NO. ______

IN THE

Supreme Court of the United States

MCKINSEY & CO., INC.; MCKINSEY HOLDINGS, INC.; MCKINSEY & COMPANY INC. UNITED STATES; MCKINSEY RECOVERY & TRANSFORMATION SERVICES U.S., LLC; DOMINIC BARTON; KEVIN CARMODY; JON GARCIA; ALISON PROSHAN; JARED D. YERIAN; ROBERT STERNFELS,

Applicants,

v.

JAY ALIX,

Respondent.

APPLICATION FOR STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants are McKinsey & Co., Inc.; McKinsey Holdings, Inc.; McKinsey & Company Inc. United States; McKinsey Recovery & Transformation Services U.S., LLC (together with the other McKinsey entities, "McKinsey"); Dominic Barton; Kevin Carmody; Jon Garcia; Alison Proshan; Jared D. Yerian; and Robert Sternfels. Applicants were defendants in the district court and appellees in the Second Circuit.

Respondent is Jay Alix. Respondent was plaintiff in the district court and appellant in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6:

Petitioner McKinsey & Company, Inc. is a privately held corporation with no parent company.

Petitioner McKinsey Holdings, Inc. is a privately held corporation whose parent company is McKinsey & Company, Inc.

Petitioner McKinsey & Company, Inc. United States is a privately held corporation whose parent company is McKinsey Holdings, Inc.

Petitioner McKinsey Recovery & Transformation Services U.S., LLC is a privately held limited liability company whose sole member is McKinsey & Company, Inc. United States.

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To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Second Circuit: Applicants respectfully seek an order staying the mandate of the Second Circuit in this case pending the filing and disposition of a petition for writ of certiorari. Applicants seek that relief from this Court because, after they moved before the Second Circuit to stay the mandate, the panel there, rather than granting or denying the requested relief, instead ordered the mandate stayed "for seven days to permit [Applicants] to seek a stay from the Supreme Court." *See* Appendix ("App.") A, CA2 ECF No. 162.[1]

INTRODUCTION

This Court should grant a stay because there is at least a reasonable probability that this Court will grant certiorari and reverse the judgment below, and because the balance of equities favors maintaining the status quo pending this Court's resolution of Applicants' petition.

The Second Circuit's decision in this case explicitly deviated from this Court's precedent articulating the standard for alleging proximate causation in a private claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act. And the Second Circuit did so on a ground—its "supervisory responsibilities"—that this

[1] Citations to "Dkt. No. [#]" refer to documents filed before the District Court in *Alix v. McKinsey & Co.*, No. 18-CV-4141 (JMF) (S.D.N.Y.). Citations to "CA2 ECF No. [#]" refer to documents filed in *Alix v. McKinsey & Co.*, No. 20-2548 (2d Cir.). Citations to "App. [X]" refer to the appendix attached hereto.

Court has held (and recently reaffirmed) cannot be used to depart from this Court's controlling decisions or circumvent a federal statute.

This Court has repeatedly held—twice in reversing the Second Circuit—that private claims under RICO are limited to plaintiffs injured "directly" by the alleged wrongdoing and do not extend to injuries "beyond the first step" of the causal chain. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269, 271 (1992); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010). Where a plaintiff's claimed harm does not necessarily follow from the alleged wrongdoing, because the cause of the harm is distinct and not at the same causal step, the plaintiff cannot bring a RICO claim. This limitation "has particular resonance when applied to claims brought by economic competitors." *Anza*, 547 U.S. at 460.

In the decision below, the Second Circuit acknowledged that it did not follow these precedents. Instead, it declared that, because plaintiff Jay Alix had alleged racketeering involving bankruptcy courts, the case implicated the Second Circuit's "supervisory responsibilities" to "ensure the integrity" of federal judicial proceedings. *See* App. B at 14.[2] On that basis, the Second Circuit let Alix's RICO claims—brought via assignment from the company he founded, AlixPartners—proceed against McKinsey, one of AlixPartners' competitors, merely because it was "plausi-

[2] The Second Circuit's decision is reported at 23 F.4th 196 and is attached as Appendix B.

ble" that the alleged wrongdoing might have ultimately reduced AlixPartners' market share if several intermediate steps also occurred. *Id.* at 19.

The Second Circuit's invocation of supervisory power to diverge from this Court's precedent squarely conflicts with this Court's decisions, as this Court confirmed in a case decided just after the Second Circuit's decision. *See United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022). To the extent supervisory power exists, a federal court cannot invoke it to "circumvent or supplement legal standards set out in decisions of this Court." *Id.* Doing so "amounts to a substitution of individual judgment for the controlling decisions of this Court." *United States v. Payner*, 447 U.S. 727, 737 (1980). Nor can the use of supervisory power "conflict with or circumvent . . . a federal statute." *Tsarnaev*, 142 S. Ct. at 1036.

The issue of improperly invoking inherent power to depart from Supreme Court precedent regarding the statutory requirements of an Act of Congress, particularly RICO, is fundamentally important and has at least a reasonable probability of warranting certiorari and reversal. In language that appears intended to attempt to shield the Second Circuit's decision from review, the panel described its new "supervisory responsibilit[y]" carveout as "*sui generis*," a "one-off," and "of little, if any, application to 'ordinary' RICO cases." App. B at 15, 23. But there is nothing unique or unusual about a civil RICO claim involving allegations of wrongdoing within the purview of the federal judiciary; indeed, the RICO statute includes as predicate offenses other crimes that necessarily entail such conduct, including obstruction and witness tampering. *See* 18 U.S.C. § 1961(1). And, more broadly, the Second Circuit's improper and expansive view of the power it may wield under the guise of its "supervisory responsibilities" invites evasion of countless other Acts of Congress and decisions of this Court interpreting them.

The balance of equities also favors a stay. Alix brought this lawsuit for the express purpose of inhibiting McKinsey from competing with AlixPartners. Permitting Alix to continue litigating his sprawling RICO claims—asserted against not only McKinsey but also seven individuals—creates exactly the irreparable anticompetitive impact that this Court warned of in *Anza*. McKinsey also faces the distinct prospect of irreparable harm if, without a stay, it is compelled to produce sensitive information in discovery to a competitor. In fact, in 2019 litigation between AlixPartners and McKinsey, AlixPartners itself argued that it would be irreparably harmed by the production of just *one* of its internal strategy documents to McKinsey. Yet Alix seeks to pursue RICO claims—that under this Court's clear precedent should be dismissed—implicating 20 years of competition among McKinsey, AlixPartners, and other debtor advisors, and ensnaring not only McKinsey, but dozens of third-party debtors, professionals, interested parties, and U.S. Trustee personnel from long-closed bankruptcy cases. Alix, by contrast, cannot identify any harm to him from a brief stay pending certiorari.

BACKGROUND

A. Legal Background

This Court has held that when Congress wrote RICO's limited right of action—permitting private claims if the plaintiff suffered a "business or property" injury "by reason of" a RICO violation, 18 U.S.C. § 1964(c)—it restricted private claims under the statute to those with harms *directly* caused by the violation. *See Holmes*, 503 U.S. at 267–68. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 547 U.S. at 461; *Bridge*, 553 U.S. at 654 (noting the "demand for some direct relation between the injury asserted and the injurious conduct alleged" (internal quotation marks omitted)).

Direct causation means harm that occurs not as a result of a causal chain but instead generally at the "first step." *Hemi*, 559 U.S. at 10 (quoting *Holmes*, 503 U.S. at 271–72). The tendency "not to go beyond the first step . . . applies with full force to proximate cause inquiries under RICO." *Id.* As this Court's precedent makes clear, the fundamental question for proximate causation under RICO is therefore whether the alleged harm necessarily followed from the alleged wrongdoing because it occurred at the same causal step:

- In *Anza*, where the plaintiff claimed that it lost business because its sole competitor failed to pay sales tax, the Second Circuit erred in finding proximate cause adequately alleged because the "cause of [the plaintiff's] asserted harms" was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." 547 U.S. at 458.

- In *Bridge*, by contrast, as the plurality in *Hemi* later explained, the defendants' act of illegally increasing bids in a closed auction for awarding tax liens "necessarily" reduced the number of liens awarded to the plaintiff, without any further step. *Hemi*, 559 U.S. at 14.

- In *Hemi*, a plurality of this Court found RICO proximate cause lacking due to the "disconnect between the asserted injury and the alleged fraud." *Id.* at 11. The "conduct directly responsible" for plaintiff New York City's lost tax on cigarette sales "was the customers' failure to pay their taxes,"

> whereas "the conduct constituting the alleged fraud was [defendant's] failure to file [the required] reports" listing cigarette sales. *Id.* The plaintiff's causal theory could not "meet RICO's direct relationship requirement" because it went "well beyond the first step." *Id.* at 10. This Court therefore again reversed a Second Circuit decision construing RICO's proximate-cause requirement too broadly in favor of a plaintiff.

B. Alix's RICO Claims

Jay Alix, as assignee of AlixPartners, asserts RICO claims in this action against McKinsey and current and former McKinsey employees. McKinsey is one of AlixPartners' competitors in the alleged "bankruptcy advising market involving estates with assets in excess of one billion dollars." App. B at 3. Between 2001 and 2018, debtors chose to engage McKinsey as one of their advisors in 13 bankruptcy cases. *Id.* at 7 & n.2.

After a debtor chooses the professionals that will serve as its advisors in its bankruptcy case, it must seek and receive approval of those selections from the bankruptcy court. 11 U.S.C. §§ 327, 330. To assist the court in determining whether the chosen advisors are qualified and disinterested, the debtor's applications to retain such advisors must state, among other things, each advisor's experience, fee, and scope of work, as well as the advisor's "connections" to other interested parties in the case. Fed. R. Bankr. P. 2014(a).

Although bankruptcy courts approved McKinsey's retention in each of the 13 cases in which a debtor retained McKinsey—without any objection from the parties-in-interest in those cases—Alix claims that McKinsey's disclosures in every one of the bankruptcy proceedings were insufficient and constituted acts of racketeering.[3] Alix asserts that had McKinsey made correct disclosures, bankruptcy courts would have disqualified it, and debtors would have hired AlixPartners instead. App. B at 7.

C. The District Court's Decision

The district court dismissed Alix's RICO claims for lack of proximate causation. *See* App. C.[4] Judge Furman reasoned that the claims failed because "the conduct that directly caused the alleged harm to AlixPartners" (the debtors' decisions "not to hire AlixPartners") was "distinct from the conduct giving rise to McKinsey's alleged fraud" (the allegedly deficient disclosures in bankruptcy proceedings to which AlixPartners was not even a party). *Id.* at 11.

That causal disconnect between alleged wrongdoing and harm was "the same flaw that the Supreme Court found to be fatal" in *Anza* and *Hemi*. *Id.* Judge Furman explained that any link between McKinsey's supposed misconduct and AlixPartners' alleged injury depended on the independent decisions of both bankruptcy courts and debtors, "render[ing] the link far too indirect to satisfy the stat-

[3] Alix also claims, in allegations directed against only the McKinsey entities and not any of the individual defendants, that McKinsey made referral offers to bankruptcy attorneys of meetings with potential clients if they recommended McKinsey to debtors, which he speculates caused debtors to not invite AlixPartners to pitch for work in 3 of the 13 bankruptcies, and which he says also should have been disclosed in McKinsey's filings to bankruptcy courts. App. B at 8, 30 & n.6; Am. Compl. ¶¶ 506–07, Dkt. No. 73.

[4] The district court's decision is reported at 404 F. Supp. 3d 827 and is attached as Appendix C.

ute's proximate-cause requirement." *Id.* at 12. *Even if* McKinsey had filed different disclosures, bankruptcy courts would still have had to exercise their discretion to reject the debtor's choice to retain McKinsey. *See id.* And, *even if* bankruptcy courts had disqualified McKinsey, debtors would still have had to choose to engage AlixPartners instead. *Id.* at 14–15 (noting "the multitude of other factors that might have led the [debtors'] trustees to deny AlixPartners the assignments").[5]

D. The Second Circuit's Reversal of the District Court's Decision

The Second Circuit vacated the dismissal. Though the parties had not mentioned supervisory power in their briefs or arguments, the Second Circuit reasoned that, because Alix alleged a fraud targeting bankruptcy courts, the panel could invoke its "supervisory responsibilities" over federal courts to excuse Alix from alleging the kind of direct injury required by this Court's decisions. App. B at 14–15, 19, 22–23. Specifically, it opined that Judge Furman "gave insufficient consideration to the fact that McKinsey's alleged misconduct targeted the federal judiciary." *Id.* at 14–15.

The Second Circuit claimed that its invocation of "supervisory responsibilities" allowed it to apply a "proximate cause analysis [that] differs somewhat from the analysis" in controlling Supreme Court precedent, because "none of these prior cases involved allegations of fraud on a court whose operations we superintend." *Id.* at 15, 19. The Second Circuit held that Alix had alleged proximate causation "in

[5] Judge Furman also reasoned that Alix's limited referral allegations did not close the causal "gap" and that, in any event, the referral allegations were conclusory. App. C at 15.

light of these special considerations," "our supervisory responsibilities," and the "Court's responsibility to oversee the integrity of the bankruptcy process." *Id.* at 15, 23, 31. In particular, it held that Alix adequately alleged proximate causation because it was not "implausible or speculative" that "AlixPartners and [McKinsey's] other competitors would have secured additional engagements absent McKinsey's alleged misconduct." *Id.* at 22.[6]

E. The Second Circuit's Order on Applicants' Stay Motion

After the denial of panel rehearing and rehearing *en banc*, Applicants moved in the Second Circuit for a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari. *See* CA2 ECF No. 156. Following Alix's opposition—but before Applicants' time to reply—the Second Circuit "granted" the motion "to the following extent: the mandate is stayed only for seven days to permit the Appellant [sic] to seek a stay from the Supreme Court."[7] App. A. This application is submitted in light of that ruling.

REASONS FOR GRANTING THE STAY

Under 28 U.S.C. § 2101(f), this Court may stay proceedings pending the filing and disposition of a petition for writ of certiorari. To obtain such a stay, an applicant must show "(1) a reasonable probability that four Justices will consider the is-

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6 The panel also found the referral allegations adequately pleaded because Alix "identified several engagements" that he "believe[d]" they had "influenced." App. B at 28.

