No.

IN THE

Supreme Court of the United States

D&T PARTNERS, L.L.C., *et al.*,

Petitioners,

v.

BAYMARK PARTNERS MANAGEMENT, L.L.C., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to maintain a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim, a plaintiff must plead a "pattern" of racketeering activity that consists of two or more predicate acts. 18 U.S.C. § 1961(5). Decades ago, this Court held that a plaintiff may demonstrate a pattern by establishing "a series of related predicates extending over a substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). In doing so, it expressly rejected a multiple-"schemes" test.

In the decision below, the Fifth Circuit found that the alleged acts satisfied the relatedness test,[1] and held that the racketeering conduct occurred over a "substantial" period of time.[2] Nonetheless, it superimposed additional, extra-statutory hurdles that this Court has never required, and found that the alleged conduct did not constitute a "pattern" "because the unlawful actions all related to a single scheme. . . ."[3]

Must a plaintiff or prosecutor plead multiple schemes (or some other fact) in addition to "a series of related acts that occur over a substantial period of time" in order to sufficiently plead a RICO "pattern?"

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1. Appendix, 9a.
2. Appendix, 11a.
3. Appendix, 15a.

PARTIES

The parties to the proceeding below are as follows:

Petitioners are D&T Partners, L.L.C., successor in interest to ACET Venture Partners, L.L.C., directly and derivatively on behalf of ACET Global, L.L.C. and Baymark ACET Holdco, L.L.C. They are the plaintiffs in the district court and appellants in the court of appeals.

Respondents are Baymark Partners Management, L.L.C.; Super G Capital, L.L.C.; SG Credit Partners, Incorporated; Baymark ACET Holdco, L.L.C.; Baymark ACET Direct Invest, L.L.C.; Baymark Partners; David Hook; Tony Ludlow; Matthew Denegre; William Szeto; Marc Cole; Steven Bellah; Zhexian "Jane" Lin; Dana Marie Tomerlin; Padasamai Vattana; Paula Ketter; Vanessa Torres; Windspeed Trading, L.L.C.; Julie Smith; Hallet & Perrin, PC; Baymark Management, L.L.C. Respondents are the appellees in the court of appeals.

The related proceedings below are:

1. Northern District of Texas No. 3:21-CV-1171, and

2. Fifth Circuit Court of Appeals No. 22-11148—Judgment Entered April 4, 2024.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

D&T Partners, L.L.C., successor in interest to ACET Venture Partners, L.L.C., has no parent corporation, and there is no publicly held company that owns more than 10% of its stock.

ACET Global, L.L.C. has no parent corporation, and there is no publicly held company that owns more than 10% of its stock.

Baymark ACET Holdco, L.L.C. has no parent corporation, and there is no publicly held company that owns more than 10% of its stock.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES

Page

OTHER AUTHORITIES

RULES

PETITION FOR WRIT OF CERTIORARI

D&T Partners, L.L.C., successor in interest to ACET Venture Partners, L.L.C., directly and derivatively on behalf of ACET Global, L.L.C. and Baymark ACET Holdco, L.L.C., petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion, No. 22-11148, is published. It is attached below as Appendix A. The District Court for the Northern District of Texas entered a Memorandum Opinion & Order on October 21, 2022, attached as Appendix C.

JURISDICTION

The Fifth Circuit rendered its decision affirming the judgment on April 4, 2024. See Appendix B. This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are:

18 U.S.C. § 1961 (Appendix E)

18 U.S.C. § 1962 (Appendix F)

INTRODUCTION

This case presents an ideal vehicle to revisit this Court's guidance in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) and thereby address the intractable split that has arisen among the circuit courts with respect to RICO's "pattern" requirement—a frequently recurring issue. The appellate and district courts' decisions below were expressly premised on the pattern requirement, and multiple parties with varying perspectives and interests exhaustively briefed the narrow pattern issue at both the district court and appellate levels.

In *H.J. Inc.*, this Court established two, and only two, requirements to plead a "pattern" for closed-ended conduct (which is at issue here): (i) relatedness and (ii) continuity. It has never required more. Under the *H.J. Inc.* framework, a plaintiff may prove a pattern by establishing "a series of related predicates extending over a substantial period of time." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 242. In adopting this standard, the Court expressly rejected a multiple-"scheme" test—a test that found no grounding in the statutory text or its legislative history. *Id.* at 240-41.

Prior to its decision in *H.J. Inc.*, this Court recognized that the RICO "pattern" requirement had resulted in divergent approaches among the courts of appeal. Indeed, Justice Scalia described the then-existing situation as "a kaleidoscope of Circuit positions." *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring in judgment) (further describing the chaotic circuit split with respect to the RICO "pattern" analysis as "the widest and most persistent Circuit split on an issue of federal law in recent memory." *Id.* at 251.) It was

against this backdrop that the Court granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Co.*, seeking to bring clarity to the "pattern" requirement.

