No. _____

IN THE

Supreme Court of the United States

DEVON DRIVE LIONVILLE, LP, *et al.*,
Petitioners,

v.

PARKE BANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT TOLAND II
Counsel of Record
KEVIN F. BERRY
O'HAGAN MEYER LLP
Two Logan Square
100 N. 18th Street, Suite 700
Philadelphia, PA 19103
215-569-2400
rtoland@ohaganmeyer.com
Attorneys for Petitioners

January 16, 2020

WILSON – EPES PRINTING CO., INC. – 202-789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Petitioners in this case allege that their bank defrauded them out of millions of dollars and committing numerous predicate acts of mail and wire fraud to the FDIC, which the bank did to protect itself from suffering the consequences of having its criminal enterprise discovered. The Third Circuit held that Petitioners were too far removed for purposes of proximate cause to recover against the bank under RICO. The question presented is:

What standards and criteria are appropriate in a civil RICO case to determine whether proximate cause exists for a plaintiff who is not the direct recipient of the mail or wire fraud, and therefore is not within the "first step" of the chain causation?

LIST OF PARTIES

Petitioners are Devon Drive Lionville, LP (Lionville), North Charlotte Road Pottstown, LP (Pottstown), Main Street Peckville, LP (Peckville), and George Spaeder, four of the Plaintiffs below.

Respondents are Parke Bank, Vito S. Pantilione, and Ralph Gallo, three of the Defendants below.

Pursuant to Rule 12.6, parties below that have no interest in the outcome of this Petition are: (1) for plaintiffs: Rhoads Avenue Newtown Square, LP, VG West Chester Pike, LP, 1301 Phoenix, LP, and John M. Shea; and (2) for defendants: Parke Bancorp, Inc.

RULE 29.6 CORPORATE DISCLOSURE

Three of the Petitioners are limited partnerships. None of the limited partnerships is a corporate entity, none of their limited or general partners is a corporate entity, and none of the limited partnerships or their limited and general partners is or is owned by a publicly traded entity.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes

Other Authorities

IN THE

Supreme Court of the United States

DEVON DRIVE LIONVILLE, LP, *et al.*,
Petitioners,

v.

PARKE BANK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is unpublished. ___ F. App'x ___. The district court's opinions (App. 14a-73a, 76a-104a) are not reported.[1]

---

[1] The district court's first opinion is not included in the Appendix because it has no bearing on the issue presented for review. 2016 WL 7475816 (E.D. Pa. Dec. 29, 2016).

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1341 and 1343 of Title 18 of the U.S. Code on mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, and §§ 1962 and 1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, are set out in Appendix B at App. 107a-111a.

STATEMENT OF THE CASE

A. The Facts Underlying This Case

Petitioner George Spaeder formed a real estate investment business with Bruce Earle in 2003. They formed limited partnerships (LPs) with other investors to borrow money and acquire commercial real estate, hold title to the properties, and run the operations. The loans for the properties totaled $24.9 million and were through Parke Bank, a relatively small New Jersey bank. The LPs' accounts were also with Parke Bank.

The ownership interests in all the LPs were different, meaning that the LPs' loans, obligations, and accounts were all held by different individuals and limited liability companies. As a result, the funds from one account at Parke Bank could not be moved to another account, at least not without the express authorization from the relevant LPs. In banking terms, the accounts were not cross-collateralized.

But Parke Bank chose to manage the accounts on its own terms, regardless of what the Federal Deposit Insurance Corporation (FDIC) and other regulators

required—it transferred funds between the non-cross-collateralized accounts, it charged mysterious $99,999.99 late fees, it fraudulently represented the collateralization of the loans, and it engaged in a host of other fraudulent acts to deceive Petitioners, the FDIC, and other federal regulators.

Parke Bank used two schemes to carry out its racketeering activities. First, it enlisted as a coconspirator Bruce Earle, Spaeder's business partner who handled the finances and paperwork while Spaeder managed the properties. Second, it falsified and manipulated the paperwork that was filed with the FDIC and other regulators to make it appear that the loans were fully collateralized and performing properly. By that, Parke Bank had Earle operating on the inside of the business enterprise to help carry out its criminal enterprise, while making the fraudulent paper record to the FDIC on the outside to avoid getting caught.

Ultimately, Parke Bank prevailed and acquired one of the properties (Pottstown) through a confession of judgment action and secured judgments against the others due to the loans going into default.

B. The District Court's Decisions

Petitioners filed suit in the Eastern District of Pennsylvania after discovering what had taken place. Federal question jurisdiction under 28 U.S.C. § 1331 was based on the claims under § 1964(c) of RICO. The underlying predicate RICO acts included mail and wire fraud under 18 U.S.C. §§ 1341 & 1343. Respondents moved to dismiss and the district court dismissed most of the claims without prejudice.

Petitioners filed an Amended Complaint, Respondents moved to dismiss, and the district court dis-

missed Pottstown and Peckville's claims with prejudice and dismissed Lionville and Spaeder's claims without prejudice. App. 75a.

Petitioners Lionville and Spaeder filed a Second Amended Complaint, Respondents moved to dismiss, and the district court dismissed Lionville and Spaeder's claims with prejudice. App. 105a.

The district court dismissed Petitioners' claims on different substantive grounds. With respect to Pottstown and Peckville, the court held in its second opinion that their claims were barred by res judicata because they could have asserted them in state court confession of judgment actions brought by Parke Bank. App. 59a-60a. As to Lionville and Spaeder, the court held in its third opinion that they lacked standing to pursue their RICO claims because they failed to allege any first- or third-party reliance on Parke Bank's mail and wire fraud. App. 85a-91a.

C. The Third Circuit's Decision

The Third Circuit affirmed, albeit on different grounds. At the outset, and despite the fact that the case had not gotten beyond the allegations in the complaints, the court found that the Petitioners were just as crooked and corrupt as the Respondents, essentially making a finding of *in pari delicto*:

> Those who agree to deceive the government may find themselves deceived. The parties here were in real estate together. Their business relationship was, to put it mildly, complicated. They cheated and lied to one another. But they were all in cahoots, signing sham agreements to evade regulatory scrutiny.

App. 2a.

With respect to the Petitioners' claims, the court found that they had in fact alleged third-party reliance—that the FDIC relied on Parke Bank's mail and wire fraud. But the court held that such third-party reliance was far too removed to be the proximate cause of the Petitioners' damages because the direct victim of the mail and wire fraud was the FDIC, not the Petitioners. The court also concluded that the regulators were intervening actors who broke the chain of causation as a matter of law:

> Under their [Petitioners'] theory, the direct victims are the regulators, not appellants. And the regulators are also intervening actors who break the chain of causation.
>
> The Supreme Court has rejected similarly remote theories of proximate causation. Consider these two scenarios: First, a party defrauds a tax authority and uses the proceeds to lower its prices and undercut its competitors. *Anza* [*v. Ideal Steel Supply Corp.*], 547 U.S. [451] at 457-58 [(2006)]. Second, a party defrauds a state government by not reporting some sales information, and without this information a city government cannot track down the people who never paid taxes on those sales. *Hermi* [sic] *Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010). In both scenarios, the harm is separate from the fraud. The fraud was perpetrated on the tax authority and state government. But the harm alleged was suffered by different parties: competitors and city government. So in both scenarios, those harms are too attenuated and distant from the reliance to show proximate causation. *Anza*,

547 U.S. at 458-59; *Hermi* [sic], 559 U.S. at 10. So too here.

App. 12a.[2]

REASONS FOR GRANTING THE PETITION

This Court has addressed the scope of proximate cause in a civil RICO case in four opinions: *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010). Certain guiding principles can be drawn from these opinions, even though proximate cause is "generally not amenable to bright-line rules." *Bridge*, 553 U.S. at 659.

Instead of accepting and working with these guiding principles, the courts of appeals have developed four distinct analytical frameworks to determine when, or if, a plaintiff beyond the "first step" in the chain of causation can recover under RICO. Although that alone warrants the issuance of a writ of certiorari, the divide among the circuits promotes forum shopping given that RICO conspiracies often span beyond a single circuit.

The circuits are also asking for guidance on this issue. *See, e.g.*, *Wallace v. Midwest Financial Mortgage Services, Inc.*, 714 F.3d 414, 419 (6th Cir. 2013) ("Despite its flexibility, the proximate-cause requirement tends to invite confusion in cases involving mail and wire fraud as the predicate acts."); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 914 (10th Cir. 2017) (Hartz, J., concurring) (joining the

[2] Judge Jordan would have affirmed with respect to Pottstown and Peckville based on res judicata. App. 10a, dagger-note.

majority's RICO analysis, but explaining that "[i]t is my hope, however, that the Supreme Court will one day cast aside the confusing and discredited notion of proximate cause.").

As explained below, the Third Circuit in this case restricted recovery under RICO to only the direct recipients of the mail or wire fraud, as have the Second, Fourth, and Eleventh Circuits. The court's holding is directly contrary to this Court's unanimous decision in *Bridge*, as well as the holdings of six other circuits, and needs to be corrected.

I. TEN CIRCUITS ARE SPLIT ON PROXIMATE CAUSE WHEN A PLAINTIFF IS NOT IN THE FIRST STEP OF THE CAUSAL CHAIN

A. This Court's Decisions in *Holmes*, *Anza*, *Bridge*, and *Hemi*

Section 1964(c) of RICO provides a private right of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . . ." 18 U.S.C. § 1964(c), App. 110a. Section 1962(c) makes it unlawful to associate with an enterprise engaged in a pattern of racketeering activity. App. 109a. Racketeering activity is defined in § 1961(1) to include a variety of predicate acts, including mail and wire fraud under 18 U.S.C. §§ 1341 & 1343. App. 107a-108a.

The proof required to establish "by reason of" in § 1964(c) has been construed differently by different courts. The starting point for determining whether the circuits have gone astray is this Court's opinions.

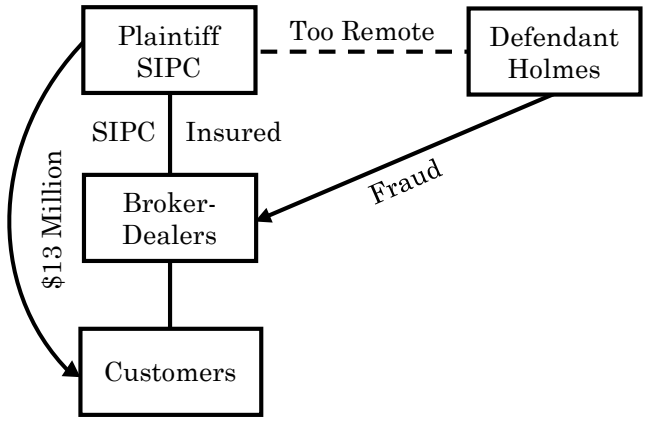
1. *Holmes v. Securities Investor Protection*

The Court in *Holmes*, held that the words *by reason of* in § 1964(c) incorporated the common law requirement of proximate cause into a civil RICO case. The Court drew from its construction of § 4 of the Clayton Act, 15 U.S.C. § 15, and held that § 1964(c) requires a plaintiff to show "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." 503 U.S. at 268.

The Court held that one of the dimensions of proximate cause at common law is "a demand for some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. This "direct-relation" requirement was driven by three considerations: (1) the difficulty in apportioning damages between causes when the causal link is more remote; (2) the difficulty in apportioning damages among different potential plaintiffs; and (3) the fact that the more directly injured victims can better serve as private attorneys general. 503 U.S. at 269-70.

The plaintiff in *Holmes* was the Securities Investor Protection Corporation (SIPC), which insured broker-dealers. Holmes had allegedly manipulated stock prices, which caused the broker-dealers to be unable to meet their customers' obligations and resulted in SIPC having to pay the broker-dealers' customers nearly $13 million.

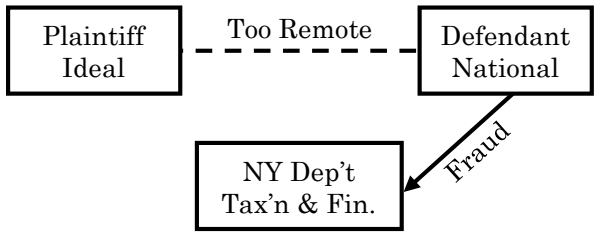
This Court found that the connection was too remote to establish proximate cause. Among other things, the Court found that "those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication." 503 U.S. at 273.



2. *Anza v. Ideal Steel Supply*

Ideal Steel Supply and National Steel Supply were competitors and operated stores in Queens and the Bronx. National failed to pay state tax on cash sales, which allowed it to underprice Ideal and use the additional proceeds to open its store in the Bronx. Ideal filed suit asserting claims under RICO based on predicate acts of mail and wire fraud.

This Court held that proximate cause could not be established because "[t]he direct victim of this conduct was the State of New York, not Ideal." 547 U.S. at 458. Drawing on the reasoning in *Holmes*, the Court held that the "requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation [the NY Department of Taxation and Finance] can be expected to vindicate the laws by pursuing their own claims." *Id*. at 460.



3. *Bridge v. Phoenix Bond & Indemnity*

The plaintiffs and defendants in *Bridge* bid on tax liens at auctions in Cook County, Illinois. A rule was developed to prevent competitors from having multiple bidders at the auctions to prevent them from securing a disproportionate number of awards when bidding hit the floor of a 0% penalty, at which point the liens were awarded on a rotational basis. The defendants fraudulently represented that they were compliant with the rule and secured a disproportionate number of liens during the auctions. Plaintiffs asserted claims under RICO, alleging that the defendants had engaged in mail fraud.

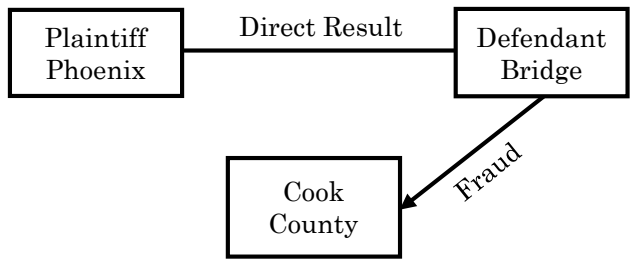
This Court rejected the proposition that first-party reliance is an element of a RICO claim: "a person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations." 553 U.S. at 649. The Court held that, although a RICO plaintiff may have to establish third-party reliance to prove causation, "'the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action.'" *Id.* at 659 (quoting *Anza*, 547 U.S. at 478 (Thomas, J., concurring in part and dissenting in part)).

In terms of the direct-relation requirement in *Holmes*, the Court held that it was satisfied because the harm was the direct *result* of the mail fraud and was the foreseeable and natural consequence of the scheme:

> Nor is first-party reliance necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*. Again, this is a case in point. Respondents' alleged injury—the loss of valuable liens—is the direct result of petitioners' fraud. It was a foreseeable and natural consequence of petitioners' scheme . . . .

553 U.S. at 657-58. The Court further noted that "no more immediate victim is better situated to sue" and that "respondents and other losing bidders [as opposed to Cook County] were the *only* parties injured by petitioners' misrepresentations." *Id.* at 658.

This changed the landscape of civil RICO claims because it: (1) established that reliance is not an element of a civil RICO claim, and (2) recognized that proximate cause extends beyond the first step in the causal chain and is not limited to the only the recipient of the mail or wire fraud:

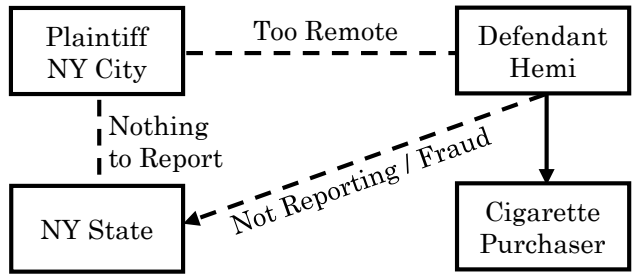


4. *Hemi Group v. City of New York*

Hemi Group sells cigarettes online to residents of New York City, which taxes its residents on the sale. Hemi did not report its sales to New York State, which therefore could not pass that information along to the City to collect taxes from its residents. The City filed suit against Hemi asserting civil RICO claims based on mail and wire fraud for failing to file its sales data with the State.

A plurality of the Court held that proximate cause was lacking for the same reasons in *Anza*: "Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud." 559 U.S. at 11. The Court held that proximate cause, like damages, generally does not go beyond the first step—those in a direct relationship with the tortfeasors. *Id.* at 10.

In terms of the direct-relation requirement, the Court observed that "[t]he State certainly is better situated than the City to seek recovery from Hemi." 559 U.S. at 12.



Chief Justice Roberts wrote the opinion of the Court in which Justices Scalia, Thomas, and Alito joined. Justice Ginsburg concurred in part and concurred in the judgment, but wrote separately "[w]ithout subscribing to the broader range of the Court's proximate cause analysis." 559 U.S. at 19. Justice Sotomayor did not participate.

Justice Breyer, with Justices Stevens and Kennedy, dissented. The dissent addressed the facts of the case, the majority's reasoning, and the decisions in *Holmes*, *Anza*, and *Bridge*. The dissent found that "[t]he upshot is that the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent [by RICO]." 559 U.S. at 24.

5. The Guiding Principles from This Court on Proximate Cause

"*Holmes*' instruction [is] that proximate cause is generally not amenable to bright-line rules." *Bridge*, 553 U.S. at 659; *see also id.* at 654 (proximate cause "is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." (internal quotations omitted)). Nevertheless, certain guiding principles can be drawn from this Court's opinions on proximate cause in a RICO case:

1. A plaintiff is not required to plead reliance when the predicate acts are mail or wire fraud;
2. As a result, RICO does not require a direct relation between the perpetrator and the victim;
3. Instead, proximate cause in a RICO case only requires a direct relation between the wrongful acts and the resulting harm;

4. Although this direct-relation requirement often limits recovery to those within the first step of the causal chain—*i.e.*, when the plaintiff is the direct recipient of the mail or wire fraud—this is not a hard-and-fast, per se rule, *e.g.*, *Bridge*[3];

5. Rather, those beyond the first step in the causal chain can recover under § 1964(c) if:

    a. Their injuries are the direct result of the fraud, meaning they were the foreseeable and intended victims of the fraudulent scheme; and

    b. Those in the first step of the causal chain lack the motive or interest in pursuing claims against the perpetrators as private attorneys general.

The circuits are generally not in conflict on the first three principles. But on the fourth and fifth, a split has developed on what requirements allow a plaintiff beyond the first step in the causal chain to recover under RICO, if at all. The Third Circuit's decision in this case demonstrates that it, like the Second, Fourth, and Eleventh Circuits, believes a plaintiff who is not the direct recipient of the mail or wire fraud cannot recover under RICO. Such a legal proposition is incorrect and directly contrary to this Court's decisions.

---

[3] *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014) (noting that an "intervening step of consumer deception is not fatal to the showing of proximate causation" under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), based on "our recognition [in *Bridge*] that under common-law principles, a plaintiff can be directly injured by a misrepresentation even where 'a third party, and not the plaintiff, . . . relied on' it." (quoting *Bridge*, 553 U.S. at 656)).

B. The Circuits Are Split on When a Plaintiff Beyond the First Step Can Recover

1. The First-Step Circuits: The Third, Second, Fourth, and Eleventh Circuits

The Third Circuit in This Case

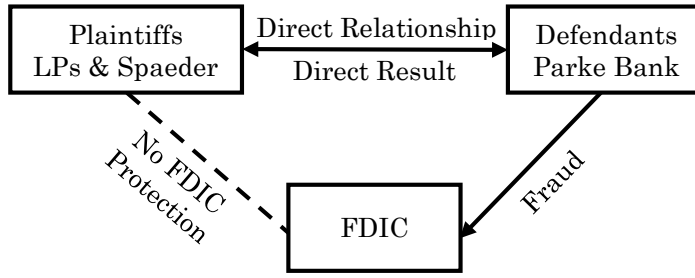
Relying on this Court's decisions in *Anza* and *Hemi*, the Third Circuit held that the relationship between Parke Bank and the Petitioners was too remote for proximate causation to exist as a matter of law. The district court had dismissed the claims by Lionville and Spaeder on the grounds that they had not made allegations of any reliance, either first- or third-party. App. 85a-91a. Petitioners explained to the Third Circuit that this was in error, a point on which the court appears to have agreed. The court nevertheless affirmed, finding that proximate cause was lacking as a matter of law:

> [I]f fraud harms the plaintiff only indirectly and other factors may have caused that harm, there is no proximate causation. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-60 (2006).
>
> The remaining appellants charge that the FDIC relied on Parke Bank's misrepresentations about the sham fees, the state of the loans, and the legitimacy of the transactions. Fraudulent representations to a third party, they claim, can support RICO standing.
>
> Not here. Under their theory, the direct victims are the regulators, not appellants. And the regulators are also intervening actors who break the chain of causation.

App. 11a-12a.

But the facts of this case are far more compelling for proximate cause than the facts in *Bridge*:

1. There was a direct relationship between Petitioners and Respondents—through the loans and bank accounts;
2. There was a direct relation between the fraud and the resulting harm—the fraudulent bank transactions were designed to steal from the Petitioners and to protect Respondents from being prosecuted by the FDIC; and
3. The Petitioners were in the first step of the causal chain—because it was *their* money and properties that Parke Bank was stealing:



Like the Cook County Treasurer's Office in *Bridge*, the FDIC suffered no loss and was not the victim of the fraud. The fraud was perpetrated by the Respondents against the FDIC in this case for self-preservation and to avoid potential criminal sanctions for what they were doing. Neither Cook County nor the FDIC has any motive or interest in pursuing a civil RICO action against the perpetrators and the plaintiffs in

Bridge and the Petitioners in this case are the only ones that have any "skin in the game."[4]

The Second Circuit

In *Empire Merchants, LLC v. Reliable Churchill, LLLP*, 902 F.3d 132 (2d Cir. 2018), the plaintiff was an alcohol distributor in New York. It brought civil RICO claims against other retailers alleging that they engaged in mail and wire fraud related to smuggling liquor into New York, which reduced plaintiff's sales. The district court dismissed plaintiff's claims.

The Second Circuit affirmed, holding that proximate cause rarely goes beyond the first step in the causal chain and that "[w]hat falls within that 'first step' depends in part on . . . an assessment of what is administratively possible and convenient." 902 F.3d at 141 (internal quotations omitted). The Court cited two of the *Holmes* factors in determining administrative difficulties. 902 F.3d at 141.

In response to one of plaintiff's arguments, the court noted that "foreseeability and intention have little to no import for RICO's proximate cause test." *Id.* at 145; *see also id.* n.11 (discussing the plurality decision in *Hemi* and possible split in this Court on the relevance of intent and foreseeability).[5]

---

[4] *See also Knit With v. Knitting Fever, Inc.*, 625 F. App'x 27, 34 (3d Cir. 2015) ("a RICO plaintiff who complains of harm flowing directly from the misfortunes visited upon a third person by the defendant's acts may not recover under § 1964(c)." (internal quotations omitted)).