7 The "Appellant" below was Alix, so the order's reference to "Appellant" seeking a stay appears to be an error that was intended to refer to Appellees.

sue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*; *see also Araneta v. United States*, 478 U.S. 1301, 1303 (1986) (Burger, C.J., in chambers). Applicants meet this test.

I. There Is a Reasonable Probability That This Court Will Grant Certiorari and a Fair Prospect That It Will Reverse the Judgment Below.

Among the reasons this Court grants writs of certiorari is that a Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10(c); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.5 (11th ed. 2019) (noting that "direct conflict" with "a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari"). Here, the panel acknowledged that it was departing from Supreme Court precedent. As the petition for a writ of certiorari will demonstrate, this departure was improper, the panel's decision is therefore directly contrary to controlling Supreme Court decisions both on RICO proximate causation and on the limitations of supervisory power, and these are important issues of federal law.

A. The Second Circuit Explicitly Departed from This Court's Precedent on RICO's Proximate-Causation Requirement.

This Court has twice reversed Second Circuit RICO decisions that, like the decision below, reinstated a lawsuit after the district court had dismissed it for inadequately alleged proximate cause. In the decision below, the Second Circuit was explicit in choosing nevertheless not to follow this Court's precedent, instead applying a "proximate cause analysis [that] differs somewhat from the analysis in" controlling decisions. App. B at 15; *see also id.* at 18 (distinguishing *Anza* because the defendants there did not "allegedly defraud[] one of the courts we oversee"); *id.* at 19 ("[N]one of these prior cases involved allegations of fraud on a court whose operations we superintend.").

The panel reasoned that, because—in its view—prior cases did not involve allegations of fraud on a court, it could use its "supervisory responsibilities" to permit a looser proximate-cause standard for Alix's claims. *Id.* at 14–15, 19, 22–23. On that basis, the panel held that Alix adequately pleaded proximate causation merely because it was not "implausible or speculative" that "AlixPartners and the other competitors would have secured additional engagements absent McKinsey's alleged misconduct," *id.* at 19, 22, regardless of the number of causal steps in Alix's causal theory.

This "plausibility" standard, however, is irreconcilable with this Court's decisions requiring direct causation—which, presumably, is why the panel invoked its supervisory responsibilities to differentiate this case. The panel's decision does not address what makes causation "direct" or examine whether AlixPartners' claimed injury occurred at the "first step." Indeed, the opinion uses "[i]n turn" to explain the sequential steps in Alix's alleged causal theory, *id.* at 4, thus betraying the *lack* of direct causation.[8]

The Second Circuit's decision does not mention *Hemi*, and its discussion of *Anza* ignores this Court's holding that proximate causation was lacking because the harm and wrongdoing were "distinct." 547 U.S. at 458. Similarly, the Second Circuit's only support for its remark that the district court "conflated proof of causation and proof of damages," App. B. at 14, was a later citation to *Anza* that was not to the majority opinion but instead to a dissent that criticized the "stringent proximate-cause requirement" that the *majority* adopted. 547 U.S. at 463 (Thomas, J., concurring in part and dissenting in part); App. B at 23 (citing *Anza*, 547 U.S. at 466, without noting that the citation is to a dissenting opinion).

Nor does the Second Circuit's opinion acknowledge *Anza*'s instruction that RICO's proximate-causation limits have "particular resonance when applied to claims brought by economic competitors" and that a marketplace competitor cannot satisfy proximate causation by alleging a scheme "to increase market share" because "[b]usinesses lose and gain customers for many reasons" and thus "lost sales could [] result[] from factors other than" the claimed wrongdoing. *Id.* at 459–60. As

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8 At points, the panel's decision reflects a fundamental misunderstanding of bankruptcy procedure. It asserts, for instance, that "had McKinsey filed proper disclosure statements" the debtor would not have hired it. App. B at 20. But debtors choose their advisors *before* filing Rule 2014 disclosures, as the rule's text shows. *See* Fed. R. Bankr. P. 2014(a) (debtor must state, among other things, "the reasons for the selection" of the advisor).

the plurality opinion in *Hemi* explained, "*Anza* teaches that the competitors' injuries in such a case [of alleged fraud to gain business from competitors] are too attenuated to state a RICO claim." 559 U.S. at 13 n.1. Instead, the Second Circuit accepted as sufficient a "plausibl[e]" claim that AlixPartners, in the absence of the alleged violation, eventually would have been retained "roughly in accordance with [its] historical market shares" and suffered a "lost opportunity to compete." App. B at 22, 30. Indeed, the panel's logic could be construed to allow any competitor alleging fraud on a court to file RICO claims, simply based on its alleged market share.

Though the Second Circuit quoted *Bridge* to support a "flexible" approach to proximate causation, App. B at 21, that case "reaffirmed the requirement" of directness, not mere plausibility. *Hemi*, 559 U.S. at 14. In *Bridge*, no further step was needed because the defendant unlawfully increasing bids in a closed, mechanical auction for liens necessarily caused the plaintiff to receive fewer, a harm for which "no independent factors" accounted. *Bridge*, 553 U.S. at 658. As *Hemi* later explained, in contrast to the "straightforward" connection in *Bridge*, proximate causation is lacking where "[m]ultiple steps . . . separate the alleged fraud from the asserted injury." 559 U.S. at 15.

As Judge Furman held, this Court's controlling authority mandates dismissal of Alix's RICO claims for lack of proximate causation. *See* App. C at 11. Because Alix's causal chain "move[s] well beyond the first step," *Hemi*, 559 U.S. at 10, the panel's decision finding the mere "plausibility" of harm to AlixPartners sufficient to plead proximate causation conflicts with this Court's decisions.

B. The Second Circuit's Decision Directly Conflicts with This Court's Precedent on the Clear Limits to Supervisory Power.

By relying on "supervisory responsibilities" to evade binding authority and lessen a statutory requirement for a private claim, the Second Circuit's opinion in this case further conflicts with decisions of this Court that strictly limit the use of supervisory power.

This Court has emphasized that (to the extent that it exists) supervisory power is subject to "clear limits." *Tsarnaev*, 142 S. Ct. at 1036.[9] The Second Circuit cited no authority to support its reliance on supervisory power, and its decision conflicts with at least two of those clear limits.[10]

1. First, a court cannot use supervisory power to "circumvent or supplement legal standards set out in decisions of this Court." *Id.* Use of the supervisory power to "disregard the considered limitations of the law [the court] is charged with enforcing" "amounts to a substitution of individual judgment for the controlling decisions of this Court." *Payner*, 447 U.S. at 737.

Recently, in *Tsarnaev*, this Court reversed the First Circuit where it had likewise, on the basis of supervisory power, "declined to apply" Supreme Court precedent. 142 S. Ct. at 1036. This Court explained that the First Circuit could not

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9 *See Tsarnaev*, 142 S. Ct. at 1035 n.1 (noting that jurists have "questioned whether the courts of appeals" have supervisory authority); *see also id.* at 1041 (Barrett, J., concurring) (expressing "skepticism" that any such power exists).

10 This Court decided *Tsarnaev* just over a month after the Second Circuit's decision and while Applicants' petition for panel rehearing and rehearing *en banc* was pending. Applicants notified the Second Circuit of this Court's decision in *Tsarnaev* through a supplemental-authority letter. *See* CA2 ECF No. 153.

craft a "rule" "pursuant to its 'supervisory authority'" that required specific jury-selection questions when this Court had previously held "that a district court enjoys broad discretion to manage jury selection." *Id.* at 1035–36.

Here, the Second Circuit likewise relied on supervisory authority to depart from Supreme Court precedent. It invoked its "supervisory responsibilities" to create a new "proximate cause analysis [that] differs" from the legal standard set out in this Court's controlling decisions. App. B at 15. The "supervisory power does not extend so far." *Tsarnaev*, 142 S. Ct. at 1036 (quoting *Payner*, 447 U.S. at 737).

2. Second, the supervisory power cannot "conflict with or circumvent" a "federal statute" or "Federal Rule." *Id.*; *see also United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 589 (1948) (supervisory power does not "permit[] departure from" a statute). In *Bank of Nova Scotia v. United States*, for instance, this Court held that a federal court could not use supervisory power in response to prosecutorial misconduct where doing so "circumvent[s] the harmless-error inquiry prescribed by" the Federal Rules of Criminal Procedure. 487 U.S. 250, 254 (1988). The "balance struck" by the rule could not be "overlooked" merely because a court chose "to analyze the question under the supervisory power." *Id.* at 255 (quoting *Payner*, 447 U.S. at 736). And in *Law v. Siegel*, this Court similarly held that a bankruptcy court could not invoke inherent power to punish a debtor's litigation fraud by surcharging the full value of the debtor's home, because doing so conflicted with statutory provisions that permit debtors to retain a portion of the value of their homes.

571 U.S. 415, 421–22 (2014). This Court explained that "it is not for courts to alter the balance struck by the statute." *Id.* at 427.

Here, this Court's decisions requiring direct causation for RICO claims delineated the proper interpretation of that statute's standing requirements, and nothing in the RICO statute allows for a looser standard for private claims simply because the alleged racketeering involves federal courts. Bankruptcy fraud is one of many crimes involving wrongdoing in judicial proceedings, such as obstruction and witness tampering, that serve as predicate acts in the RICO statute. *See* 18 U.S.C. § 1961(1). Congress did not empower courts to treat RICO allegations premised on bankruptcy fraud differently than other predicate acts.

The Second Circuit's use of supervisory power thus expands RICO's statutory-standing requirements in select instances without any textual basis. That both intrudes on Congress's power and exceeds the authority of federal courts. It "is for Congress," not federal courts, to make the "determination of who can seek a remedy" and decide whether "to extend [a] cause of action." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

Nor do allegations of "fraud on a court," App. B at 4, permit departure from controlling law. The stated purpose for invoking supervisory power in *Payner* was similarly "to protect the integrity of the federal courts." 447 U.S. at 746 (Marshall, J., dissenting). The same was said in *Bank of Nova Scotia*. *See* 487 U.S. at 250 (federal court could not use supervisory power to "safeguard the integrity of the judicial process" by circumventing a federal rule). And *Law* involved a multi-year fraud on a bankruptcy court; yet this Court unanimously held that the court could not use "inherent powers" to sanction the fraud in contravention of statutory requirements. 571 U.S. at 421. There is no reason that the inherent power that the Second Circuit invoked here is not subject to the "clear limits" identified in *Tsarnaev*, nor any reason why a federal court could contravene controlling law to supervise bankruptcy courts but not, for instance, to supervise capital trials (*Tsarnaev*), protect courts from prosecutorial misconduct (*Payner*, *Bank of Nova Scotia*), or correct a fraud in its own proceedings (*Law*).

C. Applicants' Petition for Certiorari Will Raise Important Federal Issues That Are Worthy of Certiorari.

Applicants' petition will be a strong candidate for a grant of certiorari. The Second Circuit's conflict with controlling decisions, discussed above, presents a broad question of law that is ideal for this Court's review.

1. This Court has twice corrected the Second Circuit's proximate-cause analysis, in *Anza* and *Hemi*, and the Second Circuit's decision here repeats the errors of those reversed decisions. The panel permitted Alix to plead proximate causation because he "plausibly alleged" that AlixPartners would have been engaged by debtors "roughly in accordance with [its] market shares," absent the claimed misconduct. App. B at 19, 22. In *Anza*, the Second Circuit similarly found proximate causation satisfied because the alleged misconduct "was intended to and did give the defendant a competitive advantage." *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd*, 547 U.S. at 461. This Court reversed and found such allegation insufficient to allege proximate causation. *Anza*, 547 U.S. at 460–61.

Likewise, in *Hemi*, the Second Circuit found proximate causation adequately alleged because there were "no speculative steps in th[e] chain of causation." *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 443 (2d Cir. 2008), *rev'd*, *Hemi*, 559 U.S. at 11. This Court again reversed, emphasizing that, regardless of the plausibility of the claimed harm, direct causation is lacking where a causal theory goes "well beyond the first step." *Hemi*, 559 U.S. at 10.

Further, this case implicates the exact policy concerns recognized by this Court in *Anza*, where it explained that proximate causation for RICO claims "has particular resonance when applied to claims brought by economic competitors." 547 U.S. at 460. *Anza* explained that direct causation is designed to prevent "intricate, uncertain inquiries" and the "speculative nature of the proceedings" required to prove a causal chain, especially of competitive harm in an open market. *Id.* at 459–60. Those same interests are present here, where Alix would need to reconstruct, among other things, what bankruptcy courts and debtors would have done in the absence of the purported wrongdoing, despite bankruptcy courts' discretion in retention decisions and the fact that "[b]usinesses lose and gain customers for many reasons." *Id.*

The panel's decision will not be limited to a "one off." App. B at 23. There is nothing unique about a RICO claim alleging wrongdoing in judicial proceedings; as noted, many of the crimes that serve as predicate acts in the RICO statute, such as obstruction and witness tampering, are based on just such conduct. Permitting spurned competitors to bring RICO claims on such allegations, and satisfy proximate causation on the mere plausibility of claimed lost market share, increases uncertainty and risk for businesses.

Further, the Second Circuit's decision conflicts with the decisions of numerous other circuits that, like the district court, followed this Court's precedent on the requirements for proximate causation under private RICO claims. *See, e.g.*, *Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31, 35–36 (1st Cir. 2021) (rejecting RICO claim where plaintiff's "theory of causation" went "'beyond the first step' of the injuries from the alleged RICO scheme" (quoting *Hemi*, 559 U.S. at 10)); *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018) (rejecting RICO claim because plaintiff's alleged harm occurred through "a chain of causation that extend[ed] significantly beyond 'the first step'"); *Molina-Aranda v. Black Magic Enters., L.L.C.*, 983 F.3d 779, 785 (5th Cir. 2020) (rejecting RICO claim where plaintiff's claimed harm was "several steps in the causal chain away" from the alleged racketeering); *Sidney Hillman Health Ctr. v. Abbott Labs.*, 873 F.3d 574, 578 (7th Cir. 2017) (rejecting RICO claim because plaintiff's claimed harm was "several levels removed in the causal sequence").

