No. 23-_____

In the Supreme Court of the United States

JOEL DOUGLAS, ET AL.,

Petitioners,

v.

DAVID HIRSHON, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the District Court required to consider extrinsic documents that were public records, or not directly challenged by anyone attached to the Response in Opposition to the Motion to Dismiss?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Joel Douglas
- Steven Fowler
- James Lewis

Respondents and Defendants-Appellees below

- David Hirshon
- LOSU LLC

LIST OF PROCEEDINGS

United States Court of Appeals for the First Circuit

No. 22-1483

Joel Douglas; Steven Fowler; James Lewis, *Plaintiffs-Appellants*, v. David Hirshon, LOSU LLC, *Defendants-Appellees.*

Date of Final Opinion: March 21, 2023

Date of Rehearing Denial: May 1, 2023

United States District Court, District of Maine

No. 2:20-cv-00227-JDL

Joel Douglas, et al., *Plaintiffs*, v.
Scott Lalumiere, et al., *Defendants*.

Date of Final Order: June 7, 2022

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The Opinion of the United States Court of Appeals for the First Circuit, dated March 21, 2023, is reproduced in the Appendix ("App.") at App.1a. The Order of the United States District Court for the District of Maine, granting Defendants' Motion for Entry of Final Judgment, dated June 7, 2023, is reproduced at App.24a.

On May 1, 2023, the United States Court of Appeals for the First Circuit denied a timely filed Petition for Rehearing, which is reproduced at App.44a.

JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari.

The Defendant makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution, 28 U.S.C. § 1254(1), and Rule 10 of the Supreme Court Rules. The Decision in the United States Court of Appeals for the First Circuit deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This Petition is timely as the deadline was enlarged by the Court having been filed within 150 Days of United States Court of Appeals for the First Circuit's Order denying En Banc Review docketed on May 1, 2023. Sup. Ct. No. 23A52

Appellate Jurisdiction.

The Defendant takes this appeal as of right in a civil proceeding under 28 U.S.C. § 1291 and the jurisdiction established by Federal Rule of Appellate Procedure 4. Pursuant to Fed. R. App. P. 4(b), the notice of appeal must be filed in the District Court within 14 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on June 16, 2022.

Original Jurisdiction.

District Courts of the United States have original jurisdiction of all offenses against the laws of the United States. *See* 18 U.S.C. § 3231. The cause of action in the Complaint in the matter is authorized by 18 U.S.C. § 1962(d) conspiracy to violate 18 U.S.C. § 1962(a) investment into the enterprise claim of the Racketeer Influenced and Corrupt Organizations (RICO) Act.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by

imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 932 (relating to straw purchasing), section 933 (relating to trafficking in firearms), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542

(relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons).,[1] sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings

and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic),[2] sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable

under any provision listed in section 2332b(g)(5)(B);

(2) State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly,

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

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

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

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

18 U.S.C. § 1964

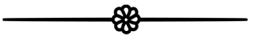
(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing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

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

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover

threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

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



STATEMENT OF FACTS

Chief Judge, Jon D. Levy, of the United States District Court for the District of Maine dismissed the complaint made against Scott Lalumiere, David Hirshon, and many other alleged defendants for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Amended Complaint asserts an 18 U.S.C. § 1962(d) conspiracy to violate 18 U.S.C. § 1962(a) investment into the enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), in which David Hirshon conspired with Scott Lalumiere to turn the proceeds of his racketeering income into

funds to be invested back into the enterprise. The District Court dismissed the Amended Complaint against David Hirshon holding the averments were not substantial enough in terms of the factual content to meet the well plead standard for the scienter requirement of knowingly joined the conspiracy.

A. The District Court Facts

The District Court's order did not recite the entire lengthy factual scenario with respect to the RICO conspiracy, but did accurately describe the averments made against David Hirshon and LOSU LLC. The Amended Complaint asserts that Scott Lalumiere and other defendants engaged in three distinct but intertwined schemes to defraud the Plaintiffs. In the first scheme, the Complaint alleges that Scott Lalumiere, funded by various banks and private lenders, fraudulently induced several vulnerable individuals, including Plaintiffs Steven Fowler and Joel Douglas, who lacked access to conventional credit, to enter into unfavorable lease/buy-back agreements. Under the terms of the agreements, the title of the victim's property would be transferred to a corporate entity controlled by Lalumiere with the victim, as the lessee, retaining a purchase option. The Lalumiere controlled entity would subsequently mortgage the property to banks and private lenders, and, when the entity defaulted on its loan, the mortgagees foreclosed on the property, frustrating the victim's option to purchase.