Unfortunately, since that time, the wide and persistent split has reappeared. Despite this Court's guidance in *H.J. Inc.*, lower courts have since reimported the multiple-schemes test as a mechanism to dismiss RICO cases and have employed other non-statutory factors to narrow the statute's application. Indeed, as commentators have recognized, "[u]nder the guise of applying *H.J. Inc.*'s framework, but against its express direction, courts [such as the Fifth Circuit] have effectively reinstated the condemned single scheme exclusion to RICO's pattern requirement." Kevin J. Murphy, *The Resurrection of the "Single Scheme" Exclusion to Rico's Pattern Requirement*, 88 Notre Dame L. Rev. 1991, 2008 (2013).

The re-importation of the multiple-schemes test has arisen from a deep split among the circuits as to the framework that governs a RICO pattern. While some courts of appeal have viewed the duration of related racketeering activity as dispositive to the closed-ended continuity (*i.e.*, pattern) inquiry, *e.g.*, *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991), others have assessed closed-ended continuity under a multi-factor approach. *E.g.*, *Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 530 (1st Cir. 2015). And many circuits have found, as the Fifth Circuit effectively did here, that a plaintiff cannot establish a RICO "pattern" unless there are multiple "schemes." *E.g.*, *Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 74–75 (D.D.C. 2009).

In the decision below, the Fifth Circuit further widened the divide by distinguishing "other circuits [that] have considered an explicit range of factors,"[4] and employing its own, unique rubric: an ill-defined "highly fact-intensive analys[i]s" that avoids committing to "specific factors," despite the court invoking the absence of multiple schemes as decisive here.[5] And its reliance on its finding that there were a limited number of victims because, on its reading,[6] some victims were not "targeted repeatedly" through "broad-based criminal conduct," and instead suffered what it characterizes as "derivative injur[ies],"[7] flies in the face of this Court's precedent as well. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (rejecting a requirement of a "direct" injury and rejecting the imposition of requirements that are not present in RICO's text).

STATEMENT OF THE CASE

Petitioner's complaint in the district court set out, in extensive detail, a series of more than 100 related predicate acts that took place over the course of some 48-plus months, harming at least 24 victims. Its complaint rivals the most comprehensive of filings. The RICO-based fraud involved the illegal transfer of a business and its assets, including valuable trade secrets; the false documentation of a foreclosure; a debtor's (ACET Global's)

4. Appendix, 10a.

5. Appendix, 10a.

6. A reading that repeatedly fails to afford Petitioner the inferences to which it is entitled at the pleading stage.

7. Appendix, 12a-13a.

law firm drafting a faux notice of foreclosure for the co-conspirator creditor to serve upon it; surreptitious and hidden ownership of a company (Windspeed), formed by the same law firm and which simultaneously had the same (co-conspirator) CEO as the debtor, that served as a recipient of stolen assets; a bankruptcy fraud; the destruction of documents and electronic data; multiple key parties being sued for carrying out similar RICO schemes; and a corporate representative openly instructing, in mob-esque fashion, a key witness to "shut the **** up" during his deposition when he was questioned about the fake foreclosure. This case presents the question of whether the interrelated predicate acts that comprise these activities, spanning across more than four years, are sufficient to merely plead (not prove) a pattern for RICO purposes.

A. Background.

Petitioners' complaint detailed a series of more than 100 predicate acts that were carried out over four-plus years and harmed multiple victims.[8] The complaint lays out, in comprehensive and detailed fashion, how Respondents (Baymark Partners) stole millions of dollars, selling off ACET Global's assets (and pocketing the proceeds) and looting its valuable trade secrets. Baymark Partners, which controlled ACET Global, and its co-conspirators carried out the illegal transfer of ACET Global's assets and business operations to a new entity, Windspeed Trading, LLC, which they surreptitiously owned and controlled.[9]

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8. Appendix, 5a; Appendix, 8a; Appendix, 10a-11a; Appendix 34a.

9. Appendix 7a; Appendix 30a; Appendix 41a; Appendix

In carrying out their fraudulent endeavors, the Respondents used a secret set of books and laundered funds and proceeds through a string of shell entities.[10] The Respondents drafted, executed, and backdated faux documents, all after the fact, designed to create the false appearance that they had engaged in a foreclosure that never actually occurred.[11]

As the Fifth Circuit noted, "the same law firm—Hallet & Perrin—authored Windspeed's company agreement, discussed the fraudulent asset transfer with Baymark, drafted the foreclosure sale agreement for [the co-conspirator creditor] and represented Baymark, [ACET] Global, and Windspeed during the foreclosure sale."[12]

The Respondents subsequently carried out a bankruptcy fraud designed to prevent ACET Global's numerous creditors from recovering against ACET Global and to cover up their fraud, knowingly and intentionally making a number of false statements to hide their frauds.[13] As the Fifth Circuit noted, numbered among these false statements, "[ACET] Global representatives distorted the value of its assets and lied about its finances."[14]

Baymark and its principals then engaged in a scheme

43a-44a.