Nor does the presence of alleged wrongdoing in litigation avoid this conflict, as nothing in the RICO statute suggests a different proximate-causation analysis depending on which predicate acts or type of racketeering is alleged. Not surprisingly, other courts addressing alleged racketeering in litigation have likewise faithfully applied this Court's precedent on RICO proximate causation. *E.g.*, *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1306–08 (11th Cir. 2003) (rejecting for lack of proximate causation RICO claims alleging obstruction and witness tampering based on defendants' claimed falsification of evidence in litigation).

2. The impact of the panel's expansion of supervisory power extends beyond RICO. The panel's reasoning opens the door for courts, whenever faced with alleged wrongdoing in judicial proceedings, to use supervisory power to bypass Supreme Court jurisprudence or statutory restrictions on private claims. Any federal court could claim the type of inherent power that the Second Circuit did here, and if that power can stretch as far as the Second Circuit took it, it would result in a drastic shift. Notably, not only did the decision below not cite any support for its invocation of supervisory power, it also stated no guideline or principle to control its misuse in future cases.

For all these reasons, there is a reasonable probability that this Court will grant review of Applicants' forthcoming petition. And because the Second Circuit's decision explicitly disregards this Court's precedent, and does so on a basis that this Court later confirmed is improper in *Tsarnaev*, there is at least a fair prospect that this Court will reverse the Second Circuit's decision. Indeed, for that reason, this case is a candidate for GVR, summary reversal, or plenary review.

II. Applicants May Face Irreparable Harm without a Stay, and the Balance of Equities Favors a Stay.

1. Permitting Alix's RICO claims to proceed opens McKinsey to irreparable competitive risks. This is a suit between two companies that compete "for lucrative business at the top of th[e] market," App. C at 3, and as noted above, it raises the same competitive concerns voiced by this Court in *Anza*. There, this Court ex-

plained the "particular" importance of proximate-causation requirements for RICO cases "brought by economic competitors," which "could blur the line between RICO and the antitrust laws." 547 U.S. at 460.

Alix's use of RICO to drive out a competitor is precisely the kind of action against which this Court warned. As Justice Breyer has cautioned, "[f]irms losing the competitive battle might find bases for a RICO attack on their more successful competitors in claimed misrepresentations"—hoping that bad press, litigation costs, or the fear of treble damages might lead prospective defendants to "hesitate to compete vigorously." *Id.* at 485–86 (Breyer, J., concurring in part and dissenting in part). Alix's admitted goal is exactly that: This lawsuit, like the many others filed by Alix through his shell company, *see* App. C at 6 n.2, are in furtherance of Alix's and AlixPartners' documented effort to make McKinsey's participation in bankruptcy "public and painful."[11] Alix even sought in this lawsuit to enforce a purported contract to have McKinsey "exit the bankruptcy consulting business." *See* Am. Compl. ¶ 570, Dkt. No. 73. If Alix is allowed to proceed with his claims, including through discovery, it will chill competition, irreparably harming McKinsey and its potential clients.

Further, no corrective relief would be available to McKinsey if, in a case that should otherwise be dismissed, discovery required it to disclose proprietary and non-public information regarding its business to Alix, a director, largest sharehold-

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11 *See In re Westmoreland Coal Co.*, No. 18-35672, Dkt. No. 2999-3 (Bankr. S.D. Tex. June 10, 2020), F. Crawford (former AlixPartners CEO) Depo. Tr. 68:3-16.

er, and founder of McKinsey's competitor. *See* Am. Compl. ¶ 29, Dkt. No. 73. Disclosure of competitive documents and information in discovery cannot be undone and is therefore the essence of irreparable harm; no subsequent remedy is likely to fully repair the harm wrought by improper production. *See, e.g.*, *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009) ("[A]n erroneous forced disclosure of confidential information could not be adequately remedied on direct appeal because a court cannot restore confidentiality to documents after they are disclosed."); *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 499 (S.D.N.Y. 2019) (noting that the "disclosure of private, confidential information 'is the quintessential type of irreparable harm that cannot be compensated or undone by money damages'"). Compliance with discovery can "cause irreparable injury" because courts "cannot always 'unring the bell' once the information has been released." *Maness v. Meyers*, 419 U.S. 449, 460 (1975).

Applicants do not contend that all unwarranted discovery presents a risk of irreparable harm; but discovery between competitors, especially where a plaintiff's express purpose in bringing the litigation is to drive its competitor out of the industry, presents unique risks. The "disclosure of trade secrets in litigation, even with the use of an appropriate protective order, could 'become by indirection the means of ruining an honest and profitable enterprise.'" *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985) (quoting 8 J. Wigmore, Evidence § 2212, at 155 (McNaughton rev. 1961)). Even when production is not to a competitor, disclosure of a defendant's business secrets in litigation "could be a bludgeon in the hands of plaintiffs to force a favorable settlement." *Id.*

That is particularly true in litigation between competitors, as "[c]ourts have presumed that disclosure to a competitor is more harmful than disclosure to a non-competitor." *Am. Std., Inc. v. Pfizer, Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987); *e.g.*, *Diamond Ventures LLC v. Barreto*, 452 F.3d 892, 896 (D.C. Cir. 2006) (stating that "competitive harm" caused by disclosure of business applications to competitors "could not be undone"); *cf. FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir. 1984) (noting that "the loss of trade secrets cannot be measured in money damages" and that a "trade secret once lost is, of course, lost forever"). Indeed, in separate litigation between McKinsey and AlixPartners in 2019, AlixPartners forcefully argued this point, claiming that it would suffer "significant economic harm" by the production of a single internal document on its competitive strategies against McKinsey. *See* Affidavit of Jay Marshall, Managing Director, AlixPartners LLP ¶ 9, May 22, 2019, *AlixPartners, LLP v. Thompson*, C.A. No. 9523-VCZ (Del. Ch.). Yet here, on behalf of AlixPartners, Alix seeks to unearth 20 years of McKinsey's internal documents relating to its competitive bankruptcy-advisory practice in an admitted effort to drive McKinsey out of the business.

2. The balance of equities also strongly favors a stay. As in previous cases where stays have been granted, "[r]efusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in

chambers); *Araneta*, 478 U.S. at 1305 (granting stay where "on balance the risk of injury to the applicants could well be irreparable and the injury to the [respondent] will likely be no more than the inconvenience of delay"). In opposing a stay of the mandate before the Second Circuit, Alix did not even attempt to argue that a brief stay pending Supreme Court review would harm his interests. *See* CA2 ECF No. 158.

Further, a stay will benefit not just the Applicants. It would save the district court from time-consuming litigation that would otherwise conclude if this Court grants certiorari and reverses. And it would protect the interests of the many third-party debtors, debtor advisors, parties-in-interest, and U.S. Trustee personnel in closed bankruptcy cases spanning back 20 years who are implicated by Alix's wide-ranging conflicts and referral allegations and likely to be subpoenaed if this case goes to discovery.

III. The Court Should Issue an Administrative Stay to Allow It to Fully Consider the Application.

The Court should grant an administrative stay to enable full consideration of the merits of this stay application. Applicants have filed this application just five days after the Second Circuit's order, and the Second Circuit's mandate will issue on April 27, 2022. Given this timing, the Court should grant a brief administrative stay of the Second Circuit's mandate while it considers this application.

CONCLUSION

Applicants respectfully ask the Court to stay the Second Circuit's mandate pending the filing and disposition of Applicants' petition for certiorari. Applicants also respectfully ask the Court to administratively stay issuance of the mandate pending disposition of this Application.

Respectfully submitted,

Dated: April 25, 2022

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of April, two thousand twenty-two.

Before: Jon O. Newman,
José A. Cabranes,
Barrington D. Parker,
Circuit Judges,

Jay Alix,

Plaintiff - Appellant,

ORDER

v.

Docket No. 20-2548

McKinsey & Co., Inc., McKinsey Holdings, Inc., McKinsey & Company Inc. United States, McKinsey Recovery & Transformation Services U.S., LLC, Dominic Barton, Kevin Carmody, Jon Garcia, Seth Goldstrom, Alison Proshan, Jared D. Yerian, Robert Sternfels,

Defendants - Appellees.

Appellees move for a stay of the Court's mandate pending the filing and disposition of a petition for a writ of *certiorari*. Appellant opposes the motion.

IT IS HEREBY ORDERED that the motion is granted to the following extent: the mandate is stayed only for seven days to permit the Appellant to seek a stay from the Supreme Court.

For the Court**:**
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX B

20-2548-cv
Alix v. McKinsey & Co., Inc., et al

In the
United States Court of Appeals
For the Second Circuit

August Term 2020

No. 20-2548-cv

Jay Alix,

Plaintiff-Appellant,

v.

McKinsey & Co., Inc., McKinsey Holdings, Inc., McKinsey & Company Inc. United States, McKinsey Recovery & Transformation Services U.S., LLC, Dominic Barton, Kevin Carmody, Jon Garcia, Seth Goldstrom, Alison Proshan, Jared D. Yerian, Robert Sternfels,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York
No. 18-cv-4141, Jesse M. Furman, District Judge, Presiding.
(Argued June 22, 2021; Decided January 19, 2022)

B e f o r e:

NEWMAN, CABRANES, PARKER, *Circuit Judges.*

Plaintiff Jay Alix appeals from a judgment of the United States District Court for the Southern District of New York (Furman, *J.*), dismissing the amended complaint against McKinsey & Co., Inc., three of its subsidiaries, and several of its current or former employees. Alix sued under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*, alleging that McKinsey filed false and misleading disclosure statements in the bankruptcy court to obtain lucrative consulting appointments and that, as a result, AlixPartners LLP lost business and profits it otherwise would have secured. The district court held that Alix failed to meet RICO's proximate cause requirement. We disagree. We hold that the amended complaint plausibly alleges proximate cause with respect to all 13 bankruptcies in which McKinsey filed false statements as well as the pay-to-play scheme. Accordingly, we VACATE and REMAND for further proceedings.

SEAN F. O'SHEA (Michael E. Petrella, Amanda L. Devereux, *on the brief*), Cadwalader, Wickersham & Taft LLP, New York, NY,*for Plaintiff-Appellant.*

FAITH E. GAY (Jennifer M. Selendy, Maria Ginzburg, Caitlin J. Halligan, David S. Flugman, *on the brief*), Selendy & Gay, PLLC, New York, NY and

JOHN GLEESON (Andrew J. Ceresney, Erica S. Weisgerber, Nathan S. Richards, *on the brief*), Debevoise & Plimpton LLP, New York, NY, *for Defendants-Appellees McKinsey & Co., Inc., McKinsey Holdings, Inc., McKinsey & Company Inc. United States, and McKinsey Recovery & Transformation Services U.S., LLC.*

ROY T. ENGLERT, JR. (Ariel N. Lavinbuk, Richard A. Sauber, *on the brief*), Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC, *for*

Defendants-Appellees Kevin Carmody, Jon Garcia, Alison Proshan, and Robert Sternfels.

REID M. FIGEL (Bradley E. Oppenheimer, *on the brief*), Kellogg, Hansen, Todd, Figel & Frederick, PLLC, Washington, DC, *for Defendant-Appellee Seth Goldstrom.*

CATHERINE L. REDLICH, Driscoll & Redlich, New York, NY, *for Defendant-Appellee Dominic Barton.*

MICAH E. MARCUS (Christopher Dean, *on the brief*), McDonald Hopkins LLC, Chicago, IL, *for Defendant-Appellee Jared D. Yerian.*

BARRINGTON D. PARKER, *Circuit Judge*:

AlixPartners LLP and McKinsey & Co., Inc. are major competitors in a niche bankruptcy advising market involving estates with assets in excess of one billion dollars. Jay Alix, as assignee of AlixPartners, sued McKinsey & Co., Inc., three of its subsidiaries (together, "McKinsey"), and several current or former McKinsey employees under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.,* and state law. The amended complaint alleges that McKinsey secured lucrative consulting assignments in this market by knowingly and repeatedly filing disclosure statements in the Bankruptcy Court containing incomplete, misleading, or false representations concerning conflicts of interest. Alix alleges that this pattern of misrepresentations to the Bankruptcy Court resulted in injury to AlixPartners through the loss of engagements it otherwise would have secured and of substantial revenues those assignments would have generated, as well as through the loss of the opportunity to compete for them in an unrigged market.

RICO affords a private right of action to "[a]ny person injured in his business or property by reason of a [RICO] violation." 18 U.S.C. § 1964(c). Alix alleges that AlixPartners was directly harmed by McKinsey's conduct because, had McKinsey truthfully and timely disclosed its conflicts to the Bankruptcy Court, McKinsey would have been disqualified from obtaining at least some of the assignments it secured. In turn, Alix alleges that AlixPartners, because of its major presence in this niche market, would have been retained in at least some of the cases.

Alix also alleges a "pay-to-play" scheme under which McKinsey arranged meetings between its clients and bankruptcy attorneys in exchange for exclusive bankruptcy assignment referrals from those attorneys. Consistent with this scheme, Alix alleges that McKinsey offered to introduce AlixPartners to its clients if Alix would "drop[] the issues he had raised concerning McKinsey's acknowledged pay-to-play scheme and its illegal disclosure declarations."

The District Court for the Southern District of New York (Jesse M. Furman, District Judge) dismissed Alix's RICO claims under Federal Rule of Civil Procedure 12(b)(6). The court concluded that Alix's allegations were insufficient to establish the required causal connection between McKinsey's purported RICO violations and AlixPartners's injury. This appeal followed. The dispositive issue is whether the amended complaint adequately alleges proximate causation under RICO. We hold that it does and, consequently, we vacate and remand for further proceedings.

BACKGROUND

Alix is the founder and a minority equity holder of AlixPartners, one of a handful of consulting firms operating in a high-end corporate bankruptcy advising market. McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS"), a subsidiary of McKinsey & Co., Inc., along with FIT Consulting, and Alvarez & Marsal are among the other major competitors in this market. The amended complaint alleges that AlixPartners, FIT Consulting, and Alvarez & Marsal were retained in 75% of the bankruptcy cases since 2010 involving assets over $1 billion in which McKinsey did not serve as the advisor. Of those cases, AlixPartners obtained about 24% of the contracts.

