threat of continuity cannot be made solely from hindsight" and must instead "be viewed at the time the racketeering activity occurred." *Id.* The majority rejects that approach here, and it is hard to see why, especially since it weakens criminal application of RICO where intervening events interrupt ongoing criminal schemes.

The Sixth Circuit applied this principle more recently in a civil RICO case, *Heinrich v. Waiting Angels Adoption Services, Inc.*, 668 F.3d 393 (6th Cir. 2012). The individual defendants argued that because the defendant adoption business they owned was shut down as part of a criminal prosecution, there had not been an open-ended threat of continued crimes. *Id.* at 410. The Sixth Circuit rejected the argument and reversed dismissal of civil RICO claims: "Subsequent events are irrelevant to the continuity determination … because 'in the context of an open-ended period of racketeering activity, the threat of continuity must be viewed at the time the racketeering activity occurred.'" *Id.*, quoting *Busacca*, 936 F.2d at 238. "The lack of a threat of continuity of racketeering activity cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict.'" *Heinrich*, 668 F.3d at 410, again quoting *Busacca*, 936 F.2d at 238, and citing *Blue Cross & Blue Shield of Michigan v. Kamin*, 876 F.2d 543, 545 (6th

Cir. 1989) (reversing dismissal on pattern issue; open-ended continuity alleged because, if defendant had not been caught, there was no reason to believe he would not still be submitting fraudulent insurance claims). In language that applies directly here, *Heinrich* explained that when the defendants committed the four predicate acts, "there was no indication that their pattern of behavior would not continue indefinitely into the future." 668 F.3d at 411. Dismissal under Rule 12(b)(6) was reversed, just as we should reverse here.

In fact, the district judge who dismissed this case made exactly this point—even quoting *Heinrich*—in denying dismissal in another civil RICO case:

> It is important to note that, in the context of an open-ended period of racketeering activity, the threat of continuity must be viewed "at the time the racketeering activity occurred." Subsequent events "are irrelevant." Thus, a lack of a threat of continuity "cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict."

Inteliquent, Inc. v. Free Conferencing Corp., 2017 WL 1196957, at *10 (N.D. Ill. 2017), quoting *Heinrich*, 668 F.3d at 410, and citing *CVLR Performance Horses, Inc. v. Wynne*, 524 Fed. App'x 924, 929 (4th Cir. 2013). In *Inteliquent*, Judge Blakey found correctly that the plaintiff had sufficiently alleged an open-ended pattern of racketeering activity through a series of fraudulent invoices under a contract that would renew automatically and that could be expected to be renewed. As a result, there was no natural ending point or "clear and terminable goal" for the scheme. *Id.* He was right then; he was wrong in this case.

In a criminal case, we have also held that even a brief scheme cut short by intervening events can establish a pattern if the scheme threatened to continue from the perspective of the time the racketeering activity occurred. In *United States v. O'Connor*, 910 F.2d 1466 (7th Cir. 1991), a police officer committed several acts of extortion over a two-month period. The acts of extortion ended with his arrest. We held that the evidence permitted the trier of fact to conclude that he "had committed himself to an enduring series of criminal acts, sufficient to establish a 'pattern' under *H.J. Inc.*" *O'Connor*, 910 F.2d at 1468. The Second Circuit in *Aulicino* cited *O'Connor* to support its approach to open-ended continuity. 44 F. 3d at 1112–13.

These cases can all be contrasted with schemes with no open-ended continuity, which are those with discrete and finite goals or natural end points. For example, in *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 783 (7th Cir. 1994), we found no open-ended continuity where the predicate acts of fraud involved one particular contract and a finite scheme that did not threaten continued wrongdoing. For other examples of inherently finite schemes, see *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 829–30 (7th Cir. 2016) (reversing plaintiff's verdict under civil RICO for lack of pattern; scheme to bribe governor to secure enactment of one new law did not pose threat of open-ended continuity because scheme had a "natural ending point"); *Vemco, Inc. v.*

Camerdella, 23 F.3d 129, 134–35 (6th Cir. 1994) (alleged fraud in one construction contract over 17 months did not pose threat of continued wrongdoing); *Thompson v. Paasche*, 950 F.2d 306, 311 (6th Cir. 1991) (five-month fraudulent scheme involving sale of lots on one divided tract of land was "an inherently short-term affair").

Against this substantial case law showing that courts do not rely on hindsight and intervening events to avoid recognizing a continued threat of crimes in both criminal and civil RICO cases, the majority offers no support for its reliance on hindsight. Curiously, rather than respond to the applicable precedent and reasoning, the majority instead denies that it is relying on hindsight. Ante at 25. It's hard to take that denial seriously, though. The majority tells us quite plainly: "What is missing from Menzies's second amended complaint is any factual allegation supporting his conclusion that, following Taylor's arrest and indictment, there existed a threat of the defendants fraudulently marketing the tax shelter into the indefinite future." *Id*. Put aside the fact that defendants actually *did* continue their scheme after Taylor's indictment. Where does that supposed requirement come from, if not from hindsight and reliance on intervening events? This mistaken reliance on hindsight offers a windfall to RICO defendants in both civil and criminal cases.

2. *The Detailed Allegations of Continuity*

The majority also errs by simply failing to engage with the extensive factual details alleged in the complaint that indicate a threat of repetition and support open-ended continuity. The majority also fails to give the plaintiff the benefit of favorable inferences from his allegations. The complaint uses the right labels and descriptors—"regular way of conducting and participating in an ongoing criminal enterprise," SAC ¶ 26; "part of [a] pattern of similar or identical activity by Defendants, as tax shelter promoters, advisors, and others that had the same or similar purposes, results, participants, victims, or methods of commission" ¶ 157; "it is the very nature of a tax shelter product, such as the Euram Oak Strategy, to be created once and then replicated multiple times to multiple taxpayers," ¶ 157; "[t]he threat of repetition and continued criminal activity is implicit, as there was a continued threat that it later could be replicated for other taxpayers**,"** ¶ 158; defendants' "predicate acts of mail and wire fraud were part of their regular way of conducting business," ¶ 183; and defendants' "pattern of criminal conduct … projects into the future," as illustrated by "the manner in which the Euram products were presented as products, with a preexisting team that could execute and support the tax shelter for other taxpayers and from the regular manner in which this enterprise did business with Menzies, Ferenc, [the Arizona and North Carolina investors], and other investors in fraudulent Euram strategies," ¶ 184.

These general allegations are made more plausible by the extensive details about how defendants carried out the fraud with Menzies and Ferenc. The majority fails to recognize that defendants themselves described those schemes as "very similar" to and "in essence identical" to transactions with the Arizona investor. The complaint also describes the similar "Euram

Rowan Strategy" with the North Carolina investors (without Northern Trust, however). To one another, they further described Menzies and Ferenc transactions as "two new trades involving the Oak structure." And the defendants presented the fancy marketing materials to Menzies with a disclaimer addressed to "investors" and demanded that prospective clients sign confidentiality agreements before the scheme could be explained to them. These details provide ample support for the allegation that defendants would continue marketing identical or closely similar fraudulent tax shelters to other taxpayers. Neither defendants nor the majority have identified any natural ending point for this profitable scheme.

In rejecting open-ended continuity, the majority fails to apply the proper standard of review, which gives the plaintiff the benefit of reasonable inferences from the allegations. Of course there was a threat of continued fraudulent episodes! As long as the defendants were getting away with this scam, why should they have stopped with the Arizona investor, Menzies, and Ferenc? They had developed a profitable product, one that promised their clients millions of dollars in tax savings and assured defendants hundreds of thousands of dollars in fees every time it was used. In the law we ordinarily assume that people are rational actors. Here, that means that we would expect defendants to continue with their profitable venture.

Giving plaintiff the benefit of his allegations and reasonable inferences from them—and *viewed at the* *time of the alleged fraud*—these were "predicate acts, which by their very nature, pose[d] 'a threat of repetition extending indefinitely into the future or [were] part of an ongoing entity's regular way of doing business.'" *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir. 1994), quoting *H.J., Inc.*, 492 U.S. at 242.

E. *Closed-Ended Continuity*

Plaintiff's strong case of open-ended continuity should be sufficient to warrant reversal here, but the majority also errs in rejecting closed-ended continuity. The majority criticizes plaintiff for not alleging in more fulsome detail the specifics of defendants' efforts to defraud the Arizona investor and the North Carolina investor using the same fraudulent tax shelter or the Euram Rowan variant. Ante at 20. In doing so, the majority imposes an unfair and excessive pleading requirement that goes beyond Rule 9(b) and any need for fair notice to defendants.

The pleading requirement is unfair because the defendants have thus far kept the cloak of attorney-client privilege around the content of some of their fraudulent communications with the Arizona and North Carolina investors and others. Given the IRS's rejection of these abusive tax shelters, there are ample reasons to think that the crime-fraud exception would apply to pierce the privilege, which may still occur on remand of some of plaintiff's state-law claims. See generally *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009) (discussing statutory tax-practitioner privilege that parallels attorney-client privilege and is subject to exceptions for crime and fraud, as well as promotion of tax shelters, 26 U.S.C. § 7525).

The majority's pleading requirement is excessive because it discounts the complaint's plausible allegations about the fraud aimed at the North Carolina and Arizona investors. In rejecting closed-ended continuity, the majority relies on *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998), which affirmed dismissal of a civil RICO complaint for failure to allege with sufficient particularity facts concerning alleged victims in addition to the named plaintiff. *Emery* is readily distinguishable. That complaint alleged only one victim with any particularity or evidence. It did not involve an off-the-shelf fraudulent product that could be repeated easily with additional targets. The plaintiff in *Emery* was not able to provide any meaningful details about the alleged fraudulent letters to other alleged victims, who apparently did not keep any documents or remember anything about the scheme. 134 F.3d at 1323.

By comparison, the North Carolina and Arizona investors spent on the order of a million dollars each on the defendants' fraudulent professional services. These investors experienced multimillion-dollar tax bills, with penalties and interest. Unlike the other targets in *Emery*, these victims do not seem to have forgotten the incidents or thrown away the relevant documents. And recall that defendants themselves described the transactions as "in essence identical" and "very similar" to the transactions with Menzies and Ferenc. SAC ¶¶ 50, 82.

Even with these handicaps, plaintiff has identified some specific fraudulent communications for the North Carolina and Arizona investors, sufficient to satisfy Rule 9(b). ¶¶ 160–64, 166–78. The closed-end theory should not fail simply because plaintiff has not yet seen those fraudulent opinion letters. Defendants claim the letters are privileged, but the complaint alleges they exist and were sent. It's not difficult to infer what they said. If the letters had not asserted the fraudulent shelters were legal, there of course would have been no point in the transactions. See SAC ¶¶ 162, 177. The inference that the defendants' opinion letters say fraudulently that the tax shelters would be legal is not merely plausible but compelling. The allegations about the opinion letters and related communications provide sufficient information about the who, what, when, where, and how of the fraud to satisfy Rule 9(b) regarding the other investors.

As discussed above, it also does not matter whether a particular taxpayer-client was deceived regarding the tax shelter's legality. If he was not deceived and did not go through with the transaction, there was at least an attempt to defraud by the defendants. If the targeted taxpayer was not deceived, understood the transaction, and went through with it, he was joining a criminal venture to defraud the federal government. Either way, that's another episode of fraud in implementing the scheme.

Even with the limited information available to him, plaintiff provided sufficient information about these additional instances of fraud to satisfy the RICO pattern requirement and Rule 9(b). By affirming dismissal of the RICO claims, the majority unfairly rewards defendants for their efforts to cover up their attempts to defraud other investor-taxpayers.

Because the majority has adopted an erroneous, restrictive view of the RICO pattern requirement, giving defendants the benefit of hindsight and failing to give plaintiff the benefit of his allegations, the majority is substantially weakening both civil and criminal RICO. I respectfully dissent from the dismissal of plaintiff's RICO claims.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 15 C 3403

Judge John Robert Blakey

[Filed September 21, 2018]

STEVEN MENZIES,	)
	)
Plaintiff,	)
	)
v.	)
	)
SEYFARTH, SHAW LLP, GRAHAM TAYLOR, NORTHERN TRUST CORPORATION, and CHRISTIANA BANK & TRUST COMPANY,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff Steven Menzies sued Defendants Seyfarth Shaw LLP (Seyfarth), Graham Taylor (Taylor), Northern Trust Corporation (Northern), and Christiana Bank & Trust Company (Christiana), alleging that Defendants have damaged him by selling him an abusive tax planning product designed to allow him to avoid paying capital gains tax. Plaintiff alleges that the tax plan ultimately failed when uncovered by the IRS, and that, as a result, he owed the IRS back taxes, in addition to fees, interest, and penalties.

Plaintiff asserts causes of action against Defendants for violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961, *et seq*. (Count I), and conspiracy to violate the RICO Act (Count II). Plaintiff also asserts state-law claims for fraudulent misrepresentation (Count III), civil conspiracy (Count IV), joint enterprise liability (Count V), negligent misrepresentation (Count VI), breaches of fiduciary duty (Counts VII and VIII), and unjust enrichment (Count IX).

After an opportunity to conduct discovery and two prior attempts to draft his complaint, Plaintiff filed his Second Amended Complaint (SAC) in August 2017. [165]. Shortly after, Defendants again moved to dismiss the SAC with prejudice. [169] [172] [175]. Plaintiff then filed motions to strike exhibits attached to Defendants' motions to dismiss. [182] [184] [186]. For the reasons explained below, this Court grants Defendants' motions to dismiss, and grants Plaintiff's motions to strike.

This Court presumes familiarity with, and incorporates by reference, its prior opinion granting in part and denying in part Defendants' motions to dismiss Plaintiff's complaint. [57]. Therefore, the Background section only briefly revisits the facts in this case, and details only the additional allegations that Plaintiff has added in his SAC. Likewise, this

Court will not repeat in detail its prior legal analysis or the required elements of each cause of action.

I. Background

Plaintiff is the co-founder, President and Chief Operating Officer of a financial services firm called Applied Underwriters Inc. (AUI). Plaintiff asserts that Defendants conspired to develop, market, and promote to himself and others an abusive tax avoidance scheme. [165] ¶ 1. Plaintiff claims that, as an unwitting participation in Defendants' scheme, he suffered millions of dollars of damages after the IRS uncovered that Plaintiff's sale of stock, through various trust tax shelters, allowed him to evade tax liabilities. *Id.* Plaintiff alleges that, since 2003, Defendants aggressively marketed generic tax shelter products to clients, all of which were designed to avoid or evade income tax. *Id.* ¶¶ 13, 15–17. Two of these tax shelters are what Plaintiff calls the "Euram Oak Strategy" and the "Euram Rowan Strategy." *Id.* ¶ 18. Apart from the named Defendants, the alleged enterprise included Euram Bank (Euram), a private bank located in Austria, and Pali Capital (Pali), an entity that worked on behalf of Euram in connection with the Euram Oak and Rowan strategies. *Id.* ¶¶ 17, 19, 188.

In the SAC, Plaintiff adds new allegations regarding three other investors who were purportedly defrauded by Defendants' enterprise: (1) an Arizona investor; (2) a North Carolina investor; and (3) Plaintiff's colleague, Sidney Ferenc.[1] *See* [165] ¶¶ 28, 38, 88, 91, 110–18, 160–80, 181, 184.

The Arizona investor. In or about March 2003, representatives of Euram and/or Pali communicated with the Arizona investor about the Euram Oak Strategy. *Id.* ¶¶ 160–61. About a year later in February 2004, Taylor and Seyfarth provided the Arizona investor with a legal opinion regarding the Euram Oak Strategy. *Id.* ¶ 162. Seyfarth has maintained attorney-client privilege over this opinion; however, Plaintiff alleges (upon information and belief) that, in the opinion, Seyfarth asserted the legality of the strategy, even though Seyfarth and Taylor knew that the strategy did not constitute legitimate tax planning advice. *Id.* Plaintiff alleges upon his information and belief that the Arizona investor suffered damages equal to, among other things, the tax deficiency from the IRS disallowance of the Euram Oak Strategy, with a purported tax savings of approximately $75 million. *Id.* ¶ 165.

The North Carolina investor. In late 2002, a representative of Pali met with the North Carolina investor to discuss the Euram Rowan Strategy. *Id.* ¶ 173. After this meeting, Euram suggested to the North Carolina investor that he engage Taylor to provide a legal opinion about the tax benefits that he would obtain by implementing the Euram Rowan Strategy. *Id.* ¶ 176. Around October 2003, Taylor and

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[1] Because the identities of the Arizona and North Carolina investors have been kept under seal, this Court will not refer to them by name.

Seyfarth provided the North Carolina investor with a legal opinion regarding the Euram Rowan Strategy. *Id.* ¶ 177. Seyfarth has asserted privilege over this opinion; nonetheless, Plaintiff alleges (also upon information and belief) that the opinion asserted the legality of the Euram Rowan Strategy, even though Seyfarth and Taylor knew that it was not a legitimate tax planning vehicle. *Id.* Ultimately, as a result of the North Carolina investor's entry into the Euram Rowan Strategy, the IRS disallowed the North Carolina investor's claimed $17.5 million loss and assessed a penalty of $911,869. *Id.* ¶ 810.

<u>Ferenc</u>. Ferenc is an executive and colleague of Plaintiff's at AUI. *Id.* ¶ 25. He entered into the Euram Oak Strategy at the same that Plaintiff entered into one of his transactions, the 2003 Tax Shelter. *Id.* ¶¶ 91, 159. Ferenc paid substantial fees associated with his initial investment. *Id.* ¶ 159. In October 2003, Taylor, in an email, advised Ferenc that he considered various IRS regulations in assuring him that the Euram Oak Strategy constituted legitimate tax planning advice. *Id.* ¶ 88. Taylor also sent Ferenc and Plaintiff a draft tax opinion via email on September 9, 2003, assuring them, among other things, that the Euram Oak Strategy was a lawful tax avoidance mechanism and not a fraudulent tax shelter. *Id.* ¶ 110. Taylor sent further drafts throughout 2004, as well as a final signed opinion letter around September 24, 2004; all of these letters assured Ferenc that the Euram Oak Strategy was a legitimate tax planning vehicle. *Id.* ¶¶ 110–11, 115, 118. Plaintiff does not say whether Ferenc ultimately owed anything to the IRS. *See generally id.*

Apart from the new allegations regarding the three investors, Plaintiff also makes a conclusory allegation that there is a threat of continued racketeering activity because Defendants' predicate acts of mail and wire fraud were part of their regular way of conducting business. *Id.* ¶ 183. Plaintiff also asserts the legal conclusion that Defendants' pattern of criminal conduct projects into the future because there is a preexisting team that could execute and support the tax shelters for other taxpayers as it did for Plaintiff and the other purported victims. *Id.* ¶ 184.

II. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must provide a "short and plain statement of the claim" showing that the pleader merits relief, Fed. R. Civ. P. 8(a)(2), so the defendant has "fair notice" of the claim "and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint must also contain "sufficient factual matter" to state a facially plausible claim to relief—one that "allows the court to draw the reasonable inference" that the defendant committed the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Santana v. Cook Cty. Bd. of Review*, 679 F.3d 614, 621 (7th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).

In evaluating a complaint on a Rule 12(b)(6) motion, this Court accepts all well-pleaded allegations as true and draws all reasonable inferences in Plaintiffs' favor.

Iqbal, 556 U.S. at 678. This Court does not, however, accept legal conclusions as true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). On a motion to dismiss, this Court may consider the complaint itself, documents attached to the complaint, documents central to the complaint and to which the complaint refers, and information properly subject to judicial notice. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

Claims alleging fraud must also meet Rule 9(b)'s heightened pleading requirements. As to the fraud portions of the RICO claims, Rule 9(b) demands that claimants "state with particularity the circumstances constituting fraud." Particularity requires that plaintiffs "describe the who, what, when, where, and how of the fraud—the first paragraph of any newspaper story." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441–42 (7th Cir. 2011) (internal quotation marks omitted); *Slaney v. The Intern. Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir. 2001). Although different cases require different levels of detail for a complaint to satisfy Rule 9(b), *id*. at 442, plaintiffs must provide "precision and some measure of substantiation," *United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*, 836 F.3d 770, 776 (7th Cir. 2016) (internal quotation marks omitted).

III. Analysis

A. Counts I and II: The RICO Claims

1. This Court's Prior Opinion

In its prior opinion, this Court dismissed Plaintiff's RICO claims because Plaintiff failed to sufficiently allege a pattern of racketeering activity. [57] at 32–39. Specifically, this Court found that Plaintiff did not adequately allege "closed-ended" continuity, because the predicate acts—mail and wire fraud—all occurred in furtherance of a single scheme to defraud a single victim, Plaintiff, whose injuries all stem from a single tax planning product. *Id.* at 33–36. This Court also found that Plaintiff's allegations lack threat of continuity because Plaintiff alleged only a single victim (himself) and the alleged pattern of criminal activity dispelled any "threat of repetition" because, by the complaint's own allegations, the alleged pattern of Defendants' conduct ended by 2005, when all of the transactions involving Plaintiff had completed. *Id.* at 36 (quoting *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 782 (7th Cir. 1994)).

Based upon these findings, this Court granted Plaintiff leave to replead his RICO claims, instructing Plaintiff that it would review any amended complaint for the existence of other victims that were defrauded by Defendants' alleged scheme. *Id.* at 39. This Court also stated that it would address whether any amended complaint set forth each requisite element of the predicate fraud acts with the specificity required under Rule 9(b). *Id.*

2. Plaintiff's Pattern Allegations Must Be Dismissed

a. Plaintiff Fails to Allege A Closed-Ended Pattern

As with his original complaint, Plaintiff attempts to allege a closed-ended pattern involving multiple acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 in furtherance of the overall scheme to defraud, all within the affairs of the alleged RICO enterprise. [165] ¶¶ 1–184; [196] at 15–16 (arguing that the SAC alleges a closed-ended pattern because Defendants' schemes involved multiple victims, multiple predicate acts over a period of several years, and at least two tax shelter products). Where, as here, mail and wire fraud form the alleged pattern, each requisite element of the underlying predicate activity must be set forth with the particularity and specificity required by Rule 9(b). [57] at 32 (citing *Slaney v. Intern. Amateur Athletic Fed'n*, 244 F.3d 580, 599 (7th Cir. 2001)). And, at a minimum, Plaintiff must allege with particularity: (1) a scheme to defraud; (2) the intent to defraud; and (3) the use of the mails or wire communications in furtherance of the scheme to defraud. *Id.*

Defendants argue that the SAC's new allegations do nothing to cure the deficiencies in Plaintiff's pleading of closed-ended pattern because they fail to plausibly and adequately allege that the three newly added investors were deceived by Defendants. [173] at 9–13.[2]

This Court agrees. In *Emery v. American General Finance, Inc.*, the Seventh Circuit affirmed dismissal of the plaintiff's RICO claim with prejudice where his complaint (which was actually his second amended complaint) included only general allegations about other alleged victims who entered into similar transactions as the plaintiff, but ultimately, "shed[ ] no light" on whether the alleged victims "were deceived." 134 F.3d 1321, 1322–23 (7th Cir. 1998). Thus, *Emery* teaches that, in the context of a RICO claim where the predicate acts are fraud-based, the complaint must set forth, with particularity, facts indicating that other victims were actually deceived by the same alleged pattern of racketeering activity by the same alleged enterprise. *Id. See also Shirley v. Jed Capital, LLC*, 724 F. Supp. 2d 904, 914 (N.D. Ill. 2010) (plaintiff failed to plead pattern of racketeering activity where his complaint omitted "many needed details," such as the content of misrepresentations, why they constituted misrepresentations, and how the plaintiff was misled by those misrepresentations); *Krug v. Am. Family Mut. Ins. Co.*, 227 F. Supp. 3d 942, 945 (N.D. Ill. 2016) (dismissing fraud claim because "the essence of fraud is deception, and plaintiff does not claim to have been deceived by defendant's conduct.").

[2] Because each Defendant has echoed, or incorporated by reference, the arguments raised by the other Defendants in their motions to dismiss, this Court addresses the motions collectively.

In his SAC, Plaintiff adds new allegations concerning three other investors who were allegedly lured by Defendants into entering into illegal tax avoidance schemes. These allegations, however, do not pass muster under Rule 9(b) because they fail to plausibly state that the investors were victims of fraud.

For instance, the allegations concerning the Arizona investor describe, in general terms, a tax shelter transaction that the Arizona investor entered into upon the advice of Seyfarth and Taylor. [165] ¶¶ 160–69. Conspicuously missing, however, are any particularized allegations demonstrating why, how, or even if, he was actually deceived by Defendants' conduct. *See generally id.* Plaintiff does not allege any particular facts about what the Arizona investor was actually told about the Euram Oak Strategy; rather, he states only that "it is reasonable to assume" that Seyfarth advised the Arizona investor as to the legality of the Euram Oak Strategy. *Id.* ¶ 162. Even more troubling, Plaintiff does not assert what, if anything, about the Euram Oak Strategy or what any of the Defendants said about the Euram Oak Strategy, actually deceived the Arizona investor.

The allegations concerning the North Carolina investor suffer the same defects. Here again, Plaintiff sets forth the general contours of the North Carolina investor's transaction, alleging that Seyfarth and Taylor provided him a legal opinion about the so-called Euram Rowan strategy and falsely represented that it was a legal tax planning vehicle. *Id.* ¶¶ 170–80. Yet, Plaintiff does not set forth any specific facts demonstrating that the North Carolina investor *was* actually deceived by any of Defendants' conduct, or *how* he was deceived. Like those relating to the Arizona investor, these allegations suggest only that the North Carolina investor lost money after entering into an ill-advised tax shelter. The allegations nowhere indicate, however, that the North Carolina investor lost that money as a result of being *defrauded* by Defendants.

Lastly, Plaintiff's allegations concerning Ferenc fare no better. In Ferenc's case, Plaintiff provides some detail about his transaction—including that he obtained a $22,800,000 loan from Euram bank—and alleges that he received tax opinion letters from Seyfarth and Taylor that were "substantially similar to" the ones that they issued to Plaintiff. *Id.* ¶¶ 91, 123. Plaintiff alleges that Ferenc invested in a Euram Oak Strategy at the same time as Plaintiff, and on his information and belief, paid substantial fees associated with the initial investment. *Id.* ¶ 159. As with the other two investors, however, Plaintiff utterly fails to set forth any facts stating that Ferenc was actually deceived. Indeed, Plaintiff does not allege that Ferenc was deceived, how he was deceived, or even that he suffered any injury in the way of IRS penalties or disallowances. *See generally id.*

In short, the SAC is devoid of any allegations that Defendants' conduct *actually deceived* other investors. Plaintiff's failure to plead such facts is particularly problematic in a case, like this one, where the purported victims knowingly entered into tax shelters, which by their nature are designed to avoid taxes. The SAC thus begs the question of how exactly the purported victims (who might not be victims at all) were actually deceived by Defendants. Because the SAC does not answer that question, Plaintiff fails to cure his RICO claims to state "when, why, how, or even if" other investors were actually defrauded. [57] at 38; *see also Emery*, 134 F.3d at 1323; *Shirley*, 724 F. Supp. 2d at 914. By insufficiently alleging other victims, Plaintiff is back at square one, in that he alleges no more than a single victim (himself) whose injuries all flowed from a single scheme. [57] at 38–39. Under these circumstances, Plaintiff fails to allege closed-ended continuity. *Id.*

b. Plaintiff Fails to Allege Open-Ended Continuity

Open-ended continuity is satisfied by "past conduct that by its nature projects into the future with a threat of repetition." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 828 (7th Cir. 2016) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 341 (1989)). To demonstrate open-ended continuity, Plaintiff must show: (1) a "specific threat of repetition"; (2) that the predicate acts form "part of an ongoing entity's regular way of doing business"; or (3) that Defendants operate a "long term association that exists for criminal purposes." *Guaranteed Rate, Inc. v. Barr*, 912 F. Supp. 2d 671, 693 (N.D. Ill. 2012) (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1023 (7th Cir. 1992)).

None of these bases are present in the SAC. First, there is no specific threat of repetition because the allegations do not suggest that any future acts of wire or mail fraud will take place. Although, as Plaintiff correctly argues, the threat of continuity must be assessed as of "the time the racketeering occurred," *Inteliquent, Inc. v. Free Conferencing Corp.*, No. 16-cv-6976, 2017 WL 1196957, at *10 (N.D. Ill. Mar. 30, 2017), the SAC indicates that Defendants' alleged scheme would not have continued indefinitely, even when assessed prospectively from the date of the last alleged predicate act, in 2005.

Plaintiff alleges that Taylor was indicted for tax fraud in 2005 and was ultimately convicted in January 2008. [165] ¶¶ 105, 108. Taylor was a key member of Defendants' alleged enterprise because he was the attorney who drafted the necessary opinion letters to provide legal justification and appearance of "legitimacy" for the tax shelter plans. *See, e.g.*, *id.* ¶¶ 100–01, 110, 111, 162, 177. When a RICO scheme depends upon a specific employment relationship, the end of that relationship may eliminate any threat of repetition. *See Midwest Grinding*, 976 F.2d at 1025. In light of the factors previously discussed in this Court's prior opinion [57] and because Taylor's indictment in 2005 surely meant that he would immediately or soon depart from the alleged enterprise, this Court finds that no specific threat of repetition exists by that point. *Id.* ("It follows that once [defendant] left Midwest, any threat of future illegal activity ceased to exist."); *Starfish Inv. Corp. v. Hansen*, 370 F. Supp. 2d 759, 777–78 (N.D. Ill. 2005) (finding no specific threat of repetition of predicate acts because the complaint alleged that the enterprise's ringleader was incarcerated and the plaintiff did not plead any predicate acts since his incarceration).

Second, Plaintiff fails to allege that the predicate acts form "part of an ongoing entity's regular way of doing business." While Plaintiff baldly alleges that there is a "threat of continued racketeering activity in that Defendants['] predicate acts of mail and wire fraud were part of their regular way of doing business," [165] ¶ 183, such allegation is conclusory and speculative, and insufficient to survive a motion to dismiss. *See Gavin v. AT&T Corp.*, 543 F. Supp. 2d 885, 904–05 (N.D. Ill. 2008) ("A RICO plaintiff is required to allege sufficient facts to support each element, and cannot simply allege these elements using boilerplate language."); *Vicom, Inc. v. Harbridge Merch. Servs.*, Inc., 20 F.3d 771, 783 (7th Cir. 1994) (cursory and unparticularized allegations of continuing racketeering activities insufficient to show open-ended continuity). Moreover, merely alleging multiple acts of Defendants' purported fraud is not sufficient to support a finding that fraud constituted their "regular way of doing business." *See A.I. Credit Corp. v. Hartford Computer Grp., Inc.*, 847 F. Supp. 588, 603 (N.D. Ill. 1994) (alleging multiple acts of fraud, without more, could not suffice to show that predicate acts were a regular way of doing business, because the "same could be said in almost any case, since dishonesty tends to become habitual."). Here, there are insufficient facts from which this Court can draw an inference that Defendants have incorporated mail and wire fraud into their regular business practices.

Finally, Plaintiff does not sufficiently allege that Defendants are engaged in a criminal pattern of activity that otherwise projects into the future. Plaintiff generally states that:

> Defendants' pattern of criminal conduct in this case projects into the future, as the manner in which the Euram products were presented as products, with a preexisting team that could execute and support the tax shelter for other taxpayers and from the regular manner in which this enterprise did business with [the alleged victims].

Id. ¶ 184. Once again, this allegation is purely speculative and conclusory, and therefore insufficiently pled. Moreover, this Court finds nothing in the SAC that allows it to infer a RICO pattern that projects into the future. Plaintiff's allegations suggest, at most, that Defendants collaborated on several transactions that produced negative tax consequences for Plaintiff and several other investors, and each Defendant profited separately from those transactions.

c. Plaintiff's RICO Claims Are Dismissed

Because Plaintiff has failed to allege either closed-ended or open-ended continuity, he fails to state a "pattern of racketeering activity." Accordingly, this Court dismisses Plaintiff's RICO claim (Count I).

Further, Plaintiff's RICO conspiracy claim rests upon the same facts as his substantive RICO claim. *See* [165] ¶¶ 211–19. Accordingly, given the record here, Plaintiff's failure to state a RICO pattern requires dismissal of his conspiracy claim as well. *See Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 677 (7th Cir. 2000).

B. Counts III to IX: Plaintiff's State-Law Claims

Plaintiff's remaining claims in his SAC all sound in Illinois state law. *See generally* [165] ¶¶ 220–66. Defendants all argue that these state-law claims are time-barred by the Illinois Securities Law, 735 ILCS 5/12, *et seq*. (ISL).[3] This Court agrees, as explained below.

1. The ISL's Scope

During the relevant time period,[4] the ISL's statute of repose provided that "[n]o action shall be brought for

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[3] Because invoking a statute of repose is an affirmative defense, the Court construes these portions of Defendants' briefs under Federal Rule of Civil Procedure 12(c). *See Johnson v. City of S. Bend*, 680 F. App'x 475, 478 (7th Cir. 2017) ("The expiration of a statute of limitations is an affirmative defense. And since plaintiffs need not anticipate affirmative defenses in a complaint, a motion to dismiss under Rule 12(b)(6) is not the appropriate means for defendants to seek dismissal based on a statute of limitations.").

[4] The statute of repose formerly found in 815 ILCS 5/13(D) was removed via amendment on August 5, 2013. The Court is nevertheless bound to enforce that repose period under Illinois law. Once "a claim is time-barred, it cannot be revived through subsequent legislative action." *Doe A v. Diocese of Dallas*, 917 N.E.2d 475, 486 (Ill. 2009); *see also M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997) ("If the claims were time-barred under the old law, they remained time-barred even after the repose period was abolished by the legislature."). Removing the statute of repose is also, at least in this case, a distinction without a difference. Plaintiff was informed of the IRS audit in 2009, [165] ¶ 137, which at the very least put him on sufficient notice to begin the three-year limitations period reflected in the current version of 815 ILCS 5/13(D).

relief under this Section or *upon or because of any of the matters for which relief is granted by this Section*," after five years from the sale of the securities at issue. 815 ILCS 5/12(D) (emphasis added). Thus, under Illinois law, even "claims that do not directly invoke" the ISL "may still fall within its" repose period. *Klein v. George G. Kerasotes Corp.*, 500 F.3d 669, 671 (7th Cir. 2007). Whether Plaintiff's state-law claims here are subject to the ISL's statute of repose "depends on what acts are encompassed within" the ISL's substantive provisions. *See id.* at 671.

Section 12(F) of the ISL prohibits engaging in "any transaction, practice or course of business *in connection with* the sale or purchase of securities which works or tends to work a fraud or deceit upon the purchaser or seller thereof." 815 ILCS 5/12(F) (emphasis added). This "in connection with" standard is subject to a "broad interpretation," capturing even fraud that merely "coincided with or touched a securities transaction." *First Nat'l Bank & Tr. Co. of Rochelle, Ill. v. McGraw-Hill Comps., Inc.*, 85 F. Supp. 3d 963, 969 (N.D. Ill. 2015) (explaining that the ISL's "in connection with" requirement is, under Illinois law, substantially similar to the expansive standard of Section 10b and Rule 10b-5 of the Securities Exchange Act). Section 12(I), meanwhile, prohibits employing "any device, scheme or artifice to defraud in connection with the sale or purchase of any security, *directly or indirectly*." 815 ILCS 5/12(I) (emphasis added).

2. Plaintiff's State-Law Claims Are Subject To The ISL

The putative fraud at the heart of the SAC clearly "coincided with" or otherwise "touched" Plaintiff's sale of his AUI stock. As alleged in the SAC, Plaintiff essentially exchanged AUI's stock for trust certificates, at Defendants' direction, as part of their tax shelter scheme. *See generally* [165]. Transfers of this sort qualify as sales under the ISL. *See Disher v. Fulgoni*, 514 N.E.2d 767, 772 (Ill. App. Ct. 1987) (the definition of "sale" is "liberal" and the exchange of stock for trust certificates is clearly a "sale" under the ISL).

Indeed, the SAC is rife with allegations that bring Plaintiff's state-law claims within the ISL's purview. The pleading states that Plaintiff's "disposition of over $60 million of AUI stock, through the artifice of various tax shelters," was the basis of the IRS's subsequent audit and penalty. [165] ¶ 1; *see also id.* ¶ 138 ("Near the end of its audit, the IRS focused on BHI's purchase of the AUI stock from the Persephone Trust."); *id.* ¶ 143 ("The IRS determined that Menzies, not the Persephone Trust, had sold the AUI stock . . . ."). Defendants' ostensible misrepresentations related directly to the sale of the AUI stock; in fact; the SAC confirms that the entire purpose of the tax shelter was to shield the proceeds of that stock sale. *Id.* ¶ 97 ("Defendants, through Northern Trust and Taylor, assured Plaintiff that the 2004 Tax Shelter would eliminate capital gains from the sale of his AUI stock . . . ."); *see also id.* ¶ 99 ("Defendants represented to Menzies that the purpose of the complicated (and costly) 2003 Tax Shelter and 2004 Tax Shelter . . . was to effectively and lawfully shield the disposition of the AUI stock from capital gains tax.").