[5] *Cf. D'Addario v. D'Addario*, 901 F.3d 80, 97 (2d Cir. 2018) (holding that proximate cause existed for plaintiff to assert RICO claims against family members for plundering assets of their late father's estate because both the plaintiff and the estate were the victims of the fraud).

The Fourth Circuit

In *Slay's Restoration, LLC v. Wright National Flood Insurance Co.*, 884 F.3d 489 (4th Cir. 2018), an apartment complex was damaged by flooding. The owner hired a contractor to do repairs, which hired Slay's Restoration as a subcontractor. The owner submitted claims to its carrier, which submitted them to adjusters, which hired consultants to assess the repairs and costs. Based on the assessment, Slay's was paid less than half its costs and filed suit against the insurance company alleging mail and wire fraud under RICO. The district court dismissed the case.

The Fourth Circuit affirmed, holding that the injury was not the direct result of the alleged mail and wire fraud:

> [R]ather than incorporating the concept of foreseeability or traceability of an injury to conduct, RICO causation requires a proximity of statutory violation and injury such that the injury is sequentially the direct result—generally at "the first step" in the chain of causation. Therefore, regardless of how foreseeable a plaintiff's claimed injury might be or even what motive underlaid the conduct that caused the harm, the injury for which a plaintiff may seek damages under RICO cannot be contingent on or derivative of harm suffered by a different party.

Slay's, 884 F.3d at 494.[6]

---

[6] *Cf. Biggs v. Eaglewood Mortg., LLC*, 353 F. App'x 864, 867 (4th Cir. 2009) ("we agree with the Biggses that *Bridge*'s holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud.").

The Eleventh Circuit

In *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340 (11th Cir. 2016), the plaintiffs filed a class action alleging that Spirit Airlines engaged in mail and wire fraud when it "portrayed its Passenger Usage Fee as a government-imposed or authorized fee when, in fact, it was merely a portion of the base fare price of an airline ticket charged by the airline." *Id.* at 1344-45. The district court dismissed the RICO claims on several grounds, including a lack of specificity that included reliance.

The Eleventh Circuit affirmed, characterizing the criteria for proximate cause as follows:

> The connection between the racketeering activity and the injury can be neither remote, purely contingent, nor indirect. . . . Notably, the fact that an injury is reasonably foreseeable is not sufficient to establish proximate cause in a RICO action—the injury must be direct.

836 F.3d at 1349.[7]

---

[7] *See also Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1343 (11th Cir. 2017) (affirming the dismissal of plaintiff's civil RICO claims on proximate cause grounds because the plaintiff was not the direct target of the wire fraud); *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 712 (11th Cir. 2014) (affirming the dismissal of plaintiffs' civil RICO claims on proximate cause grounds because the defendants' wrongful conduct was not a "substantial factor in the sequence of responsible causation." (internal quotations omitted)); *cf. City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1276 (11th Cir. 2019) ("The essential point for us then is that the 'general tendency' to stop at the first step [for proximate cause] is just that, a general tendency, not an inexorable rule.").

2. The Intended-Victim Circuits: The First, Seventh, and Tenth Circuits

The First Circuit

In *In re Celexa & Lexapro Marketing & Sales Practices Litigation*, 915 F.3d 1 (1st Cir. 2019), plaintiffs alleged that pharmaceutical manufacturers fraudulently promoted off-label use of their antidepressant medications for minors. Relying on *Bridge*, the First Circuit held that the fact that the direct target of the fraud was the intermediary pediatricians did not break the chain of proximate cause on the RICO claims:

> As for proximate causation, it is of no moment that pediatricians were the immediate target of Forest's fraudulent marketing. Here, as in *Kaiser*, a jury could find that Painters and Ramirez were the primary and intended victims of [Forest's] scheme to defraud. Moreover, Painters' and Ramirez's alleged harm (*i.e.*, reimbursing or purchasing more pediatric prescriptions than they otherwise would have) was a foreseeable and natural consequence of Forest's scheme. Indeed, it was precisely the point.

915 F.3d at 14 (internal quotations & citations omitted).[8]

The Seventh Circuit

On remand from *Bridge*, the district court again granted summary judgment in defendants' favor, finding that plaintiffs "had not been injured directly;

---

[8] The First Circuit decision in *In re Celexa* is relevant on the split in the circuits in pharmaceutical cases as well, *see infra*. But it likewise demonstrates how that court views the basic limitations of proximate cause in a civil RICO case generally.

the causal link between the fraud and the injury was 'tenuous.'" *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 752 (7th Cir. 2011). The court made that finding, despite the fact that "we [the Seventh Circuit] and the Supreme Court [in *Bridge*] had held that the plaintiffs were direct victims . . . ." *Id.*

The Seventh Circuit reversed. Judge Posner undertook a detailed analysis of the various dimensions of proximate cause. He concluded that the plaintiffs had presented sufficient evidence to create a jury question on causation: "Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation." 637 F.3d at 758.[9]

The Tenth Circuit

In *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014), the plaintiffs brought a class action against lenders claiming that they conspired to secure "non-refundable up-front fees in return for loan commitments the lenders never intended to fulfill." *Id.* at 1080. The district court certified the class.

The Tenth Circuit rejected defendants' argument that plaintiffs failed to allege proximate cause:

---

[9] *See also Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 733 (7th Cir. 2014) (question of fact presented on proximate causation on civil RICO claim because the "object of the conspiracy" was to have legislation passed in exchange for a bribe and the "Casinos thus sat in the center of the target of the conspiracy.").

> By alleging that the putative class members were the "direct targets" of defendants' fraudulent scheme (based on the alleged RICO predicate acts), plaintiffs have adequately established the requisite causal connection between defendants' act and each class member's financial loss.
>
> As the natural, foreseeable, and, most importantly, intended victims of the alleged fraud, plaintiffs have sufficiently pleaded proximate causation to survive a threshold standing inquiry.

773 F.3d at 1099 (citations omitted).[10]

3. The Foreseeable-Harm Circuits: The Fifth and Sixth (No. 1) Circuits

The Fifth Circuit

In *Waste Management of Louisiana, LLC v. River Birch, Inc.*, 920 F.3d 958 (5th Cir. 2019), the plaintiff filed a RICO suit against various defendants alleging that they bribed the former Mayor of New Orleans to shut down a landfill that had been created after Hurricane Katrina. The district court entered summary judgment in defendants' favor, finding that even if the evidence established bribery, it was neither the but for nor the proximate cause of the landfill being shuttered.

---

[10] *See also Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 890-91 (10th Cir. 2017) (property injuries "are *direct* byproducts of the location and manner in which the Marijuana Growers are conducting their operations that purportedly violate the CSA [Controlled Substances Act, 21 U.S.C. §§ 801-904]."); *but see BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 173 (D.C. Cir. 2000) (rejecting test for proximate cause based on whether the plaintiff was the intended target of the RICO scheme).

The Fifth Circuit reversed, holding that a genuine dispute existed on whether campaign contributions were in fact bribes and whether those contributions / bribes were the but for and proximate cause of the landfill being closed. On the standard for proximate causation, the court framed the test as follows:

> Proximate cause . . . requires some direct relation between the injury asserted and the injurious conduct alleged. When a court evaluates a RICO claim for proximate cause, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. . . . This burden requires Plaintiff to establish that its damages w[ere] a foreseeable and natural consequence of Defendants' action.

920 F.3d at 965 (internal quotations & footnotes omitted).[11]

The Sixth Circuit (No. 1)

The Sixth Circuit falls into two categories of the circuit split given that different panels have taken different approaches. In *In re ClassicStar Mare Lease Litigation*, 727 F.3d 473 (6th Cir. 2013), the plaintiffs alleged that the defendants engaged in a scheme of mail and wire fraud whereby investors were induced to lease mares, have them bred with stallions, receive the foals, and receive a tax deduction for the cost of the lease. The district court granted summary judgment in plaintiffs' favor.

---

[11] *See also Torres v. S.G.E. Mgmt., LLC*, 838 F.3d 629, 637 (5th Cir. 2016) (en banc) (noting that it had affirmed a verdict in a civil RICO case where the jury was instructed that "proximate cause was present if 'the injury or damage was either a direct result or a reasonably probable consequence of the act.'" (quoting *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015)).

The Sixth Circuit affirmed, rejecting defendants' argument that the plaintiffs knew of and voluntarily participated in the fraud. The court framed the proximate causation standard as follows: "Plaintiffs need only show that the defendants' wrongful conduct was a substantial and foreseeable cause of the injury and the relationship between the wrongful conduct and the injury is logical and not speculative." 727 F.3d at 487 (internal quotations omitted).[12]

4. The Factors / Considerations Circuits: The Sixth (No. 2) and Ninth Circuits

The Sixth Circuit (No. 2)

In *Wallace v. Midwest Financial Mortgage Services, Inc.*, 714 F.3d 414 (6th Cir. 2013), the plaintiff refinanced his home with an adjustable-rate mortgage (ARM). The loan was for $125,000 more than the home's value and the payment terms under the ARM resulted in the plaintiff declaring bankruptcy and surrendering his home. The plaintiff filed suit alleging that the defendants engaged in a fraudulent scheme whereby the lender, mortgage broker, and appraiser conspired to commit mail and wire fraud to inflate the value of his home. The district court granted summary judgment in defendants' favor, finding that the plaintiff could not establish proximate cause.

---

[12] *See also Brown v. Cassens Transp. Co.*, 546 F.3d 347, 357 (6th Cir. 2008) (after this Court vacated the Sixth Circuit's prior decision and remanded for reconsideration in light of *Bridge*, the court reversed the district court's dismissal based on a lack of proximate cause because plaintiffs alleged that "the defendants' fraudulent acts were a 'substantial and foreseeable cause' of [their] injuries . . . .").

The Sixth Circuit reversed. The court read *Holmes* as identifying three considerations governing proximate causation in a RICO case:

> One such consideration is directness—whether there exists some direct relation between the injury asserted and the injurious conduct alleged. Another such consideration is foreseeability—whether the plaintiff's injury was a foreseeable consequence of the conduct alleged. We have in some cases also considered whether the causal connection between the injury and the conduct is logical and not speculative.

714 F.3d at 419 (internal quotations & citation omitted). The court found that a genuine dispute of material fact existed under each of these "consideration tests."

The Ninth Circuit

In *Harmoni International Spice, Inc. v. Hume*, 914 F.3d 648 (9th Cir. 2019), plaintiffs produced fresh garlic in China and imported it into the United States with a zero-duty rate. Competitors subject to duties employed several schemes to avoid the anti-dumping duties. Plaintiffs filed suit, asserting claims under RICO and alleging that the competitors engaged in mail and wire fraud to carry out their schemes. The district court dismissed the complaint, holding that proximate cause was too remote, among other things.

The Ninth Circuit affirmed in part and reversed in part. The court affirmed with respect to one alleged scheme, finding it too remote under *Anza*. The court reversed with respect to the other scheme on the three categories of damages. The court held that if Harmoni could "prove that it lost sales as a direct result of the defendants' predicate acts of mail and wire fraud, the

proximate cause element of its RICO claim will be satisfied." 914 F.3d at 653. In making that analysis, the court cited three factors to be considered on proximate cause: (1) is there a more direct victim better positioned to sue; (2) will there be difficulties in apportioning damages; and (3) is there a risk of duplicative recoveries? *Id.* at 652.[13]

* * * * *

Based on this review, the circuit split can be summarized as follows on when a plaintiff sitting beyond the first step of the causal chain can establish proximate cause in a civil RICO case:

1. **The First-Step Circuits:** A plaintiff beyond the first causal step cannot recover under RICO because the plaintiff is not the direct recipient or victim of the mail or wire fraud—Second, Third, Fourth, and Eleventh Circuits.
2. **The Intended-Victims Circuits:** A plaintiff beyond the first causal step can recover under RICO if the plaintiff can show that he / she / it was the intended victim or target of the harm—First, Seventh, and Tenth Circuits.
3. **The Foreseeable-Harm Circuits:** A plaintiff beyond the first causal step can recover under RICO if the plaintiff can establish that the harm suffered was a foreseeable and natural

[13] *See also Gomez v. Bank of Am., N.A.*, 642 F. App'x 670, 676 (9th Cir. 2016) (affirming the dismissal of RICO claims against a Ponzi scheme and citing the same three, non-exhaustive factors); *cf. Fields v. Twitter, Inc.*, 881 F.3d 739, 748 (9th Cir. 2018) (citing RICO cases and construing the "by reason of" language in the civil remedies provision of the Anti-Terrorism Act, 18 U.S.C. § 2333(a), to "require a showing of at least some direct relationship between a defendant's act and a plaintiff's injuries.").

consequence of the fraud—Fifth and Sixth Circuits.

4. **The Factors / Considerations Circuits:** A plaintiff beyond the first causal step can recover under RICO if certain factors or considerations warrant a finding of proximate cause—Sixth and Ninth Circuits.

II. FIVE CIRCUITS ARE ALSO SPLIT ON PROXIMATE CAUSE IN PHARMACEUTICAL RICO CASES

The first-step conundrum has also split the circuits in pharmaceutical RICO cases. The inquiry and issue is no different than in the other RICO decisions discussed above, it just happens to involve similar products and similar victims standing beyond the first step in the chain of causation.

The Ninth Circuit recently addressed the split in *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.*, 943 F.3d 1243, 1246 (9th Cir. 2019). Five individual patients and a third-party payor (TPP) brought a class action against the manufacturer of Actos, a medication to reduce blood sugar in type 2 diabetics. Plaintiffs alleged that the manufacturers engaged in mail and wire fraud to conceal the risk of developing bladder cancer from Actos and asserted claims under RICO.

The plaintiffs sought damages for the cost of paying for Actos and that the patients, their physicians who prescribed the medication, and the TPPs relied on the misrepresentations about the drug's safety. The district court dismissed the claims, finding that the allegations were insufficient to establish proximate causation.

The Ninth Circuit reversed. The court reviewed this Court's decisions in *Holmes*, *Anza*, *Bridge*, and *Hemi*, as well as the split between the First, Second, Third, and Seventh Circuits. The court agreed with the First and Third Circuits and held that allegations of reliance by the prescribing physicians was not too remote for proximate cause:

> Like in *Bridge*, where it was sufficient to satisfy RICO's proximate cause requirement that the county (a third party) had relied on the defendants' false attestations, here, it is sufficient to satisfy RICO's proximate cause requirement that Painters Fund alleged that prescribing physicians (also third parties, but not intervening causes) relied on Defendants' misrepresentations and omissions.

943 F.3d at 1260. The court noted that there were factual and procedural distinctions between the cases in the various circuits, but at their core the disagreement was whether the "decisions of the prescribing physicians and pharmacy benefit managers constituted intervening causes that sever the chain of proximate cause between the drug manufacturer and TPP." *Id*. at 1257.

A. Proximate Cause Exists: The First and Third Circuits

The First Circuit in *In re Neurontin Marketing & Sales Practices Litigation*, 712 F.3d 21 (1st Cir. 2013), affirmed the jury's verdict in plaintiffs' favor, finding that:

> We reject Pfizer's core defense that there are too many steps in the causal chain between its misrepresentations and Kaiser's [plaintiff's] alleged injury to meet the proximate cause

> "direct relation" requirement as a matter of law. . . . [T]he adoption of Pfizer's view would undercut the core proximate causation principle of allowing compensation for those who are directly injured, whose injury was plainly foreseeable and was in fact foreseen, and who were the intended victims of a defendant's wrongful conduct.

712 F.3d at 38. This holding is consistent with the First Circuit falling within the intended-victim circuits, *supra*.

The Third Circuit in *In re Avandia Marketing, Sales Practices & Product Liability Litigation*, 804 F.3d 633 (3d Cir. 2015), affirmed the denial of the defendant's motion to dismiss based on, *inter alia*, a lack of proximate cause as a matter of law. The court rejected the defendant's argument:

> [T]his case does not present any of the three fundamental causation concerns expressed in *Holmes*. At least for the purposes of this motion to dismiss, the injury is sufficiently direct. There is no risk of duplicative recovery here. And, no one is better suited to sue GSK for its alleged fraud. At this stage in the litigation, plaintiffs need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of proximate causation. They have done that here.

804 F.3d at 646 (footnotes omitted). The Third Circuit reached the correct decision in *In re Avandia*. Had the Third Circuit in this case, *Devon Drive*, not resolved the question of proximate cause *sua sponte*, but taken

briefing on the issue, perhaps it would have reached a like conclusion.[14]

B. Proximate Cause Does Not Exist: The Second and Seventh Circuits

The Second Circuit in *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010), reversed class certification of RICO claims by TPPs for prescribing Zyprexa on the grounds that plaintiffs' theory of proximate cause "is interrupted by the independent actions of prescribing physicians, which thwarts any attempt to show proximate cause through generalized proof." *Id.* at 135. Based on this Court's decision in *Hemi*, the court held that "it is clear that plaintiffs' overpricing theory is too attenuated to meet RICO's requirement of a direct causal connection between the predicate offense and the alleged harm." *Id.* at 136 (internal quotations omitted).

The Seventh Circuit in *Sidney Hillman Health Center of Rochester v. Abbott Laboratories*, 873 F.3d 574 (7th Cir. 2017), followed the Second Circuit and held that "improper representations made to physicians do not support a RICO claim by Payors, several levels removed in the causal sequence." *Id.* at 578.

---

[14] Note, *Say Hello to My Little Friend Civil RICO: The Third Circuit Green Lights Insurance Shakedown of Big Pharma with* In re Avandia, 61 VILL. L. REV. 625, 649 (2016) ("*Avandia* failed to foreclose the lack-of-proximate-cause argument entirely, and the Supreme Court has yet to address the circuit split on this issue.").

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

ROBERT TOLAND II
Counsel of Record
KEVIN F. BERRY
O'HAGAN MEYER LLP
Two Logan Square
100 N. 18th Street, Suite 700
Philadelphia, PA 19103
215-569-2400
rtoland@ohaganmeyer.com
Attorneys for Petitioners

January 16, 2020

APPENDICES

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2862

DEVON DRIVE LIONVILLE, LP; NORTH CHARLOTTE ROAD POTTSTOWN, LP; MAIN STREET PECKVILLE, LP; RHOADS AVENUE NEWTOWN SQUARE, LP; JOHN M. SHEA; GEORGE SPAEDER,
Appellants

v.

PARKE BANCORP, INC; PARKE BANK; VITO S. PANTILIONE; RALPH GALLO

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cv-03435)
District Judge: Honorable Mitchell S. Goldberg

Argued June 11, 2019
Before: JORDAN, BIBAS, and NYGAARD, *Circuit Judges*
(Filed: October 22, 2019)

Kevin F. Berry [ARGUED]
Joseph E. Vaughan
O'Hagan Meyer
100 North 18th Street
Two Logan Square, Suite 700
Philadelphia, PA 19103
Counsel for Appellants

David L. Braverman [ARGUED]
Benjamin A. Garber
Peter J. Leyh
Braverman Kaskey
1650 Market Street
One Liberty Place, 56th Floor
Philadelphia, PA 19103
Counsel for Appellees

OPINION*

BIBAS, *Circuit Judge*.

Those who agree to deceive the government may find themselves deceived. The parties here were in real estate together. Their business relationship was, to put it mildly, complicated. They cheated and lied to one another. But they were all in cahoots, signing sham agreements to evade regulatory scrutiny.

After their relationship collapsed, they dashed into state and then federal courts, seeking relief. Appellants lost at both levels and now appeal the

---

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

District Court's dismissal. But their claims are either precluded or meritless.

Appellants Rhoads's and Shea's claims are precluded. They raise the same fraud claims in federal court that they have already raised and lost in state courts.

And the other appellants' claims are meritless. Pottstown, Peckville, Lionville, and Spaeder cannot show that Parke Bank's fraud proximately caused their injuries; because their only theory hinges on the actions of independent, intervening third parties, the alleged injury is too remote from the fraud. So we will affirm.

I. BACKGROUND

A. Facts

Because the District Court granted Parke Bank's motion to dismiss, we take appellants' allegations as true and draw all reasonable inferences in their favor. Many years ago, George Spaeder and Bruce Earle got into the real-estate business together. They set up four limited partnerships to run their business: North Charlotte Road Pottstown, LP; Main Street Peckville, LP; Devon Drive Lionville, LP; and Rhoads Avenue Newtown Square, LP. Spaeder and Earle had distinct roles. Spaeder managed the partnerships' day-to-day operations; Earle held their purse strings and controlled their books and records. The partnerships got financing from Parke Bank and a business partner named John Shea. As we explain below, the business eventually collapsed.

1. *Pottstown, Peckville, and Lionville.* To help launch the business, three of the partnerships

(Pottstown, Peckville, and Lionville) took out large loans from Parke Bank. These partnerships were separate legal entities, so their assets and ownership were separate as well. But Parke Bank and Earle treated them as one giant "piggy bank." App. 886, 1982.

Parke Bank commingled the partnerships' funds and cross-collateralized the loans to make bad loans look better. And it levied sham fees against the partnerships to evade regulatory scrutiny.

Earle sloshed money around without Spaeder's approval and diverted funds to his personal company and account. And he made the bank honor forged or unsigned checks to send money to his personal company.

2. *Spaeder*. Meanwhile, Earle kept the books and records secret and kept Spaeder from looking into the partnerships' finances. Earle did not show Spaeder any correspondence between the partnerships and the bank, including letters showing unauthorized transactions and fraud. Earle also lied to Spaeder about the partnerships' financial troubles, watching Spaeder go down with the sinking ship as he struggled to patch the holes with his own money.

3. *Rhoads*. Shaking the piggy bank upside down eventually left Pottstown under-collateralized. This alarmed the regulators at the Federal Deposit Insurance Corporation; they soon came knocking. So Parke Bank and Spaeder hatched a scheme to use Rhoads to evade the regulators' scrutiny.

The bank told Spaeder that it would either force the Pottstown loan into default or make Rhoads sign security agreements with the bank to cover Pottstown's collateral shortfall. Spaeder chose the

latter option on one condition: that the bank not record or enforce these security agreements. The bank promised to "rip [the security agreements] up once the feds left." App. 1104–05.

That was a lie. After showing the agreements to the regulators, the bank recorded them. And it later enforced them against Rhoads.

4. *Shea*. Earle needed someone to guarantee a line of credit for his other business ventures. He could not do so personally without violating lending-limit regulations, so he searched for someone else. Parke Bank recommended that he ask John Shea, who was already involved in the partnerships' real-estate business.

To sweeten the deal, the bank promised Shea that Earle and his wife, not Shea, would be on the hook for the line of credit. After some convincing, Shea agreed to guarantee Earle's line of credit.

But the bank had lied again. It intended the guaranty agreement to bind Shea and levied sham fees against him without notice. And it later enforced the guaranty agreement against Shea.