In the second alleged scheme, Fowler entered into an agreement with Lalumiere whereby he would provide labor and materials at a discounted rate to renovate certain properties controlled by Lalumiere, with the understanding that Fowler could purchase

the properties back upon the completion of the renovations. However, Lalumiere frustrated Fowler's right to purchase the properties by defaulting on the mortgages, causing the mortgagees to foreclose on the properties. In the third alleged scheme, several of the Defendants agreed to pay-off and discharge Plaintiff James Lewis's defaulted mortgage and to lend him money to make improvements to his property in exchange for him deeding the property to a corporation and making certain payments. After the title was transferred, they refused to loan him the money and subsequently foreclosed on the property.

The Complaint contains scant details regarding Hirshon's and LOSU's participation in Lalumiere's schemes. The Complaint merely alleges that Hirshon "is a person residing in Freeport Maine" and LOSU "is a Maine corporation doing business in the State of Maine," and that they "realized the proceeds" from the RICO enterprise and "knew about the fraud" in the first scheme noted above. These findings did not include the full assertions contained in the Plaintiffs' Response in Opposition to Mr. Hirshon Motion to Dismiss because the District Court believed it was prohibited from considering documents not attached to the Amended Complaint. Plaintiffs had attached 12 exhibits to their response.

B. The Plaintiffs Facts

Scott Lalumiere began using the sale lease back fraud scheme in 2012. Amended Complaint hereinafter AC ¶ 47; Attached Response Exhibit hereinafter RE 1. Mr. Wolf, a lawyer, who frequently worked with Mr. Lalumiere and Mr. Holsapple filed a Certificate of Formation for LH Housing LLC listing himself as an authorized person on December 17, 2012. RE 2.

LH Housing LLC was a corporate entity whose members prior to January 2019, included Eric Holsapple, Wayne Lewis, and Scott Lalumiere. RE 3 ⁋ 48. LH Housing LLC manages rental properties. RE 3 ⁋ 47. The transactions for the properties at 75 Queen Street and 661 Allen Avenue are connected by fraud committed by Scott Lalumiere and Eric Holsapple. AC ⁋ 38 and ⁋ 39.

Mecap LLC began offering lease to own arrangements to the public in 2012. RE 1. These arrangements were presented as legitimate leases with enforceable option provisions for the purchase of property. AC ⁋ 47 Exhibit A and RE 1 and RE 4. Mecap LLC offered these arrangements at least through 2018. RE 4. During this period, Mecap LLC issued "leases" with "options" to Dale Williams, Joel Douglass, and Matthew Crosby. Skyline Real Estate Services Inc, another entity controlled by Mr. Lalumiere issued a "lease" with an "option" to Christine Davis in 2012. Birch Point Storage LLC, yet another entity controlled by Mr. Lalumiere issued a "lease" with an "option" to Steven Fowler. Mecap LLC would advertise these arrangements on the internet. RE5.

The members of LH Housing LLC became involved in a dispute over proceeds related to a transaction for 9 Brault Street in Lewiston. AC ⁋ 92, RE 3 ⁋ 50. MECAP LLC and LH Housing LLC have a history of sharing funds. AC ⁋ 92 RE 3 ⁋ 50 and ⁋ 60. This dispute was over several days around December 14, 2018 and was resolved. RE 3 ⁋ 70. Ms. Papkee filed her complaint on January 8, 2020.

Mr. Lalumiere used several different lawyers in the 75 Queen Street transaction. RE 6 and RE 7. David Hirshon handled the transaction that transferred 75

Queen Street from Mr. Lalumiere to MECAP LLC on July 24, 2015. RE 6. Mr. Lalumiere used a different lawyer to transfer the property to LH Housing LLC on April 13, 2016. RE 7. Mr. Lalumiere transferred ownership of 75 Queen Street three times within a one-year period. RE 8.