The ISL also provides a remedy for the violations alleged in the SAC. Section 13(G) of the ISL allows "any party in interest" to bring suit against "any person" who allegedly violated the Act. 815 ILCS 5/13(G)(1). This subsection provides a remedy in cases where "the plaintiffs sought compensatory and other damages without expressly requesting injunctive relief." *First Nat'l Bank & Tr. Co.*, 85 F. Supp. 3d at 972. Even where, as here, a plaintiff principally seeks compensatory damages, Section 13(G) provides "some relief," which is sufficient to trigger application of the ISL. *See id.*

Plaintiff attempts to avoid this result by insisting that "there is no allegation (or evidence) that the sale of AUI securities took place in Illinois." [197] at 18. This argument remains inconsistent with guidance from the Illinois Supreme Court. In *Benjamin v. Cablevision Programming Investments*, that court explained how the ISL's definition of a "sale" was formulated "to exclude nothing that could possibly be regarded as a sale," such that "every step toward the completion of a sale would be a sale" within the meaning of the statute. 499 N.E.2d 1309, 1315 (Ill. 1986) (quoting *Silverman v. Chicago Ramada Inn, Inc.*, 211 N.E.2d 596, 599 (Ill. App. Ct. 1965)). The court accordingly rejected the notion that the ISL's sole purpose was to "protect Illinois residents and others who purchase securities in this state." *Id.* The court explained that in its view, the ISL's "patternalistic character" was "broader." *Id.* So long as the stock sale at issue has "some physical nexus with Illinois," the ISL applies. *Id.* at 1316. The instant case meets this standard. *See* [165] ¶ 3 (Seyfarth is an LLP organized under Illinois law); *id.* ¶ 6 (Northern is a corporation organized under Illinois law); *id.* ¶ 11 (alleging that venue is proper here because, *inter alia*, Christiana's conduct "as alleged in the Complaint has been committed by and through its co-conspirators . . . ."); *id.* ¶ 121 (explaining that John Rogers, Taylor's partner in Chicago, approved the legal opinion letter provided to Plaintiff).

In the end, Plaintiff's state-law claims are sufficiently "in connection with" the sale of the AUI securities to justify imposition of the ISL's statute of repose. *See id.* ¶ 155 ("But for Defendants' conduct," Plaintiff would not have "incurred substantial costs to the IRS in penalties and interest arising out of the disposition of the AUI stock."). This is not an incongruous result. *See Klein*, 500 F.3d at 671 (holding that fraud and breach of fiduciary duty claims fall under the ISL); *Tregenza v. Lehman Bros.*, 678 N.E.2d 14, 15 (Ill. App. Ct. 1997) (holding that negligent misrepresentation claims fall under the ISL); *see also Orgone Capital III, LLC v. Daubenspeck*, No. 16 C 10849, 2017 WL 3087730, at *8 n.9 (N.D. Ill. July 20, 2017) (wherein plaintiffs implicitly conceded that the ISL controlled their state-law claims).

3. Plaintiff's State-Law Claims Are Untimely

Because the ISL's statute of repose applies to Plaintiff's state-law claims, they should have been brought by at least May 2011, five years after the AUI stock sale in May 2006. [165] ¶ 132. Plaintiff did not bring these claims until April of 2015 [1], which was far too late. Plaintiff's state-law claims are accordingly dismissed.

C. Plaintiff's Motions to Strike

Plaintiff moves to strike materials attached to Defendants' motions to dismiss, arguing that they are extraneous to the pleadings and should not be considered on a Rule 12(b)(6) motion to dismiss. *See* [182] [184] [186]. Because this Court did not need to consider—and indeed, did not consider—those materials in deciding Defendants' motions to dismiss, it grants Plaintiff's motions to strike.

IV. Conclusion

This Court grants Defendants' motions to dismiss [169] [172] [175], and grants Plaintiff's motions to strike [182] [184] [186]. Because (1) it does not appear that Plaintiff would be able to amend his complaint to successfully state RICO claims, (2) his state-law claims are time-barred, and (3) this is already Plaintiff's third complaint (after discovery and the benefit of this Court's prior opinion), Plaintiff's Second Amended Complaint [165] is dismissed in its entirety, with prejudice. Civil case terminated.

Dated: September 21, 2018

Entered:

/s/John Robert Blakey
John Robert Blakey
United States District Judge

APPENDIX C

ILND 450 (Rev. 10/13) Judgment in a Civil Action

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Case No. 15 CV 3403
Judge John Robert Blakey

[Filed September 21, 2018]

Steven Menzies,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
Seyfarth Shaw LLP et al,	)
	)
Defendant(s).	)
	)

<u>JUDGMENT IN A CIVIL CASE</u>

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) Seyfarth Shaw, LLP et al and against plaintiff(s) Steven Menzies

.

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge John Robert Blakey on a motion.

Date: 9/21/2018 Thomas G. Bruton, Clerk of Court

G. Lewis , Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 15 C 3403

Judge John Robert Blakey

[Filed July 15, 2016]

Steven Menzies,	)
	)
Plaintiff,	)
	)
v.	)
	)
Seyfarth Shaw LLP,	)
Graham Taylor,	)
Northern Trust Corporation,	)
and Christiana Bank & Trust	)
Company,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff is a rich man who, ostensibly through hard work and good fortune, put himself in a position to sell over sixty million dollars in stock in a company he helped create. No crime in that, closing on such a sale exemplifies part of the American Dream. But when lawyers and financial consultants sold him on a 100% tax avoidance plan to save him millions on the deal, Plaintiff later paid the price to Uncle Sam with an even bigger IRS bill. Any crime in that? Plaintiff claims it constitutes civil racketeering and violates a host of state laws. Defendants disagree and claim that, at worst, it was just bad advice. They now challenge his right to sue in federal court.

Specifically, Plaintiff Steven Menzies ("Menzies" or "Plaintiff") sued Defendants Seyfarth Shaw LLP ("Seyfarth"), Graham Taylor ("Taylor"), Northern Trust Corporation ("Northern") and Christiana Bank & Trust Company ("Christiana"), collectively "Defendants," based upon the purchase of a tax planning product designed to allow Plaintiff to avoid paying capital gains tax. Ultimately, the plan failed, and, in addition to the tax burden he owed the IRS, Plaintiff incurred fees, interest and penalties. Among other relief sought in his Complaint [1], Plaintiff seeks more than $10.4 million in damages from Defendants via nine causes of action, including civil racketeering, fraud, conspiracy, negligence, breach of fiduciary duty and unjust enrichment.

Defendants deny any wrongdoing and now move to dismiss [29] [31] [35] the Complaint under Federal Rules of Civil Procedure 9(b), 12(b)(2) and 12(b)(6). For the following reasons, the motions are granted in part and denied in part. As explained below, this Court dismisses the RICO counts under Rule 12(b)(2) and 12(b)(6), and, in light of the findings regarding the RICO claims, defers the motions to dismiss as to the state law counts.

I. Legal Standard

Under Rule 12(b)(6), this Court accepts as true all well-pleaded facts in the Complaint and draws all reasonable inferences from those facts in Plaintiff's favor. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011). Although this Court normally cannot consider extrinsic evidence without converting a motion to dismiss into one for summary judgment, when a document is referenced in the Complaint and central to Plaintiff's claims the Court may consider it in ruling on the motion to dismiss. *Hecker v. Deere & Co.*, 556 F.3d 575, 582-83 (7th Cir. 2009).

To survive a Rule 12(b)(6) motion, the Complaint must not only provide Defendants with fair notice of a claim's basis, but must also be "facially" plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim has facial plausibility when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Although the Complaint need not include detailed factual allegations, Plaintiff's obligation to provide the grounds for his entitlement to relief requires more than mere labels and conclusions, and a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

Likewise, Rule 9(b) requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. Pro. 9(b). This "ordinarily requires describing the 'who, what, when, where, and how' of the fraud, although the exact level of particularity that is required will necessarily differ based on the facts of the case." *AnchorBank*, 649 F.3d at 615 (quoting *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441-42 (7th Cir. 2011)). Rule 9(b) applies to "all averments" of fraud, not just claims of fraud. *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) (internal quotations omitted). Any "claim that 'sounds in fraud'—in other words, one that is premised upon a course of fraudulent conduct—can implicate Rule 9(b)'s heightened pleading requirements." *Id.*

The Seventh Circuit has not yet explicitly examined whether Rule 9(b)'s heightened standard extends to each and every element of a civil RICO claim containing fraud-based predicate activity within it, or whether Rule 8's less rigorous pleading standard applies to the non-fraud elements of the violation. The Seventh Circuit has, however, explicitly applied the Rule 8 standard to RICO's enterprise element. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995); *Drobny v. JP Morgan Chase Bank, N.A.*, 929 F. Supp. 2d 839, 845 (N.D. Ill. 2013) (applying the Rule 8 standard to the non-fraud elements of a civil RICO claim). Following that lead, this Court applies the traditional Rule 8 standard to the non-fraud elements of the RICO claims, and the stricter Rule 9(b) standard to the underlying allegations of fraud-based racketeering activity within those claims (here, the mail and wire fraud predicates themselves). *Slaney v. The Intern. Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir. 2001) (finding "allegations of fraud" within a civil RICO complaint are "subject to the heightened pleading standard" of Rule 9(b)).

II. Facts

Without predicting which parties and claims might prevail later at summary judgment or trial, this Court gleans the following from the Complaint:

A. Initiation of the Estate Planning Conspiracy

Plaintiff is the co-founder, President and Chief Operating Officer of Applied Underwriters Inc. ("AUI"), a financial services firm that specializes in providing workers' compensation insurance to small and mid-sized businesses. Compl. ¶ 1. In November 2002, Northern contacted Plaintiff and other AUI senior executives to gauge their interest in Northern's estate planning services. Northern, a Delaware corporation with its principal place of business in Chicago, Illinois, is a prominent financial services firm with offices dotting the globe. Plaintiff and others at AUI accepted a meeting to learn about Northern's tax products, and, thereafter, Northern gave a presentation highlighting its services. *Id.* ¶¶ 8-9, 28-29.

In the following months, Northern marketed and discussed its estate planning and personal financial services solutions with Plaintiff and other AUI executives. Through in-person meetings and phone calls, Northern outlined the ways Plaintiff could avoid certain tax liabilities, including those related to his ownership of the highly-valued AUI stock. *Id.* ¶ 30. In January 2003, Northern sent Plaintiff a proposal for personal financial consulting. Northern proposed to:

(1) review Plaintiff's financial data and personal information; (2) develop a financial plan of action tailored to his "goals and objectives"; and (3) implement an appropriate plan of action. A key element of Northern's proposal entailed financial planning for income tax liability and "special strategy ideas relative to any potential liquidity events." *Id.* ¶¶ 31-32. Persuaded by the proposal, Plaintiff retained Northern in March 2003. *Id.* ¶ 33.

Plaintiff alleges that by mid-2003, Northern and its agents, Mark Harbour ("Harbour"), Michael Niemann ("Niemann") and Tom Hines ("Hines"), had gathered enough information about Plaintiff and other AUI executives that they then decided to perpetrate an illegal tax scam, what Plaintiff terms an "abusive" tax avoidance scheme ("Tax Scheme"). Compl. ¶ 34. Disguised as a legitimate estate planning tax-savings strategy, this Tax Scheme purported to lawfully reduce (if not eliminate) capital gains tax on a participant's gains, such as Plaintiff's disposition of AUI stock, by artificially inflating the shareholder's tax basis, thereby diminishing or eliminating any capital gains associated with the stock sale. *Id.* ¶ 16. Plaintiff avers that Defendants hatched—and then participated in, promoted, marketed and implemented—the Tax Scheme to pocket substantial fees from its participants, including Plaintiff. *Id.* ¶ 17. By early July 2003, Northern pitched the specifics of the Tax Scheme to Plaintiff and others at AUI, and marketed it as a lawful tax strategy for the disposition of the AUI stock, which supported Plaintiff's estate planning objectives. *Id.* ¶ 36.

On July 30, 2003, Northern arranged a conference call with Plaintiff to outline the steps of the Tax Scheme, describing it as a legal tax shelter for the contemplated gains realized from his disposition of AUI stock. The proposed tax shelter plan involved a series of loans, unsecured structured notes from alleged coconspirator European American Investment Bank, AG ("Euram Bank") and the creation and use of trusts and other devices. Plaintiff alleges that Northern failed to disclose during the call, or ever, that this type of tax shelter was unlawful and would subject him to significant liability for taxes, penalties and interest. Relying upon Northern's false representations, Plaintiff set up the tax shelter transactions for the purpose of selling his AUI stock and avoiding tax liability. Compl. ¶¶ 37-40.

On July 31, 2003, Plaintiff believes a conference call took place, without him, among agents for Euram Bank, Northern, Taylor, Christiana and others. The purposes of the call were: (1) to advise the conspirators that Plaintiff (as well as other AUI executives) had agreed to proceed with the Tax Scheme; (2) to discuss details on how the transactions would be structured and implemented; and (3) to determine how the parties would introduce one another to Plaintiff (and the other AUI targets) in furtherance of Defendants' conspiracy. *Id.* ¶ 42.

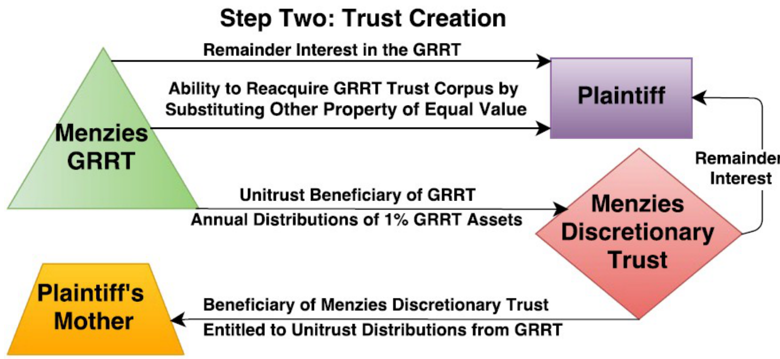
On August 7, 2003, Plaintiff believes another conference call took place, again without him, among agents for Euram Bank, Northern, Taylor, Christiana and others. The purpose of this call was to discuss the details of drafting the Euram Bank loan documents, the promissory notes, and the necessary trust documents, all in furtherance of the illegal conspiracy. During the call, Plaintiff believes that Taylor promised to draft the necessary opinion letters to provide the purported legal justification and appearance of "legitimacy" for the fraudulent tax shelter plan. *Id.* ¶ 43.

On August 7, 2003, Niemann (one of Northern's agents) emailed Plaintiff, advising him to retain Taylor, a partner at the Seyfarth law firm. Plaintiff followed this advice. Agents for Northern also convinced Plaintiff to engage Christiana as trustee for the various trusts. As part of the plan, none of the Defendants ever disclosed to Plaintiff the prior relationship that purportedly existed between the various conspirators. Compl. ¶¶ 44-47.

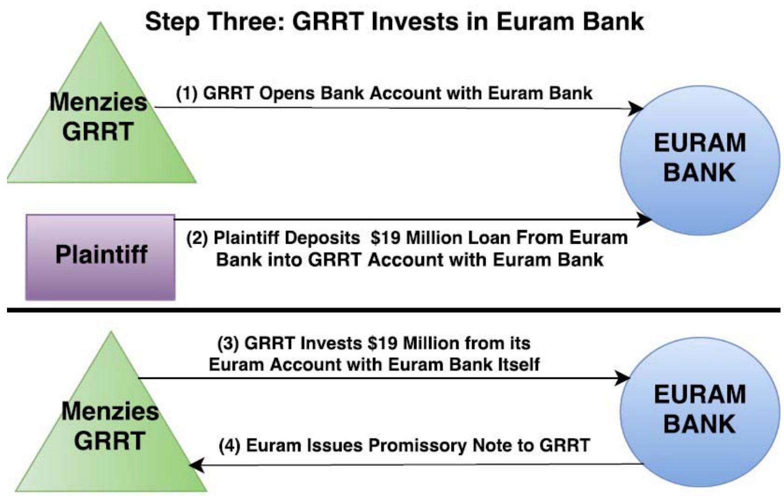
B. Execution of the Tax Shelter Scheme

Defendants then marched Plaintiff through a series of scripted steps to create tax shelters for 2003 and 2004, all in furtherance of the same Tax Scheme. Plaintiff took the first step on August 11, 2003. He obtained a loan from Euram Bank for an amount equivalent to the value of the AUI stock he intended to sell first (approximately $19 million). Per the loan agreement, Plaintiff deposited the loan funds into an account at Euram Bank, and agreed to pay Euram Bank significant fees and interest (London Interbank Offered Rate "LIBOR" plus 40 basis points). *Id.* ¶¶ 48-49.

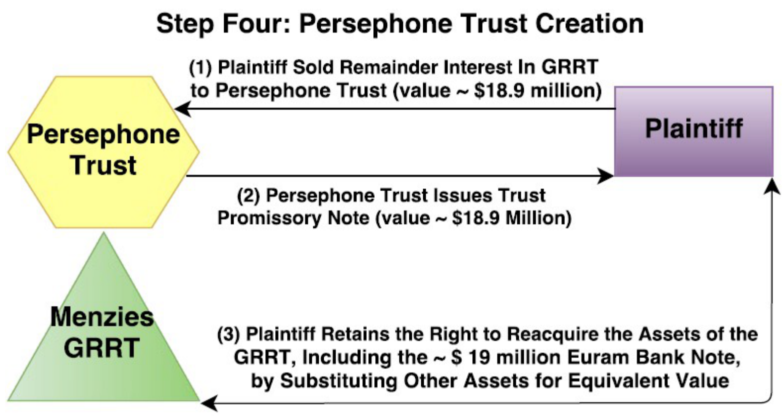
On August 25, 2003, Plaintiff took the second step, creating the "Steven Menzies Grantor Retained Remainder Trust" ("Menzies GRRT"). Under the Menzies GRRT, Plaintiff retained the power in a non-fiduciary capacity to reacquire the trust corpus by substituting other property of equal value. Plaintiff also retained a remainder interest in the trust, namely, the assets of the trust remaining upon termination of the trust term. The Menzies GRRT appointed the "Menzies Discretionary Trust" as the "Unitrust" beneficiary of the trust. According to the Menzies GRRT, the Menzies Discretionary Trust was also entitled to receive annual distributions in an amount equal to 1% of the assets of the Menzies GRRT (the "Unitrust Distributions") for the life of the trust. The Menzies Discretionary Trust was, in turn, obligated to pay the Unitrust Distributions it received from the Menzies GRRT to Plaintiff's mother, as beneficiary of the Menzies Discretionary Trust. Plaintiff held personally the remainder interest in the Menzies Discretionary Trust. Christiana served as the trustee of both the Menzies GRRT and the Menzies Discretionary Trust. Compl. ¶¶ 51-54.