B. Procedural history

1. *State court*. Spaeder's and Earle's relationship eventually reached a breaking point, as did their business. Around that time, Pottstown and Peckville defaulted on their loans. This made Parke Bank skittish, so it used Pennsylvania state courts to salvage money from the sinking business.

Parke Bank got confessed judgments against Pottstown, Peckville, and Rhoads in Pennsylvania state court to collect outstanding loans and the collateral for the Pottstown loan. In response, the

three partnerships petitioned to open the confessed judgments. Pottstown and Peckville argued that they need not pay up because Parke Bank had misapplied loan proceeds and mismanaged their funds. Rhoads raised similar arguments, but specifically attacked the judgment based on Parke Bank's fraud. According to Rhoads, the bank had fraudulently induced Rhoads to sign security agreements by promising not to record or enforce them. The state court ruled for the bank and struck all three petitions.

Parke Bank also sued Shea for breach of contract in Pennsylvania state court to collect the balance of Earle's line of credit. Shea counterclaimed that the bank had committed fraud. According to Shea, the bank had misrepresented that the guaranty would not actually bind him. The state court again ruled for the bank and ordered Shea to pay up.

2. *Federal court*. The four partnerships, Shea, and Spaeder sought a second chance in federal district court. They filed this suit against Parke Bank and its employees under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, alleging that the bank, its employees, and Earle had formed an enterprise to defraud them. They also alleged state-law claims for fraud, conversion, and civil conspiracy.

But the District Court dismissed all their claims. The Court properly took judicial notice of state-court judgments. *See Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016). And it barred the federal claims of Pottstown, Peckville, Rhoads, and Shea under claim preclusion. *Devon Drive Lionville, LP v. Parke Bankcorp, Inc.* (*Devon Drive II*), No. 15-3435, 2017 WL 5668053, at *19, *21 (E.D. Pa. Nov. 27, 2017). Despite

that dismissal, the three partnerships and Shea kept litigating the case as if they were still in it. *Devon Drive Lionville, LP v. Parke Bancorp, Inc.* (*Devon Drive III*), No. 15-3435, 2018 WL 3585069, at *2 (E.D. Pa. July 26, 2018). The Court then dismissed Lionville's and Spaeder's federal claims on the merits for lack of RICO standing. *Id.* at *6. And it declined to exercise supplemental jurisdiction over the remaining state-law claims. *Id.* at *7. In the alternative, it dismissed the complaint for ignoring the court's directives. *Id.* (relying on Fed. R. Civ. P. 41(b)).

The partnerships, Shea, and Spaeder now appeal. We review the District Court's claim preclusion ruling and dismissal on the merits de novo. *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 172 (3d Cir. 2009) (claim preclusion); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 360 (3d Cir. 2016) (12(b)(6) dismissal on the merits).

II. RHOAD'S AND SHEA'S CLAIMS ARE PRECLUDED

We give state-court judgments the same preclusive effect that the state's own courts would. 28 U.S.C. § 1738; *Turner v. Crawford Square Apartments III, L.P.*, 449 F.3d 542, 548 (3d Cir. 2006). Under Pennsylvania law, claim preclusion bars litigants' claims if their first and second suits involve (1) the same issues, (2) the same cause of action, (3) the same parties, and (4) the same quality or capacity of the parties. *Daley v. A.W. Chesterton, Inc.*, 37 A.3d 1175, 1189–90 (Pa. 2012).

Under the most generous reading, Rhoads and Shea challenge only the first element: the state and federal claims, they say, did not raise the *same issues*. But they did.

A. Rhoads's claims are precluded

Rhoads challenges claim preclusion on only two grounds: First, it says, its petition could not have opened the confessed judgment. Second, it asserts, the doctrines of adverse domination and fraudulent concealment should bar claim preclusion. These two arguments fail. And it forfeited any other arguments.

1. *Opening the confessed judgment.* Pennsylvania lets a party petition to open a confessed judgment. Pa. R. Civ. P. 2959; *see J.M. Korn & Son, Inc. v. Fleet-Air Corp.*, 446 A.2d 945, 946 (Pa. Super. Ct. 1982). If the petition states prima facie grounds for relief, the state court must open the judgment and may stay the proceedings. Pa. R. Civ. P. 2959(b). The petition, however, must spell out what it challenges; parties "waive[ ] all defenses and objections which are not included in the petition or answer." *Id.* 2959(c).

But petitions cannot, in the absence of fraud, open claims if the claims asserted are unliquidated. *See Hopewell Estates, Inc. v. Kent*, 646 A.2d 1192, 1195 (Pa. Super. Ct. 1994); *J.M. Korn*, 446 A.2d at 462. In other words, the claims must allege either that the underlying agreement is void (because of fraud, for instance) or that the damages are certain and definite. *J.M. Korn*, 446 A.2d at 947 (fraud); *Hellam Twp. v. DiCicco*, 429 A.2d 1183, 1186 (Pa. Super. Ct. 1981) (certain and definite damages).

Rhoads's claims were the sort that could have opened the confessed judgment because they alleged fraud. In its petition, Rhoads claimed that Parke Bank had induced it to sign the security agreements by fraud. The bank allegedly lulled Rhoads into a false sense of security by promising not to record or enforce the security agreements. These are exactly the kind of

fraud claims for which Pennsylvania state courts can open confessed judgments. *See Nadolny v. Scoratow*, 195 A.2d 87, 89 (Pa. 1963) (citing *Berger v. Pittsburgh Auto Equip. Co.*, 127 A.2d 334, 335–37 (Pa. 1956)) (opening to allow question of fraud to go to a jury). The state court could have opened the confessed judgment based on fraud. It did not do so because it found that Rhoads's claims lacked merit.

2. *The doctrines of adverse domination, fraudulent concealment, and the discovery rule.* Rhoads makes a last-ditch effort to save its claims by asking us to extend three timeliness doctrines, called adverse domination, fraudulent concealment, and the discovery rule, to claim preclusion as well. The gist of its argument is that Earle's control over Rhoads, as well as Parke Bank's fraud, kept Rhoads from discovering its own fraud claims.

Rhoads admits, however, that the three doctrines only toll or delay the running of statutes of limitations. It cites no Pennsylvania decision that has extended any of these doctrines to bar claim preclusion. Even if the doctrines could apply in theory, they do not fit here. They would save only claims that were *not* asserted because of control or fraud. But here, Rhoads did manage to assert its own fraud claims in its state-court petition. Neither control nor fraud kept it from doing so. Thus, none of these defenses fits these facts.

B. Shea's claims are precluded

Shea argues that his claims cannot be precluded because counterclaims in Pennsylvania are only permissive, not mandatory. Not so.

While Pennsylvania's Rules of Civil Procedure do not provide for mandatory counterclaims, its courts

do. *Compare Martin v. Poole*, 336 A.2d 363, 367 (Pa. Super. Ct. 1975), *with Del Turco v. Peoples Home Sav. Ass'n*, 478 A.2d 456, 463 (Pa. Super. Ct. 1984) (adopting Restatement (Second) of Judgments § 22 (1980)). So in Pennsylvania, claim preclusion applies "not only to claims that *were* made but also to claims that *could have* been made." *Stuart v. Decision One Mortg. Co.*, 975 A.2d 1151, 1152 (Pa. Super. 2009). And it applies fully when a party chooses to bring a counterclaim. *Hunsicker v. Bearman*, 586 A.2d 1387, 1390 (Pa. Super. Ct. 1991). Shea had to raise his counterclaims, he did raise them, and the state court dismissed them. And for the same reasons Rhoads's claims fail, adverse domination, fraudulent concealment, and the discovery rule cannot save Shea's claims either. His federal claims are thus precluded.

III. A Fraud's Influence on Federal Regulations Is Not a Proximate Cause of Harm and so Cannot Support RICO Standing

The remaining appellants (Pottstown, Peckville, Lionville, and Spaeder) fail to state a claim for relief. On appeal, they raise only one proximate-causation theory to support RICO standing: the regulators relied on the bank's fraud, and that reliance caused their injuries. But that theory fails, so they cannot survive a motion to dismiss.

To be clear, the District Court dismissed Pottstown and Peckville because their claims were precluded.† But because they kept litigating their RICO claims as

† Judge Jordan would base our decision on Pottstown's and Peckville's claims not on standing but rather on preclusion. He would hold that Pottstown's and Peckville's claims are precluded for the same reasons that Rhoads's are. *See supra* section II.A.1.

if they were still parties to the case, we will treat them as such. After all, "we can affirm for any reason in the record." *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 705 (3d Cir. 2019). So even if the District Court erred in dismissing Pottstown and Peckville under claim preclusion, we can affirm the dismissal on other grounds. And because they too lack standing to bring RICO claims, we need not address whether their claims were precluded.

Standing comes in several varieties, and plaintiffs must satisfy all that apply. Some standing is constitutional, required by Article III. Some is prudential. And some is required by the particular statute at issue, like RICO. *Maio v. Aetna, Inc.*, 221 F.3d 472, 482–83 (3d Cir. 2000). RICO provides a private cause of action only for those who are "injured . . . by reason of" a RICO violation. 18 U.S.C. § 1964(c). That requires that the defendant be both the *but-for* and the *proximate* cause of the plaintiff's injury. *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); *Maio*, 221 F.3d at 483. Only proximate causation is at issue here.

Under RICO, proximate causation requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Secs. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). Though it requires reliance, the reliance need not be by the plaintiff himself: usually, a plaintiff must show "that *someone* relied on the defendant's misrepresentations." *Bridge*, 553 U.S. at 657–58. And if fraud harms the plaintiff only indirectly and other factors may have caused that harm, there is no proximate causation. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–60 (2006).

The remaining appellants charge that the FDIC relied on Parke Bank's misrepresentations about the sham fees, the state of the loans, and the legitimacy of the transactions. Fraudulent representations to a third party, they claim, can support RICO standing.

Not here. Under their theory, the direct victims are the regulators, not appellants. And the regulators are also intervening actors who break the chain of causation.

The Supreme Court has rejected similarly remote theories of proximate causation. Consider these two scenarios: First, a party defrauds a tax authority and uses the proceeds to lower its prices and undercut its competitors. *Anza*, 547 U.S. at 457–58. Second, a party defrauds a state government by not reporting some sales information, and without this information a city government cannot track down the people who never paid taxes on those sales. *Hermi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010). In both scenarios, the harm is separate from the fraud. The fraud was perpetrated on the tax authority and state government. But the harm alleged was suffered by different parties: competitors and city government. So in both scenarios, those harms are too attenuated and distant from the reliance to show proximate causation. *Anza*, 547 U.S. at 458–59; *Hermi*, 559 U.S. at 10. So too here.

Appellants did not preserve any other theory of proximate causation. Only after oral argument did they assert that Spaeder has standing as the general partner in charge of the limited partnerships to file lawsuits on their behalf. Under this theory, Spaeder may be a "real party in interest" as a general partner. Fed. R. Civ. P. 17(a)(1). Yet he, like the partnerships,

would still lack RICO standing. But we need not consider this theory or any other because appellants have forfeited them; we see no "exceptional circumstances" here to justify overlooking that forfeiture. *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2001).

* * * * *

In short, all of appellants' claims are either precluded or barred by lack of RICO standing. So we need not address whether the District Court was right to dismiss, in the alternative, appellants' remaining claims under Federal Rule of Civil Procedure 41(b). We will thus affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

[November 27, 2017]

Civil Action No. 15-3435

DEVON DRIVE LIONVILLE, LP, *et al.*,
Plaintiffs,

v.

PARKE BANCORP, INC., *et al.*,
Defendants.

Goldberg, J. November 27, 2017

MEMORANDUM OPINION

Plaintiffs, four limited partnerships and two individuals,[1] have sued Defendant Parke Bank and two of its employees,[2] under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C §§ 1961, et seq., alleging fraud in connection with a series of large commercial loans and related transactions. In addition to three RICO claims, Plaintiffs also assert state law claims for fraud, conversion, and civil conspiracy.

[1] Plaintiffs include North Charlotte Road Pottstown, L.P., Main Street Peckville, L.P., Rhoads Avenue Newtown Square, L.P., Devon Drive Lionville, L.P., John Shea, and George Spaeder (collectively, "Plaintiffs").

[2] Defendants include Parke Bank, Vito S. Pantilione, and Ralph Gallo (collectively, "Defendants").

On December 29, 2016, I substantially granted Defendants' Motion to Dismiss the Complaint and gave Plaintiffs leave to file an amended complaint. The Amended Complaint was filed on January 30, 2017.

Defendants have now filed a Motion to Dismiss the Amended Complaint, together with a related Motion to Take Judicial Notice. Upon consideration of Defendants' Motion and the parties' briefs, I will (1) grant the Motion to Take Judicial Notice in its entirety; (2) grant the Motion to Dismiss as to Plaintiffs North Charlotte Road Pottstown, L.P., Main Street Peckville, L.P., Rhoads Avenue Newtown Square, L.P., and John Shea; and (3) deny the Motion to Dismiss without prejudice as to Plaintiffs Devon Drive Lionville, L.P. and George Spaeder.

FACTUAL BACKGROUND

I. The Formation of the Partnerships

The numerous transactions detailed in the Amended Complaint are nuanced and complicated. Thus, a detailed understanding of each is required to reach the proper resolution of Defendants' Motion. The following facts are set forth in the Amended Complaint.[3]

In 2003, Plaintiff George Spaeder ("Spaeder") and non-party Bruce Earle ("Earle") entered into an oral partnership agreement for the purpose of buying and

[3] When determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009). In accordance with this principle, my recitation of the facts assumes the truth of the factual statements in the Amended Complaint.

selling real estate (the "Earle-Spaeder Partnership"). (Am. Compl. ¶ 17.) Spaeder was charged with various tasks such as locating suitable investment properties, negotiating the terms of purchase and eventual sale or lease of the properties, and organizing and overseeing renovation work to the properties when necessary. (Id.) Earle took charge of the finances relative to the real estate transactions. Together, the two men formed four of the partnerships that are now Plaintiffs in this lawsuit: Devon Drive Lionville, L.P. ("Lionville"), North Charlotte Road Pottstown, L.P. ("Pottstown"), Main Street Peckville, L.P. ("Peckville"), and Rhoads Avenue Newtown Square, L.P. ("Rhoads Avenue") (collectively the "Partnerships"). (Id. ¶¶ 4–7, 18.)

These Partnerships were formed to purchase, develop, and lease a single Pennsylvania commercial real estate property capable of hosting multiple commercial tenants. (Id.) Although each Partnership had a unique ownership structure comprised of both individual and corporate partners, all were spearheaded by Spaeder and Earle. (Id. ¶ 18.) Spaeder was principally in charge of managing the day-to-day business of the Lionville, Pottstown, and Peckville Partnerships,[4] while Earle acted as an independent contractor through his wholly-owned company Rosedon Holding Company Limited Partnership ("Rosedon Holding"). (Id. ¶ 19.) Rosedon Holding took custody of the books and records of these three Partnerships and monitored their finances. (Id.)

For the Partnerships to succeed, they needed to obtain commercial loans. Three of the Partnerships—

[4] The Amended Complaint does not define the management structure of Rhoads Avenue.

Lionville, Pottstown, and Peckville—obtained financing through Defendant Parke Bank ("Parke Bank"), a full service commercial bank that provides personal and business financial services to individuals and small-sized businesses in southern New Jersey, Philadelphia, and surrounding Pennsylvania counties. (Id. ¶ 21.) Officer and director of Parke Bank, Defendant Vito S. Pantilione ("Pantilione"), was integrally involved in facilitating the loan transactions between Parke Bank and several of the Partnerships. (Id. ¶ 22.)

Spaeder and Earle first did business with Parke Bank in February 2007 in connection with an unrelated real estate transaction. Thereafter, when Earle closed a loan with another bank, Pantilione reached out to Spaeder to find out why Earle did not come to Parke Bank for the loan. (Id.) Pantilione dismissed Spaeder's concerns about federal "loan to one borrower" lending limit regulations, advised that he would handle lending limit issues, and requested that Earle come to him personally at Parke Bank for all future loans related to the real estate ventures. (Id. ¶ 23.)

II. Loans from Parke Bank to Lionville, Pottstown, and Peckville

In December 2007, Lionville borrowed $3,098,000 from Parke Bank to finance the purchase and development of vacant ground featuring three commercial "pads." Of the total loan amount, $748,000 was earmarked for anticipated construction costs, while the balance was to cover purchase costs. (Id. ¶ 25.) This loan (the "Lionville loan") was guaranteed by Earle. In connection with the transaction, Parke Bank received a copy of Lionville's Limited Partnership

Agreement and Lionville's General Partner Operating Agreement. (Id.)

In March 2008, Pottstown borrowed $8,000,000 from Parke Bank to acquire and renovate a shopping center, with $2.5 million allocated to acquisition costs, $4.146 million allocated to construction/renovation, and $1.354 million allocated to equity recapture. (Id. ¶ 26.) Spaeder signed a personal guaranty for the loan (the "Pottstown loan"), and Parke Bank received a copy of Pottstown's Limited Partnership Agreement and Pottstown's General Partner Operating Agreement. (Id.)

In May 2008, Peckville borrowed $5,200,000 from Parke Bank to fund the purchase and renovation of an existing shopping center, $3.4 million of which was required for purchase and $500,000 of which was earmarked for renovations. (Id. ¶ 27.) On Pantilione's advice, Earle persuaded Joseph Sweeney, who had previously worked with Earle and Spaeder, to sign a guaranty for the loan (the "Peckville loan"). Parke Bank again received a copy of Peckville's Limited Partnership Agreement and Peckville's General Partner Operating Agreement. (Id.)

III. The John Shea Line of Credit

In mid-2008, Earle went to Pantilione about obtaining a line of credit to provide additional funds for his business ventures. (Id. ¶ 28.) Pantilione identified a property owned by Earle and his wife in Margate, NJ (the "Margate Property") as a source of security for the line of credit, but explained that Earle could not personally guaranty the line of credit due to lending limit regulations. (Id. ¶28.) As such, Pantilione suggested that Earle find a business associate, specifically identifying Plaintiff John Shea,

to personally guarantee the line of credit. (Id. ¶¶ 28–29.) Pantilione explained that although Shea would need to personally guaranty repayment, the real security to Parke Bank would be through the execution of a first-position mortgage on Earle's Margate Property in favor of Parke Bank. (Id. ¶ 29.)

Eventually, Earle approached Shea about his willingness to guarantee the line of credit. (Id. ¶ 31.) In a subsequent meeting, Pantilione represented to Shea that Parke Bank viewed the real security for the line of credit to be the mortgage on the Margate Property, and that $2,350,000 of the funds available through the line of credit would be used as additional cash collateral to help improve the collateralization of the Lionville, Pottstown, and Peckville loans. (Id. ¶ 32.) In reliance on these representations, Shea agreed to enter into the line of credit agreement and guarantee the funds ("Shea LOC"). (Id. ¶ 33.) This transaction closed in October 2008.

IV. Discovery of the Alleged RICO Enterprise

By late 2011, Earle's and Spaeder's relationship had deteriorated and their business partnership began to collapse. (Id. ¶ 34.) Around that time, the loans from Parke Bank to the Pottstown and Peckville Partnerships went into default. (Id.) In 2012, Parke Bank confessed judgment in the Court of Common Pleas of Delaware County, Pennsylvania against Pottstown in the amount of $9,762,357.86, and against Peckville in the amount of $5,612,169.45. Also at that time, the state court entered an order prohibiting Spaeder from continuing in his management role for the Lionville, Pottstown, and Peckville properties or from having any involvement in the affairs of those entities. (Id. ¶ 35.) Rosedon

Holding and Earle also defaulted on other loans from Parke Bank, which were pursued by Parke Bank through confessed judgments entered in several state court actions. (Id. ¶ 36.)

In February 2013, Spaeder and other principals of some of the Partnerships attended a hearing held in one of the lawsuits brought by Parke Bank against Earle. During that hearing, Earle testified regarding a "global settlement" of the claims against him, which included a provision allowing Parke Bank to cross-collateralize funds between Rosedon Holding, Pottstown, Peckville, and Rhoads Avenue without prior consent or authorization. (Id. ¶ 37.) As a result of that testimony, Spaeder and the other principals of the Partnerships petitioned the court to intervene in order to object to the proposed settlement since Earle was not authorized to make decisions affecting the assets of the Partnerships. (Id. ¶ 38.) At a subsequent hearing on the intervention, Parke Bank withdrew its motion to enforce its global settlement with Earle. (Id.)

Spaeder later sought to strike a deal with Parke Bank, through Pantilione, to cure Peckville's default and avoid a Sheriff's Sale of the Peckville property. Pantilione refused to negotiate and indicated Parke Bank was going to use the equity from the sale of the Peckville property to help prop up other loans. (Id. ¶ 39.) Spaeder then filed for bankruptcy. During the ensuing bankruptcy proceedings in July 2013, the Partnerships began to uncover evidence of an "enterprise" among Parke Bank, Pantilione, Defendant Ralph Gallo (Senior Vice President and Chief Workout Officer for Parke Bancorp, Inc.), and Earle (collectively, the "BPGE Enterprise"). (Id. ¶¶ 2, 13, 39.)

V. Alleged Activities by the BPGE Enterprise

Parke Bank personnel allegedly participated in the BPGE Enterprise when they began to utilize the funds available under the loans and/or lines of credit extended to the various independent limited partnership entities as one "piggy bank." (Id. ¶ 50.) This piggy bank would purportedly fund troubled loans to create the appearance of a performing loan. (Id.)

Despite the fact that the Lionville, Pottstown, and Peckville Partnerships were separate legal entities with different assets and ownership, Parke Bank treated these loans as if they were three loans to the same borrower, controlled by Earle, such that their loans could be cross-collateralized by Parke Bank as it saw fit. (Id. ¶ 53.) Parke Bank, however, was not authorized to commingle the entities' funds or cross-collateralize their loans. (Id. ¶ 54.) Earle, who controlled the financial information for these three partnerships and who was also in control of the proceeds of the Shea LOC, misdirected and misappropriated loan funds and/or rental income to benefit his own interests and those of Parke Bank, Pantilione, and Gallo. (Id. ¶ 55.) For example, the Amended Complaint claims that Earle carefully safeguarded the Partnerships' books and records and actively prevented Spaeder from having access to them. (Id. ¶ 56.) Earle also allegedly ensured that correspondence from Parke Bank concerning the Shea LOC or the loans to Lionville, Pottstown or Peckville were only sent to Rosedon Holding's offices and were not forwarded to Spaeder or Shea. (Id. ¶ 57.) For their part, Pantilione and Gallo improperly lulled Spaeder into a false sense of confidence that their actions were

lawful and in the best interests of the Partnerships. (Id. ¶ 55.)