In order to secure engagements, bankruptcy advisors must demonstrate that they "do not hold or represent an interest adverse to the estate" and are "disinterested persons" within the meaning of the Bankruptcy Code. 11 U.S.C. § 327(a); *see also id*. § 101(14).[1] When these requirements are satisfied, a bankruptcy professional may be retained "with the court's approval." *Id*. § 327(a). In addition, bankruptcy courts require that an application for retention be "accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditor, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). The statements requiring these detailed disclosures are submitted under penalties of perjury and are subject to the bankruptcy fraud statute. *See* 28 U.S.C. § 1746; 18 U.S.C. §§ 152(2)-(3).

[1] "The term 'disinterested person' means a person that (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14).

Alix alleges that McKinsey violated these disclosure requirements by submitting to the Bankruptcy Court false statements in thirteen bankruptcy proceedings in which it was appointed advisor.[2] Specifically, Alix alleges that, despite "the size and complexity of McKinsey's business and business relationships" as one of the world's largest consulting firms, it "disclosed **no** connections by name in its initial declarations for these eight cases" and disclosed only a few in supplemental declarations filed in only two of the cases. Given AlixPartners's significant market share, Alix argues, if McKinsey had filed compliant disclosure statements, it would have been disqualified from certain assignments and AlixPartners would have secured at least some of the assignments from which McKinsey would have been disqualified. In other words, Alix contends that AlixPartners's injury was a foreseeable and direct

[2] The thirteen assignments are: *In re Hayes Lemmerz International, Inc.*, No. 01-BK-11490 (Bankr. D. Del. Dec. 5, 2001); *In re UAL Corp. (United Airlines)*, No. 02-BK-48191 (Bankr. N.D. Ill. Dec. 9, 2002); *In re Mirant Corp.*, No. 03-BK-46590 (Bankr. N.D. Tex. Jul. 14, 2003); *In re Lyondell Chemical Co.*, No. 09-BK-10023 (Bankr. S.D.N.Y. Jan. 6, 2009); *In re Harry & David Holdings, Inc.*, No. 11-BK-10884 (Bankr. D. Del. Mar. 28, 2011); *In re AMR Corp.*, No. 11-BK-15463 (Bankr. S.D.N.Y. Nov. 29, 2011); *In re AMF Bowling Worldwide, Inc.*, No. 12-BK-36495 (Bankr. E.D. Va. Nov. 13, 2012); *In re Edison Mission Energy*, No. 12-BK-49219 (Bankr. N.D. Ill. Dec. 17, 2012); *In re NII Holdings, Inc.*, No. 14-BK-12611 (Bankr. S.D.N.Y. Aug. 15, 2019); *In re SunEdison, Inc.*, No. 16-BK-10992 (Bankr. S.D.N.Y. Apr. 21, 2016); *In re Alpha Natural Resources*, No. 15-BK-33896 (Bankr. E.D. Va. Jul. 15, 2016); *In re GenOn Energy, Inc.*, No. 17-BK-33695 (Bankr. S.D. Tex. Jun. 14, 2017); and *In re SRC Liquidation LLC*, No. 15-BK-10541 (Bankr. D. Del. Sep. 12, 2019).

consequence of McKinsey's failure to follow the law and a fraud on the Bankruptcy Court.

The amended complaint includes additional allegations concerning a pay-to-play scheme orchestrated by McKinsey. On September 3, 2014, Alix alleges that he met with two former or current McKinsey partners, defendants Dominic Barton and Robert Sternfels. During that meeting, Alix allegedly told Barton and Sternfels that he had become aware of McKinsey's practice of agreeing to host meetings between its clients and bankruptcy attorneys in exchange for exclusive referrals of bankruptcy assignments from those attorneys, which, Alix warned them, was illegal.

The following month, Barton allegedly admitted the existence of, and McKinsey RTS's participation in, the scheme and also admitted that his outside counsel confirmed its illegality. Barton, acting on behalf of McKinsey, then agreed to remove the senior leadership of McKinsey RTS for this illegal conduct within 30 days of Barton's re-election as Global Managing Partner of McKinsey & Co. in January 2015, and to remove McKinsey from the bankruptcy consulting business by March 2015. In exchange, McKinsey allegedly asked Alix to "refrain from acting at that time." In other words, Alix alleged that McKinsey asked him not to pursue legal action targeting the pay-to-play scheme or McKinsey's allegedly fraudulent disclosure statements. But Barton, according to Alix, did not keep his end of the bargain. When Alix confronted him in October 2015 regarding McKinsey's continued misconduct, Barton allegedly offered to introduce AlixPartners to Fortescue—a large Australian iron ore mining company—and Volvo Europe for possible consulting assignments. Alix alleges that he declined these offers because he construed them as "blatant attempted pay-offs and bribes" intended to silence him.

Alix argues that McKinsey's pay-to-play scheme was aimed at eliminating the competitive process by which debtors and their trustees select a bankruptcy advisor. Additionally, Alix alleges that AlixPartners "was never even asked to pitch" in three cases where it typically would have competed for a contract and attributes this to McKinsey's alleged scheme.

McKinsey moved to dismiss the complaint under Rule 12(b)(6) and the district court granted the motion, while nevertheless noting that Alix's allegations were "indeed concerning." Still, the district court, in a careful opinion navigating a body of case law that, charitably speaking, is less than pellucid, found the allegations insufficient to satisfy RICO's proximate cause requirement.

The court concluded that "independent intervening decisions" of the trustees and the bankruptcy court rendered the causal connection between the alleged misconduct and injury "too remote, contingent, and indirect to sustain a RICO claim." As to the pay-to-play allegations, the court concluded that they too failed to meet the pleading standards and suffered from the same defects as the allegations concerning fraudulent disclosures because they did not sufficiently narrow the gap between the alleged fraud and the alleged resulting injury. This appeal followed.

We review *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).[3] However, those allegations must meet the plausibility standard set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

DISCUSSION

I.

[3] Unless otherwise indicated, when quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

This case comes to us on an unusual procedural path; thus, we first consider whether we have jurisdiction to review it. *See New York State Dep't of Env't Conservation v. Fed. Energy Regul. Comm'n*, 991 F.3d 439, 445 (2d Cir. 2021).

The amended complaint initially contained several state-law claims in addition to the federal RICO claims at issue on this appeal. After the district court dismissed the federal claims under Rule 12(b)(6), it directed the parties to brief whether an independent basis for federal jurisdiction over the remaining state law claims existed. Alix responded by filing a notice to dismiss without prejudice, under Federal Rule of Civil Procedure 41, his state law claims, which he later attempted to retract. In response, the district court ruled that Alix's voluntary Rule 41 dismissal of state law claims was effective and could not be withdrawn. The court also denied Alix's motion for entry of judgment on his federal RICO claims and his alternative request to revive the state law claims.

Ordinarily, immediate appeal is unavailable to a plaintiff, such as Alix, who seeks review of an adverse decision on some of his claims by voluntarily dismissing the others without prejudice. *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005). That is because our jurisdiction is limited to appeals from final decisions of the district court, which are orders that end the litigation on the merits and leave nothing for the court to do but execute the judgment. *Hallock v. Bonner*, 387 F.3d 147, 152 (2d Cir. 2004); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); 28 U.S.C. § 1291. Because dismissal without prejudice does not preclude reinstatement of the same claims, we do not generally permit an appeal upon dismissal without prejudice. *Rabbi Jacob Joseph Sch.*, 425 F.3d at 210 ("Tolerance of that practice would violate the long-recognized federal policy against piecemeal appeals.").

However, we have previously held that "a plaintiff may cure such defect in appellate jurisdiction by disclaiming an intent to revive the dismissed claim (effectively, converting it to a dismissal *with prejudice*, for reasons of estoppel)." *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (upholding jurisdiction where the appellants "disclaim[ed] any intent to revive their dismissed claim" in a reply brief); *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 255 (2d Cir. 2015) (upholding jurisdiction where the appellant "agreed to a dismissal of his remaining claim . . . with prejudice" at oral argument); *see also Atlanta Shipping Corp. v. Chemical Bank*, 818 F.2d 240, 246 (2d Cir. 1987) ("A party who loses on a dispositive issue that affects only a portion of his claims may elect to abandon the unaffected claims, invite a final judgment, and thereby secure review of the adverse ruling.”).

Alix made a similar effort to cure the jurisdictional defect in this case. When filing this appeal, he disclaimed his state law claims by filing an addendum to Form C, which states that he would “not pursue his appeal of the district court’s July 6, 2020 ruling” and that he “hereby discontinues with prejudice the State Law Claims.” Doc. 10-4. This statement was sufficient to cure any defect in appellate jurisdiction and to permit us to review the district court’s order dismissing Alix’s RICO claims. *See Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 394.

II.

To establish a RICO claim, a plaintiff must prove: (1) a violation of the RICO statute, (2) an injury to business or property, and (3) that the injury was caused by the RICO violation. *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013); 18 U.S.C. § 1962. This appeal implicates the causation element, pursuant to which a plaintiff must plausibly allege that the RICO violations were (1) “the proximate cause of his injury, meaning there was a direct relationship between the plaintiff’s injury and the defendant’s injurious conduct”; and that they were (2) "the but-for (or transactional) cause of his injury, meaning that but for the RICO violation, he would not have been injured." *UFCW Loc. 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 132 (2d Cir. 2010). The dispositive issue here is whether Alix plausibly alleges proximate cause.

The district court concluded that Alix failed to allege proximate cause for three reasons. First, the alleged harm to AlixPartners, it concluded, was directly caused by the decisions of the various debtors' trustees not to hire AlixPartners rather than by McKinsey's misconduct. Second and relatedly, the court concluded that the existence of several intervening factors rendered the relationship between the alleged fraud and injury too indirect and remote. Lastly, the court believed that there was "at least one 'better situated' party," such as the U.S. Trustee, "who can seek appropriate remedies for the most direct consequences of McKinsey's alleged misconduct."

We disagree with the district court's analysis and conclusions as to the thirteen engagements. In general, we conclude that its analysis conflated proof of causation and proof of damages and that it did not draw all reasonable inferences in Alix's favor. More specifically (and more importantly) we believe the district court gave insufficient consideration to the fact that McKinsey's alleged misconduct targeted the federal judiciary. As a consequence, this case requires us to focus on the responsibilities that Article III courts must shoulder to ensure the integrity of the Bankruptcy Court and its processes. Litigants in all of our courts are entitled to expect that the rules will be followed, the required disclosures will be made, and that the court's decisions will be based on a record that contains all the information applicable law and regulations require. If McKinsey's conduct has corrupted the process of engaging bankruptcy advisors, as Alix plausibly alleges, then the unsuccessful participants in that process are directly harmed. The fact that this case invokes our supervisory responsibilities makes our resolution of it *sui generis* and of little, if any, application to "ordinary" RICO cases where these responsibilities are not front and center. But in light of these special considerations, we hold that Alix has plausibly alleged proximate cause with respect to all thirteen engagements.

The fact that this case is not within the mine-run of civil RICO cases means that its proximate cause analysis differs somewhat from the analysis in cases such as *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006), or *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018).

Bridge, for example, involved a scheme to undermine a county law restricting bidders at tax lien auctions to one representative. When two or more bids were equal, which happened frequently,[4] the county allocated the liens "on a rotational basis" among the tying bidders. *Id.* at 643. The defendants in *Bridge* used straw bidders to give themselves a larger presence and increase their odds of obtaining successful bids. *Id.* at 643–44. The Court held that the plaintiffs' "alleged injury—the loss of valuable liens—[wa]s the direct result of [the defendants'] fraud." *Id.* at 658.

Alix argues that the causal chain in this case is likewise sufficiently direct for Rule 12(b)(6) purposes. Alix reasons that, because causation "need only be probable," *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011), he sufficiently alleged proximate causation by showing that AlixPartners would have received at least one of the engagements from which McKinsey likely

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[4] At these public auctions, prospective buyers bid on the percentage of penalties the delinquent property owner must pay in order to clear the tax lien on the property. If the owner failed to redeem the property within the statutory period by paying the lienholder (successful bidder) the delinquent taxes and penalty established at the auction, then the lienholder could obtain the deed for the property, effectively purchasing the property by paying only the delinquent taxes. For these reasons, the liens were profitable even at the lowest possible bid, resulting in multiple zero percent bids for many parcels. *See Bridge*, 553 U.S. at 643.

would have been disqualified based on AlixPartners's record of success in securing engagements.

The district court held that Alix failed to plead proximate cause because intervening events might have broken the chain of causation, such as the Bankruptcy Judge determining whether an advisor was necessary at all and the Trustee selecting a particular advisor, which might not have been AlixPartners. We agree that these might have been intervening events if Alix had somehow learned, before any assignments had been made, that McKinsey had been filing false statements and then sued for the fees it anticipated it would have received if McKinsey had told the truth.

However, this is not such a case. Alix sued after the assignments had already been awarded. Consequently, we need not speculate whether the Bankruptcy Judge and the Trustee would have thought an advisor was necessary. We know that they did think so in the thirteen bankruptcies at issue because they awarded assignments to McKinsey. It is certainly reasonable to infer that the Bankruptcy Court, the U.S. Trustee, and the parties involved who thought an advisor was needed in thirteen cases would continue to think so after learning that their selected advisor was ineligible because of fraud and that they would, at that point, make an alternative selection. And it is also a reasonable inference that, in making another selection, they would likely have awarded assignments to eligible firms in approximately the same ratio they had been using in the past. Of course, McKinsey might ultimately prove the existence of intervening factors, but that showing must await summary judgment or trial.

Similarly, this case differs in significant respects from *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006), where the plaintiff claimed it lost sales because the competitor did not pay sales tax and therefore sold product at lower prices. The Supreme Court noted that the plaintiff's competitor could have lowered its prices for many reasons, not necessarily because it did not pay sales taxes. These other possible reasons for lowering prices were thought to be the potential intervening events that broke the chain of causation between the tax crime and the plaintiff's alleged injury. *Anza* would have been more like this case if an internal document in Anza's files had stated, "If we do not pay sales taxes, we can and will lower our prices, but we will not lower our prices for any other reason." Anza would also be more like this case if the defendants had allegedly defrauded one of the courts we oversee. Finally, *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), does not preclude a finding of proximate cause. In *Empire*, the defendant smuggled liquor into New York to avoid excise taxes, and the plaintiff, a liquor distributor with exclusive distribution rights in New York, alleged that the smuggling caused it to lose sales. Our Court observed that "Empire's 'lost sales could [thus] have resulted from factors other than [the defendants'] alleged acts of fraud.'" *Id.* at 143 (quoting *Anza*, 547 U.S. at 459). As examples of other possible causes, Empire mentioned bootlegging from states with even lower taxes or retailers responding to changing customers' tastes by offering product not subject to Empire's exclusive distributorship. *Id*.