Mr. Lalumiere used these three transactions between himself and the entities he controlled to secure a loan to LH Housing by Machias Savings Bank for $256,500.00. AC ¶ 72 AC Exhibit D. The loan was secured by a mortgage that Mr. Lalumiere signed as LH Housing LLC's manager on April 13, 2016. AC Exhibit D. By November 19, 2019 Wayne Lewis was acting as LH Housing's Manager. AC Exhibit F. On November 20, 2019, Mr. Wolf, acting as Authorized Agent, transferred TTJR LLC's interest in 661 Allen Avenue to LH Holdings LLC. AC Exhibit N. Mr. Wolf admits that he became aware of the leases and was hired by LH Housing LLC at the end of 2019 but carefully omits the exact date. RE 9. The opposition to the Motion to dismiss had additional key documents that at the very least made limited discovery likely to result in the necessary information to fill any plausibility gap.

The existence of the lease for 75 Queen Street with its option to buy was a matter of public record. RE 10. David Hirshon recorded a "Subordination Agreement" with the Cumberland County Registry of Deeds. RE 10. This agreement explicitly recognized the lease for 75 Queen Street. RE 10. It also implicitly recognized that the lease was more than a rental agreement. RE 10. This filing was made on June 29, 2015. RE 10.

In 2019, Mr. Hirshon began investing into the enterprise. RE 11. Mr. Hirshon provided funds to Mr. Lalumiere that were secured by a mortgage. RE 11. The Junior Mortgage, Security Agreement, and Financing Statement had a provision (e) that provided all present and future leases tenancies occupancies and licenses, whether written or oral ("Leases"), of the land, the improvements, the personal property and the intangible property, or any combination or part thereof, and all income, rents, issues, royalties, profits, revenues, security deposits and other benefits of the land, the improvements, the personal property and the intangible property from time to time accruing, all payments under leases, and all payments on account of oil and gas and other mineral leases, working interests, production payments, royalties, overriding royalties, rents, delay rents, operating interests, participating interests and other such entitlements, and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law, as well as in equity, of Borrower of, in and to the same (hereinafter collectively referred to as the "Revenues"); RE 11 page 3 and 4 ⁋ e. Paragraph (e) transferred the leases to LOSU LLC. RE 11 Page 2. This agreement was secured by mortgages on 36 Settler Road owned by Christine Davis and 171 South Street owned by Dale Williams. AC ⁋ 57 RE 1. Mr. Hirshon refused to honor the options. AC Exhibit B, RE 12.

The District Court did not dismiss the RICO claims against all the defendants. Eric Holsapple, Wayne Lewis, and Russell Oakes also filed a Motion to Dismiss the RICO claims against them. In the Order denying their Motion to Dismiss the District Court acknowledged the sufficiency of the pleadings

as to them: "The Plaintiffs' theory is that Eric Holsapple, Wayne Lewis, and Russell Oakes conspired with the Lalumiere Defendants to reinvest the income from a pattern of racketeering activity back into the enterprise. The alleged racketeering activity was money laundering and mail and wire fraud. According to the Complaint, those predicate crimes 'return[ed] the funds used by the Enterprise." Most specifically, the Complaint states, "The Enterprise purchased [three properties, including 33 Sanborn Lane, that the Defendants allegedly used to perpetrate additional schemes] . . . with the proceeds from the fraud in the transaction for 75 Queen Street and generally commingled the proceeds throughout the Enterprise.'" While the District Court was skeptical about some problems like investment injury, this Order acknowledged that the Amended Complaint otherwise sufficiently plead a RICO conspiracy between Mr. Lalumiere and at least Eric Holsapple, Wayne Lewis, and Russell Oakes. In the Documents that the District Court refused to consider, Mr. Hirshon and Losu LLC were integral participants in the 75 Queen Street transaction because it would not consider the extrinsic documents attached to the opposition to the Motion to Dismiss filed by Mr. Hirshon.