VII. Alleged Specific Fraudulent Activity Regarding Each Partnership/Loan

A. The Lionville Partnership

Under the Limited Partnership Agreement for Lionville, all management and decision-making authority was vested exclusively in the general partner entity, Devon Drive Lionville GP, LLC. (Id. ¶ 65.) The sole limited partner of Lionville—Earle—was expressly prohibited from having any right or authority to manage, control, act for, or obligate Lionville. (Id.) The Operating Agreement vested management control over all decisions of the general partnership in Spaeder.

Lionville's $3,098,000 loan from Parke Bank facilitated its purchase and a portion of construction costs associated with commercial real estate located at 120 Eagleview Boulevard in Lionville, PA for occupancy by tenants. (Id. ¶ 67.) Beginning as early as January 2008, however, Parke Bank began to transfer funds by wire from Lionville to other Parke Bank accounts and, predominantly, to an outside bank account for Rosedon Holding, all without Lionville's consent or approval. (Id. ¶ 68.) In three separate transactions between January 2008 and January 2009, Parke Bank wired a total of $1,416,450.70 from Lionville's account to Rosedon Holding. (Id. ¶ 68.) Of the total funds transferred without Lionville's authorization, Parke Bank directed the return of $48,531.97 into Lionville's account, resulting in a shortfall of $1,608,197.08. (Id. ¶ 69.)

Parke Bank, through Pantilione and/or Gallo, also allegedly facilitated the transfer of additional funds to

Rosedon Holding by honoring forged or unsigned checks made payable to Rosedon Holding and drawn against Lionville's account at Parke Bank. (Id. ¶ 71.) Plaintiffs allege that these payments were made to provide Earle with additional liquid funds while avoiding lending limits. (Id. ¶ 72.)

Unaware of these transactions, Lionville, through Spaeder, entered into a long-term lease with Rite-Aid in December 2009, which required Lionville to construct a building per Rite-Aid's specifications. (Id.) Thereafter, in January 2010, Lionville entered into a long-term lease with a restaurant named Timothy's of Lionville ("Timothy's"). (Id.) At Pantilione's suggestion, Lionville pursued refinancing through Parke Bank to obtain funds for the construction of the Rite Aid building and the Timothy's location. (Id.) Pantilione agreed to refinance the Lionville loan on the condition that Earle reduce his ownership interests in Lionville so that Parke Bank would not run afoul of lending limitations. (Id. ¶ 74.) In December 2010, Lionville closed on a new loan with Parke Bank for $6,700,000 with a guaranty from a minority partner, Jerry Naples. (Id.) The proceeds were used to pay off the first loan to Parke Bank and the construction costs of the Rite-Aid building, leaving approximately $1.8 million for the Timothy's restaurant construction. (Id.) At Pantilione's direction, however, Parke Bank refused to release any funds for construction unless Earle was completely removed from Lionville's ownership. (Id. ¶ 75.)

In September 2011, Gallo, who was at the time a Vice President at Parke Bank, approved payment on an allegedly fraudulent A1A form in the amount of $105,882, and directed payment from Lionville's construction loan account to Rosedon Holding, despite

knowing that the money did not correspond to any construction cost incurred. (Id. ¶ 76.) Upon receipt of the $105,882 from the Lionville construction loan account, Rosedon Holding transferred the majority of the funds from its account back to Parke Bank as payment on several past-due mortgage loan obligations, including the loan for Lionville. (Id. ¶ 77.)

Due to the delays in construction caused by Parke Bank's decision to hold Lionville's funds hostage, Timothy's restaurant terminated its lease. (Id. ¶ 80.) Although Lionville eventually regenerated Timothy's interest, the terms of the new lease were significantly less favorable. (Id.) In the meantime, the construction delays caused Lionville to lose another prospective tenant. (Id.) In February 2014, Lionville refinanced its Parke Bank loan with WSFS Bank and finally had access to the funds necessary to begin improvements on the property. (Id.)

On at least one occasion in 2009, and on at least two occasions in 2010, Parke Bank assessed Lionville with a "Late Charge" of $99,999.99, each of which was later "waived" by Parke Bank. (Id. ¶ 82.) Lionville never received notice of the assessment of the late charges, nor were they justified. (Id. ¶ 83.) Plaintiffs allege that these sums were to create the false appearance of additional receivables on its books without triggering the additional scrutiny that accompanies transactions of $100,000 or more. (Id.)

B. The Pottstown Partnership

Like Lionville, the Limited Partnership Agreement for Pottstown vested all management and decision-making authority in the control of its general partner entity, North Charlotte Pottstown GP, LLC. Earle was expressly prohibited from having any right

or authority to manage Pottstown. (Id. ¶ 85.) The Operating Agreement vested Spaeder with management control over all decisions of the general partnership. (Id. ¶ 86.)

In March 2008, Pottstown secured an $8,000,000 loan in connection with its acquisition of the property at 1400 North Charlotte Street, Pottstown, PA. (Id. ¶ 87.) The plan for that property was to completely renovate the existing shopping center using $4,146,000 of earmarked funds and then lease the space. (Id.)

As with Lionville, Parke Bank allegedly began to unilaterally initiate wire transfers of Pottstown funds to Rosedon Holding and other Parke Bank accounts just months after the loan closed. (Id. ¶ 88.) By the end of 2008, Parke Bank had authorized at least eight such wire transfers, depleting Pottstown's account by $1,225,000. (Id. ¶ 89.) At least thirteen more wire transfers occurred through as late as August 8, 2013. (Id.) Plaintiff alleges that the total amount of unreturned funds wired out of Pottstown's accounts totaled $1,123,809.74. (Id. ¶ 90.)

Parke Bank, through Gallo, was tasked with inspecting, approving, and then releasing construction draws to pay approved A1A work invoices out of the $4.1 million of earmarked loan funds. Gallo, however, caused Parke Bank to authorize the release of Pottstown construction draw funds directly to Rosedon Holding's own checking account without authorization from Pottstown. (Id. ¶¶ 91–92.) On numerous occasions after Rosedon Holding received the funds, Earle would direct payment of only a portion of the funds to the construction company as payment and would keep the rest. (Id. ¶ 93.) He would

then blame the shortfall on Parke Bank and promise that the difference would be made up in later draw payments. (Id.) Relying on Earle's statements, Spaeder, on multiple occasions, paid the contractors using his own funds with the intent of being later reimbursed. (Id.) In total, Parke Bank allegedly misdirected approximately $3,770,000 of Pottstown's $4,100,000 construction draw funds, with Earle, through Rosedon Holding, as the primary recipient. (Id. ¶ 94.)

During calendar years 2010 and 2011, additional funds in the amount of $160,500 were provided to Rosedon Holding by payment approved by Parke Bank on forged or unsigned checks from Pottstown's accounts. (Id. ¶ 96.) Parke Bank also approved payment to itself through two forged checks totaling approximately $88,000. (Id.)

In May 2008, Spaeder negotiated and executed a twenty-year lease with Planet Fitness concerning a large portion of the property. (Id. ¶ 97.) On March 31, 2009, Bottom Dollar signed a twenty-year lease as Pottstown's anchor tenant. (Id.) Planet Fitness began paying rent in March 2010, and Bottom Dollar began paying rent in December 2010. (Id.) Around that time, Pottstown had several additional prospective tenants poised to enter leases. (Id.)

When Bottom Dollar attempted to obtain permits for the interior renovations required to ready its leased space, the local municipality advised it that no permits would issue until Pottstown posted a bond to cover the cost of off-site roadwork. (Id. ¶ 98.) As this work was not in the budget, Pottstown, through Spaeder and a local land use attorney, Marc Kaplin, approached Pantilione about obtaining a letter of

credit to fund the bond. (Id. ¶ 99.) Pantilione demanded that Pottstown post additional collateral before Parke Bank would agree to fund the line of credit. (Id.) Following some negotiations, Pantilione and/or Gallo requested that Pottstown agree to direct its tenants to send their monthly rent checks to a lockbox controlled by Parke Bank. Spaeder agreed to the request. (Id. ¶ 100.) Before Pottstown could resolve the bond issue with the municipality, Parke Bank, over Spaeder's and Kaplin's objections, sent a letter to Bottom Dollar and Planet Fitness announcing "a change in the banking relationship" that required the tenants to send future rent payments to a Parke Bank lockbox. (Id. ¶ 101.) Shortly thereafter, Bottom Dollar cancelled its lease and stopped paying rent, triggering similar reactions by the other prospective tenants. (Id. ¶ 102.) Ultimately, Pottstown defaulted on its loan obligations to Parke Bank, which confessed judgment against it in December 2012, sold the property at a Sheriff's Sale, and continues to pursue a deficiency judgment against Pottstown and its guarantors. (Id. ¶ 104.)

C. The Peckville Partnership

The Limited Partnership Agreement for Peckville vested all management and decision-making authority in the control of its general partner entity, Main Street Peckville GP, LLC. Earle was expressly prohibited from having any right or authority to manage. (Id. ¶ 105.) The Operating Agreement vested management control over all decisions of the general partnership in Spaeder. (Id. ¶ 106.)

Peckville received a loan from Parke Bank in the amount of $5,200,000, in connection with its acquisition of an existing shopping center located on

Main Street in Peckville, PA on May 1, 2008. Peckville intended to stabilize the existing commercial leases on the property and lease out vacant space to new tenants. (Id. ¶ 107.)

As it did with the other Partnerships, Parke Bank began wire transferring Peckville's funds to Rosedon Holding, beginning with a substantial transfer of $1,077,742.83 on February 12, 2009. (Id. ¶ 108.) Between 2011 and as recently as September 2013, Parke Bank transferred additional Peckville funds out of its account. (Id.) None of these transfers were properly authorized by Peckville. (Id. ¶ 109.)

Additionally, over the course of approximately three months during 2011, Parke Bank authorized payment to Rosedon Holding on six unsigned or fraudulently-executed checks drawn against the Peckville account, through which Rosedon Holding converted a total of $56,400 from Peckville. (Id. ¶ 111.)

Parke Bank also engaged in a unilateral modification of Peckville's loan terms. The original terms of Peckville's loan with Parke Bank required interest-only monthly payments with a maturity date of May 1, 2010. (Id. ¶ 112.) Peckville did not pay off the loan by that date. (Id.) On May 6, 2010, Parke Bank sent a letter to Peckville advising that its note would automatically renew for one year, establishing a new maturity date of May 1, 2011, and assessing an "Extension Fee" of $52,000 against Peckville. (Id. ¶ 113.) On May 26, 2011, Parke Bank mailed a "Loan Extension Agreement," this time requesting Peckville's consent to extend the maturity date on its loan to August 1, 2011, in exchange for payment of fees totaling $77,000 and Peckville's agreement to convert its monthly payments to a fixed principal and

interest payment totaling $38,289.09. (Id. ¶ 114.) Even though Peckville never signed the Loan Extension Agreement, Parke Bank charged the $77,000 late fee and proceeded to collect the principal plus interest payment. (Id.) In September 2011, Pantilione and/or Gallo requested that Peckville voluntarily agree to direct its tenants to pay their monthly rent into a lockbox controlled by Parke Bank, and Spaeder agreed to the request. (Id. ¶ 115.) Subsequent Loan Modification Agreements that were mailed to Peckville "C/O Bruce Earle" were not provided by Earle to the partners of Peckville and were never signed. (Id. ¶ 116.) Therefore, Parke Bank continued to charge a monthly principal and interest payment to Peckville based on the unsigned and unapproved Loan Extension Agreement. (Id.)

By consent order dated February 12, 2013, Parke Bank became the mortgagee-in-possession of the Peckville property. (Id. ¶ 117.) Rather, than hire a professional management company to collect rent, Parke Bank simply picked up payments in its lockbox. Parke Bank failed to collect over $400,000 in rent, pass through costs, and other fees. (Id. ¶ 118.)

On at least two occasions in 2011, Parke Bank assessed Peckville with "Late Charges" of $99,999.99 each. On both occasions, the Late Charge was waived by Parke Bank without Peckville ever receiving notice of the assessment. (Id. ¶¶ 119–20.)

D. The Rhoads Avenue Partnership

In October 2011, Parke Bank was allegedly under scrutiny by the FDIC concerning the severe under-collateralization of Pottstown. (Id. ¶ 123.) Pantilione advised Spaeder that Pottstown must immediately either present additional collateral for the Pottstown

loan to cover the collateral shortfall, or Parke Bank would have to "charge off" $5,000,000, forcing the Pottstown loan into default. (Id. ¶ 124.) Pantilione suggested the additional collateral should come from Rhoads Avenue, which did not have any outstanding loans or prior dealings with Parke Bank. (Id. ¶ 125.) Pantilione promised he would not record or perfect any security instruments, or use any such additional collateral. Rather, he simply wanted to show the additional collateral to the FDIC examiners. (Id. ¶ 126.)

On October 25, 2011, Parke Bank's attorney circulated draft security instruments to Spaeder, on behalf of Rhoads Avenue, which included a leasehold mortgage, assignment of rents, and guaranty agreement (the "Rhoads-Pottstown Security Agreements"). (Id. ¶ 127.) At the time these Agreements were requested, Pantilione was aware that Rhoads Avenue's underlying ground lease and sublease with subtenant Eckerd Corporation was not recorded, Eckerd was not yet due to pay any rent, construction on the property was not underway, and Rhoads Avenue had not yet obtained state and local approvals to develop the property. (Id. ¶ 128.) Relying on Pantilione's representations that Parke Bank would never use the Rhoads-Pottstown Security Agreements, Rhoads Avenue executed these Agreements and delivered them to Pantilione, who presented them to the FDIC. (Id. ¶¶ 129–31.) Contrary to his representations, however, Pantilione caused each of the Agreements to be recorded in Delaware County, and Parke Bank subsequently used them to secure a judgment by confession against Rhoads Avenue. (Id. ¶ 132.)

E. The Shea Line of Credit

Before Shea executed any guaranty of the Shea line of credit, Parke Bank represented that $2,350,000 of the $5,000,000 available through the Shea LOC would be deposited into the Lionville, Pottstown, and Peckville accounts to serve as additional cash collateral. (Id. ¶ 134.) Ultimately, however, none of the funds went to these Partnerships' accounts, notwithstanding the fact that Parke Bank's records reflected a pay out of all $5,000,000 available. (Id. ¶ 135.)

On at least six occasions from 2009 to 2011, Parke Bank assessed Shea, via the Shea LOC, with "late charges" of $99,999.99 each. (Id. ¶ 138.) On three other occasions in 2012, Parke Bank assessed additional late charges in varying amounts, all just under $78,000. (Id. ¶ 141.) The late charge of March 9, 2012 was "waived" by Parke Bank four days after it was issued, but the other two were not waived, allowing Parke Bank to collect in excess of $155,000 from these late charges.

VIII. Procedural History

Plaintiffs originally filed this lawsuit on June 19, 2015. I dismissed most of the claims without prejudice and granted Plaintiffs leave to amend their Complaint.[5] Devon Drive Lionville, L.P., et al. v. Parke Bancorp, Inc., et al., No. 15-3435, 2016 WL 475816 (E.D. Pa. Dec. 29, 2016). Plaintiffs then filed an Amended Complaint against Defendants Parke Bank, Pantilione, and Gallo on January 30, 2017, setting forth six counts as follows: (1) conduct and

[5] The only remaining claim after my ruling was the conversion cause of action by Lionville, Pottstown, and Peckville.

participation in an enterprise through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); (2) acquisition and maintenance of an interest in and control of an enterprise engaged in a pattern of racketeering activity in violation of RICO; (3) conspiracy to engage in a pattern of racketeering activity in violation of RICO; (4) common law fraud; (5) conversion; and (6) civil conspiracy.[6]

On March 17, 2017, Defendants filed the Motion to Dismiss the Amended Complaint currently at issue and an accompanying Motion for Order to Take Judicial Notice. Plaintiffs responded to both Motions on May 3, 2017.

DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE

Defendants request that I take judicial notice of certain adjudicative facts in the form of judgments, decisions, settlement agreements, and pleadings in state court proceedings, as well as publicly-filed documents including a mortgage and security agreement and an assignment of rents. According to Defendants, these documents establish a basis for dismissal of Plaintiff's substantive claims under a res judicata defense. Upon consideration of both parties' briefs, as well as their briefs filed in connection with the prior Motion to Take Judicial Notice, I will grant the Motion and take judicial notice of all of Exhibits A–O attached to the Motion.

Federal Rule of Evidence 201(b) permits a district court to take judicial notice of facts that are "not

[6] Notably, in the Amended Complaint, two of the partnerships—VG West Chester Pike, L.P. and 1301 Phoenix, L.P.—dropped out as Plaintiffs.

subject to reasonable dispute" in that they are either (1) "generally known within the territorial jurisdiction of the trial court" or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The United States Court of Appeals for the Third Circuit has instructed that judicial notice "should be done sparingly at the pleadings stage" and "[o]nly in the clearest of cases." Victaulic Co. v. Tieman, 499 F.3d 227, 236 (3d Cir. 2007). Thus, judicial notice is improper if a legitimate question exists as to the underlying source of the information. In re Synchronoss Secs. Litig., 705 F. Supp. 2d 367, 390 (D.N.J. 2010) (citing Hinton v. Dep't of Justice, 844 F.2d 126 (3d Cir. 1988)); see also Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070 (2d Cir. 1982)). Nonetheless, Rule 201(c)(2) requires that a district court take judicial notice "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(c)(2); see also Gilliam v. Holt, No. 07-359, 2008 WL 906479, at *3 (M.D. Pa. Mar. 31, 2008) ("Judicial notice is mandatory only where a party requests that it be taken and supplies the necessary information.").

Questions of judicial notice under Rule 201(c)(2) often arise when, like in the case before me, a party puts forth the defense of res judicata, also known as claim preclusion. Where the defense of res judicata is raised for adjudication on a motion to dismiss, the court can take notice of all facts necessary for the decision and adjudicate that defense. Toscano v. Conn. Gen. Life Ins. Co., 288 F. App'x 36, 38 (3d Cir. 2008). "Specifically, a court may take judicial notice of the record from a previous court proceeding between the parties." Id. (citing Oneida Motor Freight, Inc. v.

United Jersey Bank, 848 F.2d 414, 416 n.3 (3d Cir. 1988)).

More recently, the Third Circuit has emphasized that "[i]n the context of deciding a Rule 12(b)(6) motion that raises [res judicata] concerns, and where a plaintiff has not included the existence or substance of the prior adjudications in the body of, or attachments to, its complaint, it is axiomatic that a court must still consider the prior adjudication in order to determine whether [res judicata] bars that plaintiff's claims." M & M Stone Co. v. Pa., 388 F. App'x 156, 162 (3d Cir. 2010). Thus, "a prior judicial opinion constitutes a public record of which a court may take judicial notice." Id.; see also Lewis v. O'Donnell, 674 F. App'x 234, 237 (3d Cir. 2017) (reviewing complaint and state court documents submitted by the defendants with their motion to dismiss to affirm district court's finding of res judicata). The same holds true for a judicially-approved settlement. See Karatzas v. Mass Mut. Fin. Grp., No. 16-1302, 2016 WL 6953421, at *2 (D.N.J. Nov. 28, 2016) (taking judicial notice of a judicially-approved settlement).

And as pertinent here, the Third Circuit has expressly noted that a court may take judicial notice of public records, such as publicly recorded deeds. Gagliardi v. Kratzenberg, 188 F. App'x 86, 89 (3d Cir. 2006); see also Sarsfield v. Citimortgage, Inc., 707 F. Supp. 2d 546, 559 n.2 (M.D. Pa. 2010) (finding it proper to consider the mortgage between the parties because it was recorded in the County Recorder of Deeds and, therefore, was a matter of public record that could be considered by the court in deciding a Rule 12(b)(6) motion).

Defendants' original Motion to Dismiss the first complaint was granted primarily because of pleading defects. Devon Drive Lionville, 2016 WL 7475816. In that motion, Defendants also requested that I take judicial notice of various judgments, decisions, pleadings, dockets, settlements, and releases from the various prior court proceedings for purposes of their res judicata and collateral estoppel defenses. Plaintiffs responded, and I agreed, that it would be improper to consider the documents "cherry-picked" by Defendants without a more complete and accurate record of the prior court proceedings. Id. at *5–6. Rather than conduct an extensive judicial notice/res judicata analysis, I instead granted Defendants' motion to dismiss without prejudice to replead with sufficient facts.[7]

---

[7] In my previous Opinion denying the Motion to Take Judicial Notice, I relied in part upon Victaulic Co. v. Tieman, 499 F.3d 227 (3d Cir. 2007), which stated that judicial notice should be done sparingly at the pleading stage. Id. at 236. Upon further consideration, I now conclude that such reliance was perhaps in error. The Third Circuit's refusal to affirm the District Court's use of judicial notice in Victaulic is distinguishable from the situation here. In that matter, the District Court took judicial notice of the plaintiff's website to establish certain facts about the company's business and then used the "facts" from that corporate website to draw inferences against the non-moving party and find that the company's covenant not to compete was reasonable and protected legitimate confidential information. Id. at 236. The Third Circuit found that the District Court had improperly taken notice of the company's unauthenticated marketing material to resolve an inherently factual affirmative defense. Id. Unlike the present case, Victaulic did not address taking judicial notice of prior judicial proceedings for purposes of addressing a res judicata defense.

I also relied on Kaiser v. Steward, No. 96-6643, 1997 WL 476455 (E.D. Pa. Aug. 19, 1997). There, the court declined to consider the defendants' argument that the plaintiff's RICO

Defendants' current Motion to Dismiss the Amended Complaint again presents a set of documents from state court records, which Defendants urge are proper for judicial notice.[8] I now conclude that judicial notice is proper as to all of the exhibits attached to Defendants' Motion to Take Judicial Notice.

First, Exhibits A to M of Defendants' Motion to Dismiss comprise part of a public judicial record in state court. As set forth above, when deciding a motion to dismiss based on res judicata, the court may take judicial notice of the record from a previous court proceeding between the parties. Toscano, 288 F. App'x at 38; see also Jones v. Gemalto Inc., No. 15-0673, 2015 WL 3948108, at *5 (E.D. Pa. June 29, 2015).

---

claims were "barred by reason of a prior binding release, or collateral estoppel as well as res judicata." Id. at *21 n.28. The court reasoned that the documents relied upon were outside the complaint and outside the public record, and therefore could not be considered unless the motion was converted into one for summary judgment. Id. The present case is distinguishable as the state court records at issue here are within the public record and may unequivocally be considered without converting the motion to dismiss into one for summary judgment.

[8] Plaintiffs argue that both Defendants' Motion to Take Judicial Notice and their res judicata argument raised in the new Motion to Dismiss, are nothing more than motions to reconsider my prior denial of the Motion to Take Judicial Notice. I disagree. In my December 29, 2016 decision, I never considered the merits of the res judicata defense. Rather, I dismissed without prejudice almost all of the claims of the Complaint under Rule 12(b)(6), and gave Plaintiffs leave to file an Amended Complaint. At that juncture, Defendants could not have filed a motion for reconsideration as the original Complaint had been dismissed. The subsequent filing of the Amended Complaint triggered the submission of a new pleading on which Defendants were entitled to re-raise their res judicata arguments.