Here, by contrast, the loss to AlixPartners and the other large advising firms is plausibly alleged to flow directly from McKinsey's fraud on the Bankruptcy Court. If the thirteen assignments had not been awarded to McKinsey, it is entirely plausible that they would have been awarded to other advising firms, and the large advising firms would, following past practice, have received 75% of these assignments and resulting revenue (and that AlixPartners would have received a 24% share of these assignments and resulting revenue). And, of course, none of these prior cases involved allegations of fraud on a court whose operations we superintend.

Although we hold that Alix sufficiently alleges proximate cause with respect to the thirteen bankruptcies, proximate cause is especially conspicuous in the case of *GenOn*. Specifically, Alix plausibly alleges that had McKinsey filed proper disclosure statements, GenOn would not have hired McKinsey and, even if it had, the bankruptcy court would not have approved McKinsey's retention. Moreover, Alix plausibly alleges that had McKinsey been disqualified, AlixPartners would have been hired.

According to the amended complaint, McKinsey, prior to and at the time of the filing of the *GenOn* bankruptcy, had extensive connections to NRG Energy, GenOn's parent company and a current or former McKinsey client. Prior to its bankruptcy, GenOn had a multi-million-dollar fraudulent transfer claim against NRG Energy. Had McKinsey made truthful disclosures, Alix alleges, GenOn would not have hired McKinsey RTS to investigate GenOn's fraudulent transfer claim against NRG Energy, McKinsey's own client. Nor would it have hired McKinsey to negotiate GenOn's separation from NRG Energy during bankruptcy proceedings. Alix further alleges that, in addition to failing to disclose its connection to NRG Energy, McKinsey also concealed at least 53 other known conflicts and connections, some of which would have revealed that multiple

McKinsey clients were GenOn's creditors. Alix further alleges that in order to avoid being listed as a creditor of the estate, McKinsey received avoidable preference payments from GenOn and intentionally concealed an interest adverse to the estate.

Based on these alleged facts, it is implausible to conclude that GenOn would have retained McKinsey with knowledge of these serious conflicts of interests. We are even more hard-pressed to conclude that the Bankruptcy Court, given these facts, could or would have found that McKinsey was "disinterested" and did not "hold or represent an interest adverse to the estate." 11 U.S.C. § 327(a).

McKinsey contends that the causal chains in these thirteen bankruptcies are too tenuous to meet the proximate cause standard because debtors do not have to hire a bankruptcy consultant at all or may hire more than one. In its view, this discretion makes any causal relationship too speculative. We disagree. As the Supreme Court has explained, proximate cause is a "flexible concept" that is "generally not amenable to bright-line rules." *Bridge*, 553 U.S. at 654, 659. Although the existence of an intervening decision-maker "may in some cases tend to show that an injury was not sufficiently direct to satisfy [the] proximate-cause requirement, . . . it is not in and of itself dispositive." *Bridge*, 553 U.S. at 659. On our review of a Rule 12(b)(6) dismissal, which requires us to draw all reasonable inferences in Alix's favor, we see nothing implausible or speculative about the conclusion that AlixPartners and the other competitors would have secured additional engagements absent McKinsey's alleged misconduct.

Although proximate cause is most clearly alleged with respect to *GenOn*, the remaining twelve engagements also meet the proximate cause requirement. This is because, as we have noted (*see* pp. 13- 18), Alix plausibly alleges that Alix Partners and the other two firms that compete for assignments in large bankruptcies would have been in direct competition for the other twelve bankruptcies if McKinsey had not submitted allegedly fraudulent statements to the Bankruptcy Court. Then, plausibly, the firms would have received assignments roughly in accordance with their historical market shares. Moreover, fraud on the Bankruptcy Court committed in the manner alleged by Alix causes direct harm to litigants who are entitled to a level playing field and calls into play our unique supervisory responsibilities.

The congruence of these concerns has not been at play in any of the authorities cited by the parties—*Bridge*, *Anza*, or *Empire Merchants*—or, for that matter, in any other relevant authority. But the fact that this case is a "one off" does not reduce our responsibility to superintend the integrity of bankruptcy processes. Of course, proximate cause is merely one hurdle. McKinsey might well prevail on summary judgment or at trial, and to be sure, uncertainties at those stages might exist. But in light of our supervisory responsibilities, we remand in order for a more complete record to be developed: one that will disclose more about who did what, when, and with what reasonably likely consequences.

For the guidance of the parties on remand, we note that uncertainty on how to calculate damages should not be confused with proximate cause because they are distinct concepts. *See Anza*, 547 U.S. at 466 ("Proximate cause and certainty of damages, while both related to the plaintiff's responsibility to prove that the amount of damages he seeks is fairly attributable to the defendant, are distinct requirements.")

Alix alleges that if McKinsey had disclosed what it was required to disclose, McKinsey would have been disqualified and the thirteen assignments would have been added to the pool available to Alix Partners and McKinsey's other competitors. McKinsey's three largest competitors would have received

75% of these assignments (and revenue), just as they historically received 75% of assignments and revenue.

Of course, we cannot tell which particular assignments would have been within AlixPartners' 24% and therefore cannot determine exactly its losses. But certainty as to the amount of damages is not required at the pleading stage. And whatever uncertainty exists does not undermine the fact that Alix plausibly alleged that McKinsey's fraud caused Alix some damage.

The law is well-settled that uncertainty as to amount of damages is not a reason to deny a plaintiff some recovery. *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 251-52 (1931). There the Court said that "[t]he wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise…the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." *Id.; see also Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927).

Uncertainty as to the amount of damages can arise in a somewhat analogous context where wrongdoing has injured one member of a group, but it is not known which one. The Seventh Circuit has offered the example of several job applicants who were passed over on racial grounds for one promotion. "If four people competing for one position lost an equal chance to get it, then each should receive 25% of the benefits available." *Biondo v. City of Chicago*, 382 F.3d 680, 688 (7th Cir. 2004). *See BCS Services, Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011).

Finally, McKinsey has not demonstrated that anyone else is "better situated to sue" than Alix. *See Empire Merchants*, 902 F.3d at 144. Unlike in *Empire Merchants* or in *Anza* where the alternative and "more immediate victim" was the state with its plenary enforcement authority to address tax evasion, *see id.*, we are not persuaded that the Bankruptcy Court or the U.S. Trustee, which McKinsey argues would be a more appropriate alternative plaintiff, would be in a position to gather information about McKinsey's conduct were Alix not in the picture. Although the Bankruptcy Court has the inherent authority to investigate and remedy fraud on the court, *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, (1991), we have no reason to believe that a belated investigation may be launched into an already-closed matter.[5] That task is usually assigned to the United States

[5] The *GenOn* bankruptcy matter, for example, is closed and has not been active since June 30, 2020, when the Final Decree was filed. Final Decree Closing the Remainder of the Chapter 11 Cases, *In re: GenOn Energy, Inc., et al.* (S.D. Tx. June 30, 2020) (No. 17-

Attorney's Office. To be sure, in an ordinary civil or criminal case, a court would "vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers*, 501 U.S. at 44. While, theoretically, that may also be possible here, we are not persuaded that, under the circumstances presented here, either the Bankruptcy Court or the U.S. Trustee would be in a superior position to find out what McKinsey did (or did not do). In other words, adjudicating any potential claims of the U.S. Trustee or the Bankruptcy Court would not be more "straightforward" than adjudicating Alix's claims. *See Empire Merchants*, 902 F.3d at 144 (quoting *Anza*, 547 U.S. at 460). For these reasons, we conclude that Alix has alleged a sufficiently direct relationship between the asserted injury to AlixPartners and McKinsey's purported racketeering activities in all thirteen bankruptcies**.**

III.

The district court dismissed Alix's RICO claims predicated on the pay-to-play scheme because it found that the allegations failed to meet the pleading and proximate cause standards. It concluded that the pay-to-play allegations were

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33695), ECF No. 2176. Even when the case was active, nothing in the record suggests that the U.S. Trustee or any of the private parties with pecuniary interests filed an objection or otherwise tried to vindicate the integrity of the bankruptcy system in that case.

"devoid of any supporting specifics" and inadequate to meet the pleading requirements, and that even if they did, that they failed to show a sufficiently direct link between the allegedly unlawful conduct and injury. We disagree. We hold that Alix adequately pleaded bankruptcy fraud under Federal Rule of Civil Procedure 9(b) and that the allegations show a sufficiently direct link between the alleged fraud and injury.

A.

Alix alleges that McKinsey's pay-to-play scheme violated 18 U.S.C. § 152(6), which requires a showing that the defendant acted "fraudulently" in "giv[ing], offer[ing], receiv[ing], or attempt[ing] to obtain any money or property, renumeration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any [bankruptcy cases]." In alleging that McKinsey violated this statute, Alix was required to plead with sufficient particularity the circumstances constituting the fraud. *See* Fed. R. Civ. P. 9(b). Crucially, however, "allegations may be based on information and belief when facts are particularly within the opposing party's knowledge," provided that they "adduce specific facts supporting a strong inference of fraud." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990).

The district court found Alix's pay-to-play allegations insufficient because they did not "specify any single act of 'paying' or 'playing'" or connect instances of corruption to a particular bankruptcy case. However, the amended complaint does identify several engagements that Alix believes had been influenced by the pay-to-play scheme. For example, it specifically alleges the influence of the pay-to-play scheme in the Alpha Natural Resources, NII Holdings, and Edison Mission Energy bankruptcies because AlixPartners was "never even asked to pitch for the work" despite its strong relationship with the debtors or extensive expertise in the relevant industries.

Moreover, the details that the district court found lacking are rarely within the knowledge of a victim of fraud and are more appropriately left for discovery. At this stage, Alix's pay-to-play allegations need only suggest "a strong inference of fraud." *Wexner*, 902 F.2d at 172. The allegations in the complaint about specific cases, when combined with the unusually detailed allegations (*see* pp. 8-10) regarding Alix's meetings with Barton, one of which allegedly led to Barton admitting McKinsey's role and participation in an illegal scheme and supposed agreement to take steps to end that scheme, easily raise a strong inference of fraud. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171

(2d Cir. 2015) ("In determining the adequacy of [a plaintiff's] fraud pleading[] . . . [a court] view[s] the alleged facts in their totality, not in isolation."). Accordingly, we conclude that Alix's detailed pay-to-play allegations comfortably meet the Rule 9(b) standard.

B.

Even if they are adequately pleaded, McKinsey contends that the pay-to-play allegations suffer from the same problem of insufficient causal connection as the allegations concerning fraudulent disclosure statements. The pay-to-play allegations, McKinsey argues, "narrow" the gap between the alleged predicate acts and injury but fall short of "eliminat[ing]" that gap because of the independent decisions of debtors and the bankruptcy court. Specifically, McKinsey contends that Alix's RICO claim predicated on the pay-to-play scheme necessarily fails when the allegations do not show that the debtors would have hired AlixPartners in the absence of the scheme.

We disagree. At the motion to dismiss stage, Alix need only plausibly allege that the pay-to-play scheme proximately caused AlixPartners' harm. We believe that the pay-to-play allegations are sufficiently robust to plausibly allege that the causal connection has been met. Whether Alix can substantiate his allegations is a question for summary judgment or trial, but at this juncture we find that the allegations are sufficient to allege proximate cause.

The injury alleged due to the fraudulent disclosure statements is, as we have discussed, the loss of assignments as a bankruptcy consultant. [6] Pay-to-play is different because the purported injury is the lost opportunity to compete in an unrigged "beauty contest." Where this occurs, competitors who do not pay are *ipso facto* harmed. In this sense, the allegations concerning the pay-to-play scheme are like those in *Bridge*, where the Court recognized the existence of an injury resulting from the rigged lottery system. Here, Alix likewise plausibly alleges a direct causal chain between AlixPartners's loss (the opportunity to participate in an unrigged contest) and McKinsey's pay-to-play scheme that was intended to buy off the competition. For each pay-to-play engagement, Alix specifically alleges that AlixPartners "was never even asked to pitch for the work" in cases in which it ordinarily would have competed for an assignment absent the scheme. Furthermore, it follows from Alix's pay-to-play allegations, which we must accept as true at this point, that McKinsey eviscerated what had

[6] Of the thirteen total engagements in dispute, all of which the amended complaint alleges have been affected by McKinsey's fraudulent disclosure statements, three engagements are alleged to also have been influenced by the pay-to-play scheme.

historically been an even playing field in the bankruptcy advising marketplace. Suffice it to say that it is implausible—indeed inconceivable—that any Bankruptcy Court would have approved McKinsey's retention if Alix's allegations were substantiated. There is accordingly a plausibly alleged direct causal link between McKinsey's purported marketplace manipulation and the harm to Alix of being excluded from a market that had been rigged.

In view of Alix's allegations that competitors had been bought off, we, in the absence of discovery and on an undeveloped record, are not in a position to identify intervening causes that could have severed this causal chain. And given this Court's responsibility to oversee the integrity of the bankruptcy process, we see no other victims with the appropriate incentive to remedy the harm caused by McKinsey's scheme as alleged by Alix. Accordingly, we hold that the pay-to-play allegations plausibly allege RICO proximate causation.

CONCLUSION

For the foregoing reasons, we **VACATE and REMAND** for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAY ALIX,

Plaintiff,

-v-

MCKINSEY & CO., INC., et al.,

Defendants.

18-CV-4141 (JMF)

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

Plaintiff Jay Alix is the founder, thirty-five-percent owner, and a director of a company now known as AlixPartners LLP ("AlixPartners"). Docket No. 73 ("Am. Compl."), ¶ 45. AlixPartners specializes in bankruptcy consulting, and particularly in "providing professional crisis management and consulting services in major corporate Chapter 11 bankruptcy cases involving companies with assets valued at over $1 billion." *Id.* ¶¶ 1, 47. AlixPartners is one of only a few companies operating in that market. Among its competitors are two subsidiaries of McKinsey & Co., Inc.: McKinsey & Company Inc., U.S. ("McKinsey US") and McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS"), of which McKinsey US is the sole member. *Id.* ¶¶ 32-33, 48-49. Those McKinsey entities are Defendants here, as is a third subsidiary, McKinsey Holdings, Inc. (collectively, "McKinsey" or the "McKinsey Defendants"), and various McKinsey employees (the "Individual Defendants"). *Id.* ¶¶ 30-40.