The United States Court of Appeals for the First Circuit has long recognized that futility requires a *de novo* standard of review. A finding of futility requires a more stringent standard of review for the request for leave to amend in this case:

> Thus, we look at whether the district court correctly determined that the Proposed Complaint failed to meet the pleading standards of Rule 12(b)(6). There is no practical differ-

> ence, in terms of review, between a denial of a motion to amend based on futility and the grant of a motion to dismiss for failure to state a claim. *See Motorcity of Jacksonville, Ltd. v. Southeast Bank*, 83 F.3d 1317, 1323 (11th Cir. 1996); *see also Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993). Review is *de novo*. *See, e.g.*, *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 361 (1st Cir. 1994) (motions to dismiss are reviewed *de novo*).

Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996). The Panel declined to analyze this case under the *de novo* standard. The Panel's use of the abuse of discretion standard came from the Petitioners' concession. The Panel explained that Petitioners did not dispute the abuse of discretion standard and Petitioners did not argue review of the documents was mandatory. While true, that does not relieve the Panel of considering the District Court's finding of futility in the decision not to allow amendment.

Instead, the First Circuit Panel adopted the Ninth Circuit's view of considering extrinsic documents not included by reference in the complaint. The abuse of discretion standard shifted the standard of review in this case despite the factual scenario presented in the motion to dismiss:

> We take this opportunity to clarify what standard of review applies to a district court's decision to incorporate by reference documents outside the pleadings. Our relevant case law has recognized consistently that the district court may, but is not required to

> incorporate documents by reference. *See, e.g.*, *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (observing that a court "may consider" evidence that is incorporated by reference); *Knievel*, 393 F.3d at 1076 (noting that the incorporation doctrine "permits" the court to consider extrinsic documents); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (explaining that a document "may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim"). Additionally, in *Hamilton Materials, Inc. v. Dow Chemical Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007), we explained that "Federal Rule of Civil Procedure 12(b)(6) specifically gives courts the discretion to accept and consider extrinsic materials offered in connection with these motions, and to convert the motion to one for summary judgment when a party has notice that the district court may look beyond the pleadings." Thus, we have held, for example, that a district court's decision to take judicial notice of extrinsic evidence shall be reviewed for abuse of discretion. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n. 9 (9th Cir. 2012). The foregoing leads us to conclude that the district court's decision to incorporate by reference documents into the complaint shall be reviewed for an abuse of discretion.

Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1159-60 (2012). *Davis* rests on a different context

from the context of the present case. In *Davis*, the district court considered extrinsic documents attached to the motion to dismiss that showed sufficient notice of credit card fees involved in that case and dismissed the plaintiff's case. Here, Petitioners attached documents that were mostly public records that showed limited discovery would likely result in information sufficient for plausibility and meet the knowingly joined standard. Like the District Court, the Panel was unwilling to consider this information under the abuse of discretion standard that then reinforced the finding of futility. Futility should not be construed as a tautological exercise that does not ultimately judge plausibility under the known facts.

The First Circuit has avoided deciding the standard of review in the past by analyzing the proposed amendment under both abuse of discretion and *de novo* review standards. The Panel could have acknowledged this dual application if the extrinsic documents had not met plausibility or likely standards under *de novo* review:

> We have not previously clarified the standard of review that governs a court's determination that documents external [extrinsic] to the complaint cannot be relied upon under Rule 12(b)(6). Because we would uphold the district court's judgment pursuant to either *de novo* or abuse of discretion review, we need not reach the issue here.

Freeman v. Town of Hudson, 714 F.3d 29, 36 n.5 (1st Cir. 2013)(comment in bracketed added). There are significant differences between the present case and *Freeman*. First, the District Court found a plausible conspiracy for some defendants. Second, the extrinsic

documents showed that Mr. Hirshon was not just acting as a money lender. Finally, the standard of review made a difference. While rules may be complex, they are not meant to make the procedure benefit the sophisticated defendant with a complex scheme.

The Petitioners assert only the need to do what has been done in the past. At least one First Circuit Panel has endorsed the use of extrinsic documents:

> In considering a motion to dismiss, a court must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs. *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 988 (1st Cir. 1992). Here the district court also took into account certain facts set out in public documents plaintiffs attached to an opposition they filed to the motion to dismiss. Ordinarily, of course, any consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56. *See* Fed. R. Civ. P. 12(b)(6). However, courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint. *See, e.g.*, *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n. 3 (1st Cir. 1991) (considering offering documents submitted by defendants with motion to dismiss claim of securities fraud); *Fudge v. Penthouse Int'l, Ltd.*, 840