Accordingly, I will take judicial notice of these exhibits.[9]

With respect to Exhibits N and O, I also find that they are entitled to judicial notice and may be considered with respect to the res judicata defense. As both of these exhibits were recorded with the Delaware County Recorder of Deeds, they are matters of public record proper for judicial notice and consideration with respect to the Motion to Dismiss.

In granting the Motion to Take Judicial Notice, I emphasize that such notice "serves only to indicate what was in the public realm at the time, not whether the contents of those documents are true." U.S. ex rel. Spay v. CVS Caremark Corp., 913 F. Supp. 2d 125, 139–40 (E.D. Pa. 2012) (citing Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt., L.P., 435 F.3d 396, 401 n.15 (3d Cir. 2006); DCIPA, LLC v. Lucile Slater Packard Children's Hosp. at Stanford, 868 F. Supp. 2d 1042, 1048 (D. Or. 2011) ("[T]aking judicial notice of certain documents does not demonstrate the truth of everything contained in those records, and, as such, the truthfulness and proper interpretation of the document are disputable.")). With that caveat in mind, I will

[9] In their Motion, Defendants argue that judicial notice is not required because Plaintiffs affirmatively plead the existence of these state court records in their Amended Complaint. Defendants are correct that when deciding a motion to dismiss, a court may consider a document "integral to or explicitly relied upon in the complaint." In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); see also In re NAHC, Inc. Secs. Litig., 306 F.3d 1314, 1331 (3d Cir. 2015). The Amended Complaint in this case does explicitly reference many of the state court judgments and pleadings at issue. Because I find that judicial notice of the documents is proper, I need not definitively address this argument.

consider these documents in ruling on the pending Motion to Dismiss.

MOTION TO DISMISS

I. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant bears the burden of demonstrating that the plaintiff has not stated a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); see also Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005). The United States Supreme Court has recognized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quotations omitted). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "only a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "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." Id. A complaint does not show an entitlement to relief when the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct. Id.

The United States Court of Appeals for the Third Circuit has detailed a three-step process to determine whether a complaint meets the pleadings standard. Bistrian v. Levi, 696 F.3d 352 (3d Cir. 2014). First, the court outlines the elements a plaintiff must plead to state a claim for relief. Id. at 365. Next, the court must "peel away those allegations that are no more than conclusions and thus not entitled to the assumption of

truth." Id. Finally, the court "look[s] for well-pled factual allegations, assume[s] their veracity, and then 'determine[s] whether they plausibly give rise to an entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 679). The last step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (quoting Iqbal, 556 U.S. at 679).

Claims of fraud, either standing alone or as predicate acts for a RICO claim, are subject to the heightened requirements of Federal Rule of Civil Procedure 9(b). Warden v. McLelland 288 F.3d 105, 114 n.6 (3d Cir. 2002). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). In order to satisfy Rule 9(b), "a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) (citation omitted). Plaintiffs may satisfy this requirement by pleading the "date, time and place" of the alleged fraud or "otherwise inject precision or some measure of substantiation into a fraud allegation." Id.

II. Res Judicata

Defendants seek dismissal of the entire Amended Complaint on the grounds of res judicata. Res judicata, also known as claim preclusion, bars a subsequent suit where there has been: "(1) a final judgment on the merits in a prior suit involving (2) the same claim and (3) the same parties or their privies." E.E.O.C. v. U.S. Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990). "The doctrine of res judicata bars not only

claims that were brought in a previous action, but also claims that could have been brought." Marmon Coal Co. v. Dir., Office of Workers' Comp. Programs, 726 F.3d 387, 394 (3d Cir. 2013). Res judicata "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." Brown v. Felsen, 442 U.S. 127, 131 (1979).

Defendants allege that all of the claims raised by Plaintiffs in the current action were previously litigated to final, binding dispositions in state court, meaning that they may not now be relitigated in federal court. Plaintiffs respond that Defendants have failed to establish that all of the elements required for the application of res judicata are present. Addressing these competing arguments as to each of the Plaintiffs, I find that res judicata bars the claims of Pottstown, Peckville, Rhoads Avenue, and Shea, but does not bar the claims of Lionville and Spaeder.

A. The Pottstown, Peckville, and Rhoads Avenue Claims

As noted above, Plaintiffs Pottstown, Peckville, and Rhoads Avenue were all subject to state court confessed judgments. To analyze the merits of Defendants' res judicata argument, I will first review both the state court proceedings and current federal claims for each of these Plaintiffs, and then jointly consider whether the confessed judgments satisfy the elements of res judicata.

1. Pottstown

a. State Court Proceedings

In late 2012, Parke Bank obtained a confession of judgment against the Pottstown Partnership on the loan Parke Bank had extended. (Defs.' Mot. to

Dismiss, Ex. A.) Immediately thereafter, Pottstown filed a petition to strike off and/or open judgment by confession. (Defs.' Mot. to Dismiss, Ex. D.) There, Pottstown explicitly argued that the confessed judgment should be opened because Parke Bank misapplied loan proceeds and income, thereby casting serious doubt on both the amount and validity of the outstanding debt. (Id. ¶ 43.) The Pottstown petition went on to enumerate how Parke's administration of Pottstown's loan was "fraught with error, ignorance, and potential fraud," and was done "in a manner designed to artificially inflate the balance on the North Charlotte Loan." (Id. ¶ 57.) In particular, Pottstown alleged that:

- The terms of the loan required that the budget on each project be balanced and that there be sufficient financing to complete the project before the Bank would make advances. Parke Bank failed, however, to inspect and monitor the projects before making advances on the loans, and advanced far more money than was needed to finance renovations of the property for which the loan was made. (Id. ¶¶ 16–19.)
- Parke Bank misapplied funds and failed to provide any disclosure to [Pottstown] regarding the details of the Interest Reserve or Equity Reserve accounts. The Bank appears to have failed to apply rents from the Premises as required. The Bank also failed to apply $150,000 in funds from the John Shea Loan to the [Pottstown] loan as necessary. (Id. ¶ 50.)
- Between October of 2011 and June 2012, Parke Bank applied, without authority, Pottstown's rent collections to other loans and/or

transferred to other accounts for non-Pottstown loans. (Id. ¶ 62.)

- Parke Bank failed to apply funds from its loan to John Shea to the Pottsville loan in the manner required by the loan documents. (Id. ¶ 64.)

On June 18, 2013, upon consideration of these arguments, the state court declined to open the confession of judgment. (Defs.' Mot. to Dismiss, Ex. A.)

b. Federal Court Claims

Similar to the petition to reopen the confessed judgment, the federal RICO claims and state law claims of fraud, conversion, and civil conspiracy in the federal Amended Complaint are premised on the assertion that, in March 2008, Pottstown secured an $8,000,000 loan from Parke Bank. Just months after the loan closed, Parke Bank began to unilaterally initiate wire transfers of Pottstown Partnership funds to Rosedon Holding and other Parke Bank accounts, amounting to at least twenty-one wire transfers occurring through as late as August 8, 2013. In addition, although Parke Bank, through Gallo, was tasked with inspecting, approving, and then releasing construction draws to pay approved work invoiced, Parke Bank allegedly authorized the release of Pottstown construction draw funds without authorization from Pottstown. During 2010 and 2011, additional funds were provided to Rosedon Holding or Parke Bank by payment approved by Parke Bank on forged or unsigned checks from Pottstown's accounts. Finally, Parke Bank allegedly directed Pottstown's tenants to send future rent payments to a Parke Bank lockbox.

2. Peckville

a. State Court Proceedings

Parke Bank confessed judgment against Peckville on December 14, 2012 in the Court of Common Pleas for Delaware County. (Defs.' Mot. to Dismiss, Ex. B.) Peckville responded with a petition to strike off and/or open judgment by confession, which was substantially similar to the one filed regarding the Pottsville loan. (Defs.' Mot. to Dismiss, Ex. E.) Peckville argued that Parke Bank "misapplied loan proceeds and income in an improper manner" and applied funds received towards Peckville's loan to other loans and other individuals, "leaving Peckville liable for a greater amount than it should have been." (Id. ¶¶ 1, 47–50.) The petition further alleged that despite the fact that loan documents provided that Bruce Earle was the sole individual who could obtain financing or enter into loan agreements on behalf of Peckville, a business acquaintance of Spaeder named Joseph Sweeney executed the loan agreements. (Id. ¶¶ 31–36.) In addition, both Sweeney and his wife, neither of whom had any connection to Peckville or benefitted therefrom, personally guaranteed the $5.2 million dollar loan. (Id. ¶¶ 37–40.)

The state court denied this petition on June 18, 2013. (Defs.' Mot. to Dismiss, Ex. B.)

b. Federal Court Claims

Like the state court petition, the federal RICO claims and state law claims of fraud, conversion, and civil conspiracy in the federal Amended Complaint are premised on the assertion that Peckville received a loan from Parke Bank in the amount of $5,200,000 in connection with its acquisition of an existing shopping center located on Main Street in Peckville, PA on May

1, 2008. As it did with the other Partnerships, Parke Bank began wire transferring Peckville's funds to Rosedon Holding. The federal suit alleges that none of the transfers were properly authorized by Peckville. Additionally, over the course of approximately three months during 2011, the Amended Complaint alleges that Parke Bank authorized payment to Rosedon Holding on six unsigned or fraudulently executed checks drawn against the Peckville account, through which Rosedon Holding converted a total of $56,400 from Peckville.

Parke Bank also allegedly engaged in a unilateral modification of Peckville's loan terms. In September 2011, Pantilione and/or Gallo requested that Peckville voluntarily agree to direct its tenants to pay their monthly rent into a lockbox controlled by Parke Bank, and Spaeder agreed to the request. Parke Bank purportedly failed to collect over $400,000 in rent and fees, and improperly assessed Peckville with "Late Charges" of $99,999.99 each.

3. Rhoads Avenue Partnership

a. State Court Proceedings

On July 29, 2013, Parke Bank confessed judgment in state court against Rhoads Avenue on its guaranty of the $8,000,000 Pottstown loan. (Defs.' Mot. to Dismiss, Ex. C.) On November 7, 2014, Rhoads Avenue filed a petition to strike or open the judgment. (Id., Ex. F.) In that petition, Rhoads Avenue alleged generally that its agreement to execute the guaranty was void and unenforceable since it was obtained as a result of Parke Bank's fraudulent conduct in the use of funds. (Id.) In support of its petition, Rhoads Avenue set forth the following allegations:

- Parke Bank, through Pantilione, threatened that all of Spaeder's business with Parke Bank would be at risk if Spaeder did not execute the Rhoads Avenue documents to provide additional security for the Pottstown loan, a loan totally unrelated to any aspect of the Rhoads Avenue project. (Id. ¶¶ 11–12.)
- Pantilione promised Spaeder that he would never file the Assignment of Leases or Leasehold Mortgage or enforce the Guaranty since he was using them to placate federal regulators, but Pantilione did so anyway. (Id. ¶ 13.)
- Parke Bank collected $800,000 from the lien of its judgment against Pottstown from another guarantor of the loan, Rosedon Holding, but failed to apply the $800,000 to reduce the amount of the confessed judgment against Pottstown, and instead applied it to reduce the balance of an unrelated loan to Earle and Rosedon Holding. (Id. ¶¶ 18–29.)
- Parke Bank improperly used rent payments collected from Pottstown's tenants to pay down loans other than the Pottstown loan. (Id. ¶¶ 31–40.)
- Parke Bank was required to lend the construction loan funds to Pottstown as the borrower. Parke Bank, however, lent them to Rosedon Holding, the entity controlled by Earle. (Id. ¶¶ 41–49.)
- Parke Bank improperly paid tens of thousands of dollars from Pottstown's account based on checks with forged signatures, including in excess of $185,000 on unsigned checks which

were not submitted for payment by Rhoads Avenue or Spaeder, but were nonetheless drawn on the Pottstown account at Parke Bank. (Id. ¶¶ 50–56.)

- Parke Bank violated the terms of the Pottstown Construction Loan Agreement by disbursing construction funds even though the Construction Loan Agreement required that such Construction Loan not be disbursed until certain requirements were met. (Id. ¶¶ 57–65.)

On February 9, 2015, the Delaware County Court of Common Pleas granted Parke Bank's motion to strike this petition as untimely. (Defs.' Mot. to Dismiss, Ex. C.)

Also with respect to Rhoads Avenue, the subtenant at the PNC Property, Eckerd Corporation, filed an interpleader action in this Court to resolve competing claims to rents owed by Eckerd (Rite Aid) under a sublease between it and Rhoads Avenue. (Eckerd Corp. v. Rhoads Avenue Newtown Square, LP, No. 13-4752 (E.D. Pa Aug. 15, 2013).) In response, Rhoads Avenue filed a cross-claim, again asserting that Parke Bank, through Pantilione, improperly and fraudulently insisted that Rhoads Avenue provide a leasehold mortgage and assignment of rents relating to the Pottstown property as additional collateral and execute a guaranty. (Id., ECF No. 7.) Parke Bank moved to dismiss the cross-claim on grounds that the confession of judgment was res judicata of all matters regarding the execution of the lease assignment and guarantee. (Mot. to Dismiss, Eckerd Corp., No. 13-4752, ECF No. 85 (E.D. Pa. Aug. 21, 2014).) I agreed and dismissed the cross-claim with prejudice. (Id., ECF No. 136; Defs.' Mot. to Dismiss, Ex. J.)

b. Federal Court Claims

The federal RICO claims and state law claims of fraud, conversion, and civil conspiracy in the federal Amended Complaint similarly allege that, in October 2011, Pantilione advised Spaeder that Pottstown must immediately either present additional collateral for the Pottstown loan, or Parke Bank would have to charge it $5,000,000. Pantilione purportedly suggested the additional collateral should come from Rhoads Avenue, but promised he would not record, perfect any security instruments for, or use any such additional collateral. On October 25, 2011, Parke Bank's attorney circulated draft security instruments to Spaeder, on behalf of Rhoads Avenue, which included a leasehold mortgage, assignment of rents, and guaranty agreement. Relying on Pantilione's representations that Parke Bank would never use the security agreements, Rhoads executed them and delivered them to Pantilione. Contrary to his representations, however, Pantilione caused each of the Agreements to be recorded in Delaware County, and Parke Bank subsequently used them to secure a judgment by confession against Rhoads Avenue.

4. Application of the Res Judicata Elements

As set forth above, a finding of res judicata requires (1) a final judgment on the merits in a prior action, (2) involving the same parties or their privies, and (3) the same claims. E.E.O.C. v. U.S. Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990). In light of the underlying similarity between the state court confession actions against Pottstown, Peckville, and Rhoads Avenue, and the current federal court claims, I find that all of the elements of res judicata are present and that the federal claims are barred.

a. Final Judgment on the Merits

The first factor requires that the prior proceedings—in this case, the state court confessed judgments—be final judgments on the merits. A federal court must give a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which it was rendered. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 83 (1984). "Under Pennsylvania law, a judgment by confession is a final judgment 'on the merits' which operates as res judicata to bar a collateral challenge to that judgment or any claim arising out of the same underlying transaction or nucleus of events." Zhang v. Se. Fin. Grp., Inc., 980 F. Supp. 787, 792 (E.D. Pa. 1997). Res judicata will apply "where the . . . claims could have been raised in confession of judgment proceedings through a petition to open or strike off the judgment entered upon confession but were, instead, raised in a new action." Newton v. First Union Nat'l Bank, 316 F. Supp. 2d 225, 238 (E.D. Pa. 2004) (quotations omitted).

Plaintiffs argue that no "final judgment on the merits" exists because the state court "summarily denied" the petitions to reopen with no supporting opinions regarding the bases for the denials. As a result, they contend that I cannot discern, for res judicata purposes, what issues the state court actually determined.

This argument misunderstands the Pennsylvania confession process. After a confession of judgment is entered, a defendant may petition to open or strike the judgment. Pennsylvania Rule of Civil Procedure 2959 provides that all grounds for relief "whether to strike off the judgment or to open it must be asserted in a

single petition" and "a party waives all defenses and objections which he did not include in his petition or answer." Pa. R. Civ. P. 2959(a)(2) and (c). "If the party against whom judgment is confessed pleads prima facie grounds for relief, the court must open the judgment, and 'may grant a stay of proceedings.'" Resolution Trust Corp. v. W.W. Dev. & Mgmt., Inc., 73 F. 3d 1298, 1308 (3d Cir. 1996) (citing Pa. R. Civ. P. 2959(b)). Testimony, depositions, admissions, or other evidence may be produced and, if that evidence creates issues that need to be resolved by a jury, the court shall open the judgment. Id. at R. 2959(e). Thus, a confessed judgment and, logically, a denial of a petition to reopen the confessed judgment "would necessarily imply a determination that [the defendant to the confessed judgment] was in default in the stated amount under a valid and enforceable note." Stoss v. Singer Fin. Corp., No. 08-5968, 2010 WL 678115, at *4 (E.D. Pa. Feb. 24, 2010) (quoting Zhang v. Haven–Scott Assoc., Inc., No. 95–2126, 1996 WL 355344 at *8 (E.D. Pa. June 21, 1996)).

In this case, Pottstown, Peckville, and Rhoads Avenue actually raised allegations that challenged the validity and enforceability of the loan on which the judgments were based. Had the state court found any of these allegations to be meritorious, it could have reopened the judgment. The state court's refusal to do so, whether or not accompanied by a written opinion, constitutes a final and express denial of those grounds.[10]

---

[10] Plaintiffs cite Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970) for the proposition that "[r]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel." Id. at 1274. That case involved the distinguishable question of when litigation of a question in a civil

Plaintiffs argue that the Rhoads Avenue petition was stricken as untimely and, therefore, the state court's decision does not constitute a final judgment on the merits. However, it is not the state court decision striking the petition which constitutes res judicata; rather it is the original confessed judgment that operates to preclude the federal claim. Collateral challenges to the loan at issue "could have been brought" in a petition to reopen. The fact that Rhoads did not do so in a timely manner does not deprive the state court's confessed judgment of the requisite finality. See Zhang v. Haven-Scott Assocs., Inc., No. 95-2126, 1996 WL 355344, at *7 (E.D. Pa. June 21, 1996) ("A party who fails to petition to open or strike a confessed judgment is barred by res judicata from raising in a collateral proceeding any issue she could have raised as a defense in such a petition.") (citing Romah v. Romah, 600 A.2d 978, 981 (Pa. Super. 1991) (finding that failure to timely petition the trial court to open or strike off the judgment waives the right to raise the issues and the party cannot raise the issues in a collateral proceeding)).

b. Same Parties

Second, the prior suit involved the same parties—Pottstown, Peckville, or Rhoads Avenue, on one hand, and Parke Bank, on the other hand. Although Plaintiffs argue that their claims against individual defendants Vito Pantilione and Ralph Gallo cannot be barred because these Defendants were not individually named in the state court action, "[t]he

---

suit is barred by a prior criminal trial, noting that the standard is "whether the question was distinctly put in issue and directly determined in the criminal prosecution, and issues which were essential to verdict of guilty must be regarded as having been determined by the judgment." Id.

doctrine of res judicata applies to parties where one is vicariously responsible for the other, such as in an employer-employee relationship." Metcalf v. Merrill Lynch, Pierce, Fenner & Smith, 895 F. Supp. 2d 645, 657 (M.D. Pa. 2012) (citing Turner v. Crawford Square Apartments III, L.P., 449 F.3d 542, 548 n.11 (3d Cir. 2006); Restatement (Second) of Judgments § 51 (1982)), reversed on other grounds 587 F. App'x 719 (3d Cir. 2014). The Amended Complaint contains no allegations that Pantilione and Gallo were acting outside the scope of their employment. To the contrary, the Amended Complaint repeatedly emphasizes that their actions were taken entirely on behalf of Parke Bank. As such, I find Pantilione and Gallo to be in privity with Parke Bank for purposes of res judicata.

c. Same Claims

The last element requires that the prior suits involve the same claims. Making this determination "does not depend on the specific legal theory invoked, but rather 'the essential similarity of the underlying events giving rise to the various legal claims.'" Elkadrawy v. Vanguard Grp., Inc., 584 F.3d 169, 173 (3d Cir. 2009) (quoting Davis v. U.S. Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982)) (internal quotations omitted). In analyzing essential similarity, I am guided by several factors: (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 277 (3d Cir. 2014) (quotations omitted), cert. denied, 135 S. Ct. 1738 (2015). "It is not dispositive that a plaintiff asserts a different theory of

recovery or seeks different relief in the two actions." Id. Moreover, res judicata will "not be defeated by minor differences of form, parties or allegations" where the "controlling issues have been resolved in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." Zhang, 1996 WL 355344, at *8 (quoting Helmig v. Rockwell Mfg. Co., 131 A.2d 622, 627 (Pa. 1957)).

Here, the federal and state law claims raised in the Amended Complaint by Pottstown, Peckville, and Rhoads Avenue Partnerships are premised on allegations that, beginning in 2008, Parke Bank fraudulently induced the signing of guaranties, misapplied loan proceeds, cashed bad checks against the Partnerships' account, and improperly authorized the transfer of construction funds from the various loans to Earle/Rosedon Holding. These allegations were also at issue in the state court proceedings. Although these issues were presented as defenses to the confessed judgments, and while the federal action raises these issues in the form of a request for affirmative relief under RICO, the material factual events and corresponding evidentiary proof underlying the two proceedings are practically identical. See Davis v. U.S. Steel Supply, Div. of U.S. Steel Corp., 688 F.2d 166, 171 (3d Cir. 1982) ("Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarity has proven elusive.").

In an effort to refute this conclusion, Plaintiffs posit two arguments. First, they contend that res judicata does not apply because Pottstown, Peckville, and Rhoads Avenue could not raise the claims

asserted in the Amended Complaint as grounds to open Parke Bank's confession of judgment. Second, they contend that some of the predicate acts forming the basis of their RICO action were not raised in the petition to open the confession judgment.

The flaw within Plaintiffs' first argument is illustrated by Plaintiffs' misplaced reliance on the case of Zhang v. Se. Fin. Grp., Inc., No. 95-2126, 1996 WL 355344 (E.D. Pa. June 21, 1996). In Zhang, a confessed judgment was entered against the plaintiff on a debt owed to the defendants. Id. at *3. The plaintiff brought a complaint in federal court alleging, in part, (a) a RICO claim premised on a scheme to fraudulently induce persons to purchase services and sign notes and (b) a Fair Debt Collection Practices Act ("FDCPA") claim that defendant used unlawful means to collect the debt after she failed to pay the amount due. Id. at *1. In a Rule 12(b)(6) motion to dismiss, the defendants raised a res judicata defense regarding only the FDCPA claim, alleging that the plaintiff never brought that claim in the confession action as a counterclaim. Id. at *7. Although the court acknowledged that a judgment by confession is a final judgment on the merits that can act as a res judicata bar on a collateral challenge to that judgment, the court held that res judicata was not applicable because there was no identity of issues between the confession action and the FDCPA claim. Id. at *8. The court reasoned that, in the confession action, the plaintiff could only have raised claims that would nullify or call into question the validity of the debt on which the confessed judgment is entered. Id. By contrast, the FDCPA claim attacked the methods by which the defendants attempted to collect the debt. Id.