In the third step, the Menzies GRRT opened a bank account at Euram Bank. Plaintiff deposited the proceeds of the $19 million loan from Euram Bank into the Menzies GRRT account at Euram Bank as the initial funding of the Menzies GRRT. Compl. ¶ 55. On August 26, 2003, Christiana, as trustee of the Menzies GRRT, then "invested" the loan funds deposited in the Menzies GRRT with Euram Bank (the very same party that loaned the funds to Menzies in the first place and who remained in possession of the funds at all times). The "investment" was a promissory note issued by Euram Bank paying interest of three months of LIBOR plus an equity multiplier based on the performance of gold (referred to hereafter as the "Euram Bank Structured Note"). *Id.* ¶ 56.

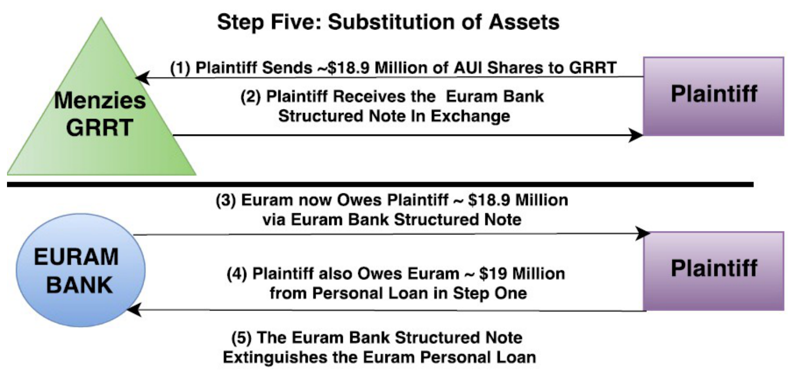


On September 24, 2003, in the fourth step, Plaintiff created a second trust named the Persephone Trust for the benefit of the Menzies Discretionary Trust. Christiana once again served as the trustee. Two days later, Plaintiff sold his remainder interest in the Menzies GRRT (which held the note from Euram Bank) to the Persephone Trust valued at approximately $18.9 million, in exchange for a promissory note of equal value from the Persephone Trust to Plaintiff ("Persephone Trust Promissory Note"). At this stage of the transactions, the Persephone Trust owned the remainder interest in the Menzies GRRT (which held the Euram Bank Structured Note), but the Persephone Trust had a note of obligation to Plaintiff in the principal amount of approximately $18.9 million (*i.e.*, equal to the value of the remainder interest in the Menzies GRRT). Although Plaintiff no longer held the remainder interest in the Menzies GRRT, he still had the power to reacquire assets of the Menzies GRRT by substituting other assets of equal value. Under the terms of the Menzies GRRT, Plaintiff had the right to exercise this power in his absolute discretion and in a non-fiduciary capacity. In early October 2003, through various phone calls, Taylor and Harbour assured Plaintiff that this substitution of assets would be a non-taxable event. Compl. ¶¶ 57-59.

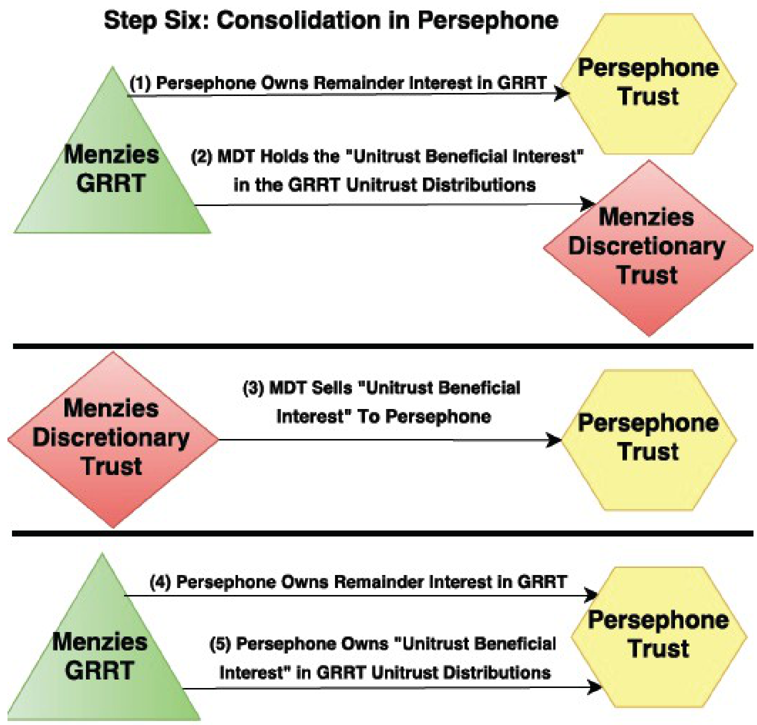


On October 10, 2003, in the fifth step, Plaintiff took a fixed number of AUI shares and substituted those shares in exchange for the assets of equivalent value in the Menzies GRRT, namely, the Euram Bank Structured Note. After the substitution of assets, the Menzies GRRT held the AUI stock and Plaintiff held the Euram Structured Promissory Note as a receivable from Euram Bank and virtually identical in value to his payable to Euram Bank (*i.e.*, the loan obligation to Euram Bank arising from Plaintiff's original loan). Later, to satisfy that original obligation on the Euram Bank loan, Plaintiff used the Euram Bank Structured Note as repayment for his personal debt obligation to Euram Bank, and thereby extinguished both the

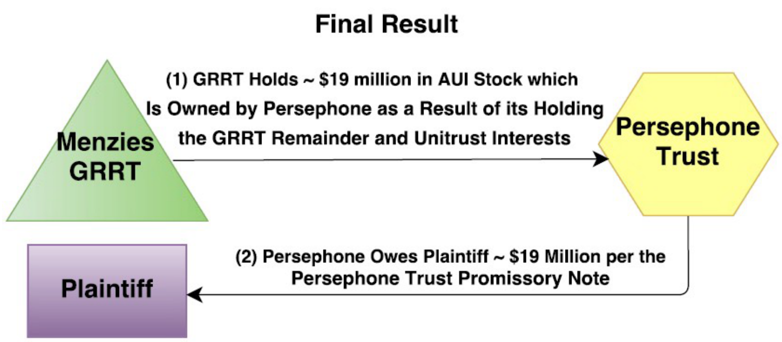
Euram Bank loan and the Euram Bank Structured Note. Compl. ¶¶ 60-62.



At this point, in the sixth step, the Persephone Trust owned the remainder interest in the Menzies GRRT, and the Menzies Discretionary Trust held the "Unitrust" beneficial interest in the Unitrust Distributions. The Menzies Discretionary Trust then sold the Unitrust interest to the Persephone Trust, which then owned both the Unitrust interest and the remainder interest in the Menzies GRRT. The AUI stock, earlier substituted by Plaintiff, constituted the sole asset of the Menzies GRRT. On February 25, 2004, Plaintiff terminated the Menzies GRRT. The Persephone Trust, as the holder of all the legal and beneficial interest of the trust, thus received the AUI stock upon termination. Compl. ¶ 63.



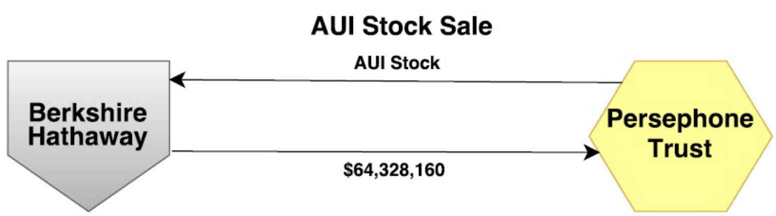
As of February 25, 2004, the first set of financial transactions was complete. The Persephone Trust now held the AUI stock valued at approximately $19 million and, per the Persephone Trust Promissory Note, it owed an obligation to Plaintiff personally for approximately $19 million. Compl. ¶ 64. For ease of reference, the Court will refer to the foregoing portion of the overall Tax Scheme as the 2003 Tax Shelter.



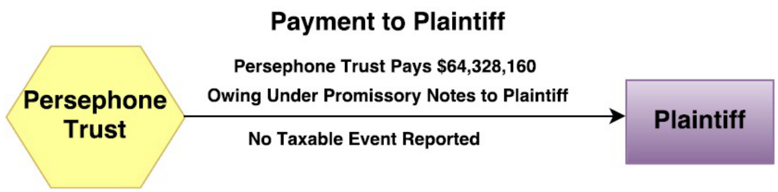
In June 2004, at Defendants' direction and as part of the same Tax Scheme, Plaintiff performed a substantially identical series of transactions involving the same parties and steps, but this time to set-up the sale of the rest of his AUI stock worth approximately $54 million. *Id.* ¶¶ 65-66. The Court will refer to this portion of the overall Tax Scheme as the 2004 Tax Shelter.

To provide Plaintiff with additional assurance that the Tax Scheme was legitimate and lawful, and that Plaintiff would later be able to "sell" his stock tax-free, Taylor informed Plaintiff that Seyfarth would provide "independent" opinion letters confirming the propriety of the strategy. Taylor explained that the opinion letters would convince the IRS that the two Tax Shelters were legitimate in the unlikely event that the IRS audited Plaintiff. On September 24, 2004, Seyfarth provided a signed opinion letter for the 2003 Tax Shelter, and, on June 7, 2005, provided a signed opinion letter for the 2004 Tax Shelter. When Seyfarth issued the Opinion Letters, Seyfarth (and other Defendants) allegedly knew that their conclusions were false and misleading. Compl. ¶¶ 71-77. With Seyfarth's issuance of the Opinion Letters, Defendants completed all necessary transactions in furtherance of the Tax Scheme, and pursuant to the conspiracy, they were all paid substantial fees and expenses from Plaintiff. *Id.* ¶ 76.

By late 2005, Berkshire Hathaway Inc. ("BHI") planned to acquire AUI. By early 2006, AUI agreed to sell its shares to BHI. BHI agreed to buy AUI stock from its stockholders in exchange for a cash payment. As part of the deal, BHI agreed to keep senior executives, including Plaintiff, at their positions at AUI. In May 2006, and consistent with the stock purchase agreement between the AUI shareholders and BHI, BHI purchased the AUI stock held by the Persephone Trust for $64,328,160 in cash. *Id.* ¶¶ 79-82.



Thereafter, the Persephone Trust used the $64,328,160 in proceeds to repay Plaintiff the amounts owed under the promissory notes it had issued to him when it acquired his remainder interest through the Menzies GRRT device. Consequently, when filing his 2006 federal income tax returns in 2007, and relying upon Defendants' investment and legal advice, Plaintiff did not report the sale of the $64 million in AUI stock to BHI as a taxable event, because the AUI stock was "owned" by the Persephone Trust at the time of sale, and the Persephone Trust had a full tax basis in the AUI stock and thus recognized little or no gain on disposition of the stock. Compl. ¶¶ 83-84.



C. Resolution of the IRS Audit

In October 2009, the IRS advised Plaintiff of its intention to audit his 2006 tax filings. The IRS audit occurred from October 2009 through most of 2012. Near the end of its audit, the IRS focused on BHI's purchase of the AUI stock from the Persephone Trust. Despite Defendants' assertions that the Tax Scheme was legitimate, the IRS audit deemed the plan to be an unlawful tax avoidance maneuver, because Plaintiff's transfer of AUI stock to "Grantor Retained Remainder Interest Trusts (GRRTs) did not represent arm's length transactions." Compl. ¶ 88. As such, the 2006 disposition of AUI stock was actually a "sale" that should have been reported by Plaintiff as a long-term capital gain. Specifically, the IRS found that the transfer and substitution of assets and the various trusts were designed as elements of an abusive tax shelter with "the primary purpose" to disguise the ownership of the stock, inflate Plaintiff's basis, and allow him to evade the 2006 tax liabilities related to the stock sale. *Id.* ¶ 89. The IRS determined that Plaintiff, not the Persephone Trust, had sold the AUI stock to BHI for $64,328,160; and therefore, the IRS recalculated the basis of the AUI stock as $19,436,324. Upon this basis, the IRS determined that Plaintiff unlawfully failed to report $44,891,836 of capital gains from the sale of his AUI stock. *Id.* ¶¶ 85-90.

In December 2012, Plaintiff agreed to settle with the IRS and later paid $10,427,201.98, in capital gains taxes, penalties and interest for the disposition of the AUI stock to BHI. *Id.* ¶¶ 91-92. Thereafter, Plaintiff sued Defendants.

III. Analysis

Because each Defendant has echoed, or even incorporated by reference, the arguments raised by the other Defendants in their motions to dismiss, this Court addresses the motions collectively, and begins with Counts I and II of the Complaint.

A. Counts I and II: Sufficiency of the RICO Allegations

In 1970, Congress enacted the Organized Crime Control Act containing Title IX, otherwise known as "RICO." 18 U.S.C. §§ 1961-68. Creating enhanced criminal and civil remedies, Congress drafted RICO to address "enterprise criminality," that is, "patterns" of unlawful conduct, including: (1) acts of violence and terrorism; (2) the provision of illegal goods and services; (3) corruption in labor or management relations; (4) corruption in government; and (5) criminal fraud by, through, or against various types of licit or illicit enterprises. *St. Paul Mercury Insurance Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (summary restatement of RICO's elements).

As part of RICO's remedial scheme, a private civil plaintiff may sue under § 1964(c) for a violation of the statute that proximately causes an injury to his business or property. *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992).[1] In Counts I and II of his Complaint, Plaintiff alleges both a substantive RICO violation under § 1962(c) and a RICO conspiracy violation under § 1962(d). Compl. ¶¶ 104-36.

Under § 1962(c), RICO makes it unlawful for any "person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Thus, in order to establish a violation of § 1962(c), Plaintiff must allege: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

Likewise, because § 1962(d) prohibits any person from conspiring to violate subsections (a), (b) and (c) of § 1962, the overall objective of the RICO conspiracy claim often mirrors the underlying RICO substantive claim. This case is no exception. Hence, as to § 1962(d), Plaintiff must establish that each Defendant joined an agreement to participate in "an endeavor which, if completed, would satisfy all of the elements" of a

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[1] Under § 1964(c), any "person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee..."

substantive violation of RICO, here, the elements of the § 1962(c) offense noted above. *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 964 (7th Cir. 2000).

In moving to dismiss Counts I and II, all Defendants attack the Complaint's allegedly insufficient showings under RICO of: (1) an "enterprise"; (2) "pattern"; (3) "conduct" (otherwise known as the "operation-management" test); and (4) the purported non-existence of a RICO conspiracy generally. They also argue that (5) Plaintiff's RICO claim is precluded by the statutory exception of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). This Court considers each challenge in turn below.

1. Elements of a RICO Enterprise

Under 18 U.S.C. § 1961(4), an "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. These examples are illustrative, not exhaustive. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934) (distinguishing the non-exhaustive statutory term "includes," which is used in RICO, from its counterpart "means"). The entities comprising a RICO enterprise can also play different roles in the case, including the roles of victim, prize, instrument or perpetrator of the violation. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 n.5 (1994); *see* Prof. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 307-25 (1982).

Relevant here, for "association-in-fact" enterprises in particular, the Supreme Court defines the term as a "group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). These enterprises, licit or illicit, may be "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* In this regard, Congress has broadly defined the "enterprise" concept to mean any group of persons "whose association, however loose or informal, furnishes a vehicle for the commission" of two or more predicate crimes (or the collection of unlawful debt). *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978).

Although an "association-in-fact" enterprise must have some ascertainable structure, it need not be "much" more than a bare-bones conspiracy to commit the predicate acts themselves. *Boyle v. United States*, 556 U.S. 938, 948-49 (2009) (explaining the "breadth" of RICO's enterprise concept). In the *Boyle* case, the Supreme Court outlined the three essential features of an "association-in-fact" enterprise: (1) a purpose; (2) relationships among those associated with the enterprise; and (3) longevity sufficient to permit the associates to pursue the enterprise's purpose. *Id.* at 946-48. The Court then gave examples of how such an enterprise might satisfy this broad structural requirement:

> Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any

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

Id. at 948; *see also Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*, 610 F.3d 382, 388 (7th Cir. 2010). Given the flexibility of RICO's statutory language, a single "association-in-fact" enterprise can even exist when its members and associates constitute opposing factions. *United States v. Orena*, 32 F.3d 704, 710 (2d Cir. 1994) (finding that internal divisions did not undermine the existence of a single "association-in-fact" enterprise under RICO). As with all RICO enterprises, however, the existence of an association-in-fact "enterprise" is a "separate" element from the "pattern" of racketeering activity itself. *Turkette*, 452 U.S. at 583 (finding that RICO requires "separate" or distinct elements, even though the proof at trial may "coalesce"); *see United States v. Torres*, 191 F.3d 799, 805-06 (7th Cir. 1999) (general discussion of sufficient RICO "association-in-fact" allegations).[2]

Applying such standards at this preliminary stage of the proceedings, the Complaint here properly alleges a RICO enterprise. The allegations, and the reasonable inferences drawn therefrom, establish both common purposes under RICO and various relationships among those associated with the enterprise. Compl. ¶¶ 104-36. Among such purposes and relationships, the allegations here show that Defendants joined together to enrich themselves and further the common interests of the group as a whole—not just their own, otherwise unrelated self-interests. Compl. ¶¶ 44-47, 104-36. Thus, the alleged interactions among the members of the enterprise here extend beyond those typical of normal commercial relationships. The alleged enterprise also exhibits sufficient longevity (at least 31 months or more) to permit its associates to pursue its purposes. Compl. ¶¶ 44-47, 104-36. No further features or other ascertainable structures beyond those inherent in the predicate activity are required. *Boyle*, 556 U.S. at 943-49; *St. Paul Mercury Insurance*, 224 F.3d at 440-41.

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[2] An "association-in-fact" enterprise also generally constitutes an exception to the "enterprise-person" rule arising under violations of § 1962(c). *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 399-402 (7th Cir. 1984) (enterprise-person rule); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162-63 (2001) (collecting decisions from the circuits, the Court found that substantive violations of § 1962(c) require that the alleged "person" and "enterprise" be separate or distinct elements).