The Bankruptcy Code permits the trustee of a bankruptcy estate to hire bankruptcy "professional[s]" such as AlixPartners and McKinsey, but only "with the court's approval." 11 U.S.C. § 327(a). Bankruptcy professionals must "not hold or represent an interest adverse to the estate," and must also be "disinterested persons" within the meaning of the Code. *Id.*; *see id.* § 101(14). To help bankruptcy courts ensure compliance with those requirements, Rule 2014 of the Federal Rules of Bankruptcy Procedure ("Rule 2014") provides that when a bankruptcy trustee or committee applies for an order approving the employment of a bankruptcy professional, the trustee's application must disclose "to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). Rule 2014 requires that any such application "be accompanied by a verified statement of the person to be employed" — that is, the bankruptcy professional — "setting forth" those same connections. *Id.* Such declarations are submitted under penalty of perjury pursuant to 28 U.S.C. § 1746, and are also subject to the criminal bankruptcy fraud statute, 18 U.S.C. §§ 152(2)-(3). *See* Am. Compl. ¶¶ 57, 468-77.

Alix brings this lawsuit because he believes that McKinsey has won bankruptcy-consulting business at the expense of AlixPartners by filing incomplete or misleading Rule 2014 disclosure statements. According to Alix — to whom AlixPartners has assigned each of the claims asserted here — every time McKinsey filed an incomplete or misleading statement with the bankruptcy courts, it committed an act of criminal fraud. Am. Compl. ¶ 3. More important for present purposes, Alix alleges that Defendants' Rule 2014 filings constituted predicate acts of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, which provides a private right of action to "[a]ny person injured in his business or property by reason of a violation" of RICO, *id.* § 1964(c). Simplifying matters somewhat, Alix's theory is that AlixPartners was "injured it [its] business or property by reason of" a RICO violation because Defendants won business from bankruptcy estates, then filed fraudulent Rule 2014 statements, on the basis of which they obtained court approval to do work that otherwise would have been secured by AlixPartners. The question presented here, on Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is not whether, as Alix puts it, the facts alleged are "deeply concerning." ECF No. 93 ("Alix Opp'n"), at 2. If true — and for purposes of Defendants' motion, the Court is required to assume they are true — the facts are indeed concerning. Instead, the principal question presented is whether the facts alleged are sufficient for Alix to satisfy RICO's proximate-cause standard. In light of binding Supreme Court and Second Circuit precedent, the Court concludes that they are not and thus dismisses Alix's federal claims. The Court defers judgment on Alix's state-law claims pending supplemental briefing on the question of subject-matter jurisdiction.

BACKGROUND

The following brief factual summary is drawn from the facts alleged in the Amended Complaint — which are taken as true and construed in the light most favorable to Alix for purposes of this motion to dismiss — and from documents attached to the complaint, statements or documents incorporated into the complaint by reference or relied upon so heavily for their terms and effect as to be "integral" to the complaint, and matters of which judicial notice may be taken. *See, e.g.*, *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018); *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016).

McKinsey first entered the bankruptcy-consulting market "in or around 2001," and now competes with a small group of companies for lucrative business at the top of that market. Am. Compl. ¶ 48. McKinsey has three primary competitors at that level: FTI Consulting, Alvarez & Marsal, and AlixPartners. *Id.* ¶ 49. More specifically, "in approximately 75% of the bankruptcy cases since 2010 involving assets over $1 billion in which" McKinsey did *not* serve as a bankruptcy professional, one of these companies did. *Id.* Of those cases, AlixPartners obtained approximately twenty-five percent of "the contracts." *Id.*

Alix's allegations concern thirteen of the bankruptcy proceedings in which McKinsey has been employed as a bankruptcy professional since it first entered the market. *See* Am. Compl. ¶¶ 16, 48, 67, 136, 143.[1] Alix alleges that, in each of those cases, "McKinsey's disclosure affidavits and declarations violated Rule 2014" and "were also false and misleading in numerous respects." *Id.* ¶¶ 68, 113. "All or any one of McKinsey's undisclosed connections," Alix repeatedly asserts, "would have disqualified [McKinsey] from employment as a bankruptcy professional . . . . However, because of Defendants' fraudulent concealment of those connections, neither the bankruptcy court, the U.S. Trustee, nor any of the Interested Parties could meaningfully assess the nature and extent of McKinsey's conflicts." *Id.* ¶ 75; *accord id.* ¶¶ 79, 85, 92, 103, 111, 118. The net result, Alix alleges, is that AlixPartners was deprived of work it otherwise would have secured. More specifically, McKinsey's fraudulent Rule 2014 statements "caused [AlixPartners] to lose considerable revenue that it otherwise would have earned had Defendants complied with the law and truthfully disclosed McKinsey's disqualifying conflicts of interest." *Id.* ¶ 5.

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[1] The thirteen cases are as follows: *In re GenOn Energy, Inc.*, No. 17-BK-33695 (Bankr. S.D. Tex. June 14, 2017); *In re SunEdison, Inc.*, No. 16-BK-10992 (Bankr. S.D.N.Y. Apr. 21, 2016); *In re Alpha Natural Resources, Inc.*, No. 15-BK-33896 (Bankr. E.D. Va. Aug. 3, 2015); *In re Standard Register Co.*, No. 15-BK-10541 (Bankr. D. Del. Mar. 12, 2015); *In re NII Holdings (Nextel)*, No. 14-12611 (Bankr. S.D.N.Y. Sept. 15, 2014); *In re Edison Mission Energy*, No. 12-BK-49219 (Bankr. N.D. Ill. Dec. 17, 2012); *In re AMF Bowling Worldwide, Inc.*, No. 12-BK-36495 (Bankr. E.D. Va. Nov. 13, 2012); *In re AMR Corp.*, No. 11-BK-15463 (Bankr. S.D.N.Y. Nov. 29, 2011); *In re Harry & David Holdings, Inc.*, No. 11-BK-10884 (Bankr. D. Del. Mar. 28, 2011); *In re Lyondell Chemical Co.*, No. 09-BK-10023 (Bankr. S.D.N.Y. Jan 6, 2009); *In re Mirant Corp.*, No. 03-BK-46590 (Bankr. N.D. Tex. July 14, 2003); *In re UAL Corp. (United Airlines)*, No. 02-BK-48191 (Bankr. N.D. Ill. Dec. 9, 2002); and *In re Hayes Lemmerz International, Inc.*, No. 01-BK-11490 (Bankr. D. Del. Dec. 5, 2001).

Additionally, in highly general terms, Alix alleges an "unlawful 'pay-to-play' scheme whereby McKinsey made offers to bankruptcy attorneys to arrange exclusive meetings between bankruptcy counsel and high-level executives from McKinsey's most valued clients in exchange for exclusive referrals of bankruptcy assignments from those attorneys." *Id.* ¶ 120. Alix alleges that he confronted Individual Defendants Dominic Barton and Robert Sternfels on several occasions in late 2014, informed them of the "pay-to-play" scheme, advised them that the scheme was illegal, and warned them of the "grave potential consequences of McKinsey's serious past misconduct." *Id.* ¶¶ 119-21. At one of those meetings, Alix "explained McKinsey's disclosure obligations under bankruptcy law at length to Barton and Sternfels," "provided a lengthy and detailed exposition of the relevant legal principles and demonstrated how all of McKinsey's past disclosure declarations were non-compliant and illegal because they failed to identify connections by name and failed to describe connections in sufficient detail," "raised McKinsey's pay-to-play scheme," and "explained . . . why it, too, was illegal." *Id.* ¶ 123. According to Alix, Barton responded by "frankly express[ing] doubt about McKinsey RTS as a business," called him the next day to thank him, and later admitted the wrongdoing. *Id.* ¶¶ 126-28. Thereafter, Barton promised that, once he was reelected as McKinsey's Global Managing Partner, he would remove the individual wrongdoers from their posts and that "by March 2015, McKinsey would exit the bankruptcy consulting business" altogether, including from active consulting engagements. *Id.* ¶¶ 130-31. In consideration for that promise, Alix allegedly agreed on behalf of AlixPartners "to remain patient and refrain from acting at that time on the issues he had raised, including forbearance from legal action." *Id.* ¶ 131. When Barton did not hold up his end of the alleged deal, Alix and Barton met one final time; at that meeting, Alix alleges, Barton "offered Alix bribes" — in the form of introductions to potential clients — "to keep quiet." *Id.* ¶ 134. Alix refused the overture, and negotiations apparently broke down. *Id.*

Since then, McKinsey has continued to handle bankruptcy consulting work. *See* Am. Compl. ¶¶ 159-77; *see also, e.g.*, *In re Westmoreland Coal Co.*, No. 18-35672 (Bankr. S.D. Tex. Oct. 9, 2018), ECF No. 452. Eventually, Alix brought this action as AlixPartners' assignee, seeking treble damages under RICO alongside an assortment of state-law claims. Am. Compl. ¶¶ 539, 569-88. According to Alix, each of Defendants' misleading Rule 2014 filings constituted a predicate act of racketeering activity for purposes of RICO, making them liable to Alix for the damage Defendants' alleged scheme caused to AlixPartners.[2] Defendants now move to dismiss. ECF No. 88; *see* ECF No. 89 ("Defs.' Mem.").

LEGAL STANDARDS

In evaluating a motion to dismiss pursuant to Rule 12(b)(6), a court must accept all facts set forth in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g.*, *Empire Merchants*, 902 F.3d at 139; *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, — F. Supp. 3d —, No. 14-MD-2589 (JMF), 2019 WL 2269929, at *4 (S.D.N.Y. May 28, 2019). The Supreme Court has made clear, however, that a court should not accept

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[2] Although not directly relevant to the issues discussed in this Opinion, the Court notes that Alix (through an entity he owns called Mar-Bow Value Partners, LLC ("Mar-Bow")) has also sought to challenge McKinsey's Rule 2014 disclosure practices by purchasing claims and litigating in the bankruptcies themselves. Bankruptcy courts have largely, if not unanimously, rejected those attempts without reaching the merits of Mar-Bow's allegations. *See, e.g.*, *In re SunEdison, Inc.*, No. 16-10992 (SMB), 2019 WL 2572250 (Bankr. S.D.N.Y. June 21, 2019) (denying Mar-Bow's Rule 60(d) motion for relief from prior orders approving McKinsey's retention for lack of standing); *In re Old ANR, LLC*, No. 19-00302 (KRH), 2019 WL 2179717, at *1 (Bankr. E.D. Va. May 17, 2019) (same), *reconsideration denied*, No. 19-00302 (KRH), 2019 WL 3264576 (Bankr. E.D. Va. July 18, 2019); *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US, LLC*, 578 B.R. 325, 347 (E.D. Va. 2017) (dismissing Mar-Bow's appeals of Rule 2014 orders for lack of standing), *aff'd sub nom. In re Alpha Nat. Res., Inc.*, 736 F. App'x 412 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1601 (2019).

non-factual matter or "conclusory statements" set forth in a complaint as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). And the Court must "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. A claim is facially plausible "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.* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully," *id.*, and cannot rely on mere "labels and conclusions" to support a claim, *Twombly*, 550 U.S. at 555. If the plaintiff's pleadings "have not nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.* at 570.

RICO CLAIMS

The Court begins with Alix's federal claims, brought under RICO.[3] RICO creates a private cause of action for "[a]ny person injured in his business or property by reason of a

[3] Before turning to the parties' arguments, the Court is compelled to express its misgivings about one feature of Alix's briefing: its excessive use of footnotes. (The irony of doing so in a footnote is not, of course, lost on the Court, but — in contrast to many of the items relegated to footnotes in Alix's briefing — the point is indeed a marginal one here.) Alix's principal brief contains a whopping 154 footnotes that comprise, by the Court's calculation (assisted by Microsoft Word's word-count function), approximately forty-six percent of the brief's text. Making matters worse, despite having been granted leave to file a seventy-five page brief, *see* ECF No. 81, Alix does not even include a fact section in his brief, simply (and unhelpfully) "refer[ring] the Court" to the Amended Complaint "for the relevant facts." Alix Opp'n 2. The net result is that Alix's brief is approximately twenty-three percent longer (by word count) than Defendants' principal brief — tantamount to a self-granted enlargement of the page limits. This is, to put it mildly, an unacceptable abuse of the briefing limitations set by the Court (and the fact that those limitations are by page rather than by word), and the Court would be on firm ground either in striking Alix's brief or in disregarding all arguments relegated to footnotes. *See, e.g.*, *Gramercy Advisors, LLC v. Ripley*, No. 13-CV-9070 (VEC), 2014 WL 5847444, at *2 (S.D.N.Y. Nov. 12, 2014) ("[C]ourts generally do not consider an argument mentioned only in a footnote to be adequately raised." (collecting cases)); *Weslowski v. Zugibe*, 96 F. Supp. 3d 308, 314 (S.D.N.Y. 2015) (noting that courts are "under no obligation to consider" an argument mentioned only in a footnote (collecting cases)). Because Alix's arguments fall short even with

violation of section 1962" of the statute. 18 U.S.C. § 1964(c). Section 1962, in turn, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). "[R]acketeering activity" is defined to include a wide variety of criminal offenses, including, as relevant here, bankruptcy fraud, wire fraud, and mail fraud. *Id.* § 1961(1); *see, e.g.*, *Empire Merchants*, 902 F.3d at 139.