F.2d 1012, 1014–15 (1st Cir.) (considering allegedly libelous article submitted by defendants with motion to dismiss), *cert. denied*, 488 U.S. 821, 109 S.Ct. 65, 102 L.Ed.2d 42 (1988); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) ("[O]n a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment."); *see also In re Wade*, 969 F.2d 241, 249 & n. 12 (7th Cir. 1992). Here, all or most of the above-mentioned elements are present. Plaintiffs, moreover, introduced the documents themselves, in order to bolster their argument against defendants' motions to dismiss. *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("[T]he problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff. . . .Where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated."), *cert. denied*, 503 U.S. 960, 112 S.Ct. 1561, 118 L.Ed.2d 208 (1992); *Berk v. Ascott Inv. Corp.*, 759 F.Supp. 245, 249 (E.D. Pa. 1991) ("[W]hen a plaintiff has admitted the authenticity of a document . . . , a court may consider that document in ruling on a motion under Fed. R. Civ. P. 12(b)(6)."). Like the court below, therefore, we treat the documents submitted by plaintiffs—the Abuse and Neglect Peti-

> tions, the Pittsfield District Court orders, defendant Seymour's written report to defendant Page, and Seymour's affidavit—as part of the pleadings.

Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993). The documents that reference Mr. Hirshon were public records. The documents also demonstrated that Mr. Hirshon knew that Scott Lalumiere was renting these homes and promising the renters options to buy. The documents also demonstrate that Mr. Hirshon did not honor those options. These extrinsic documents were in every way the kind of extrinsic information authorized by *Watterson*. The United States Court of Appeals for the First Circuit affirmed the district Court's ruling that amendment was futile.

ARGUMENT

I. This Is an Important Federal Question Regarding the Use of Extrinsic Documents as Part of the Pleadings When Reviewing a Motion to Dismiss Pursuant to 12(b)(6) in Response to Which a Split Between the Circuits Has Developed.

The Court has prescribed a holistic approach to the review of complaints when a motion to dismiss under 12(b)(6) requires application of the plausible standard. The Court endorsed the use of extrinsic documents in the context of the Private Securities Litigation Reform Act:

> We establish the following prescriptions:
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> First, faced with a Rule 12(b)(6) motion to dismiss a § 10(b) action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed. 2d 517 (1993). On this point, the parties agree. *See* Reply Brief 8; Brief for Respondents 26; Brief for United States as Amicus Curiae 8, 20, 21. [3] Second, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *See* 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007). The inquiry, as several Courts of Appeals have recognized, is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007). In the present case, the First Circuit Panel endorsed a procedure that does not conform to *Tellabs*'s mandate. The concern over knowingly joined, which is at issue in the present case, is a similar kind of scienter element. While the District Court avoided the scienter question by refusing to

examine the attached documents, that process does not conform to the must consider aspect of *Tellabs* and particularizes consideration to only documents attached to the complaint. *Tellabs* is broader than that limited application because the must consider mandate requires consideration without regard to how the extrinsic document are brought to the District Court's attention for judicial notice.

This Court has long required an explanation for dismissal at the 12(b)(6) stage as part of the necessary procedure. Dismissal must be based on one of the reasons identified in Rule 12:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foman v. Davis, 371 U.S. 178, 182 (1982). In the present case, the District Court relied on futility and

that finding had profound implications for application of the plausible standard because it shifted the standard of review from the application of legal principle to an exercise of the District Court's discretion. This reduced standard of review made consideration of the complaint in its entirety impossible because there was very little included in the First Amended Complaint about the activities of any of the lenders like Mr. Hirshon. *De novo* review makes a difference in this case.

The Circuits of the United States Court of Appeals remain split as to which standard of review should apply to the use of extrinsic documents. The various Court of Appeals has applied both *de novo* and abuse of discretion standards of review to extrinsic documents:

> We first consider whether the Court of Appeals applied the correct standard when reviewing the District Court's determination that the Secretary's position was not substantially justified. For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for "abuse of discretion").