Having considered Defendants' arguments, this Court's conclusion about the legal sufficiency of the enterprise allegations remains firm. For example, Defendants' reliance on the *Walgreen* case is misplaced. *United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719F.3d 849 (7th Cir. 2013). Like the defendants in *Walgreen*, which involved a scheme to fraudulently fill prescriptions for generic drugs with differentials in dosage and price from those actually prescribed, Defendants here claim that the alleged interactions among the co-conspirators show only "a commercial relationship" and not that they had "joined together to create a distinct entity" for RICO purposes. *Id.* at 855-56. This theory does not get Defendants far.

In *Walgreen*, unlike here, the Seventh Circuit *assumed* that the complaint had pled the "existence of an association-in-fact enterprise under *Boyle*," and only then affirmed dismissal of the complaint because the pled allegations failed to establish that the defendants "were conducting the affairs" of that enterprise, rather than their "own affairs" under the requisite operation-management test. *Id.* at 854; *see Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (holding that RICO requires compliance with the "operation-management" test). This Court will address the sufficiency of the Complaint under *Reves* in Section III(A)(3) below, but, for the purposes of pleading the existence of a RICO enterprise under Rule 12(b)(6), the Complaint passes muster. Unlike *Walgreen*, Plaintiff here has alleged much more than "parallel uncoordinated fraud" among Defendants. 719 F.3d at 855.

In contrast to *Walgreen*, a more recent Seventh Circuit decision—*Bible*—confirms that the allegations here satisfy the "enterprise" pleading requirements. *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015). In that case, the plaintiff brought RICO claims based upon the managing of accounts as part of an unlawful loan rehabilitation process. In doing so, the plaintiff, as here and unlike in *Walgreen*, alleged facts permitting the "reasonable inference" that the defendants worked as a "single" enterprise. *Id.* at 655-57. For example, the alleged "economic interdependence" among the enterprise membership in *Bible* included allegations that the violators referred defaulting loans to one another. *Id.* The Seventh Circuit thus concluded that the members of the RICO enterprise in *Bible* did "not operate as completely separate entities" in managing the loan rehabilitation process. *Id.* The same conclusion must be drawn here.

Like the Seventh Circuit in *Bible*, this Court can distinguish the allegations here from "run-of-the-mill" commercial activity, because the Complaint establishes a "truly joint enterprise" in which each individual entity acted in concert with the others to "pursue a common interest." *Bible*, 799 F.3d at 655-56. Here, Defendants planned and worked in concert, even referring business to one another vital to the fraud. Defendants then performed other services, such as issuing opinion letters and conducting trust activities, all in aid of a single overall scheme that generated sustained profits for the enterprise membership. As in *Bible*, these allegations, when taken together, show a common purpose, relationships among the entities associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes. 799 F.3d at 656; *see also Crichton v. Golden Rule Insurance Co.*, 576 F.3d 392, 400 (7th Cir. 2009) (distinguishing a normal marketing arrangement among distinct entities from a RICO enterprise); *Sykes v. Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 426-27 (S.D.N.Y. 2010) (finding that the complaint alleged a plausible RICO enterprise comprising of a debt-buying company, debt collection agency, process service company and others).

Defendants fare no better by citing *Guaranteed Rate, Inc. v. Barr*, 912 F. Supp. 2d 671 (N.D. Ill. 2012). In that case, the court found no "common purpose" in the allegations to establish any enterprise relationships among the violators as required by *Boyle*, nor any "conduct" that otherwise satisfied the *Reves* test. *Guaranteed Rate*, 912 F. Supp. 2d at 686-89. Indeed, Defendants here misread *Guaranteed Rate* to argue that RICO requires the enterprise members to share the profits of their illegal scheme. There is no such requirement. Although sharing profits (or otherwise comingling illicit proceeds) might show a "common purpose" under RICO, the law after *Boyle* is clear that such allegations are merely relevant and possibly sufficient—but in no event necessary—for liability. This Court rejects Defendants' efforts to extend *Guaranteed Rate*, and declines to create a new and unfounded "profit-sharing" test for establishing membership within a RICO enterprise.[3]

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[3] In determining whether a defendant is a member of the enterprise, or merely an outside "hireling" earning a "normal" fee, the existence or absence of profit-sharing is a relevant factor, but

2. Elements of a RICO Pattern

For substantive violations, a RICO "pattern" under § 1961(5) requires the commission of at least two acts of "predicate" activity enumerated in § 1961(1) that occur within ten years of each other (excluding any period of imprisonment), with at least one act occurring after the enactment of RICO itself on October 15, 1970. 18 U.S.C. §§ 1961(1) and (5).

In *H.J. Incorporated v. Northwestern Bell Telephone Company*, the Supreme Court set forth the process for determining what conduct meets this "pattern" requirement under RICO. *H.J.*, 492 U.S. 229, 236-50 (1989). The Court began with the proposition that proof of two acts of racketeering activity, without more, does not establish a pattern. Instead, the Court found that the "pattern" element requires a showing of continuity plus relationship. *H.J.*, 492 U.S. at 237-39 (pattern reflects relation and continuity (or its threat)). Although these two constituents of a RICO offense are discussed separately for analytic purposes, their proof often will overlap in practice. *Id.* at 239.

In its analysis in *H.J.*, the Supreme Court developed a six-step process for determining if a

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it is neither required nor dispositive in the analysis. *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 967, 979 (7th Cir. 1995) (observing that the "operation" of an enterprise includes "foot soldiers" as well as "generals" and can even include a participant's acquiescence to *losing* money to advance the enterprise's goals); *Nesbitt v. Regas*, No. 13-8245, 2015 WL 1331291, at *11 (N.D. Ill. March 20, 2015) (explaining the narrow significance of the profit-sharing language in *Bachman v. Bear, Stearns & Co., Inc.*, 178 F.3d 930, 932-33 (7th Cir. 1999)).

"pattern" is present within the meaning of RICO. To determine whether the goals of relationship and continuity are met, up to six questions must be asked. The first two questions are:

1. Are the acts in a series (at least two) related to one another, for example, are they part of a single scheme?

2. If not, are they related to an external organizing principle, for example, to the affairs of the enterprise?

H.J., 492 U.S. at 238; *see also Elliott*, 571 F.2d at 899; *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983). When analyzing a RICO pattern, a broad range of criminal conduct can exhibit relationship, including unlawful acts that have the same or similar purposes, results, participants, victims or methods of commission, or acts that are otherwise interrelated by distinguishing characteristics. In this way, RICO's pattern element can be shown with either a "horizontal" relationship between the predicate acts themselves or a "vertical" relationship of the predicate acts to the RICO enterprise itself. If both of the above questions are answered in the negative, no relationship is present and this Court need not proceed further.

If either question is answered "yes," however, relationship is present and the following additional questions must be asked:

3. Are the acts in the series open-ended, that is, do the acts have no obvious termination point?

4. If not, did the acts in the closed-ended series go on for a substantial period of time, that is, more than a few weeks or months?

H.J., 492 U.S. at 241-43. Generally, if either question is answered in the affirmative, continuity is present.

If both questions are answered in the negative, however, up to two additional questions must be asked:

5. May a threat of continuity be inferred from the character of the illegal enterprise?

6. If not, may a threat of continuity be inferred because the acts represent the regular way of doing business of a lawful enterprise?

H.J., 492 U.S. at 242-43; *Torres*, 191 F.3d at 808. If either question is answered in the affirmative, a threat of continuity is present.

As to a "threat" of continuity (Questions 5 and 6), the Seventh Circuit in *Torres* emphasized that, as "other courts of appeal have noted, in cases where the acts of the defendant or the enterprise were inherently unlawful" or "were in pursuit of inherently unlawful goals," then courts generally have "concluded that the requisite threat of continuity was adequately established by the nature of the activity, even though the period spanned by the racketeering activity was short." 191 F.3d at 808 (internal quotations omitted). As such, the continuity requirement may be satisfied by showing past conduct which "by its nature projects into the future" with a "threat" of repetition. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1023 (7th Cir. 1992) (internal quotations omitted); *see also*

Shields Enterprises, Inc. v. First Chicago Corp., 975 F.2d 1290, 1296-97 (7th Cir. 1992) (finding that a threat of continuity may be shown by establishing that the conduct is a "regular way" of doing business) (internal quotations omitted); *United States v. Aulicino*, 44 F.3d 1102, 1112 (2d Cir. 1995) (observing that continuity is assessed prospectively and not from hindsight, after the pattern ends).

When assessing a RICO pattern as a whole, the Seventh Circuit includes among the relevant factors "the number and variety of predicate acts and the length of time over which they were committed, the number of victims, and the presence of separate schemes and the occurrence of distinct injuries." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). In *Morgan*, however, the court also cautioned that "the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement" because the pattern requirement is "a standard, not a rule." *Id.* at 975-76. Thus, the determination "depends on the facts and circumstances of the particular case, with no one factor being necessarily determinative." *Id.* at 976. Elements of the RICO violation beyond the racketeering activity itself also may be considered in assessing relatedness and continuity.

In the end, this Court must evaluate all the allegations with the goal of "achieving a natural and commonsense result, consistent with Congress' concern with long-term criminal conduct." *Roger Whitmore's Automotive Services, Inc. v. Lake County, Illinois*, 424

F.3d 659, 673 (7th Cir. 2005) (internal quotations omitted); *see also 420 East Ohio Ltd. Partnership v. Cocose*, 980 F.2d 1122, 1124 (7th Cir. 1992) (finding that the Seventh Circuit still examines the *Morgan* factors post-*H.J.* when assessing continuity "with an eye towards achieving a natural and common sense result") (internal quotations omitted).[4]

a) Pattern Allegations Are Not Strictly Construed

Here, Defendants claim the Complaint fails to allege a proper RICO pattern. Defendants begin this challenge by misreading the holding of *Midwest Grinding* for the proposition that the federal courts must strictly construe the pleading requirements for civil RICO in order to prevent it from supposedly becoming a federal surrogate for "garden-variety fraud actions properly brought under state law." 976 F.2d at 1019, 1022.

No strict-construction rule, however, exists for RICO cases in general or for civil RICO in particular. The Seventh Circuit applies "ordinary civil standards to pleadings in civil RICO cases" and sees "no reason to depart from that practice." *Haroco*, 747 F.2d at 404. Nor could any such judicially-created rule for civil

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[4] Of course, under § 1962(c), the "pattern" must also be *in the affairs* of the enterprise. *United States v. Starrett*, 55 F.3d 1525, 1542 (11th Cir. 1995) (pattern must regularly utilize the facilities or services of the enterprise, or otherwise have an effect upon the common affairs of the enterprise). If not, liability will not obtain. *Palmetto State Medical Center, Inc. v. Operation Lifeline*, 117 F.3d 142, 149 (4th Cir. 1997) (no evidence conduct was "in the affairs" of the enterprise).

RICO cases be reconciled with the Supreme Court's admonition to read the statute's provisions the same way in both a criminal or civil context. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) ("a pattern for civil purposes is a pattern for criminal purposes") (internal quotations omitted); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 (1985) (same). Nor could any special "strict construction" rule withstand Congress' mandate to "liberally" construe the statute in light of its broad remedial purposes. Pub. L. No. 91-452, § 904(a), 84 Stat. 947; *Sedima*, 473 U.S. at 497-98. As the Supreme Court has repeatedly warned, such narrow distortions of RICO must be rejected based upon the "self-consciously expansive language and overall approach" of Congress in enacting RICO. *Sedima*, 473 U.S. at 497-98 (citing *Turkette*, 452 U.S. at 586-87 and *Russello v. United States*, 464 U.S. 16, 26-29 (1983)); *see also H.J.*, 492 U.S. at 236-50.[5]

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[5] Since RICO's enactment over 45 years ago, various judicial calls to invalidate the statute's enhanced remedies and legal standards have been uniformly, and rightly, rejected by Congress and the federal courts. *See, e.g.*, William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 9-10 (1989); *Bingham v. Zolt*, 66 F.3d 553, 566 (2d Cir. 1995) (explicitly rejecting a call to invalidate RICO for vagueness, and holding that the pattern and enterprise requirements are not unconstitutionally vague); *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995) (stating that RICO provides a clear standard of conduct, which is proscribed by the pattern requirement); *United States v. Bennett*, 984 F.2d 597, 606-07 (4th Cir. 1993) (holding that RICO provides members of a RICO enterprise or RICO conspiracy adequate notice that certain acts are prohibited); *United States v. Glecier*, 923 F.2d 496, 498 n.1 (7th Cir. 1991) (joining First and Third Circuits in re-affirming constitutionality of RICO despite *dicta* from a Supreme

Instead, when read properly, *Midwest Grinding* and its precedents merely require what RICO already requires, namely, a showing of pattern that can satisfy the well-settled "continuity plus relationship" test. *H.J.*, 492 U.S. at 237; *Jennings v. Auto Meter Products, Inc.*, 495 F.3d 466, 473 (7th Cir. 2007). To the degree "garden-variety" fraud in the marketplace otherwise meets the well-settled elements of a RICO claim, Congress intended the RICO statute to address such fraud and "weed" it out of the garden.

b) Plaintiff's Pattern Allegations Lack Continuity

As to the pattern requirement, Defendants next attack Plaintiff's continuity showing.[6] Here, the

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Court Justice raising concerns over the pattern requirement). Various attempts to artificially narrow RICO with judicially-created limitations have, likewise, been properly rejected. *See, e.g.*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (unanimously rejecting the creation of any "economic motive" limitation for civil RICO cases); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 244 (1989) (rejecting judicially-created "organized crime" limitation and noting that the contention that RICO is somehow limited to organized crime finds no support in the Act's text and remains at "odds with the tenor of its legislative history"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489-90 (1985) (rejecting judicially-created "criminal conviction" and "racketeering injury" limitations for civil RICO cases).

[6] In contrast, Defendants do not (and cannot in light of Plaintiff's allegations here) challenge the sufficiency of Plaintiff's "relatedness" showing. If nothing else, the alleged predicates in this case all relate to "an external organizing principle," that is, to the affairs of the same enterprise. *H.J.*, 492 U.S. at 238; *Vicom,*

Complaint alleges a closed-ended pattern involving multiple acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343 in furtherance of the overall scheme to defraud, and all within the affairs of the alleged RICO enterprise. Compl. ¶¶ 1-136; [41] at 5 (Plaintiff concedes he has alleged a "closed-ended" pattern). When, as here, mail and wire fraud form the alleged pattern, each requisite element of the underlying predicate activity must be set forth with the particularity and specificity required by Rule 9(b). *Slaney*, 244 F.3d at 599. At a minimum, this requires Plaintiff to show: (1) a scheme to defraud; (2) the intent to defraud; and (3) the use of the mails or wire communications in furtherance of the scheme to defraud. *See Corley v. Rosewood Care Center, Inc. of Peoria*, 388 F.3d 990, 1005 (7th Cir. 2004); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 656 (2008) (finding that civil RICO plaintiffs need not show reliance on any misrepresentation to establish proximate causation).

Given the numerous predicate acts and their duration over 31 months, the allegations here initially seem to present a sufficient pattern but, upon further inspection, the Complaint ultimately fails to make a proper showing. *U.S. Textiles, Inc. v. Anheuser-Busch Cos., Inc.*, 911 F.2d 1261, 1267-68 (7th Cir. 1990); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 n.8 (7th Cir. 1989). Specifically, Counts I and II of the

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Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 779 (7th Cir. 1994) ("vast majority of cases dealing with RICO pattern requirement" fail to "turn on the relatedness of the alleged predicate acts").

Complaint, even when considered as a whole, do not allow this Court to draw the reasonable inference that Defendants can be found liable under RICO, because the showing of continuity remains insufficient.

(1) Plaintiff's Pattern Allegations Lack Closed-Ended Continuity

First, Plaintiff makes a weak showing of "closed-ended" continuity, because the predicate acts all occurred in furtherance of a single scheme to defraud a single victim, whose injuries all stem from a single tax planning product. Lacking any variety in the nature of the underlying criminal offenses, the predicate activity here involves only two substantive crimes (wire fraud and mail fraud) in the execution of a single tax avoidance plan for the disposition of a single person's ownership of stock. Although Defendants staged the complex tax plan over time, the totality of the circumstances alleged here still constitutes "one dishonest undertaking" for pattern purposes. *U.S. Textiles*, 911 F.2d at 1267-69.

This case tracks *U.S. Textiles*. There, the alleged RICO violators (Anheuser-Busch and others) extorted a discounted sales contract from a t-shirt manufacturing company and then, over an approximately two-year span, engaged in various acts of mail and wire fraud as orders and shipments were made under the contract. *U.S. Textiles*, 911 F.2d at 1264. Although the number-of-victims factor "cannot be dispositive of any 'pattern' determination," the Seventh Circuit still found "highly significant" the presence of only a single victim with no apparent threat of repetition. *Id.* at 1268-69; *Uniroyal Goodrich Tire Co.*

v. Mutual Trading Corp., 63 F.3d 516, 523 (7th Cir. 1995) (finding that the existence of a single victim remains a relevant factor even though it does not, by itself, preclude the existence of a pattern of racketeering activity). As here, the allegations in *U.S. Textiles* gave "no indication that this is a type of activity" in which the defendant "normally engages or, indeed, that there are other potential Busch victims waiting in the wings." 911 F.3d at 1268-69. The Seventh Circuit thus found the alleged pattern insufficient.

Although the existence of a single "dishonest undertaking" (even one directed against a single victim incurring ostensibly non-distinct injuries) is not necessarily a determinative factor, the entirety of Plaintiff's allegations here put the existence of RICO continuity in doubt. In this case, like *U.S. Textiles*, despite the "pure happenstance" that the predicate acts included a significant "raw number of transactions" over a substantial length of time, which at "first glance" would seem to otherwise mandate a finding of pattern, Plaintiff alleges a single victim (himself) whose injuries all flowed from a single scheme. 911 F.3d at 1268-69. Without more (and there is nothing more here), these allegations fail to establish a sufficient showing of closed-ended continuity. This is especially true in the absence of any showing of a potential threat of continuity, as explained further in Section III(A)(2)(d) below.

Contrary to Plaintiff's assertions, the mere "multiplicity" of mailings or wire communications does not automatically translate into a pattern of racketeering activity; and although a RICO pattern may be established on the basis of a single scheme, "it is not irrelevant, in analyzing the continuity requirement, that there is only one scheme" as the allegations here show. *Sutherland v. O'Malley*, 882 F.2d 1196, 1204-05, 1205 n.8 (7th Cir. 1989). The complexity of the transaction itself sometimes creates the potential for a greater number of possible fraudulent acts, but the sheer number of mail or wire fraud acts alone does not, by itself, establish the requisite threat of continued criminal activity. *Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986); *see also Midwest Grinding*, 976 F.2d at 1024-25 (finding that, given the nature of the scheme, the mere multiplicity of mail and wire fraud acts by itself "may be no indication of the requisite continuity of the underlying fraudulent activity") (internal quotations omitted); *Jennings*, 495 F.3d at 475 (same); *Vicom*, 20 F.3d at 781 (same).