A. The RICO Proximate Cause Standard

To show injury "by reason of" a statutory violation, a civil RICO plaintiff must allege and ultimately prove that the violation was both a "but-for" *and* a "proximate cause" of its injury. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 132 (2d Cir. 2010). Significantly, however, the term "proximate cause" in this context does not mean precisely what it means at common law. *See, e.g.*, *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654-55 (2008); *see also, e.g.*, *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 24 (2010) (Breyer, J., dissenting) (recognizing "that some of our opinions may be read to suggest that the words 'by reason of' in RICO do not perfectly track common-law notions of proximate cause"); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 754 (7th Cir. 2011) (Posner, J.) (noting that the term arguably "muddie[s] the waters"). Instead, it "requires some direct relation between the injury asserted and the injurious conduct alleged." *Empire Merchants*, 902 F.3d at 141 (internal quotation marks and alterations omitted); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451,

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all of the footnotes, the Court will do neither. But it cautions counsel that similar conduct will not be tolerated and may result in the imposition of sanctions.

461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Put differently, "a link that is too remote, purely contingent, or indirect is insufficient." *Empire Merchants*, 902 F.3d at 141 (internal quotation marks and alterations omitted).

Perhaps mindful of the Supreme Court's observation that "proximate cause is generally not amenable to bright-line rules," *Bridge*, 553 U.S. at 659, the Second Circuit has looked for guidance to the few Supreme Court cases that have applied the standard. *See Empire Merchants*, 902 F.3d at 141-44. For example, in *Anza*, the plaintiff alleged that the defendants had caused the plaintiff harm by defrauding New York tax authorities, and using the proceeds to lower prices and outcompete the plaintiff for customers. *See* 547 U.S. at 457-58. But because "[t]he cause of [the plaintiff's] asserted harms . . . [was] a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)," the Court held that New York — not the plaintiff — was "[t]he direct victim" of the RICO violation and that proximate cause was lacking. *Id.* at 458. In *Hemi*, a plurality of the Court held that the City of New York could not recover against a cigarette merchant whose alleged RICO violations — failing to submit customer information to New York State — deprived the City of the chance to enforce its cigarette taxes against those customers. The plurality found that causal chain too indirect: The City's injuries were most directly caused by the delinquent taxpayers, not by the defendant, while the State, not the City, was most directly injured by the cigarette manufacturer's alleged fraud. 559 U.S. at 11 (plurality opinion). And in both *Hemi* and *Anza*, the Court's conclusion was reinforced by the observation that the more directly injured victim was also a preferable plaintiff under the RICO statute. *Id.* at 11-12; *Anza*, 547 U.S. at 460.

The Supreme Court has found sufficient allegations of proximate cause for purposes of RICO only once, in *Bridge*. *Bridge* involved an Illinois county's system for auctioning tax liens to private buyers: interested parties would bid on the liens, but for complex reasons not relevant here, the auctions frequently ended with multiple bidders tied for the lowest bid (at zero, no less). 553 U.S. at 642-43. The plaintiffs alleged that the county would handle that situation by allocating liens to the tied zero-bidders on a fixed, rotational basis. *Id.* at 643. The plaintiffs brought suit in *Bridge* against defendants who took advantage of that system by fraudulently placing extra zero-bids, thereby obtaining extra rotational shares of tax liens at the other zero-bidders' expense. *Id.* at 643-45. The Court held that those allegations satisfied RICO's proximate-cause requirement because the plaintiffs' losses were "the direct result of [the defendants'] fraud." *Id.* at 658. In particular, the Court explained, the plaintiffs' losses were "a foreseeable and natural consequence of [the defendants'] scheme," there were "no independent factors that account[ed] for [the plaintiffs'] injury, there [was] no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim [was] better situated to sue." *Id.*

The Second Circuit examined and applied these cases most recently in *Empire Merchants*. In that case, a company with exclusive rights to distribute certain brands of liquor in New York sued competing distributors for unlawfully smuggling liquor into the state from Maryland. *See Empire Merchants*, 902 F.3d at 136. The plaintiff contended that because the smuggled liquor was not subject to New York excise taxes, the defendants were able to sell it at a lower price to retailers, thus costing the plaintiff sales. *See id.* at 137. The Second Circuit cited "three principal reasons" in support of its conclusion that the complaint did not adequately plead proximate cause. *Id.* at 142. "First, just like in *Anza*, the cause of Empire's asserted harms is a set of actions (not buying Empire liquor) entirely distinct from the alleged RICO violation (smuggling liquor into New York)." *Id.* (internal quotation marks, ellipsis, and alterations omitted). "Second, the predicate act of smuggling and the separate act of not buying Empire's liquor do not *necessarily* follow from one another, as was true in *Bridge*." *Id.* at 143 (internal quotation marks, citation, and alterations omitted). That is, "Empire's 'lost sales could [thus] have resulted from factors other than petitioners' alleged acts of fraud.'" *Id.* (quoting *Anza*, 547 U.S. at 459). And third, "New York State was a more direct victim of the smuggling operation." *Id.* at 144.

B. Discussion

Applying the foregoing principles and cases here, the Court is compelled to conclude that Alix's claims fail as a matter of law. First and foremost, Alix's allegations share the same flaw that the Supreme Court found to be fatal in *Anza*, that a plurality of the Court found to be fatal in *Hemi*, and that the Second Circuit found to be fatal in *Empire Merchants*: the conduct that directly caused the alleged harm to AlixPartners was distinct from the conduct giving rise to McKinsey's alleged fraud. *See Empire Merchants*, 902 F.3d at 142; *Hemi*, 559 U.S. at 11; *Anza*, 547 U.S. at 458-59. Put differently, Alix's alleged injuries were the result of independent, intervening third-party conduct. AlixPartners alleges that McKinsey filed fraudulent Rule 2014 statements in order to obtain court approval to work on behalf of the bankruptcy estates. But it was the decisions of those debtors' trustees not to hire AlixPartners that most directly inflicted harm to AlixPartners "business or property" (assuming, of course, that AlixPartners suffered such harm). Moreover, even before a trustee could "not hire" AlixPartners, the bankruptcy court would have had to reject the trustee's application for approval of its first choice, McKinsey.

To illustrate the problem with Alix's allegations, consider what would have had to happen in order for AlixPartners to have avoided its claimed injuries. *First*, having been chosen by the trustee to work on behalf of the bankruptcy estate, McKinsey would have had to file a compliant Rule 2014 statement (instead of a fraudulent one). *Second*, the bankruptcy court would have had to exercise its discretion and reject the trustee's application to retain McKinsey (instead of approving it). *Third*, the trustee would have had to choose to hire AlixPartners — rather than one of its other competitors or no one at all. And *fourth*, the bankruptcy court would have had to exercise its discretion to approve the trustee's application to retain AlixPartners. Defendants describe an even more complex, though no less convincing, chain of events in their principal brief, *see* Defs.' Mem. 24-25, but the foregoing list is enough to make the point. As that counterfactual causal chain makes plain, McKinsey's filing of fraudulent Rule 2014 statements could not have been a sufficient cause of AlixPartners' injuries. And, of the several steps between McKinsey's alleged RICO violations and AlixPartners' injuries, at least three are sufficient to render the link far too indirect to satisfy the statute's proximate-cause requirement.

First, two steps in the causal chain (rejection of the trustee's decision to retain McKinsey and approval of the trustee's alternative decision to retain AlixPartners) depend on a bankruptcy court's exercising its discretion in a particular way. Courts are understandably reluctant — and indeed generally refuse — to predict how other courts will decide issues presented to them. *See, e.g.*, *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 203 (2d Cir. 2006) ("We cannot guess with any degree of assurance what the Federal Circuit would have done . . . ."), *abrogated on other grounds by FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 201 (E.D.N.Y. 2003); *see also, e.g.*, *Eddystone Rail Co., LLC v. Jamex Transfer Servs., LLC*, 289 F. Supp. 3d 582, 590 (S.D.N.Y.

2018); *In re Qualcomm Antitrust Litig.*, No. 17-MD-02773-LHK, 2018 WL 4110498, at *12 (N.D. Cal. Aug. 29, 2018); *Berrian v. Pataki*, 510 F. Supp. 2d 348, 355 (S.D.N.Y. 2007); *In re AlphaStar Ins. Grp. Ltd.*, 383 B.R. 231, 262 (Bankr. S.D.N.Y. 2008); *In re Malese 18 Corp.*, No. 8-02-80586-478, 2009 WL 1044556, at *6 (Bankr. E.D.N.Y. Apr. 16, 2009). That principle has even more force in an area where, as here, the decision of the other tribunal is one over which it has broad discretion. *See, e.g.*, *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999) (explaining that a bankruptcy court exercises "discretionary powers" in evaluating the proposed retention of bankruptcy professionals under Section 327); *see generally* 3 Collier on Bankruptcy ¶¶ 327.02, 327.04; 9 Collier on Bankruptcy ¶ 2014.05; *see also* Fed. R. Bankr. P. 2014 advisory committee's notes to 1991 amendments.

Trying to overcome this obstacle, Alix points out that "courts routinely make . . . determinations" of "what would have happened" in other courts in the unique context of legal malpractice litigation. Alix Opp'n 17. For three reasons, however, the Court concludes that civil RICO does not work the same way. First, in legal malpractice cases, "the objective . . . is to determine what the result *should have* been (an objective standard) not what the result *would have* been by a particular judge or jury (a subjective standard)." 4 Ronald E. Mallen, LEGAL MALPRACTICE § 37:87 (Westlaw 2019 ed.). If a legal malpractice claim turned on the proper application of Rule 2014 (*i.e.*, how it "should" have been applied), this Court would be competent to adjudicate it. But that is not the same thing as predicting which cases, or what percentage of them, *would* have gone AlixPartners's way but for Defendants' conduct, which would be the relevant inquiry in assessing Alix's RICO damages. Second, legal malpractice is "a species of negligence," *Rubens v. Mason*, 387 F.3d 183, 189 (2d Cir. 2004), meaning that a malpractice plaintiff's recovery (unlike a RICO plaintiff's) is therefore governed by ordinary common-law limitations on causation and damages. The civil RICO statute is not so broad, and protects only injuries to "business or property" — which, as the Second Circuit has "made clear," does not include a "mere expectation." *Villoldo v. BNP Paribas S.A.*, 648 F. App'x 53, 55 (2d Cir. 2016) (internal quotation marks omitted) (citing *McLaughlin v. Am. Tobacco Corp.*, 522 F.3d 215, 228 (2d Cir. 2008), *abrogated on other grounds by Bridge*, 553 U.S. 639). Indeed, the Second Circuit has all but held that "[t]he hope of collecting upon a judgment if one's suit proves successful is precisely the sort of mere expectation that is too speculative to constitute a property right within the meaning of 18 U.S.C. § 1962." *Id.* Where discretionary judicial intervention stands between a plaintiff and his recovery, it is hard to see how the interest at stake amounts to more than a "mere expectation." Finally, and in any event, the proximate-cause analysis applicable in the civil RICO context renders any analogies beyond that context beside the point: The bankruptcy court's intervening discretionary approval decisions are "independent factors" distinct from the underlying RICO violations that account for AlixPartners' alleged injuries.

Separate and apart from the hazards of predicting how bankruptcy judges would exercise their discretion in different scenarios, Alix's theory of harm depends on another set of independent intervening decisions: those of the various bankruptcy trustees not to hire AlixPartners. But "[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of" AlixPartners' lost business, or even lost business expectancy, was attributable to McKinsey's alleged fraud. *Anza*, 547 U.S. at 459. That is, even if it were possible to identify specific bankruptcy assignments that AlixPartners would have secured in the absence of Defendants' conduct, or to pin down how likely AlixPartners might have been to secure them in a fraud-free marketplace, the Court would also have to contend with the multitude of other factors that might have led the trustees to deny AlixPartners the assignments. In sum, "[s]orting out" AlixPartners' "counterfactual" business deals in the absence of Defendants' conduct would "prove speculative in the extreme." *Empire Merchants*, 902 F.3d at 143 (internal quotation marks omitted); *cf. Medgar Evers Houses Tenants Ass'n v. Medgar Evers Houses Assocs., L.P.*, 25 F. Supp. 2d 116, 121-22 (E.D.N.Y. 1998), *aff'd sub nom. Abbott v. Medgar Evers Houses Assocs., L.P.*, 201 F.3d 430 (2d Cir. 1999) ("[A]s in *Holmes*, the law need not shoulder these difficulties. HUD itself can deter fraudulent statements to HUD. Owners who make the fraudulent statements face criminal prosecution under 18 U.S.C. § 1001, and remain subject to civil penalties and other remedies under the HUD regulations." (citation omitted)).

Alix attempts to solve this problem by intimating that the trustees' decisions not to hire AlixPartners were not *really* independent of Defendants' bad acts. As discussed, Alix alleges that Defendants won several bankruptcy estates' business in the first instance through an unlawful "pay-to-play" scheme. Am. Compl. ¶ 383. If true, that would at least narrow the gap between the trustees' decisions to hire McKinsey and AlixPartners' business losses. (Even then, however, it would not eliminate the gap given the bankruptcy courts' role in approving the trustees' applications.) But there are several problems with this attempt. First, as a simple matter of pleading, Alix's pay-to-play allegations are devoid of any supporting specifics. In particular, Alix fails to specify any single act of "paying" or "playing" involved in that alleged sub-scheme, or to connect any specific allegations of corruption to any of the particular bankruptcies at issue here. That lack of supporting factual allegations renders Alix's allegations of an unlawful "pay-to-play" scheme insufficient as a simple matter of pleading. *See, e.g.*, *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (holding a claim inadequate under the plausibility standard where it was not supported by any "nonconclusory allegation in the Complaint").

More broadly, Alix fails to allege facts plausibly suggesting a connection between Defendants' alleged pay-to-play conduct and AlixPartners' losses. With respect to the *NII Holdings* bankruptcy, for example, Alix alleges that

> [a]lthough [AlixPartners] sought an opportunity to bid or make a pitch for that assignment, it was never given any opportunity to do so. As an industry leader, [AlixPartners] is typically afforded at least an opportunity to make a pitch for high-end restructuring assignments such as the *NII Holdings* case. That [AlixPartners] was denied such an opportunity for the *NII Holdings* matter strongly suggests that the influence of McKinsey's illegal "pay-to-play" scheme resulted in a pre-selection of McKinsey RTS.