Pierce v. Underwood, 487 U.S. 552, 557-58 (1988). The majority rule requires *de novo* review and is required by the Second Circuit[1], the Third Circuit[2],

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[1] *Global Network Communications v. City of New York*, 458 F.3d 150 (2006).

the Fourth Circuit[3], Fifth Circuit[4], Sixth Circuit[5], and Eleventh Circuit[6]. The minority rule requires abuse of discretion review and is required by the First Circuit[7], Seventh Circuit[8], and the Ninth Circuit[9]. Mr. Douglas, Mr. Fowler, and Mr. Lewis ask the Court to determine the correct standard of review because it determines what exactly must be considered for extrinsic documents submitted as part of opposing a motion to Dismiss under 12(b)(6).

A. The *De Novo* Standard of Review Is the Majority Rule and Has Been Adopted by the Second Circuit, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, and the Eleventh Circuit.

The Circuits that have adopted *de novo* review have expressed that standard in two ways. The first way is more nuanced and requires parsing each step and assigning a standard to plausibility, amendment,

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2 *Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192 (1993).

3 *Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176 (2009).

4 *Krystal One Acquisitions, L.L.C. v. Bank of America, N.A.*, 805 Fed.Appx. 283 (2020).

5 *Cates v. Crystal Clear Technologies, LLC*, 874 F.3d 530 (2017).

6 *SMF Holdings Ltd. v. Banc of America Securities, LLC.*, 600 F.3d 1334 (2010).

7 *Douglas v. Hirshon*, 63 F.4th 49 (1st Cir. 2023).

8 *Financial Fiduciaries, LLC v. Gannett Co., Inc.*, 46 F.4th 654 (2022).

9 *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (2018).

and final conclusion. The second simply identifies *de novo* review as the standard and applies it to the sufficiency and the legal conclusion justifying dismissal. The expression of the three-step parsing is more apt to the present case.

The Eleventh Circuit has articulated the parsing method to its expression of *de novo* review for the analysis required for dismissal under Rule 12(b)(6). The Eleventh Circuit requires the majority rule:

> We have jurisdiction over the appeals of final decisions of the district court pursuant to 28 U.S.C. § 1291. We exercise *de novo* review as to the district court's decision to grant a motion to dismiss. *Cachia v. Islamorada*, 542 F.3d 839, 841-42 (11th Cir. 2008). We review the district court's refusal to grant leave to amend for abuse of discretion, although we exercise *de novo* review as to the underlying legal conclusion that an amendment to the complaint would be futile. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 (11th Cir. 1999).

SMF Holdings Ltd. v. Banc of America Securities, LLC., 600 F.3d 1334, 1336 (2010). Expressed in this three-step analysis of motion to dismiss, the Eleventh Circuit's definition most closely fits the situation in the present case. The Petitioners are asking that *de novo* review be in place for sufficiency, that allowing limited discovery is discretionary, but that the ultimate conclusion that amendment was futile must also be reviewed *de novo*.

B. The Minority Rule Has Been Adopted by the First Circuit, Seventh Circuit, and the Ninth Circuit Providing for an Abuse of Discretion Standard of Review for the Consideration of Extrinsic Documents.

The Minority rule is consistently expressed within the context of the single act of considering the extrinsic documents for motions to dismiss under Rule 12(b)(6). The Ninth Circuit has most recently expressed the standard in this way:

> We review dismissal for failure to state a claim *de novo*. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). The decision to take judicial notice and/or incorporate documents by reference is reviewed for an abuse of discretion. *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008) (judicial notice); *Davis v. HSBC Bank Nev.*, N.A., 691 F.3d 1152, 1160 (9th Cir. 2012) (incorporation by reference).

Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 998 (2018). The Ninth Circuit explained that this was the best way to balance the competing interest of defendants attaching documents to the motion to dismiss in hopes of getting the district court to dismiss the action even though it may prove meritorious after discovery and the plaintiffs interest in having meritorious claims heard. Notably, this expression does not seem to comport with the mandate for considering extrinsic documents in the scienter context described in *Tellabs*.

C. The Eighth Circuit and Tenth Circuit Have Adopted the Use of Extrinsic Documents but Have Not Articulated a Standard of Review for Consideration of Any Extrinsic Documents.