That the alleged pattern occurred over a lengthy period of time does not alter this Court's conclusion regarding RICO continuity. Although the Seventh Circuit does not employ any bright-line rule for how long a closed period must be to satisfy continuity, this Court does not hesitate to find that, in appropriate cases like this one, "closed periods of several months to several years" will sometimes fail to qualify as "substantial" enough to satisfy RICO's continuity requirement. *Roger Whitmore's Automotive Services*, 424 F.3d at 672-73 (affirming summary judgment and dismissing the plaintiffs' RICO claim because of a lack of continuity, even though the defendants' predicate activity lasted for approximately two years). As in

Rogers Whitmore's Automotive Services, the "natural and commonsense" result here is to find a lack of continuity.

(2) Plaintiff's Pattern Allegations Lack Threat of Continuity

Second, the current allegations present no showing of any "threat" of continuity because the Complaint sets forth a single victim with a "clear and terminable" goal. *Vicom*, 20 F.3d at 782. In this way, the Complaint creates a "natural ending point" for the alleged pattern of criminal activity that dispels any "threat" of repetition. *Id.* In fact, the Complaint here states that, by June 7, 2005, Defendants "completed all necessary transactions in furtherance of the Tax Shelters, and pursuant to the Defendants' Conspiracy were paid substantial fees and expenses from Menzies." Compl. ¶ 76. On the Complaint's own terms, the alleged pattern does not project into the future in any way, either from the character of the enterprise, or from the regular manner in which the enterprise allegedly did business. Compl. ¶¶ 104-36.

In these respects (and more), this case follows the Seventh Circuit's findings in *Olive Can Co., Inc. v. Martin*, 906 F.2d 1147, 1150 (7th Cir. 1990). In *Olive Can*, the defendants set up a sham corporation to divert money from their own failing cookie manufacturing business. They concealed the corporation's existence from the plaintiffs, who had provided defendants with supplies on credit. The district court found that the scam lacked sufficient RICO continuity, because the entire scheme to pay off one of the defendants' personal obligations possessed a clear and natural ending point with no threat of ongoing criminal activity. The Seventh Circuit agreed, affirming the dismissal of the RICO counts. *Id.* at 1151-52. The Complaint here warrants a similar finding.

Plaintiff claims that he is "not yet privy" to the underlying facts as to how broadly Defendants "marketed" the tax shelter at issue, but avers that "discovery will likely reveal" whether Defendants promoted the scheme to others, thus suggesting the existence of a potential threat of ongoing criminal activity. [42] at 10; [41] at 14. Counsel for Plaintiff reiterated this theory at the hearing on the motions to dismiss, suggesting that discovery might uncover other sales by Defendants of the purportedly abusive tax plan to other victims. Transcript of Proceedings of 1/28/16 [52]. Nevertheless, no details of any such sales or victims appear in either Count I or II the Complaint, and no such facts have otherwise arisen during discovery due to the parties' *joint* request to stay discovery pending resolution of the present motions. See Order issued 6/24/15 [40] (granting the parties' joint request to stay).

Falling short of the requirements of Rules 9(b) and 12(b)(6), the Complaint merely states that:

> Defendants, comprising of lawyers, bankers, and financial planners, conspired to develop, market and promote to, *among others*, Menzies, an abusive tax avoidance scheme – disguised as a tax savings plan that would lawfully shield capital gains from the sale of his AUI stock from tax liability.

Compl. ¶ 1 (emphasis added). Similarly, the Complaint elsewhere makes references to unnamed "others" and "participants," noting, for example, that Defendants disguised their abusive tax scheme as a legitimate tax plan to purportedly reduce "capital gains tax on a participant's, such as Menzies, disposition of stock." Compl. ¶¶ 16, 20, 28-30, 34-36, 42, 112-113 and 126 (examples of Plaintiff's vague references to "participants" or "others"). Yet, the Complaint never states when, why, how, or even if, such "other" unnamed participants were actually defrauded, nor how they might have suffered any economic injury or might otherwise be connected at all to the alleged RICO violations. To be sure, Plaintiff does reference Taylor's 2008 conviction for tax fraud, and Senate hearings about Euram Bank's purportedly abusive tax shelters. But Plaintiff then fails to identify any other victims or otherwise connect these two facts to the RICO counts in this case. Compl. ¶¶ 7, 26. To survive a motion to dismiss, Rules 9(b) and 12(b)(6) require more than mere allusions about the prospect of other fraud victims.

In sum, by setting forth a single scheme to defraud only Plaintiff, the Complaint here fails to establish any threat of continuity. Compl. ¶¶ 104-36. As alleged in Paragraph 109 of the Complaint, Defendants' course of conduct "operated as a fraud *upon Menzies*"—not anyone else. *See also U.S. Textiles*, 911 F.2d at 1269 (allegations fail to indicate other potential victims are "waiting in the wings").

c) Plaintiff's Pattern Allegations Must Be Dismissed

Because Plaintiff failed to make a proper showing of continuity or its threat, the RICO counts are dismissed without prejudice. This Court nonetheless gives Plaintiff leave to file an Amended Complaint re-alleging Counts I and II, provided he can do so consistent with his obligations under Federal Rule of Civil Procedure 11. Because mail and wire fraud presumably will still form the basis of Plaintiff's alleged pattern of predicate activity, this Court will later address whether any Amended Complaint sets forth each requisite element of mail or wire fraud with the specificity required by Rule 9(b). *Slaney*, 244 F.3d at 599. Although any Amended Complaint need only provide a general outline of the unlawful scheme, it "must, at minimum, describe the predicate acts with some specificity and state the time, place, and content of the alleged communications perpetrating the fraud." *Midwest Grinding*, 976 F.2d at 1020 (internal quotations omitted).

In its analysis, this Court will also review any Amended Complaint to ascertain whether Plaintiff has alleged the existence of other victims, or the manner in which he or others suffered distinct injuries resulting from Defendants' alleged scheme. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1300-05 (7th Cir. 1987) (repeated infliction of separate economic injuries upon a single victim of a single scheme over seven months was sufficient to establish a pattern of racketeering activity for purposes of civil RICO); *Corley v. Rosewood Care Center, Inc. of Peoria*, 142 F.3d 1041, 1048-49 (7th

Cir. 1998) (finding a 14-month closed-ended pattern sufficient based in part upon the presence of other victims); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 962-64 (7th Cir. 1996) (RICO jury verdict upheld and pattern found sufficient, in part, due to the presence of "separate and distinct injuries") (internal quotations omitted). But as currently pled, the RICO counts cannot survive Defendants' motions to dismiss.

3. Elements of RICO Conduct: The "Operation-Management" Test

In *Reves*, the Supreme Court resolved a circuit split, holding that for a substantive violation under § 1962(c), the phrase "conduct or participate" requires "some part in directing those affairs" through "operation or management." *Reves*, 507 U.S. at 177-86. In other words, a person conducts or participates in the conduct of the affairs of an enterprise only if that person uses his position in, or association with, the enterprise to perform acts which are involved in some way in the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so. To be associated with an enterprise, a person must be involved with the enterprise in a way that is related to its affairs or common purpose, although the person need not have a stake in the goals of the enterprise and may even act in a way that subverts those goals. A person may be associated with an enterprise without being so throughout its existence. The *Reves* "operation-management" test, as it has become known, is deployed to include and exclude certain RICO defendants.

In a conspiracy case like this one, the law adjusts the *Reves* concept. Specifically, a RICO conspiracy does not require violators to meet the "operation or management" test themselves, but instead a conspiracy defendant must "knowingly agree to perform services of a kind which facilitate" the activities of those who are operating or managing the RICO enterprise. *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000); *see also United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993) (*Reves* does not "address the principles of conspiracy law undergirding § 1962(d)"); *Goren v. New Vision International, Inc.*, 156 F.3d 721, 731 (7th Cir. 1998) ("a defendant can be charged under § 1962(d) even if he cannot be characterized as an operator or manager of a RICO enterprise under *Reves*").

Thus, Defendants here cannot be held liable for RICO violations unless they exercised some direction over the named enterprise or helped to operate it, or otherwise conspired knowingly to facilitate the activities of anyone who was a manager or operator of the enterprise. *United States v. Cummings*, 395 F.3d 392, 397-98 (7th Cir. 2005).

For purposes of the motions to dismiss, the Complaint satisfies the *Reves* test. As either a principal offender or as an aider and abettor, each Defendant personally operated, or otherwise exerted control over, the affairs of the enterprise. This participation included the planning and commission of the predicate activity and the active concealment of their prior relationships as part of the fraudulent scheme as a whole. Compl. ¶¶ 44-47, 104-36. By way of example, this alleged conduct includes: (1) luring Plaintiff into the bogus tax shelter plan; (2) referring business to other violators by convincing Plaintiff to hire co-conspirators; (3) participating in various telephone conversations (without Plaintiff) to plan the scheme; (4) structuring the legal instrumentalities of the scheme; (5) defrauding Plaintiff and supporting the appearance of legitimacy of the scheme with false statements and opinion letters; and (6) otherwise controlling the instrumentalities of the scam through active service as a trustee for the relevant assets and legal instrumentalities used to injure Plaintiff. Compl. ¶¶ 104-36. These allegations suffice, because the class of potential RICO violators entails, of course, not only "upper management" but also "lower-rung participants in the enterprise who are under the direction of upper management," or "others associated with the enterprise who exert control" over its affairs. *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*, 62 F.3d 976, 977 (7th Cir. 1995) (citing *Reves*) (internal quotations omitted).

Unlike *Crichton*, 576 F.3d at 399, and *Goren*, 156 F.3d at 727-28, which Defendants cite, each of the alleged violators in this case did far more than just perform otherwise "legitimate" services. Therefore, Defendants' alleged conduct constitutes more than a mere "tangential involvement" in the affairs of the RICO enterprise. *Crichton*, 576 F.3d at 399.

4. Elements of a RICO Conspiracy

As in all conspiracies, the essence of a RICO conspiracy violation is the agreement itself; the distinction between a traditional conspiracy and a

RICO conspiracy is simply the breadth of the overall objective. *Salinas v. United States*, 522 U.S. 52, 63-66 (1997). Accordingly, the fact that the "many defendants and predicate crimes were different, or even unrelated," is irrelevant in a RICO case, so long as it can "be reasonably inferred that each crime was intended to further the enterprise." *United States v. Gonzalez*, 921 F.2d 1530, 1539-40 (11th Cir. 1991); *see also United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988) (finding that a RICO conspiracy is "by definition broader than an ordinary conspiracy to commit a discrete crime"); *United States v. Valera*, 845 F.2d 923, 930 (11th Cir. 1988) (finding that "a series of agreements, which, pre-RICO, would constitute multiple conspiracies, can form, under RICO, a single 'enterprise' conspiracy").

Consistent with these general principles, the essential elements of a conspiracy to violate § 1962(c) are well-settled. A plaintiff must prove that the conspiracy existed and that each named defendant knowingly became a member of the conspiracy with an intention to further that conspiracy. Obviously, a conspiracy may be established even if its purposes were not accomplished, and in order to be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or means by which its purposes were to be accomplished. A defendant, however, must be generally aware of the common purpose or purposes of the RICO conspiracy, and be a willing participant. *Goren*, 156 F.3d at 732 ("In order to plead a viable § 1962(d) claim, a plaintiff must allege that a defendant agreed to the objective of a violation of RICO.") (internal quotations omitted).

Finally, RICO conspirators need not personally commit any predicate act, or otherwise agree as to *which* two predicates would be committed. Instead, RICO merely requires that each defendant, "by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise," through the proposed commission of "two or more predicate crimes" by any member of the conspiracy. *United States v. Campione*, 942 F.2d 429, 436 (7th Cir. 1991) (citing *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986)); *see also Salinas*, 522 U.S. at 63-66 (usual conspiracy rules apply to RICO); *H.J.*, 492 U.S. at 237; *Glecier*, 923 F.2d at 499-501 (the agreed upon predicate-act objectives of the conspiracy need not "come to fruition"); *Elliott*, 571 F.2d at 903.

But for the failure to allege the requisite element of pattern (as discussed above in Section III(A)(2)(e) of this Opinion), the Complaint here would otherwise appear to contain the additional facts necessary to support Count II at this preliminary stage. *Brouwer*, 199 F.3d at 963-64 (stating that RICO conspiracy requires an agreement not to commit, but rather simply to facilitate a pattern of two or more statutorily enumerated predicate acts). Because Defendants have not asserted any other independent conspiracy-based objections in their motions to dismiss (beyond their challenges to Count I and RICO generally), this Court need not address Count II in any further detail at this time. Given the fatal absence of continuity (or its threat) in the underlying RICO claim, the RICO conspiracy count cannot stand, and it is thus dismissed without prejudice.

5. The PSLRA'S RICO Exception

Defendants argue that Plaintiff's RICO claims are barred by the PSLRA. In Pub. L. No. 104-67, § 107, 109 Stat. 737, 758, Congress enacted a series of securities law reforms via the PSLRA, and in doing so also amended § 1964(c) of RICO. Among its provisions, the PSLRA added the italicized language below to § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *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.*

18 U.S.C. § 1964(c) (emphasis added). The phrase "fraud in the purchase or sale of securities" refers to violations of § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), which bans the use of manipulative or deceptive devices or contrivances in connection with

the purchase or sale of securities. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5.[7]

Defendants argue that Plaintiff's RICO claims are barred by § 1964(c) because the claims rely upon conduct that would have been "actionable" as fraud in the purchase or sale of securities. To decide this claim, the Court must address two related PSLRA issues: (1) the scope of conduct "actionable" as fraud in the purchase or sale of securities; and (2) whether the misconduct alleged here occurred "in the purchase or sale" of securities.

a) Defining the Scope of "Actionable" Conduct

(1) A Plain Text Reading of § 1964(c)

In determining the scope of civil RICO's securities fraud exception, this Court looks first to the operative legislative text, and asks "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Exelon Generation Co., LLC v. Local 15, International Brotherhood of Electrical Workers, AFL-CIO*, 676 F.3d 566, 570 (7th Cir. 2012) (internal quotations omitted);

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[7] The Securities Exchange Act of 1933, 15 U.S.C. § 77b(a)(1), and the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10), define a "security" as "any note, stock, treasury stock, security future, bond, debenture, . . . investment contract, . . . or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

Lawson v. FMR LLC, 134 S. Ct. 1158, 1165 (2014) (courts must give "the words used their ordinary meaning"). If the "statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Turkette*, 452 U.S. at 580 (internal quotations omitted); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (same). In short, when a "statute is unambiguous, our inquiry starts and stops with the text." *United States v. Marcotte*, Nos. 15-1266 and 15-1271, 2016 U.S. App. LEXIS 10883, at *6 (7th Cir. June 16, 2016).

Such a plain reading begins with the words and grammar employed by Congress. Here, the linguistic structure of the amended version of § 1964(c) itself sets forth both a general rule and an exception to that rule.[8] The first clause of § 1964(c) establishes a private civil remedy for RICO violations (the "Rule"):

> "Any person injured in his business or property by reason of a violation of § 1962 of this chapter" may sue and "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee..."

18 U.S.C. § 1964(c). The second clause of this same sentence (the "Exception") then creates an exception to this general rule, stating that:

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[8] Although not relevant here, the final sentence of the revised provision also creates an exception to the exception for private civil claims against those who are "criminally convicted in connection with the fraud." 18 U.S.C. § 1964(c).

> "…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 § 1962."

Id. Like any other exception, the exception created by the second clause is, by definition, more narrow than the general rule that it modifies; thus, the class of "persons" authorized to pursue a remedy under the first clause defines the subset class of "persons" barred under the second clause from doing so where the underlying conduct relied upon triggers the RICO "exception." According to a plain reading of the text, therefore, a civil RICO claim filed under the first clause of § 1964(c) will fall under the second clause exception if the predicate activity alleged by the "person" seeking remedy for the RICO injury would be "actionable" as "fraud in the purchase or sale of securities."

Despite this plain reading, some litigants have disputed the "actionable" conduct concept under the PSLRA. Essentially, the dispute asks: When Congress used the term "actionable" conduct in the PSLRA's RICO exception, did it mean actionable conduct by any *conceivable* person, or rather actionable conduct that caused the injuries to the same "person" referenced twice in § 1964(c)?

Some courts have emphasized the absence of yet a third reference to such "person" in the statute, and based upon that absence found that the exception applied to conduct "actionable" by any conceivable person. *E.g.*, *MLSMK Investment Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 275-76 (2d Cir. 2011). Ostensibly, such courts would require Congress to have inserted the additional words "by such person" in the text after the words "that would have been actionable" (and before the words "as fraud in the purchase or sale of securities") in order to conclude that Congress was referring to the same injured "person" throughout the sentence. That purported omission of a theoretical third reference to "person" in the PSLRA amendment, as the logic goes, forms the basis for some courts to dismiss any RICO count if the underlying conduct would have been "actionable" by *any* person as a securities fraud (not just conduct injuring the RICO "person" as listed in the statute), as illustrated below.

Relevant Text of § 1964(c)	**Theoretical Addition**
Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, 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.	Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable **<u>by such person</u>** as fraud in the purchase or sale of securities to establish a violation of section 1962.

This "actionable-by-anyone" approach, however, distorts the plain statutory text. Within a single sentence, the statute already states that any "person" injured by the RICO violation may sue, except that no "person" may rely upon any conduct that would have been "actionable" as securities fraud. This sentence structure shows that "actionable" modifies the injurious "conduct" being relied "upon" by the same "person" seeking a remedy for the RICO injury. Per the statute's text, the person must first have been "injured in *his* business or property by reason of a violation of section 1962" in order to fall within the general rule of § 1964(c). *Id.* (emphasis added). A reading of the statute's plain language, then, shows that all "actionable conduct" within the RICO exception must constitute conduct that injured the plaintiff in his business or property in order for it to be relied upon by that "person" to establish a RICO violation. If the actionable "conduct" concept does not refer to the injurious conduct harming the business or property of the "person" in the "Rule" portion of § 1964(c), and instead somehow refers to conduct harming anyone generally, then the underlying conduct would not fall within the general "Rule" of § 1964(c) in the first place. And thus, no second-clause "Exception" would be needed to take such "conduct" out of the general rule. It would make little sense for Congress to create an exception covering so broad a landscape of conduct that certain conduct covered by the exception would never fall within the general rule. There would be no need to except such conduct from a rule that does not reach it. As a matter of pure linguistics, the "actionable-by-anyone" reading is thus over-inclusive, preempting actions without regard to whether the underlying actionable conduct falls within § 1964(c) in the first place. An over-inclusive reading is a false reading.