During the subsequent summary judgment proceedings, however, the defendants raised a new res judicata defense, this time alleging that the plaintiff's RICO and fraudulent inducement claims were barred by the confession of judgment in the state courts. Zhang v. Se. Fin. Grp., Inc., 980 F. Supp. 787, 792 (E.D. Pa. 1997). The court found that both the fraud in the inducement and the RICO claim challenged the validity of the debt and were grounds to open the confessed judgment. Id. at 795. As such, plaintiff was barred by res judicata from re-asserting those claims in federal court. Id. (citing Klecha v. Bear, 712 F. Supp. 44, 47 (M.D. Pa. 1999) (res judicata effect of confessed judgment bars claim based on fraud in the inducement); Kravinsky v. Wolk, No. 86-4820, 1988 WL 84748, at *1 (E.D. Pa. Aug. 11, 1988) (res judicata effect of denial of petition to open confessed judgment bars RICO claim based on fraud), aff'd, 869 F.2d 589 (3d Cir. 1989)) (further citations omitted).[11]

[11] Plaintiffs' other citations are also inapposite. In Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62 (3d Cir. 1978), the Third Circuit simply found that "Pennsylvania practice does not permit the filing of a counterclaim for an unliquidated amount in a petition to open a judgment if the counterclaim is not directly related to the cause of action on which the plaintiff's judgment has been entered." Id. at 68. That case did not address the situation where a claim has or could have been raised as a ground to open the confessed judgment. Similarly, in Hopewell Estates, Inc. v. Kent, 646 A.2d 1192 (Pa. Super. Ct. 1994), the court acknowledged that claims that are grounds to open a confessed judgment may subsequently be barred by res judicata. Id. at 1194. It found, however, that the appellant's claim for professional malpractice could not have been litigated as a part of the proceedings to open the judgment confessed against appellant for professional fees owed pursuant to contract. Id. at 1195.

Here, Parke Bank confessed judgment against Pottstown, Peckville, and Rhoads Avenue for defaulting on their loans. In their petitions to reopen, these partnerships specifically asserted that Parke Bank mishandled and misappropriated funds, violated loan agreements, and disbursed funds on fraudulent checks. These allegations directly challenged the validity of the confessed judgment. They were not, as Plaintiffs urge, collateral actions for unliquidated amounts unrelated to the validity of the confessed judgment. The mere fact that Plaintiffs now couch these assertions in the form of RICO claims does not undermine the prior state court determinations. See Riverside, 581 F.2d at 67 ("[T]he common pleas court adjudicated the validity of the judgment note and its consideration in favor of [the broker]. [Plaintiffs] cannot evade that finding by simply adding allegations of conspiracy to the very same activity passed upon the state court.").

Plaintiffs' second argument fares no better. They contend that Pottstown and Peckville did not put before the state court several of the predicate acts underlying their RICO claims and, as such, not all of their claims were decided.[12] Res judicata, however, "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. 127, 131 (1979); see also CoreStates Bank,

[12] Specifically, Plaintiffs argue that Pottstown did not allege in state court that Parke Bank gave a lockbox directive to Pottstown's tenants, causing Bottom Dollar to cancel its lease. Moreover, Peckville did not argue in state court that Parke Bank unilaterally imposed and collected more onerous monthly loan payments, along with loan extension and late fees from Peckville.

N.A. v. Huls America, Inc., 176 F.3d 187, 194 (3d Cir. 1999). Merely alleging several new and discrete events in support of a claim in a subsequent adjudication does not extinguish the res judicata effect since "[a] claim extinguished by res judicata includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, *or series of connected transactions,* out of which the action arose." Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 277 (3d Cir. 2014) (emphasis in original) (internal quotation marks omitted).

As noted several times above, in the state court, Plaintiffs challenged the validity of the confessed judgments based on Parke Bank's mishandling of loan proceeds and violation of loan agreements. In federal court, Plaintiffs now allege that these same actions constitute a pattern of racketeering in violation of RICO. But the fact that some of the predicate acts set forth in support of the RICO claim were not specifically alleged in state court—although they could have been—does not deprive the state court judgment of preclusive effect.

5. Whether the Doctrines of Adverse Domination and Fraudulent Concealment Preclude Application of Res Judicata

In a final effort to avoid the application of res judicata to Pottstown, Peckville, and Rhoads Avenue, Plaintiffs contend that, even assuming all of the elements of res judicata are met, the defense fails under the doctrines of adverse domination and fraudulent concealment. Plaintiffs reason that when Parke Bank entered the confessions of judgment, all of the Partnerships were under the exclusive control of Parke Bank's co-conspirator Earle, who was

actively trying to conceal the activities of the racketeering enterprise.[13] As such, it was Earle who (a) responded to Parke Bank's confessions of judgment against Pottstown and Peckville on January 25, 2013, and (b) failed to file a timely petition to reopen the confession of judgment against Rhoads Avenue. Plaintiffs now contend that Earle's adverse domination and fraudulent concealment preclude a res judicata bar.

These doctrines do not apply to the case before me. "Under the doctrine of adverse domination, the statute of limitations is tolled for as long as a corporate plaintiff is controlled by the alleged wrongdoers." Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143, 1151 (E.D. Pa. 1994) (citing 3A Fletcher Cyclopedia § 1306.20)). "The doctrine is based on the theory that the corporation which can only act through the controlling wrongdoers cannot reasonably be expected to pursue a claim which it has against them until they are no longer in control."[14] Id. The doctrine of fraudulent concealment serves to toll the statute of limitations where the wrongdoer has taken some step to deceive, either intentionally or unintentionally, so that the plaintiff is not aware of the injury until after the statute of limitations has

---

[13] By order dated August 16, 2012, the state court prohibited Spaeder from having any involvement in the Partnerships and granted Earle, doing business as Rosedon Holding, exclusive control. (Pls.' Resp. Opp'n, ECF No. 20, Ex. 11.)

[14] Although Pennsylvania courts have not explicitly adopted this theory, federal courts have found that the adverse domination theory is applicable to equitably toll the statute of limitations for a cause of action based upon Pennsylvania state law claims. In re O.E.M./Erie, Inc., 405 B.R. 779, 785–86 (W.D. Pa. 2009).

lapsed. Id. Importantly, in both cases, the doctrines serve as a basis for equitable tolling to excuse untimely filings.

In the present case, Plaintiffs face no statute of limitations issues with respect to either Pottstown or Peckville. To the contrary, Plaintiffs actually filed petitions to open the confessed judgments against Pottstown and Peckville in state court and specifically and timely set forth claims of fraudulent activity by Parke Bank. Plaintiffs do not cite, and I cannot locate, any cases where adverse domination and fraudulent concealment were applied outside the tolling context to preclude a finding of res judicata.[15]

To the extent that Plaintiffs contend that the doctrines of adverse domination and fraudulent concealment should excuse Earle's failure to file a timely petition to reopen the confession of judgment against Rhoads Avenue, I have already considered

---

[15] Plaintiffs rely on the case of FDIC v. Bird, 516 F. Supp. 647 (D.P.R. 1981), which held that "a cause of action does not accrue while the culpable directors remain in control of the bank." Id. at 651. In so ruling, the court exhibited "an implicit appreciation of the realities of the shareholders' position, that, without knowledge of wrongful activities committed by directors, shareholders have no meaningful opportunity to bring suit." Id. Plaintiffs urge that this same reasoning should apply in this case where the partnerships did not have a meaningful opportunity to assert the relevant claims against Parke Bank while Earle was in control.

Putting aside the factual dispute of whether Earle was actually in control of the Partnerships at the time of the confessed judgments, Plaintiffs' argument still misses one crucial point. The Partnerships knew of the alleged wrongdoing and actually filed petitions to reopen the confessed judgment on the basis of fraud and breach of fiduciary duty. Unlike the situation in Bird, Plaintiffs here raised the relevant claims now barred by res judicata.

and rejected this argument. As noted above, one of Rhoads Avenue's tenants, Eckerd, filed an interpleader action on August 15, 2013 to determine who should receive its rent payments. Rhoads Avenue filed a cross-claim against Parke Bank alleging, in part, that Parke fraudulently induced Rhoads Avenue into signing the Parke loan documents. Parke Bank moved to dismiss, contending that the confessed judgment operated as a bar to Rhoads Avenue's cross-claim. In its response—filed at the time when Plaintiffs had control over the partnerships and had already settled with Earle—Rhoads Avenue did not argue that its untimely petition resulted from the fact that Earle was in control of Rhoads Avenue. Rather, it contended that it was precluded from filing its petition because of (a) defective service and (b) an alleged inability to raise invalidity issues in the confession action. In an opinion issued on August 4, 2015, I rejected both of those arguments and found that Rhoads Avenue's failure to file a petition to reopen the judgment barred it from asserting that the guaranty, assignment and mortgage were procured by fraud or were not properly recorded in the action. (Defs.' Mot. to Dismiss, Ex. J.)

Having lost on their previous efforts to explain away their untimely petition, Plaintiffs may not now get a second bite at the apple and offer the alternate argument that their failure to timely file a petition to reopen the confessed judgment was a result of Earle's control of Rhoads Avenue.

5. Conclusion as to Pottstown, Peckville, and Rhoads Avenue

In light of the foregoing, I find that all of the claims by Plaintiffs Pottstown, Peckville, and Rhoads Avenue

in the Amended Complaint were raised and rejected, or could have been raised, in their petitions to reopen the confessions of judgment in state court. Accordingly, I conclude that the doctrine of res judicata applies and I will dismiss their claims with prejudice.

B. Shea's Claim

1. State Court Proceedings

On August 1, 2013, Parke Bank filed a Complaint in Delaware County Court of Common Pleas against Shea because he defaulted under the Shea LOC. (Defs.' Mot. to Dismiss, Ex. G.) In his Third Amended Answer and New Matter, Shea made the following claims:

- On October 23, 2008, Shea was told by a business associate, Earle, that Earle and his entities wanted to borrow money from Parke Bank, but due to federal lending limits, Parke Bank could not lend the money. (Def.'s Mot. to Dismiss, Ex. I, ¶¶ 16–17.)
- Earle asked Shea to sign the loan papers, but stated that Shea would have no liability because the loan would be fully collateralized by Earle's property. (Id. ¶ 18.)
- Shea agreed and, on October 23, 2008, Earle picked up Shea and drove him to Parke Bank. Shea spent about one-half hour there and the only person who saw him or spoke to him was a person named "Dee." (Id. ¶¶ 20–21.)
- Shea did not read any of the documents and was never asked by anyone at the Bank why he was signing the loan documents, or what he believed the loan was for. (Id. ¶¶ 22, 24.) Nor

was he asked by the Bank to provide any financial statements, tax returns, or other proof of worth. (Id. ¶ 25.)

- After he signed the documents, Shea got back in Earle's car and was driven home. (Id. ¶ 26.)
- Shea never received any of the loan proceeds. (Id. ¶ 27.)

On January 20, 2015, the state court entered a default judgment in favor of Parke Bank and scheduled a damages hearing. (Def.'s Mot. to Dismiss, Ex. G.) At the damages hearing, the court entered judgment against Shea in the amount of $1,573,682.25. (Id., Ex. H.)

2. Federal Court Claims

The federal and state law claims in the current Amended Complaint allege that in mid-2008, Earle went to Pantilione about obtaining a line of credit to provide additional funds for his ventures. Pantilione identified a property owned by Earle and his wife in Margate, NJ as a source of security for the line of credit, but explained that Earle could not personally guaranty the line of credit due to lending limit regulations. As such, Pantilione suggested the Earle find a business associate to personally guarantee the line of credit. Earle approached Shea about his willingness to guarantee the line of credit. Pantilione then represented to Shea that Parke Bank viewed the real security for the line of credit to be the mortgage on Margate Property and that $2,350,000 of the funds available through the line of credit would be used as additional cash collateral to help improve the collateralization of the Lionville, Pottstown, and Peckville loans. In reliance on these representations,

Shea agreed to enter into the line of credit agreement and guarantee the funds.

3. Application of Res Judicata Elements

Given the foregoing, I find that Shea's claims, like those of Pottstown, Peckville, and Rhoads Avenue, are barred by res judicata.

First, the state court action constituted a final judgment on the merits. The Third Circuit has repeatedly emphasized the longstanding principle law that "a default judgment is a final judgment with res judicata effect." Schuldiner v. Kmart Corp., 284 F. App'x 918, 921 (3d Cir. 2008) (citing Riehle v. Margolies, 279 U.S. 218, 225 (1929)). Pennsylvania courts have also expressly found that "[a] default judgment in an earlier case constitutes a "valid final judgment on the merits" for the purpose of a res judicata analysis. See Zimmer v. Zimmer, 326 A.2d 318, 320 (Pa. 1974) ("This Court has long held that a judgment by default is res judicata and quite as conclusive as one rendered on a verdict after litigation insofar as a defaulting defendant is conceived.").[16]

Second, the parties are the same in the two litigations. In state court, Parke Bank brought suit

[16] See also Morris v. Jones, 329 U.S. 545, 550–51 (1947) ("A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default.") (internal quotation marks omitted); Balent v. City of Wilkes–Barre, 669 A.2d 309, 313 (Pa. 1995) ("Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.").

against Shea. In federal court, Shea has brought suit against Parke Bank and its privies.

Finally, the state court suit involved the same claims as the present federal action. In state court, Shea filed an Answer, New Matter, and Counterclaims alleging fraud in the inducement, fraud, civil conspiracy, and breach of contract/lender liability. In response to Parke Bank's preliminary objections and/or motions for summary judgment, Shea amended his pleading three times, ultimately filing a Third Amended Complaint that converted his counterclaims into the affirmative defenses of fraud, fraud in the inducement, illegality, unclean hands, bad faith, unfair lending practices, and breach of contract. These defenses mirror the federal court claims. See Smith v. Litton Loan Servicing, LP, No. 04-2846, 2005 WL 289927, at *5 (E.D. Pa. Feb. 4, 2005) (holding that where current federal claims would have been defenses to foreclosure, the entry of a default foreclosure judgment by the state court constitutes a bar to the reassertion of any such claims in federal court that should have been litigated in the state court). The simple fact that Shea now couches his claims in the RICO statute does not disrupt the essential similarity of the underlying events giving rise to the claims.

In light of the foregoing, Shea's claims are barred by the doctrine of res judicata.

C. Lionville's Claims

1. State Court Proceedings

On April 1, 2013, Plaintiff Spaeder filed a complaint in Delaware County against Earle, Earle's wife, and Earle's company Rosedon Holdings. (Defs.'

Mot. to Dismiss, Ex. K.) Spaeder made the following allegations with respect to Lionville:

- Spaeder negotiated the December 17, 2007 purchase of a movie theater in Lionville, Chester County, on behalf of Earle and Spaeder's partnership, for $2,456,644 with proceeds from a second loan for $3,098,000 from Parke Bank. The funds in excess of the purchase price were kept in escrow by the Bank for construction. Earle guaranteed the loan and legal title was put in Devon Drive Lionville, LP, with equitable ownership in the partnership between Earle and Spaeder. (Def.'s Mot. to Dismiss, Ex. 27, ¶ 40.)
- In December 2010, Spaeder negotiated refinancing the loan and, due to loan lending limits to Earle at Parke Bank, Spaeder and Earle asked third party Jerry Naples to guaranty the new $6,700,000 note. Proceeds from this new loan were used to (a) pay off the original loan of $3,098,000 that was guaranteed by Earle; (b) pay the contractor $2,500,000 for construction at the Rite Aid building at Lionville; and (c) held in escrow $1,102,000 for Phase 2 of the Devon Drive Lionville development. (Id. ¶ 57.)
- In exchange for his guaranty, Naples was given a controlling interest in the Lionville property. On December 29, 2010, Earle sold 100% of his interest in the Lionville Partnership to Naples, and Earle and Spaeder resigned as officers and managers. (Id. ¶ 58.)
- Earle misappropriated $930,383 from Lionville between February 9, 2010 and June 4, 2012.

The source of the money that he misappropriated was the Parke Bank loan guaranteed by Naples. Most of the misappropriated funds were simply transferred to Rosedon Holding to be used for the Earles' personal benefit. (Id. ¶ 84.)

- Spaeder's relationship with Earle collapsed in March, 2012, when Earle instructed Spaeder to physically go to Parke Bank and move all funds out of Devon Drive Lionville, LP, and Peckville, and deposit them in the Rosedon Holding account. (Id. ¶ 97.)

Spaeder eventually settled that suit with Earle and gave Earle and Rosedon Holding an unlimited general release of all claims against them and their "representatives, agents, attorneys, employees, affiliates, predecessors, officers, directors, shareholders, members, partners, successors, heirs, executors, and assigns," from all causes of action "from the beginning of time." (Defs.' Mot. to Dismiss, Ex. L.) On October 10, 2013, the state court entered the Praecipe to Settle, Discontinue and End the case. (Id., Ex. M.)

2. Federal Court Claims

According to the federal Amended Complaint, Parke Bank transferred funds by wire from Lionville to other Parke Bank accounts and, predominantly, to an outside bank account for Rosedon Holding, all without Lionville's consent or approval. Unaware of these transactions, Lionville, through Spaeder, sought to refinance the Parke Bank loan to obtain needed construction funds. Pantilione agreed to refinance the Lionville loan on the condition that Earle reduce his ownership interests in Lionville so that Parke Bank

would not run afoul of lending limitations. In December 2010, Lionville closed on a new loan with Parke Bank for $6,700,000, with a guaranty from a minority partner, Jerry Naples. At Pantilione's direction, however, Parke Bank refused to release any funds for construction unless Earle was completely removed from Lionville's ownership.

In September 2011, Gallo approved payment on an allegedly fraudulent A1A form and directed payment from Lionville's construction loan account to Rosedon Holding, despite knowing that the money did not correspond to any construction cost incurred. Upon receipt of the money from the Lionville construction loan account, Rosedon Holding transferred the majority of the funds from its account back to Parke Bank as payment on several past-due mortgage loan obligations, including the loan for Lionville.

3. Application of Res Judicata Elements

Unlike the previous Plaintiffs, I find that Lionville is not barred by res judicata because neither Lionville nor Parke Bank was a party to the prior settlement. Given the absence of facts to establish the second element of res judicata, this defense does not preclude Lionville's claims.[17]

---

[17] As to the first element, the Third Circuit has held that a settlement agreement could constitute a final judgment on the merits. Weber v. Henderson, 33 F. App'x 610, 612 (3d Cir. 2002) ("For purposes of *res judicata*, final judgment on the merits occurred when the District Court approved settlement and dismissed the case."); see also Rein v. Providian Fin. Corp., 270 F.3d 895, 903 (9th Cir. 2001) ("A judicially approved settlement agreement is considered a final judgment on the merits." (citations omitted)); Guiles v. Metro. Life Ins. Co., No. 00–5029, 2001 WL 1454041, at *1 (E.D. Pa. Nov. 13, 2001) ("A judgment entered with prejudice pursuant to a settlement is a final

In an attempt to overcome this deficiency, Defendants rely on a two-tiered privity argument. First, they contend that the relationship between Spaeder and Lionville is such that Lionville should be deemed to be in privity with Spaeder. Second, they assert that Earle is alleged to have conspired with Parke Bank and, therefore, is in privity with Parke Bank.

As set forth above, "[p]rivity exists where a party adequately represented the nonparties' interests in the prior proceeding." Berwind Corp. v. Apfel, 94 F. Supp. 2d 597, 609 (E.D. Pa. 2000) (citing Martin v. Wilks, 490 U.S. 755, 761 n.2 (1989) (a nonparty may be bound if his interests are "adequately represented by someone with the same interest who is a party"); Gambocz v. Yelencsics, 468 F.2d 837, 841 (3d Cir. 1972) (res judicata bars second action as to defendants who were not parties to first action when there is close or significant relationship between them and defendants who were parties)). "[P]rivity requires a prior legal or representative relationship between a party to the prior action and the nonparty against whom estoppel is asserted. Without such a relationship, there can be no estoppel." Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc., 571 F.3d 299, 312 (3d Cir. 2009). The United States Supreme Court has identified six categories where nonparty preclusion may be appropriate:

---

judgment on the merits for the purposes *of res judicata*."). Accordingly, the Earle-Spaeder settlement, on which basis the state court dismissed the action with prejudice, constitutes a final judgment on the merits for purposes of res judicata.

> 1) the nonparty agrees to be bound by the determination of issues in an action between others;
>
> 2) a substantive legal relationship—i.e. traditional privity—exists that binds the nonparty;
>
> 3) the nonparty was "adequately represented by someone with the same interests who [wa]s a party";
>
> 4) the nonparty assumes control over the litigation in which the judgment is rendered;
>
> 5) the nonparty attempts to bring suit as the designated representative/agent of or proxy for someone who was a party in the prior litigation; and,
>
> 6) the nonparty falls under a special statutory scheme that "expressly foreclos[es] successive litigation by nonlitigants."

Taylor v. Sturgell, 553 U.S. 880, 893–94 (2008) (internal citations omitted).

None of these categories apply either to the Spaeder-Lionville relationship, or to the Earle-Parke Bank relationship.

As to the Spaeder-Lionville relationship, the first, fourth, fifth, and sixth categories are plainly irrelevant because nothing in the record indicates that Lionville agreed to be bound by the results of the Earle-Spaeder litigation, that Lionville assumed control over the state court litigation, that Lionville is now attempting to bring suit as Spaeder's designated representative, or that some special statutory scheme applies. The second category is similarly inapplicable because, although Spaeder was a partner in Lionville,

Plaintiffs have identified no provision in the partnership agreement to indicate that Spaeder's individual action against another partner would bind the partnership. Finally, under the third category,[18] Lionville was not adequately represented by someone with the same interests. Rather, Spaeder raised claims against Earle to recover damages in his personal capacity and not on behalf of, or as the managing partner of, Lionville. On this record, and under these circumstances, there is no basis on which Spaeder could be viewed as so closely connected with Lionville that a suit by Spaeder against Earle could be tantamount to a suit by Lionville itself against Earle.