The Eighth Circuit and Tenth Circuit have endorsed the use of extrinsic documents but have not articulated a standard of review. In *Zean v. Fairview Health Services*, 858 F.3d 520, 527 (2017) the Eighth Circuit recognized the use of extrinsic documents for analyzing a motion to dismiss under Rule 12(b)(6) under plain error analysis. In prior decision on similar and related uses of extrinsic documents the Eighth Circuit has not identified a standard of review but has suggested reviewing extrinsic documents is a matter of discretion. *See Stahl v. U.S. Dept. of Agriculture*, 329 F.3d 697, 701 (2003). The decisions of the Tenth Circuit are similar in that the use of extrinsic documents is authorized but without identifying the standard of review. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (2010). These two Circuits are the only Circuits that have not declared which standard of review should apply.

II. The United States Court of Appeals for the First Circuit Has Applied a Standard That Is Inconsistent with This Court's Requirements for Dismissal Pursuant to Rule 12(b)(6) and Its Own Historical Approach to Limited Discovery.

The standard of review matters because it establishes what must be considered under a Rule 12(b)(6) analysis when considering the complaint in its entirety. The Petitioners in this case have been trapped by the ambiguity over must and may even

though they attempted to get the District Court to consider additional information not contained in the complaint:

> One last thing with respect to Zell's various appellate contentions. Zell also says she should have been allowed to amend her complaint to address any perceived deficiencies. In the normal course, we review the denial of a motion to amend for abuse of discretion, deferring to the district court's "hands-on judgment" and for any adequate reason apparent from this record. *Najas Realty, LLC*, 821 F.3d at 144 (citing *Aponte-Torres v. Univ. of P.R.*, 445 F.3d 50, 58 (1st Cir. 2006)). But as we noted earlier, Zell did not actually file a motion to amend. Instead, as an alternative to outright dismissal, she perfunctorily requested leave to amend at the close of each opposition submission below. We've said before that requesting amendment as a fallback position, without more, is not sufficient to constitute a motion to amend. *See, e.g.*, *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 327 (1st Cir. 2008). That said, the district court concluded Zell would not be allowed to amend her complaint, citing futility to support that conclusion. *Zell*, 321 F. Supp. 3d at 304. As to the federal claims and the state-law negligent supervision/training claim, there was no abuse of discretion in so concluding, *see, e.g.*, *Aponte-Torres*, 445 F.3d at 58, especially when Zell has not demonstrated that any hypothetical amendment (she hasn't floated a proposed amended

> complaint delineating the alterations she'd make to rectify the deficiencies) would not have been futile. As to the state-law general negligence claim (Count VIII), though, our just-explained outcome on the dismissal of that claim renders moot the denial of the motion to amend as to that claim.

Zell v. Ricci, 957 F.3d 1, 18 n.20 (1st Cir. 2020). In the present case, the Appellants attached a series of documents that had been obtained from public sources and asked the District Court to consider them both in the face of a plausibility challenge and the request for limited discovery. The documents provided the detail of what occurred including that Mr. Hirshon was aware of the leases having filed a subordination agreement to protect his mortgage priority in the face of the option to buy 75 Queen street, Mr. Hirshon was providing money to Scott Lalumiere in exchange for mortgages, and that he took control over 36 Settler and 171 South Street that were both part of the fraud scheme turning the value of the properties into money. The assertion here is that Petitioners could have gotten limited discovery even if the information did not meet the plausibility standard.

The only First Circuit case to uphold a futility finding in the context of a civil RICO action characterized limited discovery as being an important factor. The First Circuit has called access to limited discovery an important part of the futility analysis:

> But the missing link that is common to the claims at issue in the case before us has not been alleged "upon information and belief," as it was in Menard, see 698 F.3d 44, 45 n5, and is not plausible simply by appeal to

> common sense, as in García–Catalán, see 734 F.3d at 103. Here, the gap between the allegations in the complaint and a plausible claim is wider than it was in those cases. Importantly, Saldivar was allowed modest discovery before she filed her amended complaint, namely access to Pridgen's disciplinary record, upon which Saldivar's allegations are based. There is no indication from that record, however, that any of the violations involved violent conduct.

Saldivar v. Racine, 818 F.3d 14, 23 (1st Cir. 2016). Until the present case, the First Circuit's precedents suggest two strategic counters to the missing connection without preference: Amendment and Limited Discovery. The Panel has now decided that limited discovery is subject to a lower standard of review than the futility standard that would be applied had a motion to amend been made in this case. This technical application of the Rules too easily prejudices actions that can be made plausible and should be reversed.