In contrast, a plain reading of the phrase "any conduct that would have been actionable" means conduct that: (1) injured a person's business or property (and is thus being relied upon by that person to establish a RICO violation); and (2) would have been actionable as fraud in the purchase or sale of securities. When such injurious "conduct" to the RICO "person" could also trigger an "action" for remedies under the securities laws, then it constitutes "actionable" conduct under the exception. As such, the term "actionable" conduct means injuries to the "person" that he could use to seek a remedy via a private securities fraud action, or the same injurious conduct to such person that could otherwise be remedied via a public action filed by the SEC.[9]

Despite the precedent relied upon by Defendants, there is simply no basis in the text to read the term "actionable" conduct to include injurious conduct that could be "actionable-by-anyone" as a securities fraud. Such a reading fails to tie that underlying "conduct" to

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[9] As explained in more detail in this Opinion, this Court's plain text interpretation of the amended version of § 1964(c) remains consistent with the legislative history showing Congress' intent to eliminate overlap, not create gaps, in remedial statutory coverage. It further reads all of the various PSLRA provisions in harmony (as courts must do), including the RICO exception and the reservation of aiding/abetting securities fraud actions to the SEC, as set forth independently in another part of the PSLRA. *See* 15 U.S.C. § 78t(f) (aiding and abetting securities fraud actionable by the SEC but not private parties).

the rest of the sentence in § 1964(c). As noted before, in a single sentence, § 1964(c) already refers to the same RICO "person" twice, and refers to the "conduct" that "injured" such person in "his business or property." Securities fraud conduct that merely injured some third-party (rather than the RICO plaintiff himself) cannot be "actionable" conduct under a plain reading of the RICO exception, because it does not relate to the "conduct" being relied upon by the "person" bringing suit to address "his" injury to business or property.

(2) *MLSMK Investment*

Nevertheless, certain courts have still adopted some form of an "actionable-by-any-conceivable-person" construction. Often without rigorous analysis of the PSLRA's text or a proper concern for creating an unwarranted and unintended remedial gap in statutory coverage, these cases offer little in the way of compelling textual or contextual justification for their interpretation, other than citing certain favorable legislative remarks and ignoring unfavorable ones.[10]

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[10] As discussed in this Opinion, this Court finds unpersuasive the language, often found in *dicta* in other non-binding cases, that misreads the plain language of the PSLRA so far as to create a remedial gap, rather than merely eliminate an overlap, in the statutory framework formed by RICO and the securities laws. *See Hollinger International*, 2004 WL 2278545, at *5, *7 ("RICO bar operates irrespective of whether the RICO plaintiff has standing to bring a securities claim—*i.e.*, was a purchaser or seller of the company's stock—as long as another plaintiff could bring a securities action based on the alleged conduct"); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 620 (S.D. Tex. 2003) ("The RICO Amendment bars claims based on conduct that could be actionable under the securities laws even

Notable is the Second Circuit's decision in *MLSMK Investment*. 651 F.3d at 275-76. In that case, the court resolved a split of authority within the Second Circuit and dismissed civil RICO counts against defendant JP Morgan, who served as the bank and trading partner of Bernie Madoff. The plaintiff alleged that JP Morgan learned of Madoff's now-infamous Ponzi scheme, but continued to knowingly aid and abet the fraud anyway—thereby inflicting massive losses upon its victims—because JP Morgan received "substantial" profits from the fees it charged through continuation of the scheme. Noting that the plaintiff could not have brought a private claim against JP Morgan for aiding and abetting the fraud under securities laws, the Second Circuit dismissed the plaintiff's RICO claims because, in the court's view, the alleged mail and wire fraud predicates were "actionable" by someone other than the plaintiff.

To justify dismissing the plaintiff's private remedy under RICO, the Second Circuit quipped:

> [The] language of the statute simply does not require that, for a RICO claim to be barred, the plaintiff who sues under RICO must be able to sue under securities laws, or that the conduct

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when the plaintiff, himself, cannot bring a cause of action under the securities laws. The language of the statute does not require that the same plaintiff who sues under RICO must be the one who can sue under securities laws."); *Payton v. Flynn*, No. 06-465, 2006 WL 3087075, at *6 (N.D. Ill. Oct. 26, 2006); *Jones v. U.S. Bank National Association*, No. 10-8, 2012 WL 899247, at *5 (N.D. Ill. March 15, 2012); *Howard v. America Online Inc.*, 208 F.3d 741, 749-50 (9th Cir. 2000).

> "actionable as securities fraud" on which the plaintiff relies to establish the RICO violation must be that of the defendant.

MLSMK Investment, 651 F.3d at 275-76 (internal citations omitted). According to the court, the "better interpretation," and the one supposedly "supported by the plain meaning" of § 107 of the PSLRA, is "that the RICO Amendment bars claims based on conduct that could be actionable under the securities laws even when the plaintiff, himself, cannot bring a cause of action under the securities laws." *Id.* at 278 (internal citations omitted). Without addressing the specific grammar tying together the references to "person," "injury," "conduct" and "actionable" in the text, the Second Circuit concluded that "the plain language of the statute" does not require that "the same plaintiff who sues under RICO must be the one who can sue under securities laws." *Id.* (internal citations omitted). According to the Second Circuit's reading, the wording of the RICO exception "does not make such a connection." *Id.* (internal citations omitted). The Second Circuit then quoted a Texas district court decision to confirm its interpretation:

> [W]hen Congress stated that "no person" could bring a civil RICO action alleging conduct that would have been actionable as securities fraud, it meant just that. It did not mean "no person except one who has no other actionable securities fraud claim." *It did not specify that the conduct had to be actionable as securities fraud by a particular person to serve as a bar to a RICO claim by that same person.*

Id. (quoting *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d at 620 (citing *Hemispherx Biopharma, Inc. v. Asensio*, No. 98-5204, 1999 WL 144109, at *4 (E.D. Pa. Mar. 15, 1999))) (emphasis added).

Failing to address the PSLRA's legislative history as a whole, the Second Circuit then cited portions of the legislative history consistent with its ultimate decision. *See MLSMK Investment*, 651 F.3d at 278-79 (citing H.R. Rep. No. 104–369, at 47 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 746 (Congress "intend[ed]" that the section would "eliminate securities fraud as a predicate offense in a civil RICO action," and would bar a plaintiff from "plead[ing] other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud"); S. Rep. 104–98, at 19 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 698 (Congress appears satisfied that the securities laws "generally provide adequate remedies for those injured by securities fraud")) ("The [Senate] Committee believes that amending the 1934 [Securities Exchange] Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to [the RICO Amendment's] goal of reducing meritless securities litigation. The Committee does, however, grant *the SEC* express authority to bring actions seeking injunctive relief or money damages against persons who knowingly aid and abet primary violators of the securities laws" (emphasis added)).[11]

(3) A Critique of the "Actionable-by-Anyone" Approach

With all due respect, this Court disagrees with both the Second Circuit's reasoning and its result. First, the Second Circuit (through its citation to *In re Enron*) misread the PSLRA's text. Here, Congress did not need to again specify that the injurious conduct had to be "actionable" as to a particular person, because the provision already defines the relevant person—in the very same sentence—to be the same RICO "person" who suffered the "injury" to his business or property, and whose injury was otherwise "actionable" under the securities laws. Per the text, the focus remains upon the actionable *injury* inflicted upon the RICO person (and whether such injury can be remedied under the

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[11] Like *MLSMK Investment*, several other courts have conducted a truncated analysis of the PSLRA's legislative history to justify their removal of an actionable injury to the RICO person from the plain language of the RICO exception. Typically, these cases either cite broad statements about the general purpose of securities reform or they turn specifically to the partisan statements of Representative Christopher Cox (R-CA) when he initially proposed an early version of the § 1964(c) amendment. *See, e.g.*, *Bald Eagle Area School District v. Keystone Financial, Inc.*, 189 F.3d 321, 327-28 (3d Cir. 1999) ("The 'focus' of the Amendment was on 'completely eliminating the so-called 'treble damage blunderbuss of RICO' in securities fraud cases.'") (quoting *Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 157 (3d Cir. 1998); 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995), *as reprinted in* 1996 U.S.C.C.A.N. 679, 746 (1995) (statement of Rep. Cox)). A piecemeal historical account cannot prevail, however, when one takes an honest look at the bill's entire path to enactment.

securities laws), not the *standing* of people generally to file a securities fraud lawsuit for conduct, which may or may not have injured the RICO person.

Second, the legislative history of the § 1964(c) amendment fails to justify the creation of a statutory gap in the remedies created by Congress for fraud. Neither the plain text of the RICO exception nor its context supports the notion that the PSLRA as enacted constitutes any intent to affect general or wholesale reform of civil RICO. Instead, via the RICO amendment, Congress intended simply to create a specific exception to RICO's civil provision to avoid overlapping private remedies under RICO and the federal securities laws. Nothing in the legislative history justifies the notion that, in eliminating an overlap, Congress intended to create a "gap" in the remedial scheme such that real fraud victims would be denied any federal remedy under either statute.

Nevertheless, after focusing upon only portions of the legislative history, the Second Circuit in *MLSMK Investment* adopted an "actionable-by-anyone" standard because, in part, it feared that any other reading of the term "actionable" would require the courts to "overlook" that the RICO exception "was made in the same statute that explicitly authorized only the SEC—not private parties—to bring enforcement actions against aiders and abettors." 651 F.3d at 275-76. According to the court, it would be a "treacherous" interpretation and "strange indeed if Congress, in a statute that otherwise bars private causes of action under RICO for predicate acts that describe conduct actionable as securities fraud, nevertheless chose to allow enhanced RICO remedies" against "*only* the very parties that Congress simultaneously made immune from private suit" under the reformed securities laws. *Id.* (quoting *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F.Supp.2d 267, 282-83 (S.D.N.Y 2009)). Unfortunately, in attempting to avoid one result it viewed as absurd, the Second Circuit chose another absurdity.

As noted above, the *MLSMK Investment* court focused much of its concern upon the "aiding and abetting" provision of the PSLRA passed in response to the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Prior to *Central Bank*, federal courts generally held that a private plaintiff could bring a private aiding and abetting action under § 10(b) of the 1934 Securities Exchange Act. The courts based this understanding upon the following language in § 10(b):

> It shall be unlawful for any person, *directly or indirectly* . . . (b) to use or employ, in connection with the purchase or sale of any security . . . [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.

15 U.S.C. § 78j (emphasis added). In *Central Bank*, however, the Supreme Court rejected, as a matter of statutory construction, the inclusion of any aiding and abetting actions under § 10(b) of the 1934 Act. *Id.* at 177-78. While the Court did not specifically say so, its ruling by implication precluded both private aiding and

abetting actions, and public aiding and abetting actions filed by the SEC. Thus, prior to the passage of the PSLRA, § 10(b) did not provide for *any* remedial actions for aiding and abetting securities fraud (private or public).

Subsequently, as part of the congressional debate over the enactment of the PSLRA, the Senate considered legislatively overruling the *Central Bank* decision by clarifying § 10(b) and expressly permitting aiding and abetting securities fraud actions by both private parties and the SEC. As explained in the Committee on Banking, Housing, and Urban Affairs Report:

> Prior to the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, [114 S.Ct. 1439 (1994)] courts of appeals had recognized that private parties could bring actions against persons who 'aided and abetted' primary violators of the securities laws. In *Central Bank*, the Court held that there was no aiding and abetting liability for private lawsuits involving violations of the securities antifraud provisions. The Committee considered testimony endorsing the result in *Central Bank* and testimony seeking to overturn this decision. The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation. The Committee does, however, grant *the SEC* express authority to bring actions seeking injunctive relief or

> money damages against persons who knowingly aid and abet primary violators of the securities laws.

S. Rep. No. 104-98, at 19 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 727-28 (emphasis added). Ultimately, then, even though Congress declined to overturn *Central Bank* for *private* plaintiffs in the PSLRA, Congress did choose to overrule *Central Bank* in part by expanding (not restricting) remedial coverage in the PSLRA to allow the SEC to file public § 10(b) actions against individuals and entities aiding and abetting securities fraud.

In *MSLMK Investment*, the Second Circuit sought unsuccessfully to square the congressional response to *Central Bank* with the RICO exception, and in the process, lost sight of the textual requirement of tying the actionable injury to the RICO plaintiff. In the Second Circuit's view, if Congress specifically chose not to allow private actions for aiding and abetting under the securities laws via the PSLRA, then the court could not read the RICO amendment to allow private RICO actions for the same conduct. Apparently, the Second Circuit believed that if it read the § 1964(c) amendment to exempt only claims "actionable by the plaintiff" under the securities laws, it would then be forced to allow private aiding and abetting securities claims under the RICO exception. Such a reading of "actionable" in the PSLRA, said the Second Circuit, would have directly contradicted Congress' decision not to create such a private cause of action in response to *Central Bank*. Even though the Second Circuit properly avoided an ostensibly absurd reading (*i.e.*, allowing a private securities-based RICO action for aiding and abetting when Congress clearly sought to limit such actions under the securities laws), the *MSLMK Investment* ruling focused only upon standing (not injury), and thus ultimately adopted, in place of the absurd reading it feared, an even more absurd reading (the nullification of actionable conduct tied to the RICO injury of the "person"). As noted previously, this Court's reading of the text shows that an adherence to its plain language avoids the Second Circuit's false-dichotomy of absurdities.

At its core, *MLSMK Investment*, and the cases which follow it, implicitly repeals important applications of civil RICO. Such a reading defies precedent. When "two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (applying canon to find two federal statutes compatible with each other) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Moreover, when "two statutes complement each other"—that is, "each has its own scope and purpose" and imposes "different requirements and protections"—finding that one precludes the other would flout congressional design. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (internal quotations omitted). Courts will harmonize overlapping statutes "so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 144 (2001). Implied repeal should be found only when there is an "irreconcilable conflict between the two federal statutes at issue." *Matsushita Electric Industrial Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996) (internal quotations omitted). As the Court warned in *Morton*, when addressing the interactions of federal statutes, federal courts may not go out *looking* for trouble or "pick and choose among congressional enactments." 417 U.S. at 551. Instead, courts must employ a strong presumption that each of the statutes be given its full effect. *Id.* By properly avoiding any remedial gaps or unfounded implicit repeal, this Court's plain reading of § 1964(c) thus interprets the operative statutory language in a manner consistent with the ultimate version enacted by Congress itself.[12]

(4) A Full Legislative History of the PSLRA

A comprehensive analysis of the legislative history supports this Court's plain reading of the PSLRA—a reading that leaves no unwarranted gaps in remedial statutory coverage. Focusing upon securities reform, not RICO reform—(in a bill aptly named the Private *Securities* Reform Act)—the initial draft of the bill did not even mention RICO when it first appeared in the

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[12] This Court's plain language approach to the PSLRA finds compelling support from the legal academy. Prof. G. Robert Blakey & Michael Gerardi, *Eliminating Overlap or Creating a Gap? Judicial Interpretation of the Private Securities Litigation Reform Act of 1995 and RICO*, 28 Notre Dame J.L. Ethics & Pub. Pol'y 435 (2014) (After analysis of the text and legislative history, authors state the case for the coexistence of RICO and the securities law without any remedial gaps in coverage, or any implicit repeal of RICO under the *Billing*'s test set forth in *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007)).

House of Representatives from the Committee on Commerce in February 1995. *See* A Bill To Reform Federal Securities Litigation, H.R. 1058, 104th Cong., (1995). One week later, Representative Cox proposed the first version of the RICO exception. 141 Cong. Rec. H2717 (daily ed. Mar. 6, 1995). On the floor, Representative Cox claimed that the omission of a RICO exception in the bill to reform securities litigation was an administrative oversight, and that he and the other sponsors had always intended to include it, but it must have slipped through the cracks as the bill made its way to the House floor. *Id.*

These statements and the proposed amendment faced immediate challenge in the House. For example, Representative John Conyers (D-MI) warned that, as drafted, the proposed amendment overreached and would bar worthy lawsuits that provide important relief to legitimate victims. Citing various high-profile white collar cases at the time, such as the "Lincoln Saving and Loan debacle" and the "Bank of Credit and Commerce International" scam, Representative Conyers also attacked the suspicious timing of the amendment:

> [T]his amendment was hastily put together without the benefit of any hearings or debate in any committee or the possibility of a markup where there could have been important improvements, and now within an 8-hour ambit, we are asked to consider the revocation of the greatest single crime-fighting bill provision, RICO, on the law books today.

141 Cong. Rec. H2759 (daily ed. Mar. 7, 1995). The initial version of the amendment then passed out of the House of Representatives, but the battle lines of the rival legislative factions had been drawn. *See* Vote Report: Private Securities Litigation Reform Act, 1995 House Role No. 216 (Mar. 8, 1995).

Meanwhile, in the Senate, another version of the securities reform bill also contained a RICO exception when it reached the Senate floor in January 1995. Originating in the Committee on Banking, Housing, and Urban Affairs, Senate Bill 240 contained a section amending RICO, which read: "[N]o person may bring an action under this provision if the racketeering activity involves fraud in the sale of securities." Private Securities Litigation Reform Act, S. 240, 104th Cong. (1995). This version, however, faced opposition by then-Senator Joe Biden, and other Senators, who proposed and obtained various changes to the language to broaden RICO coverage, including maintaining private civil RICO suits for securities-based fraud claims involving prior criminal convictions. 18 U.S.C. § 1964(c).

The final version of the bill produced in the Senate did not end the political debate. Thereafter, the House rejected the Senate version, and a conference committee convened to fashion a new bill to send to the White House. *See* H.R. Rep. No. 104-369 (1995) (Conf. Rep.). This effort, in turn, met with opposition by President Bill Clinton, who vetoed the conference committee's revision of the bill. H.R. Doc. No. 104-159 (1995). In his words: "I am not willing to sign legislation that will have the effect of closing the courthouse door on investors who have legitimate claims. Those who are the victims of fraud should have recourse in our courts." *Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act of 1995*, 31 Weekly Comp. Pres. Doc. 2210 (Dec. 19, 1995).

At the conclusion of this legislative maneuvering and partisan political debate, another compromise version of the PSLRA amendment emerged from the conference committee that was much narrower than the versions first proposed. In the end, the requisite super-majority in both houses of Congress approved the current "would have been actionable" language, and not the earlier proposed versions, such as the phrasing: "no person may bring an action under this provision if the racketeering activity involves fraud in the sale of securities." Private Securities Litigation Reform Act, S. 240, 104th Cong. (1995). As part of the substantive compromises needed to override the Presidential veto, Congress included the narrower "actionable" language to define a smaller class of cases being brought by RICO plaintiffs, rather than a broader "involves" securities fraud approach, or the judicially-created "actionable-by-anyone" construction used by some courts.