Am. Compl.¶ 136; *see also id.* ¶ 156 ("Absent Defendants' misconduct, there is a strong likelihood that AP would have been employed in *Standard Register*, particularly given its market position and the fact that AP had provided services to Standard Register in the past."). Without additional factual support, however, such allegations of "strong likelihoods" and "strong suggestions" are simply too speculative to "nudge[]" Alix's claims "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570; *see id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation, footnote, and internal quotation marks omitted)); *Galiano v. Fid. Nat'l Title Ins. Co.*, 684 F.3d 309, 315 (2d Cir. 2012) (affirming the dismissal of a complaint under the *Twombly*/*Iqbal* standard "because the Complaint did not allege factual content that would have allowed the district court to draw a plausible inference that defendants paid kickbacks for business referrals"); *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 11-CV-4665 (PGG), 2014 WL 4832321, at *20 (S.D.N.Y. Sept. 29, 2014) ("[C]onclusory allegations that [a defendant] 'could not have obtained' meetings . . .

without the payment of a bribe — absent further detail or explanation regarding how these meetings were arranged and where and when they took place — are not sufficient to demonstrate that these meetings were, in fact, obtained through the payment of bribes.").

Finally, as in *Empire Merchants* and *Anza*, there are "better situated plaintiff[s]" who were "more directly harmed by the defendants' alleged racketeering." *Empire Merchants*, 902 F.3d at 142. Recent developments in three bankruptcies — *SunEdison*, *In re Alpha Natural Resources*, and *In re Westmoreland Coal Co.* — illustrate the point. As described in Alix's "Status Report" of March 25, 2019, the U.S. Trustee sought various forms of relief in each of these three bankruptcies, all relating to McKinsey's allegedly incomplete Rule 2014 disclosures. *See* Docket No. 102. As of March 25, 2019, McKinsey had reached a preliminary settlement with the U.S. Trustee, to which Alix "plan[ned] to file fulsome objections" through Mar-Bow Value Partners, LLC (an entity wholly owned by Alix that purchased claims in each bankruptcy). *Id.* at 3; *see id.* at 1 n.1. In the end, Mar-Bow filed only a "limited objection," seeking an acknowledgement from the bankruptcy courts that the settlement would not prejudice Mar-Bow's rights to pursue further relief. *See* Limited Objection of Mar-Bow Value Partners, LLC to the Proposed Settlement, *In re Westmoreland Coal Co.*, No. 18-34672, ECF No. 1663. On April 18, 2019, the three bankruptcy courts jointly approved the settlement, which provided for $5 million payments by McKinsey to the reorganized debtors or estates in each of the three bankruptcies and a general release by the U.S. Trustee of any claims arising from McKinsey's Rule 2014 disclosures in fourteen bankruptcies, including all thirteen at issue in this case. *See* Order Approving Settlement Agreement Between U.S. Trustee Program & McKinsey & Co., Inc. and Certain of Its Affiliates, *In re Westmoreland Coal Co.*, No. 18-34672, ECF No. 1763. The settlement did not contain Mar-Bow's proposed language reserving its rights to pursue other relief, but that is of no moment here. The critical point is that the U.S. Trustee's pursuit of relief illustrates that there is at least one "better situated" party who can seek appropriate remedies for the most direct consequences of McKinsey's alleged misconduct. It is precisely such "directly injured victims," not plaintiffs like AlixPartners who are "injured more remotely," that RICO "count[s] on to vindicate the law as private attorneys general." *Bridge*, 553 U.S. at 654-55 (internal quotation marks omitted).

In sum, the link between McKinsey's allegedly unlawful conduct and AlixPartners' alleged injury is too remote, contingent, and indirect to sustain a RICO claim. Not surprisingly, in arguing otherwise, Alix relies most heavily on the Supreme Court's decision in *Bridge*, the one and only case in which the Supreme Court found allegations sufficient to establish proximate cause. *See* Alix Opp'n 3-6. But *Bridge* is easily distinguished from this case for the same reasons that the Second Circuit found it distinguishable in *Empire Merchants*. As the Second Circuit pointed out, the system alleged in *Bridge* "mechanically allocate[d] liens 'on a rotational basis' between the tying bidders." 902 F.3d at 142 (quoting *Bridge*, 553 U.S. at 643). As a result, to award a lien to one such bidder was "*necessarily*" to deny it to the plaintiff, whose portion of the rotational allocation was thereby diluted on a predictable, *pro rata* basis. *Id.* at 143; *see also Bridge*, 553 U.S. at 658 (observing that because of that auction structure, there were "no independent factors that account for [plaintiffs'] injury"). "[N]or," the Second Circuit observed, "was there a 'more immediate victim [] better situated to sue,' as the county was not financially injured by the fraud." 902 F.3d at 142 (quoting *Bridge*, 553 U.S. at 658). Here, by contrast, it is not the case that by fraudulently obtaining approval to work on behalf of a bankruptcy estate, Defendants "necessarily" deprived AlixPartners of that, or any, business. After all, because, "[a]s the Court recognized in *Anza*, '[b]usinesses lose and gain customers for many reasons,'" *Empire Merchants*, 902 F.3d at 143 (quoting *Anza*, 547 U.S. at 459), no factfinder could connect the dots between Defendants' conduct and AlixPartners' lost business without engaging in an analysis that would be "speculative in the extreme," *id.* (internal quotation marks omitted). Far from being "directly on point," Alix Opp'n 5, *Bridge* involved an unusual degree of predictability over a markedly direct causal chain that only serves to highlight the relative complexities and indirectness of the causal chain alleged in this case.

Alix also relies on Judge Posner's decision in *BCS Services*, which reversed the district court's grant of summary judgment to defendants following the Supreme Court's remand in *Bridge*. Although *Bridge* was decided on the assumption that the plaintiff had lost a fixed rotational share of the available tax liens, the *BCS Services* court construed the summary-judgment record to mean that the liens were actually distributed randomly among tied bidders. *BCS Servs.*, 637 F.3d at 753. As Judge Posner explained, however, the fact that the plaintiff's losses would only be capable of probabilistic estimation made no difference as far as the RICO proximate-cause standard was concerned, because those losses (however estimated) were still a direct result of the defendant's conduct. *Id.* at 757-59. That is, whether the defendant's conduct caused the plaintiff to lose a fixed, rotational share or an uncertain, random share of the available bids, RICO's proximate-cause standard was still satisfied because the defendant caused the loss directly. Here, by contrast, Defendants did not cause AlixPartners' injuries directly enough for RICO purposes, no matter how certainly (or probabilistically) those losses could be quantified. Alix tries to capitalize on Judge Posner's hypothetical of a gambler who loses an unknown sum when a building contractor's negligence causes the casino to collapse just as he is about to spin the roulette wheel. Alix Opp'n 5-6; *see BCS Servs.*, 637 F.3d at 758-59. But Alix misses the point of the hypothetical: The building contractor's negligence directly caused the gambler's lost chance; only the *magnitude* of the loss remains uncertain and subject to probabilistic estimation. Put differently, unlike the disappointed gambler in Judge Posner's hypothetical, Alix relies on probabilistic allegations to prove not just the extent of his alleged damages, but also the fact that Defendants' alleged RICO violations caused them. *Cf. BCS Services*, 637 F.3d at 759 (distinguishing between "proof of damages" — as to which probabilistic evidence is appropriate — and "proof of cause" — as to which the normal directness requirements apply). In any event, even if *BCS Services* would permit Alix to allege a probabilistic harm to AlixPartners' business expectations in the Seventh Circuit, the decision is obviously not binding here, and indeed it is questionable whether such probabilistic harms to "mere expectation[s]" are cognizable injuries for purposes of RICO in the Second Circuit. *See Villoldo*, 648 F. App'x at 55.

In sum, in every relevant respect, this case and the Second Circuit's decision in *Empire Merchants* are on all fours. In both cases, the plaintiff "was harmed by [a third party's] decisions to purchase less" from the plaintiff, decisions which are "not [themselves] racketeering activity"; in both cases, "the asserted causal relationship between the alleged racketeering and [third parties'] decisions to purchase less . . . from [the plaintiff] is intricate and uncertain, as in *Anza* and *Hemi*, and not *Bridge*"; and in both cases, there is "a better situated plaintiff that was more directly harmed by the defendants' alleged racketeering." *Empire Merchants*, 902 F.3d at 142. Accordingly, Alix's RICO claims must be and are dismissed. Further, that dismissal is without leave to amend. Among the many arguments hidden in Alix's footnotes is an assertion that any dismissal should be "without prejudice and with leave to amend." Alix Opp'n 75 n.154. Even had that request been raised properly, the Court would deny Alix leave to replead his RICO claims. *See, e.g.*, *Ritchie Capital Mgmt., LLC v. Gen. Elec. Capital Corp.*, 821 F.3d 349, 351-52 (2d Cir. 2016) (per curiam) (holding that it was not an abuse of discretion to deny the plaintiff an opportunity to amend its complaint *sua sponte*). Among other things, because the problems with those claims are substantive, amendment would be futile. *See, e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *Maragh v. Roosevelt Island Operating Corp.*, No. 16-CV-7530 (JMF), 2018 WL 6573452, at *6 (S.D.N.Y. Dec. 13, 2018); *Croft v. AXA Equitable Life Ins. Co.*, No. 17-CV-9355 (JMF), 2018 WL 4007646, at *5 (S.D.N.Y. Aug. 22, 2018). Moreover, Alix does not identify any additional facts he might add to an amended complaint, much less facts that might change the Court's conclusions set forth above. And finally, when Defendants moved to dismiss the original Complaint, the Court ordered that Alix file any amended complaint by August 20, 2018, and warned that he would "not be given any further opportunity to amend the complaint to address issues raised by the motion to dismiss." Docket No. 66. Among the issues raised by Defendants' motion to dismiss the original Complaint was that it failed to allege facts sufficient to satisfy the proximate-cause requirement. *See* Docket No. 63, at 17-23. Alix took advantage of that opportunity to amend, but it was his last one. *See Empire Merchants*, 802 F.3d at 146 (affirming a denial of leave to amend where the plaintiff "already had one opportunity to amend its complaint" and "identified no additional facts or legal theories it might assert if given leave to amend that would alter [the court's] proximate cause analysis" (internal quotation marks omitted). The Court will therefore dismiss Alix's RICO claims with prejudice.

STATE-LAW CLAIMS

That leaves Alix's state-law claims, which are asserted only against the McKinsey Defendants (that is, the corporate entities). Absent an independent basis for federal jurisdiction, the Court would ordinarily decline to exercise supplemental jurisdiction over state-law claims where, as here, it has dismissed all federal claims. *See, e.g.*, *Banco Safra S.A.-Cayman Islands Branch v. Andrade Gutierrez Int'l S.A.*, No. 16-CV-9997 (JMF), 2018 WL 1276847, at *5

(S.D.N.Y. Mar. 8, 2018). But Alix does invoke an independent basis for federal jurisdiction: the Court's diversity jurisdiction under 28 U.S.C. § 1332(a). Am. Compl. ¶ 42. For several reasons, however, it is not clear whether that invocation is proper.

First, and perhaps most easily cured, Alix does not actually allege the state of his citizenship; he merely alleges that he "resides in Michigan." *Id.* ¶ 29. That does not cut it. *See, e.g.*, *Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996) ("[A] statement of the parties' residence is insufficient to establish their citizenship."). Second, and potentially more substantial, it is not clear that Alix's citizenship is what matters because he brings his claims here as the assignee of AlixPartners. *See* FAC ¶ 29. Under 28 U.S.C. § 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. Applying that provision, the Second Circuit has held that assignments between parent companies and their subsidiaries should be treated as "presumptively ineffective" and that assignments between other entities with similarly "close ties" may also trigger the presumption. *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862-63 (2d Cir. 1995). Among the closely related pairs that draw such suspicion under Section 1359 are corporate entities and their directors, officers, and significant shareholders. *See, e.g.*, *Falow v. Cucci*, No. 00-CV-4754 (GBD), 2003 WL 22999458, at *6 (S.D.N.Y. Dec. 19, 2003) (citing cases); *see generally* 13F Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 3639 (3d ed. Westlaw 2019). That raises the prospect that, for purposes of diversity jurisdiction, the assignment to Alix is ineffective, as Alix is a director and substantial minority equity holder of AlixPartners. *See* Am. Compl. ¶ 29. And if it is AlixPartners's citizenship that matters, that raises a third complication: The citizenship of AlixPartners —

which, as a limited liability partnership, is derivative of the citizenship of its partners, *see, e.g.*, *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 52 (2d Cir. 2000) — is not alleged in the Amended Complaint.

Although the parties do not address these issues, the Court has an independent obligation to confirm that it has jurisdiction before addressing the merits of Alix's claims. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S.83, 94-95 (1998)). Accordingly, the Court will defer ruling on Defendants' motion to dismiss Alix's state-law claims pending supplemental briefing on the foregoing issues. Specifically, no later than **two weeks** from the date of this Opinion and Order, Alix shall file a supplemental brief, not to exceed ten pages, addressing the Court's jurisdiction over the state-law claims. To the extent that an amendment of the complaint is necessary to establish such jurisdiction (as the Court suspects — assuming jurisdiction is possible at all), Alix shall file a proposed amended complaint (limited to new jurisdictional allegations and showing any proposed changes in redline form) by the **same date**. The McKinsey Defendants shall file any response, not to exceed ten pages, within **two weeks** of Alix's supplemental submission. No reply may be filed absent leave of Court.

CONCLUSION

If Alix's allegations in this case are true (as the Court has assumed they are for purposes of this motion), they are certainly troubling. Moreover, Alix and AlixPartners may well have good reason to be upset about Defendants' alleged misconduct and may indeed have genuinely public-spirited reasons for seeking to deter it going forward. But that is not enough to state a claim for relief, much less a claim under the civil RICO statute, which provides a remedy only to those whose injuries directly resulted from a defendant's scheme. Defendants' motion to dismiss is accordingly GRANTED as to Alix's federal claims and those claims — the First, Second, Third, and Fourth Causes of Action — are dismissed with prejudice. The Court defers ruling on Defendants' motion to dismiss Alix's state-law claims until it confirms, following the parties' supplemental briefing in accordance with the schedule set forth above, that it has diversity jurisdiction over those claims.

The Clerk of Court is directed to terminate the Individual Defendants — Dominic Barton, Kevin Carmody, Jon Garcia, Seth Goldstrom, Alison Proshan, Robert Sternfels, and Jared D. Yerian — as parties and to terminate ECF No. 88.

SO ORDERED.

Dated: August 19, 2019
New York, New York

JESSE M. FURMAN
United States District Judge