As to the Earle-Parke Bank relationship, I also cannot find, on the record before me, that Parke Bank was in privity with Earle for purposes of res judicata. Relying on the Third Circuit case of Gambocz v. Yelencsics, 468 F.2d 827, 841 (3d Cir. 1972), Defendants assert that the Amended Complaint characterizes them as co–conspirators with Earle in the RICO violations and, therefore, they must be deemed to be privies of Earle for purposes of the prior settlement. Contrary to Defendants' theory, however, the Gambocz case does not automatically convert all co-conspirators into privies. In that matter, the original action averred a conspiracy participated in by multiple individuals, only some of whom were named as defendants. Id. at 842. The later suit set forth the

[18] Under the third category, "the interests of the party and nonparty must be squarely aligned and there must be either an understanding that the party is acting in a representative capacity or special procedural protections must have been in place in the original action to ensure the due process rights of nonparties who might face issue or claim preclusion." Nationwide Mut. Fire Ins. Co., 571 F.3d at 313.

same cause of action with the same conspiracy, but added some of the originally named conspirators as defendants. Id. The Third Circuit concluded that "the relationship of the additional parties to the second complaint was so close to the parties to the first that the second complaint was merely a repetition of the first cause of action and, therefore, it is barred by application of [res judicata]." Id.[19]

By contrast, the Spaeder-Earle lawsuit involved claims by Spaeder in his individual capacity against Earle in his individual capacity. The complaint in that matter involved no claims of a conspiracy between Earle and any other individual or entity. Nor did the complaint set forth any facts which could have indicated that Parke Bank was involved in any of the alleged wrongdoing. Perhaps most importantly, the Settlement Agreement to which Defendants seek to give res judicata effect is limited to the Earle entities and the Spaeder entities, of which Parke Bank is not a party, and expressly provides that "nothing herein, express or implied, is intended to or shall confer upon any other person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this agreement." (Defs.' Mot. to Dismiss, Ex. 28, ¶ 24.) The mere fact that Plaintiff now alleges that Earle and Parke Bank were co-conspirators in the purported wrongdoing does not permit Parke Bank to

[19] See also Vacanti v. Apothaker & Assocs., P.C., No. 09-5827, 2010 WL 4702382, at *5 (E.D. Pa. Nov. 12, 2010) (applying res judicata where both former complaint and current complaint alleged the same violations of the FDCPA arising from the same facts, but the first suit alleged that the debt collection agency was responsible, while the second suit alleged that the attorney for the agency, acting on behalf of the agency, was responsible).

benefit from an otherwise private settlement between Spaeder and Earle.

As privity of parties is lacking between the Earle-Spaeder settlement and Lionville's claims against Defendants in this case, I need not address the last res judicata element. I conclude that res judicata does not apply to bar Lionville's current claims.

D. Spaeder's Claims

Finally, Defendants seek a finding of res judicata with respect to claims brought by Spaeder individually. Defendants premise their res judicata argument on two theories: (1) the settlement of the Spaeder-Earle lawsuit operates as a res judicata for any claims against the current Defendants and (2) Spaeder's claims are derivative of the direct claims asserted by the Partnerships.

I find no merit to either theory. As discussed in detail above, the settlement in the Spaeder-Earle lawsuit cannot establish res judicata because although Spaeder was a party to that settlement, Earle was not in privity with Parke Bank or its officers. Moreover, nothing in the Amended Complaint reveals that Spaeder's individual claims are derivative of the Partnerships' claims. Rather, Spaeder signed a personal guaranty for the Pottstown loan for which he is now individually liable. Therefore, I will deny the Motion to Dismiss Spaeder's claims.

E. Conclusion on Res Judicata

In light of the foregoing, I find that the claims of Plaintiffs Pottstown, Peckville, Rhodes Avenue, and Shea are all attempts to re-litigate matters that were fully and finally decided in prior judicial proceedings before the state court. Under well-established res

judicata principles, these claims will be dismissed with prejudice. The claims of Plaintiffs Lionville and Spaeder, however, are not barred by the doctrine of res judicata because there is an absence of privity between the parties in the state court action and the parties in the federal court action. To that end, I will deny the Motion to Dismiss Lionville's and Spaeder's claims on res judicata grounds.

III. Whether Plaintiffs Have Properly Pled Their Causes of Action

Defendants argue, in the alternative, that (1) Plaintiffs lack standing to assert RICO claims; (2) Plaintiffs' fail to state a Section 1962(b) claim; (3) Plaintiffs fail to state claims for common law fraud; (4) Spaeder and Rhoads Avenue's claims are time barred; (5) Plaintiffs' conversion claims are barred by the gist of the action doctrine; and (6) Plaintiffs' common law conspiracy claim fails. Plaintiffs respond that they have standing, that their Amended Complaint states a violation of § 1962(b), and that their state law claims satisfy scrutiny.

I decline to consider any of these arguments at this juncture. The Amended Complaint sets forth the various causes of action as to all Plaintiffs collectively. As such, it is almost impossible to decipher which specific allegations go to which Plaintiff. Having now dismissed four of the six Plaintiffs, I cannot discern how the absence of these Plaintiffs' claims impacts the validity of the remaining causes of action by the remaining Plaintiffs. Accordingly, I will deny this portion of Defendants' Motion without prejudice.

CONCLUSION

For all of the foregoing reasons, I will grant the Motion to Dismiss the Amended Complaint as to Plaintiffs Pottstown, Peckville, Rhodes Avenue, and Shea. Defendants' Motion regarding Plaintiffs Lionville and Spaeder is denied without prejudice. Plaintiffs Lionville and Spaeder shall either (1) file a Second Amended Complaint containing allegations only relating to themselves and Defendants, or (2) state that they will not pursue any further claims against Defendants. Upon the filing of a Second Amended Complaint, Defendants shall have another opportunity to move for dismissal.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

[November 27, 2017]

Civil Action No. 15-3435

DEVON DRIVE LIONVILLE, LP, *et al.*,
Plaintiffs,

v.

PARKE BANCORP, INC., *et al.*,
Defendants.

ORDER

AND NOW, this 27th day of November, 2017, upon consideration of (1) Defendants' Motion to Take Judicial Notice (Doc. No. 44), Plaintiffs' Response (Doc. No. 48), and all of the parties' arguments incorporated by reference from their previous briefing on issues of judicial notice; and (2) Defendants' Motion to Dismiss the Amended Complaint (Doc. No. 43), Plaintiffs' Response (Doc. No. 47), and all of the parties' arguments incorporated by reference from their briefing on Defendants' Motion to Dismiss the original Complaint, it is ORDERED that:

1. Defendants' Motion to Take Judicial Notice is GRANTED.
2. Defendants' Motion to Dismiss the Amended Complaint is GRANTED IN PART and DENIED IN PART as follows:

a. The Motion to Dismiss the federal and state law claims of Plaintiffs North Charlotte Road Pottstown, LP, Main Street Peckville, LP, Rhoads Avenue Newtown Square, LP, and John M. Shea is GRANTED and these claims are DISMISSED WITH PREJUDICE;

b. The Motion to Dismiss the federal and state law claims of Plaintiffs Devon Drive Lionville, LP and George Spaeder is DENIED; and

c. Within thirty (30) days from the date of this Order, the remaining Plaintiffs Devon Drive Lionville, LP and George Spaeder shall either file a second amended complaint consistent with the Court's Memorandum and Order or give notice that they will not pursue any further claims against Defendants. Upon the filing of a second amended complaint, Defendants shall have the opportunity to move for dismissal of any remaining claims.

BY THE COURT:

/s/ Mitchell S. Goldberg

_____

MITCHELL S. GOLDBERG, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

[July 26, 2018]

Civil Action No. 15-3435

DEVON DRIVE LIONVILLE, LP, *et al.*,
Plaintiffs,

v.

PARKE BANCORP, INC., *et al.*,
Defendants.

Goldberg, J. July 26, 2018

MEMORANDUM OPINION

This litigation was originally instituted by Plaintiffs, eight limited partnerships and two individuals, against Defendants Parke Bancorp, Inc., Parke Bank, and two of Parke Bank's employees, Vito Pantilione and Ralph Gallo (collectively, "Defendants"). The original Complaint alleged claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C §§ 1961, et seq., in connection with a series of large commercial loans and related transactions. Following two rounds of Motions to Dismiss, only two Plaintiffs presently remain. These Plaintiffs filed a Second Amended Complaint setting forth three RICO claims, as well as state law claims for fraud, conversion, and civil conspiracy. Defendants have moved to dismiss the Second Amended Complaint under Federal Rules of

Civil Procedure 12(b)(6) and 41(b). For the following reasons, I will grant the Motion on both grounds and dismiss the Second Amended Complaint with prejudice.

I. PROCEDURAL HISTORY

The eight original Plaintiffs—Devon Drive Lionville, LP ("Lionville"), North Charlotte Road Pottstown, LP ("Pottstown"), Main Street Peckville, LP ("Peckville"), Rhoads Avenue Newtown Square, LP ("Rhoads Avenue"), VG West Chester Pike, LP ("West Chester Pike"), 1301 Phoenix, LP ("Phoenix"), John Shea ("Shea"), and George Spaeder ("Spaeder")—filed this lawsuit against Defendants on June 19, 2015. I dismissed most of the claims without prejudice for failure to state a claim. Devon Drive Lionville, L.P., et al. v. Parke Bancorp, Inc., et al., No. 15-3435, 2016 WL 475816 (E.D. Pa. Dec. 29, 2016). Two of the Plaintiff Partnerships—West Chester Pike and Phoenix—dropped out of the suit, and the remaining Plaintiffs filed an Amended Complaint on January 30, 2017, setting forth six counts: (1) conduct and participation in an enterprise through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(c); (2) acquisition and maintenance of an interest in and control of an enterprise engaged in a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(b); (3) conspiracy to engage in a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(d); (4) common law fraud; (5) conversion; and (6) civil conspiracy.

On November 27, 2017, I granted in part Defendants' Motion to Dismiss on the grounds of *res judicata* and dismissed all claims brought by Plaintiffs Pottstown, Peckville, Rhoads Avenue, and

Shea, but found no *res judicata* bar regarding the claims alleged by Lionville or Spaeder. I also declined to address Defendants' argument that Lionville and Spaeder had failed to properly plead their substantive causes of action, noting that:

> The Amended Complaint sets forth the various causes of action as to all Plaintiffs collectively. As such, it is almost impossible to decipher which specific allegations go to which Plaintiff. Having now dismissed four of the six Plaintiffs, I cannot discern how the absence of these Plaintiffs' claims impacts the validity of the remaining causes of action by the remaining Plaintiffs.

Devon Drive Lionville, LP v. Parke Bancorp, Inc., No. 15-3435, 2017 WL 5668053, at *25 (E.D. Pa. Nov. 27, 2017). Accordingly, I denied the remainder of the Defendants' Motion to Dismiss without prejudice and granted Plaintiffs Lionville and Spaeder leave to file a second amended pleading, directing that this pleading shall contain "*allegations only relating to themselves and Defendants*." Id. (emphasis added).

On December 27, 2017, Lionville and Spaeder (collectively, "Plaintiffs") filed their Second Amended Complaint. Defendants, in turn, filed (1) a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 41(b) and 12(b)(6); and (2) a Motion to Take Judicial Notice of Adjudicative Facts.[1]

[1] As I will dismiss the Second Amended Complaint on grounds that do not require reliance on any documents outside the pleadings, I will not address the Motion to Take Judicial Notice.

II. FACTUAL BACKGROUND

Despite my directive that any amended complaint disentangle Lionville and Spaeder's claims from those of the dismissed Plaintiffs, the Second Amended Complaint at issue is practically identical to the Amended Complaint. Rather than restating the allegations set forth in the Second Amended Complaint, I will incorporate by reference the extensive factual recitation in my Memorandum and Order of December 29, 2016. Devon Drive Lionville, L.P., et al. v. Parke Bancorp, Inc., et al., No. 15-3435, 2016 WL 475816, at *1–7 (E.D. Pa. Dec. 29, 2016). For purposes of clarity, however, I will summarize the allegations in the Second Amended Complaint below.

The Second Amended Complaint alleges—in identical fashion to the First Amended Complaint—that, in 2003, Plaintiff George Spaeder ("Spaeder") and non-party Bruce Earle ("Earle") entered into an oral partnership agreement for the purpose of buying and selling real estate (the "Earle-Spaeder Partnership"). Together, the two men formed four of the partnerships—Lionville, Pottstown, Peckville, and Rhoads Avenue (collectively, "the Partnerships")—that were, at one point, Plaintiffs in this lawsuit. (Sec. Am. Compl. ("SAC") ¶¶ 15–16.) Currently, only Lionville and Spaeder are Plaintiffs. These Partnerships were formed to purchase, develop, and lease a single Pennsylvania commercial real estate property capable of hosting multiple commercial tenants. Spaeder was principally in charge of managing the day-to-day business of Partnerships, while Earle acted as an independent contractor through his wholly-owned company Rosedon Holding Company Limited Partnership ("Rosedon Holding"). Rosedon Holding took custody of

the books and records of these three Partnerships and monitored their finances. (Id. ¶¶ 16–18.)

To finance their operations, three of the Partnerships—Lionville, Pottstown, and Peckville—obtained financing through Defendant Parke Bank ("Parke Bank"). In December 2007, Lionville borrowed $3,098,000 from Parke Bank to finance the purchase and development of vacant ground featuring three commercial "pads." In March 2008, Pottstown borrowed $8,000,000 from Parke Bank to acquire and renovate a shopping center. In May 2008, Peckville borrowed $5,200,000 from Parke Bank to fund the purchase and renovation of an existing shopping center. (Id. ¶¶ 19–21, 26–28.)

By late 2011, Earle's and Spaeder's relationship had deteriorated and their business partnership began to collapse. Around that time, the loans from Parke Bank to the Pottstown and Peckville Partnerships went into default. Spaeder then filed for bankruptcy and, during the ensuing proceedings in July 2013, the Partnerships began to uncover evidence of an "enterprise" among Parke Bank, Vito Pantilione (Officer and Director of Parke Bank), Defendant Ralph Gallo (Senior Vice President and Chief Workout Officer for Parke Bancorp, Inc.), and Earle (collectively, the "BPGE Enterprise"). (Id. ¶¶ 2, 35–37, 41.)

According to the Second Amended Complaint, Parke Bank allegedly participated in the BPGE Enterprise when it utilized the funds available under the loans and/or lines of credit extended to the various independent limited partnership entities as one "piggy bank." This piggy bank allegedly funded troubled loans to create the appearance of a

performing loan. Despite the fact that the Lionville, Pottstown, and Peckville Partnerships were separate legal entities with different assets and ownership, it is alleged that Parke Bank treated these loans as if they were three loans to the same borrower, controlled by Earle, such that their loans could be cross-collateralized by Parke Bank as it saw fit. Parke Bank sent correspondence revealing unauthorized transfers and other allegedly fraudulent activity to Earle. In addition to the individual bank account statements, Parke Bank, acting at Pantilione's and/or Gallo's instruction, compiled and/or emailed to Earle reports that detailed account activity for each of the Parke Bank accounts over which Earle had allegedly usurped control. (Id. ¶¶ 52, 54–65.)

As stated above, aside from two small additions, set forth below, the Second Amended Complaint's 192 paragraphs are identical to the dismissed Amended Complaint.[2] The new allegations and one new claim that vary from the First Amended Complaint are as follows:

First, paragraphs 107–112 of the Second Amended Complaint allege that, in March 2008, Pottstown secured an $8,000,000 loan in connection with its acquisition of the property at 1400 North Charlotte Street, Pottstown, PA. The plan for that property was to completely renovate the existing shopping center using $4,146,000 of earmarked funds and then lease the space. The agreement, which described the total

[2] The Second Amended Complaint added several new paragraphs intended to bolster their existing claims, none of which require further discussion here as they are repetitive of other allegations already in the pleading. (Id. ¶¶ 22, 38, 161, 164, 167 (first version on p. 44), 162–63 (second versions on p. 44), 167 (second version on p. 45), 168.)

loan budget, permitted Pottstown to pull an additional $1 million from the loan balance contingent on providing additional collateral. When the $1 million was repaid, the collateral was to be released. The additional collateral—two other Pennsylvania properties—was delivered prior to any draw on the funds from the Construction Loan. Even though the collateral was released by the terms of the loan documents, Earle allowed Parke Bank to take a confessed judgment against the limited partnership that owned the collateral, without raising any defenses. (Id. ¶¶ 88-89, 108–11.) Importantly, the Second Amended Complaint does not connect these new allegations to any of the claims of the remaining Plaintiffs.

Second, paragraphs 184 to 188 of the Second Amended Complaint set forth a new conversion claim by Spaeder. In the Amended Complaint, the conversion claim was brought by Lionville, Pottstown, Peckville, and Shea. In the Second Amended Complaint, Plaintiffs deleted Pottstown and Peckville from the claim and substituted Spaeder's name wherever Shea's name appeared.

III. MOTION TO DISMSS UNDER FED. R. CIV. P. 12(b)(6)

A. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant bears the burden of demonstrating that the plaintiff has not stated a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); see also Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005). The United States Supreme Court has recognized that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and

conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quotations omitted). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "only a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "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." Id. A complaint does not show an entitlement to relief when the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct. Id.

The United States Court of Appeals for the Third Circuit has detailed a three-step process to determine whether a complaint meets the pleadings standard. Bistrian v. Levi, 696 F.3d 352 (3d Cir. 2014). First, the court outlines the elements a plaintiff must plead to state a claim for relief. Id. at 365. Next, the court must "peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth." Id. Finally, the court "look[s] for well-pled factual allegations, assume[s] their veracity, and then 'determine[s] whether they plausibly give rise to an entitlement to relief.'" Id. (quoting Iqbal, 556 U.S. at 679). The last step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (quoting Iqbal, 556 U.S. at 679).

Claims of fraud, either standing alone or as predicate acts for a RICO claim, are subject to the heightened requirements of Federal Rule of Civil Procedure 9(b). Warden v. McLelland 288 F.3d 105, 114 n.6 (3d Cir. 2002). "In all averments of fraud or

mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). In order to satisfy Rule 9(b), "a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the 'precise misconduct with which [it is] charged.'" Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) (citation omitted). Plaintiffs may satisfy this requirement by pleading the "date, time and place" of the alleged fraud or "otherwise inject precision or some measure of substantiation into a fraud allegation." Id.

B. Claims Against Parke Bancorp, Inc.

Plaintiffs set forth RICO claims against, among others, Parke Bancorp, Inc. ("PBI"), which, according to the Second Amended Complaint, is a corporation that wholly owns Defendant Parke Bank. (SAC ¶¶ 8–9.) Defendants seek to dismiss all causes of action against PBI.

The Third Circuit has held that "mere ownership of a subsidiary does not justify the imposition of liability on the parent." Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001). While the Third Circuit recognized that it is "theoretically possible for a parent corporation and its subsidiary to be the enterprise" under RICO, "the plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity which is distinct from the activities of its subsidiary." Lorenz v. CSX Corp., 1 F.3d 1406, 1412 (3d Cir. 1993). "A RICO claim under section 1962(c) is not stated where the subsidiary merely acts on behalf of, or to the benefit of, its parent." Id.

Here, the sole allegation in the Second Amended Complaint regarding the parent company, PBI, is a statement that Parke Bank is a "wholly owned subsidiary" of PBI. (SAC ¶ 9.) Plaintiffs' pleading otherwise contains no facts that could justify any inference that PBI had any involvement in the alleged actions at issue in this case. Plaintiffs do not address this argument, let alone make an effort to identify any misdeeds by PBI. Accordingly, I will grant Defendants' Motion to Dismiss on this ground and dismiss all claims against PBI.

C. Standing to Assert RICO Claims

Counts I to III of the Second Amended Complaint set forth RICO claims against Defendants under 18 U.S.C. § 1962(b), (c), and (d). Defendants move to dismiss all three of these claims on the ground that Plaintiffs do not have standing under RICO.

Apart from the Article III constitutional and prudential standing requirements, plaintiffs seeking recovery under RICO must satisfy additional standing criterion set forth in section 1964(c) of the statute. Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000). "In the RICO setting, standing is conferred upon 'any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . .'" Id. at 482–83 (quoting 18 U.S.C. § 1964(c)). Based on this language, the Third Circuit has read section 1964(c) as requiring a RICO plaintiff to make two related but analytically distinct threshold showings: (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the defendant's violation of 18 U.S.C. § 1962. Id. at 483. A failure to allege RICO standing is grounds for dismissal under Rule 12(b)(6). Vavro v.

Albers, No. 05-321, 2006 WL 2547350, at *20 (W.D. Pa. Aug. 31, 2006).

Here, the only issue is whether Plaintiffs have adequately pled the second requirement. RICO's "by reason of" language requires that the defendant's RICO violation be the proximate cause of the plaintiff's injury. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006); Holmes v. Secs. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992). The plaintiff must therefore allege "some direct relation between the injury asserted and the injurious conduct alleged." Holmes, 503 U.S. at 268. A showing only that the RICO violation was a "but for" cause of the injury will not suffice for RICO standing. Id.; Walter v. Palisades Collection, LLC, 480 F. Supp. 2d 797, 805 (E.D. Pa. 2007).

In cases involving RICO claims premised on mail and wire fraud, the law is somewhat unsettled as to whether the "proximate cause" element of standing requires a plaintiff to plead some form of reliance on the alleged mail and wire fraud. The United States Supreme Court, in Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008), expressly held that first-party reliance—*i.e.,* reliance by the plaintiff on a fraudulent wire or mailing—is not an element of a civil RICO claim premised on mail fraud. Id. at 641–42. In so ruling, the Court also rejected the contention that proof of first-party reliance is necessary to establish proximate causation. Id. The Court stated that "first-party reliance [is not] necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy . . . proximate-cause principles." Id. at 657–58.

The Supreme Court, however, was less clear on whether some other type of reliance allegation remained crucial to RICO standing. In Bridge, the Court remarked that "[o]f course, none of this is to say that a RICO plaintiff who alleges injury 'by reason of' a pattern of mail fraud can prevail without showing that *someone* relied upon the defendant's misrepresentations." Id. at 658 (emphasis in original). "In most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation. . . . Accordingly, it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation." Id.