In sum, the legislative history confirms this Court's plain reading of the text of the § 1964(c) amendment as a narrow exception borne of a legislative compromise and designed to merely eliminate overlapping remedies under the securities laws and civil RICO—nothing more, nothing less. For example, the legislative reports draw heavily upon the comments of Arthur Levitt, the chairman of the SEC at the time, who testified before both the House and Senate committees. H.R. Rep. No. 104-369, at 42-43, 48 (1995) (Conf. Rep.) *as reprinted in* 1995 U.S.C.C.A.N. 730; S. Rep. No. 104-98, at 19 (1995) *as reprinted in* 1995 U.S.C.C.A.N. 679, 698.

In discussing the merits of the various proposals, Chairman Levitt crystalized the ultimate consensus motivation behind the PSLRA provisions and, time and again, articulated a balanced approach that would both deter frivolous securities litigation yet still protect the effective remedies and rights of legitimate victims of fraud. *Securities Litigation Reform Proposals S. 240, S. 667, and H.R. 1058: Hearings Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 232 (1995) (statement of Arthur Levitt, Chairmen, SEC). Despite the competing factions within the legislative process, at the very least, both sides of the aisle appeared to find agreement in the SEC's view that Congress should "[e]liminat[e] the overlap between private remedies under RICO and the Federal securities laws." *Id.*; H.R. Rep. No. 104-369, at 42-43, 48 (1995) (Conf. Rep.) *as reprinted in* 1995 U.S.C.C.A.N. 730 (Conference Report lists the RICO amendment and quotes Chairman Levitt's rationale). Clearly, the purpose of the PSLRA was not to leave legitimate victims without *any* remedy, but rather to find the *appropriate* statutory remedy depending upon the circumstance, i.e., either a private RICO suit, a private securities fraud suit, or, a public suit brought on behalf of victims by the SEC (in the case of offenders aiding and abetting securities fraud). In Chairman Levitt's words, the ultimate goal remains the provision of adequate remedies: "[T]he securities laws provide adequate remedies for those injured by securities fraud, [therefore] it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO." *Securities Litigation Reform Proposals S. 240, S. 667, and H.R. 1058: Hearings Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 251 (1995) (statement of Arthur Levitt, Chairmen, SEC).

In light of the plain text of the statute, and considering the complete legislative history for context, this Court finds unpersuasive any construction of the word "actionable" that ignores whether the RICO plaintiff's injury was actionable as a securities action, either privately or via the SEC. In the end, judicially transforming the term "actionable" to become "actionable-by-anyone" would implicitly repeal RICO for legitimate claims and leave real victims without any of the remedies that Congress clearly intended to give them through the enactment of a carefully-designed framework of federal statutes.

This Court's analysis above raises another important point: whenever review of legislative history becomes necessary (and it need not here in light of the plain text), such review remains useful and legitimate only to the extent that courts consider such legislative history in its entirety. Stray partisan comments offer little in isolation and often lead courts upon a false path. Indeed, to the degree that snippets of the legislative history (as cited by *MLSMK Investment* and other courts) conflict with the words of the statute itself, then the statute's plain text must prevail and ultimately define any interpretation of the law – here, the scope of the PSLRA's RICO exception. As so aptly explained in *In re Sinclair*, "[s]tatutes are law, not evidence of law" and thus, the text of the statute controls. 870 F.2d 1340, 1341, 1343 (7th Cir. 1989). Unlike the legislative history, which merely provides contextual background for the text, the statute must prevail:

> Which prevails in the event of conflict, the statute or its legislative history? The statute was enacted, the report just the staff's explanation. Congress votes on the text of the bill, and the President signed that text. Committee reports help courts understand the law, but . . . [if a committee] report contradicts rather than explains the text . . . [then] the statute must prevail.

Id. Accordingly, courts must distinguish between the proper and improper uses of legislative history and recognize the dangers of substituting the views of any individual legislator—like Representative Cox here—for the express language employed by Congress in enacting the statute. As the court in *Sinclair* observed, the clarity of the text will always depend upon context, which legislative history may illuminate, but the process must remain an objective one, because "the search is not for the contents of the authors' heads but for the rules of language they used." *Id.* at 1342; *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 113 (Feb. 2010) ("To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control").

b) Misconduct "in the Purchase/Sale of Securities"

Having determined the proper scope of the PSLRA amendment, the Court now must address whether Plaintiff's claims fall within that exception. Looking once again at the plain text, Congress' use of the words actionable "as fraud in the purchase or sale of securities" in the second clause controls this Court's analysis, because, under established rules of statutory construction, the revised version of § 1964(c) must be read in conjunction with the text of the securities laws. *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001) (stating the rule that "different acts which address the same subject matter, which is to say are *in pari materia*, should be read together such that the ambiguities in one may be resolved by reference to the other"). Here, the specific subset of misconduct "actionable" under § 10(b) is narrower than the universe of all misconduct merely "involving" securities fraud generally or otherwise involving securities in the background. From the plain language of the PSLRA amendment, therefore, the exception only applies if the "person" seeking relief for a RICO injury relies "upon any conduct" that would have been actionable "as fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c).

The PSLRA's structure confirms this ordinary reading of the text. For example, in the "saving clause" of § 108 of the PSLRA, the statute states that the "amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933." Thus, the PSLRA exception to RICO draws upon a known and closed set of unlawful actions in defining its boundaries, rather than some amorphous standard broadly prohibiting any predicate activity merely involving mail or wire fraud in which some form of a security interest might otherwise appear. Certainly, since § 108 explicitly refers to enumerated statutory actions, this Court cannot read the RICO "securities" exception (contained in the immediately preceding provision (§ 107)) as creating some absolute preclusion of RICO for any securities-related conduct not otherwise actionable "as fraud in the purchase or sale of securities" under the securities laws.

Given this interpretative backdrop, the assessment of the preclusive effect of the RICO exception must be determined based upon whether the underlying conduct alleged by the person could constitute an actionable securities fraud claim under the 1933 and/or 1934 Acts. Here, Defendants' invocation of the RICO exception fails this test.

For an actionable securities fraud claim, § 10(b) of the Securities Exchange Act requires five elements: (1) a material misrepresentation or omission by the defendant in connection with the purchase or sale of securities; (2) scienter; (3) reliance; (4) economic loss; and (5) proximate causation of such loss. *AnchorBank*, 649 F.3d at 617; *In re HealthCare Compare Corp. Securities Litigation*, 75 F.3d 276, 280 (7th Cir. 1996). To satisfy the "in connection with the purchase or sale of securities" requirement, the claim must allege a fraud or misrepresentation "coinciding" with or "touching" upon the securities transaction itself. *United States v. Durham*, 766 F.3d 672, 681-82 (7th Cir. 2014) (internal quotations omitted).

In applying § 10(b)'s reach to specific conduct, the Supreme Court explains that the securities laws should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotations omitted). To that point, the Supreme Court has observed that the executive branch generally adopts "a broad reading" of the phrase "in connection with the purchase or sale of any security" and, given the SEC's role in enforcing the Act, its view is "entitled to deference if it is reasonable" within the particular dispute faced by a court.[13] *Id.* at 819-20.

Using the appropriate standard, this Court finds that Plaintiff has not alleged an "actionable" securities claim, because nothing about the sale of his AUI stock

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[13] Based upon such controlling precedent (which states the requisite approach to the securities laws more precisely), and Congress' mandate to liberally construe RICO in light of its remedial purposes, Pub. L. No. 91-452, § 904(a), 84 Stat. 947, this Court finds unpersuasive the simplistic language in such cases as *Hollinger International, Inc. v. Hollinger Inc.*, No. 04-698, 2004 WL 2278545, at *5 (N.D. Ill. Oct. 8, 2004), which urges federal courts to "broadly" construe the RICO exception in an effort to dismiss any civil RICO claims whenever they are based upon mail or wire fraud. Although merely sweeping RICO cases out of court with a broad brush may be an objective for some defendants, the joint construction here of two federal statutes, in tandem, requires a more tailored analysis.

itself was fraudulent in this case. By selling Plaintiff a bogus tax shelter plan, Defendants were attempting to hide the resulting income from Plaintiff's sale of stock from the IRS. In both form and substance, therefore, this case remains a case about tax shelter fraud, not securities fraud. The relevant misrepresentations concerned the legitimacy of Defendants' plan to avoid capital gains tax on the disposition of an asset, which—by happenstance—was the non-fraudulent sale of an interest in corporate shares. This same scheme could have been perpetrated in connection with the sale of any asset: a piece of real estate, a piece of art, or any other conceivable property interest that might incur capital gains. Hence, the Complaint fails to trigger any bar to RICO relief, because the conduct underlying Plaintiff's cause of action, per the statute itself, must first be "actionable" as a securities fraud case before it can trigger the PSLRA's RICO exception. Having a defendant simply point to some "securities" interest in the record is not enough to invoke the exception. Sand in the shoe does not a beach make.

In the absence of any guidance from the Seventh Circuit to the contrary, compelling cases from the Sixth and Ninth Circuits (plus decisions from this District), support this Court's plain reading of the PSLRA. All conclude that the PSLRA exception does not bar RICO claims, like the ones alleged here, if the fraudulent tax shelter scheme at issue only incidentally involved the underlying securities or securities transactions. *Ouwinga v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783 (6th Cir. 2012); *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866 (9th Cir. 2010); *Martinek v. Diaz*, No. 11-7190, 2012 WL 2953183 (N.D.

Ill. July 18, 2012); *Moorehead v. Deutsche Bank AG*, No. 11-106, 2011 WL 4496221 (N.D. Ill. Sept. 26, 2011).

In *Rezner*, a taxpayer sued the firms that misled him with advice to take out loans to avoid taxes, a recommendation that turned out to be fraudulent. 630 F.3d at 869. Although the taxpayer had pledged an interest in an account holding municipal bonds as collateral for the loans, that fact did not establish that the misrepresentation occurred "in connection with" a securities transaction. *Id.* at 872. The Ninth Circuit thus held that the taxpayer's RICO claim was not precluded by the PSLRA. *Id.* In reaching that holding, the Ninth Circuit emphasized that the taxpayer's losses did not flow from the pledge of the securities, or any misrepresentation about their value, and thus the securities at issue, like the ones here, were "merely a happenstance cog in the scheme." *Id.*

Likewise, in *Ouwinga*, the Sixth Circuit found that the PSLRA's RICO exception did not preclude RICO claims directed against a fraudulent tax avoidance scheme. There, the plaintiffs alleged RICO and fraud claims relating to the tax consequence of a tax shelter plan requiring the purchases of variable life insurance policies. Because it was "merely incidental" that the policies happened to be securities, the Sixth Circuit found that the RICO exception did not apply. The court then drew from a similar Southern District of New York decision that "articulated the distinction" well:

> Plaintiffs do not allege a securities fraud, but rather a tax fraud. There was nothing *per se* fraudulent from a securities standpoint about the financial mechanism and schemes used to

> generate the tax losses. While the alleged fraud could not have occurred without the sale of securities at the inflated basis (which created the artificial loss to offset Plaintiffs' major capital gains), it is inaccurate to suggest that the actual purchase and sale of securities were fraudulent. In actuality, the securities performed exactly as planned and marketed; it was the overall scheme that allegedly defrauded the Plaintiffs and Class Members. . . . This Court as well finds that the alleged fraud here involved a tax scheme, with the securities transactions only incidental to any underlying fraud. Accordingly this Court will not apply the PSLRA bar to Plaintiffs' RICO claims.

694 F.3d at 791 (quoting *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 n.9 (S.D.N.Y. 2009)). This simple logic controls here.

The present case also mirrors the tax fraud scenario noted in *Moorehead*. 2011 WL 4496221. In that case, the plaintiffs sued the defendants for a fraudulent investment plan to avoid tax liability, known as an "Offshore Portfolio Investment Strategy." *Id.* at *1. When analyzing the defendants' PSLRA argument, the court emphasized that in their dealings with defendants, plaintiffs "were hoping to minimize the income tax consequences of sales of securities they had recently sold." *Id.* at *11. In response, the court noted that, if this were "the only role that securities played in the transactions at issue, the PSLRA would *not* bar plaintiffs' claims." *Id.* (emphasis added). Like the Sixth Circuit, the court in *Morehead* also relied on *Kottler*;

and noted that the PSLRA would not apply because, "[f]ramed this way, the claims do not allege a securities fraud, but rather a tax fraud." *Id.* (quoting *Kottler*, 607 F. Supp. 2d at 458 n.9).

Ultimately, in *Moorehead*, the court barred the claim under the PSLRA, but only did so when, unlike here, the complaint included additional assertions alleging traditional securities fraud. As emphasized in *Moorehead*, the complaint repeatedly alleged "that defendants made false and misleading representations about the securities transactions—not just regarding their tax effects, but also regarding their profitability." *Id.* at *12. (noting that the alleged misrepresentations were about "both the investment results *and* the tax consequences") (emphasis added); *see also MJK Partners, LLC v. Husman*, 877 F. Supp. 2d 596, 606 (N.D. Ill. 2012) (applying the PSLRA bar and distinguishing cases in which, as here, "the primary thrust of the fraudulent scheme was unlawful tax avoidance").

Also instructive is *Martinek*. 2012 WL 2953183. In that case, the court dismissed a RICO claim under the PSLRA's RICO exception, but did so only because, unlike here, the plaintiffs "agreed to purchase" the securities at issue as a "result" of the defendants' fraudulent misrepresentations. *Id.* at *13. Although the plaintiffs sought to avoid the RICO exception by arguing that the misrepresentations did not go to the "value" of the securities *per se*, the court still found the bar applicable because it found a causal connection between the false statements and the decision to buy the securities themselves. *Id.* In the court's words, even though "the Seventh Circuit does not appear to have had occasion to speak on [the] scope of the RICO bar," the Ninth Circuit's approach is informative:

> [I]t interprets the requirement that the fraud be committed "in connection with" a securities transaction to mean that "a certain relationship [must] be established between the fraud and the transaction that resulted in the injury complained of."

Id. (citing *Renzer*, 630 F.3d at 871-72) (brackets in original).

Following this line of cases, the fraudulent tax scheme here was not "in connection with" the sale of AUI stock. Indeed, the sale of AUI stock possessed no causal connection to the tax shelter fraud. Thus, the RICO exception does not apply because the tax fraud and the securities transactions alleged were "essentially independent events." *Ouwinga*, 694 F.3d at 791.[14]

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[14] Unlike other cases applying the PSLRA's RICO exception, the tax shelter fraud alleged here could also never form the basis of an action by the SEC or any shareholders' class, because nothing about the securities transactions by themselves is "actionable" as securities fraud. *Bald Eagle Area School District*, 189 F.3d at 328 (noting that the SEC's complaint alleged the same scheme which "is at the heart of this RICO action"); *Florida Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 165 F. Supp. 2d 1345, 1356-57 (S.D. Fla. 2001) (in dismissing RICO claims under § 1964(c), the court compared the RICO action with a shareholder action to determine if the predicate acts were actionable as securities fraud); *In re Ikon Office Solutions, Inc. Securities Litigation*, 86 F. Supp. 2d 481, 486 (E.D. Pa. 2000) (same); *Tyrone Area School District v. Mid-State Bank & Trust Co.*, No. 98-881, 1999 WL 703729, at *4

B. Counts III to IX: Sufficiency of State Law Claims

As to the remaining counts of the Complaint, Defendants Seyfarth, Taylor, Northern, and Christiana all challenge the legal sufficiency of the Plaintiff's state law claims. Particularly troubling for Plaintiff is the potentially fatal time-bar of his state law claims raised by Defendants pursuant to 735 ILCS 5/12-214.3.

Yet, in light of this Court's dismissal of Counts I and II, this Court will defer ruling on the state law counts until, and if, Plaintiff can properly amend his complaint with viable RICO claims consistent with the requirements of Rule 11. If Plaintiff cannot plead viable RICO claims, then this Court may decline to exercise supplemental jurisdiction over his state law claims. *Wright v. Associated Insurance Cos. Inc.*, 29 F.3d 1244, 1251-52 (7th Cir. 1994). Indeed, the "general rule is that, when all federal-law claims are dismissed before trial," the pendent claims should be left to the state courts. *Id.* at 1252; 28 U.S.C. § 1367(c). The Seventh Circuit also instructs that, in exercising its discretion, this Court should consider "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources," among other factors. *Timm v. Mead Corp.*, 32 F.3d 273, 277 (7th Cir. 1994). When the matter becomes ripe here, this Court will consider the merits

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(W.D. Pa. Feb. 9, 1999) (fact that the conduct involved in the scheme "is actionable under securities laws is evidenced by the SEC's commencement" of a public action for "violations of federal securities laws" based upon the same conduct alleged in the RICO claims).

of Defendants' motions to dismiss the state law counts, and if necessary, all of the pertinent factors within its discretion regarding the possibility of exercising supplemental jurisdiction over those claims.

But for now, Defendants' motions to dismiss Counts III to IX of the Complaint are denied without prejudice, and the parties will be given leave to revisit the issues raised, if needed, at a later time.

IV. Conclusion

For these reasons, Defendants' motions to dismiss [29] [31] [35] are granted in part and denied in part. Counts I (RICO) and II (RICO Conspiracy) are hereby dismissed without prejudice. This Court further lifts the current stay of discovery and grants Plaintiff leave to file an Amended Complaint properly re-alleging Counts I and II, provided he can do so consistent with his obligations under Rule 11. To the degree Defendants seek to dismiss Plaintiff's state law claims alleged in Counts III to IX, the requests are denied without prejudice, and the parties will be given leave to revisit the issues raised, if needed, at a later time.

This matter is set for a status hearing on 7/26/16, at 9:45 a.m. in Courtroom 1725. At the status heating, the parties should come prepared to discuss the timing for the filing of any amended complaint, and the parties' positions regarding the possibility of seeking an immediate interlocutory appeal of this Court's order under 28 U.S.C. § 1292(b).

IT IS SO ORDERED

Dated: July 15, 2016

/s/John Robert Blakey
John Robert Blakey
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 18-3232

[Filed December 12, 2019]

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

STEVEN MENZIES,	)
Plaintiff Appellant,	)
	)
v.	)
	)
SEYFARTH SHAW LLP,	)
an Illinois limited liability	)
partnership, *et al.*,	)
Defendants Appellees.	)
	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:15 cv 3403

John Robert Blakey, *Judge*.

O R D E R

Plaintiff appellant filed a petition for rehearing and rehearing *en banc* on November 26, 2019. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

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[1] Judge Joel M. Flaum did not participate in the consideration of this matter.