The petitioners are not the first parties to have fallen into this futility to amend plausibility problem and the risk that there is only one chance at getting the complaint right in the face of a motion to dismiss. Historically the First Circuit has allowed those parties to amend the complaint:

> Nevertheless, we think the motion to amend should be allowed. The precedents on pleading specificity are in a period of transition, and precise rules will always be elusive because of the great range and variations in causes of action, fact-patterns and attendant

> circumstances (e.g., warnings, good faith of counsel). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

Pruell v. Caritas Christi, 678 F.3d 10, 15 (1st Cir. 2012). Because the First Circuit's precedents do not clearly define the consequence for failing to try to amend and the District Court need not allow that amendment anyway, the procedure as it was defined during the litigation in this case did not allow Petitioners to predict the outcome. Not only has the First Circuit historically allowed for amendment in such circumstances, the First Circuit provides for limited discovery when that likely cures the deficiency. Pleading requirements should not be so opaque that ordinary attorneys cannot find the way through.

Moreover, the First Circuit recognizes that requesting permission to amend may itself be treated as an amendment. Neither the District Court nor the Panel considered this information:

> There may be exceptional circumstances in which a request to amend will become the functional equivalent of a motion to amend—but no such circumstances are present here. In any event, even if we treated HVE's statement in its memorandum as a motion to amend, we would consider the court's implicit denial of this motion to be well within its discretion. To this day, HVE has failed to allege any facts that would suffice to avoid dismissal on *in pari delicto* grounds.

Gray v. Evercore Restructuring LLC., 544 F.3d 320, 327 (1st Cir. 2008). The District Court in this case just refused to consider the information that made discovering the facts that demonstrated knowingly joined likely and determined that further amendment was futile not having considered the extrinsic information. The Panel similarly declined to consider the additional information in its review because it affirmed the District Court's decision that the claims against Mr. Hirshon and LOSU were not plausible and that considering the extrinsic information was subject to an abuse of discretion standard. The Petitioners, though, provided more than just a mere request to amend the complaint.

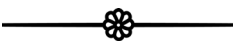
III. The United States Supreme Court Should Grant the Petition for a Writ of Certiorari to Resolve the Significant Issues That Surrounds This Well-Developed Split Among the Circuits That May Never Be Resolved If Not Addressed Now.

All the Circuits in the United States Court of Appeals have held that extrinsic documents may be considered. Six of the Circuits have identified *de novo* review as the standard of review in recognition that consideration is mandatory as a question of law. Three of the Circuits have identified this as a matter of discretion. This kind of split demonstrates that some guidance is necessary to fully implement the mandate of *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* Geography should not determine the merits of a complaint.

This case is a sound vehicle to resolve the issue over the standard of review and necessity of considering extrinsic documents under the plausibility standard. In this case, the standard of review makes

a difference. The District Court refused to consider the information attached to the Petitioners' opposition to the motion to dismiss despite instruction in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* The failure to consider the extrinsic documents is even more serious in a circumstance like the circumstance of this case where the deficient element is knowingly joined because of the role that scienter plays in meeting the plausible standard. Even the Ninth Circuit, the propagator of the discretionary standard of review raises the concern that the well plead standard is being used to subvert otherwise meritorious claims from proceeding through the process.

The stakes are high both for the judicial system and the Petitioners. Congress intended the private enforcement mechanism in the RICO statute as a means of enforcing the criminal law against those who violate the law with sophisticated means involving criminal enterprises. The law surrounding RICO is complex and the standards are not easily met when the issue is scienter. This is a case where the plausibility standard is being used to weed out a case where its merits are not immediately apparent. The plausible standard is not designed to test the facts, only as a gateway to the part of the process designed to test those facts. In this case the Amended Complaint alleged that Mr. Hirshon knew about the scheme and participated in it. The extrinsic documents showed the details of that participation, and the District Court should have considered it. The Petitioners ask this Court to grant a Writ of Certiorari and accept this case for full briefing.



CONCLUSION

The Supreme Court should review the conclusion of the Court of Appeals for the First Circuit and grant this petition for writ of certiorari.

Respectfully submitted,

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