This latter language has left open for debate whether a RICO plaintiff alleging mail and wire fraud must plead at least third-party reliance in order to establish standing. The Third Circuit has yet to weigh in on this issue. Walter, 480 F. Supp. 2d at 806 (noting the lack of guidance from the Third Circuit). "However, numerous cases from this district have held that reliance upon a material representation is required because '[i]t is a matter of basic logic that a misrepresentation cannot cause, much less proximately cause, injury, unless someone relies upon it.'" Lynch v. Capital One Bank (USA), N.A., No. 12-992, 2013 WL 2915734, at *3 (E.D. Pa. 2013) (quoting Central Transp., LLC v. Atlas Towing, Inc., 884 F. Supp. 2d 207, 215–16 (E.D. Pa. 2012)); see also Stoneback v. ArtsQuest, Civ. A. No. 12–3287, 2013 WL 3090714, at *15 (E.D. Pa. June 20, 2013) (denying civil RICO class certification because establishing proximate cause required individualized showings that "*someone* relied on the defendant's misrepresentations"); Coleman v. Commonwealth

Land Title Ins. Co., 318 F.R.D. 275, 288 (E.D. Pa. 2016) ("A demonstration of some form of reliance, whether first- or third-party, is necessary to establish causation, linking the prohibited racketeering activity to the alleged injury."); Checker CAB Phila., Inc. v. Uber Techs., Inc., No. 14-7265, 2016 WL 950934, at *9 (E.D. Pa. Mar. 7, 2016) ("To establish a RICO violation premised on mail or wire fraud (as Plaintiffs' claims are here), the plaintiff must also allege facts to show reliance on the defendant's alleged misrepresentations."), aff'd, 689 F. App'x 707 (3d Cir. 2017); District 1199P Health & Welfare Plan v. Janssen, L.P., 784 F. Supp. 2d 508, 525 (D.N.J. 2011) ("[W]ithout sufficient allegations of direct reliance, Plaintiffs have not properly alleged that Defendants' misrepresentations were the 'but for' cause of their injuries."); see also In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 119 (2d Cir. 2013) (holding, in the context of the predicate acts of mail and wire fraud, "'proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation' . . . because plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to establish causation under RICO.") (internal quotations omitted).[3]

A majority of the district courts within this Circuit have concluded that "some form of reliance on the defendant's misrepresentation is necessary to

[3] But see Impala Platinum Holdings Ltd. v. A-1 Specialized Servs. & Supplies, Inc., No. 16-1343, 2016 WL 8256412, at *10 (E.D. Pa. Sept. 16, 2016) ("While the Supreme Court acknowledged 'it may well be that a RICO plaintiff alleging injury by reason of a pattern of mail fraud must establish at least third-party reliance in order to prove causation,' the Court did not hold that it was a requirement for doing so, particularly at the pleading stage.")

properly establish proximate cause for a RICO violation based on mail or wire fraud." Lynch, 2013 WL 2915734, at *3. I also find this line of reasoning persuasive.

Here, the Second Amended Complaint lists a number of allegedly fraudulent communications occurring through the mail or interstate wire system. Notably, however, all of these communications occurred solely, and secretly, between Defendant Parke Bank and third-party Bruce Earle, who is part of the alleged RICO enterprise. The pleading at issue specifically references:

- Correspondence from Defendant Parke Bank concerning the loans to the Lionville, Pottstown, and Peckville partnerships was sent only to the offices of Rosedon Holding, an entity controlled entirely by alleged co-conspirator Bruce Earle. (Sec. Am. Compl. ¶¶ 54–59.)
- Correspondence from Parke Bank revealing unauthorized transfers and other allegedly fraudulent activity to Earle, including periodic loan account statements generated by Parke Bank for each account held by the Plaintiff partnerships, as well as reports that detailed account activity for each of the Parke Bank accounts over which Earle had allegedly usurped control. (Id. ¶¶ 60–65.)
- Parke Bank's facilitation of funds transfers from Lionville's account to Rosedon Holding without Lionville's authorization. These payments were directed by mail, email, and/or online access to Rosedon Holding at Earle's request. (Id. ¶¶ 69–74.)

- Parke Bank's assessment of Lionville's account with an allegedly fraudulent "late charge" which was later waived. Lionville never received notice of the assessment of these late charges. (Id. ¶¶ 84–86.)

None of the communications which form the basis of the mail or wire fraud claims were directed towards Plaintiffs. Quite to the contrary, Plaintiffs explicitly assert that they never received any of the alleged fraudulent mailings or wires and that Parke Bank's use of the mails to send account statements reflecting unauthorized transactions was directed "to Earle only" so as to conceal the activities of the BPGE Enterprise. (SAC ¶¶ 59, 60, 61, 64, 70, 78, 81, 85, 91, 94, 117, 128, 159(a)(b)(e).) Thus, Plaintiffs have not alleged first-party reliance.

Moreover, nothing in the Second Amended Complaint demonstrates any reliance on the alleged mail and wire fraud by any third-party outside the RICO enterprise. The unauthorized wire transfers of funds and mailing of fraudulent bank statements were all made by Parke Bank, purportedly at the direction of Pantilione and Gallo, to Rosedon Holdings, which was controlled entirely by alleged co-conspirator Bruce Earle. (SAC ¶¶ 70–72, 78–81 90–92, 116–18.) The Second Amended Complaint repeatedly emphasizes that all fraudulent use of the mails and wires was intra-enterprise, with no communications sent to third parties. (SAC ¶¶ 59–62, 64–66, 70–72, 81, 90–92, 116–18.) Plaintiffs' pleading is devoid of any allegation that any party outside the purported conspiracy was aware of the transfers, let alone that an outside party relied upon them.

In their response to Defendants' Motion, Plaintiffs make no effort to identify any reliance by anyone outside the alleged enterprise.[4] Rather, Plaintiffs argue that, under Bridge, first-party reliance is not required. But Plaintiffs do not address the great weight of authority requiring at least some form of reliance on the alleged mail and wire communications. Absent a demonstration of reliance, whether first-party or third-party, Plaintiffs cannot establish that the wires/mailings referenced in the Second Amended Complaint proximately caused Plaintiffs' injuries. As such, I conclude that the proximate cause element of RICO standing has not been satisfied.[5]

D. Remaining State Law Claims

Having dismissed all federal causes of action upon which the Court's jurisdiction is based, I must now determine whether to retain supplemental jurisdiction over the remaining state law claims.

Under 28 U.S.C. § 1367, "a district court has authority to exercise supplemental jurisdiction over non-federal claims arising from the same case or controversy as the federal claim." De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 308 (3d Cir. 2003). "The purpose of supplemental jurisdiction is to promote convenience and efficient judicial administration." Resnick v. Lower Burrell Police Dept., No. 09-893, 2010 WL 88816, at *3 (W.D. Pa. Jan. 8, 2010). When the district court dismisses all of the claims over which it had original jurisdiction, it may decline to exercise supplemental jurisdiction. 28 U.S.C. §

[4] Plaintiffs incorporated by reference their Response to Defendants' Motion to Dismiss the Amended Complaint.

[5] Because I will dismiss the RICO claims on standing grounds, I need not address Defendants' other Rule 12(b)(6) arguments.

1367(c)(3). "A district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639 (2009). In order to determine whether supplemental state law claims should be dismissed when the federal law claims have been eliminated before trial, the court must consider the balance of factors including judicial economy, convenience, fairness, and comity. Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

Although neither party in this case has addressed the foregoing factors, I find that the balance of such factors advocates against the exercise of supplemental jurisdiction. This case remains at the most preliminary stages of litigation with Defendants having yet to even file an answer. I have heard no other motions other than motions to dismiss, held no status conferences, and entered no scheduling order. Moreover, the sole claims remaining are common law fraud, conversion, and civil conspiracy, which the Pennsylvania courts are better suited to address, particularly in the absence of any federal issue or other independent basis for federal jurisdiction. See Carnegie-Mellon, 484 U.S. at 351 ("[w]hen the single federal-law claim in the action [is] eliminated at an early stage of the litigation, the District Court ha[s] a powerful reason to choose not to continue to exercise jurisdiction."). Therefore, I decline to exercise supplemental jurisdiction over the remaining state law claims and will dismiss them without prejudice to Plaintiffs' right to refile them in state court.

IV. MOTION TO DISMISS UNDER FED. R. CIV. P. 41(b)

Notwithstanding my ruling under Federal Rule of Civil Procedure 12(b)(6), I find that the Second Amended Complaint is also subject to dismissal under Federal Rule of Civil Procedure 41(b).

In my prior Memorandum Opinion granting in part the Motion to Dismiss the Amended Complaint, I declined to consider Defendants' arguments regarding the merits of the remaining Plaintiffs' RICO and common law claims because it was difficult to determine how the dismissal of four Plaintiffs impacted the validity of the remaining causes of action. Devon Drive Lionville, 2017 WL 5668053, at *25. Consequently, I ordered the remaining Plaintiffs (Lionville and Spaeder) to "either (1) file a Second Amended Complaint containing allegations only relating to themselves and Defendants, or (2) state that they will not pursue any further claims against Defendants." Id.

Despite these clear directives, Plaintiffs filed the identical complaint with the addition of some new claims, which included facts regarding an additional loan and a conversion claim by Plaintiff Spaeder. In other words, instead of paring down the existing 184-paragraph Amended Complaint to reflect the dismissal of four of the six Plaintiffs, Plaintiffs submitted a 192-paragraph Second Amended Complaint that again included allegations involving all six Plaintiffs. Defendants now claim that Rule 41(b) supports dismissal of the Second Amended Complaint with prejudice.

Federal Rule of Civil Procedure 41(b) provides:

> (b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b).

The United States Court of Appeals for the Third Circuit has recognized that "[d]istrict court judges, confronted with litigants who flagrantly violate or ignore court orders, often have no appropriate or efficacious recourse other than dismissal of the complaint with prejudice." Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). To determine the propriety of punitive dismissals, the Third Circuit, in Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984), has outlined a series of factors to be considered. The six Poulis factors include:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

747 F.2d at 868. Although "[d]ismissal is a harsh remedy and should be resorted to only in extreme cases," Marshall v. Sielaff, 492 F.2d 917, 918 (3d Cir. 1974), not all of the Poulis factors need be satisfied in order to dismiss a complaint." Mindek, 964 F.2d at 1372. Indeed, there is no "magic formula" or "mechanical calculation" with regard to Poulis analysis. Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008) (quoting Mindek, 964 F.2d at 1372). Instead, the decision should be made "in the context of the district court's extended contact with the litigant." Mindek, 964 F.2d at 1372.

With these principles in mind, I consider the Poulis factors in the context of this case.[6]

A. Personal Responsibility

"The first Poulis factor is an inquiry into the noncompliant party's personal responsibility." In re Avandia Mktg., Sales Practices & Prods. Liab. Litig., 319 F.R.D. 480, 485 (E.D. Pa. 2017). The United States Supreme Court has emphasized that the mere fact that a party is represented by counsel whose

[6] Defendants assert that application of the Poulis factors is unnecessary in circumstances where the plaintiff fails to file an amended complaint in accordance with a court order, as the "litigant's conduct makes adjudication of the case impossible." Azubuko v. Bell Nat'l Org., 243 F. App'x 728, 729 (3d Cir. 2007) (citing Guyer v. Beard, 907 F.2d 1424, 1429–30 (3d Cir. 1990)). Azubko, however, involved a situation where the original complaint was dismissed and, notwithstanding the court's order, the plaintiff failed to file an amended complaint. Under those circumstances, adjudication of the case was impossible because there was no operative complaint, meaning balancing of the Poulis factors was unnecessary. Id. at 729. Here, Plaintiffs have filed a Second Amended Complaint, albeit one that does not comply with the Court's Order. Given these circumstances, I will engage in a Poulis balancing test.

conduct was dilatory does not preclude dismissal of a case under Rule 41(b):

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposed an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. Wabash R. Co., 370 U.S. 626, 633–34 (1962) (quotations omitted). Nonetheless, the first Poulis factor focuses more closely on whether the party himself has failed to comply with the court's orders as opposed to whether counsel for the party is responsible. Briscoe, 538 F.3d at 258-59; Vittas v. Brooks Bros. Inc., Grp., No. 14-3617, 2017 WL 6316633, at *2 (D.N.J. Dec. 11, 2017). Thus, where the party's attorney is largely responsible for the misconduct, the Third Circuit has "increasingly emphasized visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault." Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 807 (3d Cir. 1986).

Here, Plaintiffs' response to the Rule 41(b) motion does not attempt to disclaim Plaintiffs' responsibility for counsel's actions. Defendants, however, present no evidence that Plaintiffs were personally responsible

for the Second Amended Complaint's noncompliance with the Court Order. As I cannot determine responsibility, I find the first Poulis factor neutral.

B. Prejudice to the Adversary

Under the second Poulis factor, "[e]vidence of prejudice to an adversary would bear substantial weight in support of a dismissal or default judgment." Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 873-74 (3d Cir. 1994) (internal quotation marks and citation omitted). Prejudice is not limited to "irremediable" or "irreparable" harm. Briscoe, 538 F.3d at 259; see also Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir. 2003); Curtis T. Bedwell & Sons, Inc. v. Int'l Fidelity Ins. Co., 843 F.2d 683, 693–94 (3d Cir. 1988). It also includes "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy." Ware, 322 F.3d at 222.

Here, Plaintiffs' disregard of my Order granting them a third opportunity to properly plead their claims precluded the advancement of this litigation. It is worth repeating the procedural history of this case. Plaintiffs originally filed this lawsuit against Defendants on June 19, 2015. I dismissed most of the claims without prejudice for failure to state a claim, and granted Plaintiffs leave to amend their Complaint. Six of the original eight Plaintiffs then filed an Amended Complaint on January 30, 2017. I dismissed claims by four of the Plaintiffs based on the doctrine *res judicata*. Devon Drive Lionville, 2017 WL 5668053. Plaintiffs are now on their third iteration of the Complaint and, despite my clear directive that they pare down the remaining allegations to clearly reflect the basis of liability for the remaining RICO

violations, Plaintiffs submitted an even more unwieldy pleading that mostly mirrors the prior pleading. As a result, Defendants cannot decipher the claims against them and have been forced to re-raise arguments previously submitted in connection with their Motion to Dismiss the Amended Complaint. As the Court reviewing the pleading, I have the same dilemma. Because Plaintiffs' actions "frustrate[] and delay[] the resolution of this action," I find that the second Poulis factor weighs in favor of dismissal. Metro Metals USA v. All-State Diversified Prod., Inc., No. 12-1448, 2013 WL 1786593, at *2 (D.N.J. Apr. 25, 2013).

C. History of Dilatoriness

The third Poulis factor looks at the Plaintiffs' history of dilatoriness. "Extensive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders." Chiarulli v. Taylor, No. 08-4400, 2010 WL 1371944, at *3 (D.N.J. Mar. 31, 2010) (quoting Adams, 29 F.3d at 874).

Although Defendants argue that Plaintiffs' conduct with respect to the filing of the Second Amended Complaint demonstrates their dilatoriness, the third Poulis factor is more concerned with the *history* of dilatoriness. "[C]onduct that occurs one or two times is insufficient to demonstrate a 'history of dilatoriness.'" Briscoe, 538 F.3d at 261 (quotations omitted). As Defendants have not identified any other instances of noncompliance with Court orders, or any other conduct amounting to dilatoriness, I find that this factor weighs against dismissal.

D. Willfulness or Bad Faith

Under the fourth factor, the Court must consider whether the conduct was "the type of willful or contumacious behavior which was characterized as flagrant bad faith." Adams, 29 F.3d at 875 (internal quotation marks and citation omitted). Generally, "[w]illfulness involves intentional or self-serving behavior." Id. "If the conduct is merely negligent or inadvertent, we will not call the conduct 'contumacious.'" Briscoe, 538 F.3d at 262; see Poulis, 747 F.2d at 868–69 (finding that plaintiff's counsel's behavior was not contumacious because, although he had missed deadlines, there was no suggestion that his delays were for any reason other than his and his wife's poor health); see also Emerson v. Thiel Coll., 296 F.3d 184, 191 (3d Cir. 2002) (finding bad faith because the conduct went beyond mere negligence).

Plaintiffs made no effort to comply with my order that they file a Second Amended Complaint relating only to themselves and Defendants. Instead, they filed an almost verbatim copy of the Amended Complaint, and in self-serving fashion, justify this non-compliance arguing it was "necessary" and "crucial":

> Of course, in order to provide the necessary facts and background to support Plaintiffs' causes of action, Plaintiffs had to provide the facts relating to the Defendants['] conduct for all Partnerships. This is complex litigation with causes of action based on Defendants['] egregious violations of the RICO Act, fraud, conversion and conspiracy. All of the allegations set forth in the Second Amended Complaint are crucial to establish the conduct

> and pattern of behavior exhibited by the Defendants.[7]

(Pls.' Opp'n Mot. to Dismiss p. 16.) Despite my unambiguous statements that (a) the Amended Complaint contained numerous irrelevant allegations; (b) I could not clearly analyze the merits of their Amended Complaint in its existing format; and (c) Plaintiffs must replead the allegations, Plaintiffs nonetheless decided that they would disregard my Order. Plaintiffs' willful failure to comply with my Order weighs in favor of dismissal.

E. Effectiveness of Sanctions Other Than Dismissal

The fifth Poulis factor considers whether alternative sanctions would be more effective than dismissal. Generally, a district court "should be reluctant to deprive a plaintiff of the right to have his claim adjudicated on the merits[,]" see Titus v. Mercedes Benz of North Am., 695 F.2d 746, 749 (3d Cir.1982), and therefore "must consider the availability of sanctions alternative to dismissal." Briscoe, 538 F.3d at 262 (citing Poulis, 747 F.2d at 869). The Third Circuit has recognized that alternative sanctions

---

[7] Plaintiffs' claim that all the facts in the Second Amended Complaint are crucial to establish a pattern of misconduct is disingenuous. By way of example, Plaintiff Shea was previously dismissed from this case and his claims have no bearing on injury suffered by any of the Plaintiff Partnerships or Plaintiff Spaeder. Yet, the Second Amended Complaint contains at least fourteen paragraphs exclusively relating to Shea. Moreover, although Plaintiff Peckville was dismissed from this case, the Second Amended Complaint contains at least sixteen paragraphs discussing the alleged unauthorized wire transfers, payment of unsigned/forged checks, assessment of fraudulent late charges, and unilateral modification of loan terms relating solely to Peckville's account.

"include a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees, the temporary suspension of the culpable counsel from practice before the court, . . . dismissal of the suit unless new counsel is secured[,] . . . the preclusion of claims or defenses, or the imposition of fees and costs upon plaintiff's counsel under 28 U.S.C. § 1927." Titus, 695 F.2d at 749 n.6.

Two cases from this district with similar procedural backgrounds have deemed dismissal warranted under this factor. In Morris v. Kesserling, No. 09-1739, 2011 WL 1752828 (M.D. Pa. May 9, 2011), aff'd, 514 F. App'x 233 (3d Cir. 2013), the court dismissed the plaintiffs' amended complaint because it contained "sweeping statements and generalized allegations" that failed to provide the necessary details. Id. at *1. The court had ordered the plaintiffs to file a new complaint that "provide[d] factual information corresponding to the allegations of the amended complaint." Id. But, the plaintiffs' counsel "refused to heed" the court's directives and submitted a second amended complaint "whose factual allegations [were] essentially identical to those of the [a]mended [c]omplaint." Id. Considering the Poulis factors, the court found that because "Plaintiffs' scornful refusal to abide by the clear and reasonable Order of the Court is a direct affront to the judicial process," there was "no sanction short of dismissal" which was appropriate. Id. at *3.

Similarly, in Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh, No. 09-1548, 2011 WL 2637481 (W.D. Pa. July 6, 2011), the court dismissed plaintiff's original complaint alleging age, sex, national origin, and race discrimination, and granted

leave to file an amended complaint only with respect to her claims of race discrimination and retaliation under 42 U.S.C. § 1981. Id. at *1. Plaintiff filed an amended complaint which realleged all fourteen previously dismissed claims. Id. The court struck the amended complaint for failure to comply with the prior order and directed plaintiff to file a conforming second amended complaint. Plaintiff, proceeding *pro se*, failed to file a second amended complaint and defendants moved to dismiss. Id. The court found, under the Poulis factors, that dismissal was warranted. Id.

Here, Plaintiffs offer no persuasive reason to convince me that any other sanction other than dismissal will remedy the continuing pleading problem. Plaintiffs were clearly advised that the Amended Complaint, in its current form, did not permit clear adjudication of Defendants' remaining 12(b)(6) challenges. Plaintiffs' noncompliance makes adjudication of the case impossible. Other than allowing Plaintiffs yet another opportunity to provide a complaint that conforms to my Order, I cannot discern, and Plaintiffs have not suggested, any alternative sanction.

F. Meritoriousness of Claim or Defense

The standard of meritoriousness when reviewing a dismissal is not stringent:

> [W]e do not purport to use summary judgment standards. A claim, or defense, will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense.

Poulis, 747 F.2d at 869–870.

This factor weighs in favor of dismissal here. As set out above, and incorporated here into my Poulis analysis, Plaintiffs have not properly alleged the necessary reliance to maintain standing to pursue their RICO claims. (See pp. 8–13, infra.) Therefore, I find that this factor weighs in favor of dismissal.

G. Conclusion as to Rule 41(b) Motion

"The final step in the Poulis analysis is to weigh and consider all the above factors to determine if dismissal is warranted." Stafford v. Derose, No. 09-346, 2015 WL 1499833, at *5 (M.D. Pa. Apr. 1, 2015). The second, fourth, fifth, and sixth factors weigh significantly in favor of dismissal, while the third factor leans against dismissal, and the first factor appears to be neutral. As the weight of these factors strongly supports dismissal of the action, I will dismiss this case with prejudice under Federal Rule of Civil Procedure 41(b).

V. CONCLUSION

For the foregoing reasons, I conclude that Plaintiff has not adequately pled a claim against Defendant Parke Bancorp, Inc., and has not alleged any form of reliance sufficient to adequately plead standing for a RICO claim premised on mail or wire fraud against the remaining three defendants. Because the only remaining claims are brought under state law, and because factors of judicial economy, convenience, fairness, and comity weigh against my exercise of supplemental jurisdiction, I dismiss the Second Amended Complaint without prejudice to Plaintiffs' re-filing of their common law claims in state court. Alternatively, I also find that Plaintiffs' willful refusal to comply with my prior Order when filing their

Second Amended Complaint warrants dismissal under Federal Rule of Civil Procedure 41(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

[July 26, 2018]

Civil Action No. 15-3435

DEVON DRIVE LIONVILLE, LP, *et al.*,
Plaintiffs,

v.

PARKE BANCORP, INC., *et al.*,
Defendants.

ORDER

AND NOW, this 26th day of July, 2018, upon consideration of Defendants' Motion to Dismiss the Second Amended Complaint (Doc. No. 58), Defendants' arguments incorporated by reference from their Motion to Dismiss the Amended Complaint (Doc. No. 43), Plaintiffs' Response (Doc. No. 63), Plaintiffs' arguments incorporated by reference from their Response to the Motion to Dismiss the Amended Complaint (Doc. No. 47), and Defendants' Reply Brief (Doc. No. 69), and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the Motion is GRANTED and Plaintiffs' Second Amended Complaint is DISMISSED WITH PREJUDICE.

It is further ORDERED that Defendants' Motion to Take Judicial Notice of Adjudicative Facts (Doc. No. 59) is DENIED AS MOOT.

The Clerk of Court shall mark this case CLOSED.

BY THE COURT:
/s/ Mitchell S. Goldberg

_____
MITCHELL S. GOLDBERG, J.

APPENDIX B

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of

which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

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

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

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

18 U.S.C. § 1964. Civil remedies

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

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(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.

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