10. Appendix, 30a.

11. Appendix, 32a.

12. Appendix, 4a.

13. Appendix, 4a; Appendix 32a.

14. Appendix, 4a.

of soliciting and committing perjury and obstruction of proceedings, with their corporate representative (who was a licensed attorney and CPA) going so far as to openly instruct a key witness to "shut the **** up" during his deposition when he was questioned about the faux foreclosure.

"When interested parties got wind of these problems, [Respondents] undertook an extensive cover-up."[15] They carried out the intentional destruction of ACET Global's emails, electronic data, and website.[16] And during the pendency of the appeal, Respondents' attorneys informed undersigned counsel that Windspeed (the fraudulent transferee) had been "shut down" as well, thereby further thwarting ACET Global and Windspeed's creditors.

B. Legal Background.

Under RICO, it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

A "pattern" of racketeering activity consists of two or more predicate acts that are (1) related ("the relatedness" prong) and (2) amount to or pose a threat of continued criminal activity (the "continuity" prong). *H.J. Inc.*, 492

15. Appendix 4a.

16. Appendix 33a.

U.S. 229, 239. Congress, this Court has recognized, had a fairly flexible concept of a "pattern" in mind. *See id.* at 240.

To satisfy the continuity prong under RICO, a plaintiff must sufficiently plead either a "closed period of repeated conduct" or an "open-ended period of conduct" that by its nature projects into the future with a threat of repetition. *Id.* at 241. Closed periods of continuity, which are at issue in this petition, require a series of related predicates over a substantial period of time. *Id.* at 242.

C. Proceedings and Disposition Below.

On May 21, 2021, Petitioners filed their original complaint. Petitioners filed a first amended complaint as of right. Respondents filed motions to dismiss. The parties extensively briefed their positions. On May 9, 2022, the district court granted the Respondents' motions to dismiss, finding that the Petitioners' complaint did not adequately plead a pattern of racketeering activity, but granted Petitioners leave to file an amended complaint.

On June 8, 2022, Petitioners filed a second amended complaint. Respondents again filed motions to dismiss. Again, the parties extensively briefed their positions. The district court granted those motions and dismissed Petitioners' RICO claims with prejudice, finding that the complaint did not adequately plead a pattern of racketeering activity.

Petitioners timely appealed. Following that appeal, the Fifth Circuit affirmed the lower court's holding. As the circuit court noted in its opinion, during the pendency of that appeal, several of the parties to this matter engaged

in a bench trial in Texas state district court, which was tried by undersigned counsel.[17] That state district court issued a ruling, finding several of the defendants liable for, among other claims, breach of contract, breach of fiduciary duty, and violations of the Texas Uniform Fraudulent Transfer Act. *Id.* Multiple parties to the matter below, however, were not defendants in the state court proceedings.

Petitioners now seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Decision Conflicts with Decisions of this Court.

The Fifth Circuit's "highly fact-intensive analys[i]s"—which, at least nominally, does not commit to specific factors as a framework—is inconsistent with the statute and contrary to this Court's precedent. Its unpredictable framework promises to spawn a great deal of uncertainty.

Contrary to the Fifth Circuit's decision below, this Court's precedent has established two, and only two, requirements to demonstrate a "pattern" for closed-ended conduct: (i) relatedness and (ii) continuity. It has never required more. Its framework looks to whether a series of related predicate acts extended over a substantial period of time. *H.J. Inc.*, 492 U.S. at 242. That framework was implemented against a backdrop of repeated admonitions that RICO is to be interpreted expansively.

17. Appendix, 5a, n.4.

In *Sedima, S.P.R.L.*, for example, this Court underscored its liberal construction of RICO:

> RICO is to be read broadly. This is the lesson not only of Congress' self consciously expansive language and overall approach, see *United States v. Turkette*, 452 U.S. 576, 586–587, 101 S.Ct. 2524, 2530–2531, 69 L.Ed.2d 246 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub.L. 91–452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985). The Court has repeatedly "reject[ed] a pinched construction of RICO's provision for a private civil action," *H.J. Inc.*, 492 U.S. at 249, and has emphasized Congress's "fairly flexible concept of a pattern." *Id.* at 239.

"[T]o prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239. Under this Court's precedent, "[a] party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 242.

This Court has clarified that predicate acts "extending over a few weeks or months" do not satisfy the continuity requirement. *Id.* Nor does "sporadic activity," *id.* at 239

(citing S. Rep. No. 91–617), or "two widely separated and isolated criminal offenses." *Id.* (citing 116 Cong. Rec., at 18940 (1970) (Sen. McClellan)).

Rather, the Court has characterized the elements of relatedness and continuity as the "constituent" components of RICO's pattern requirement. *Id.* at 239. Thus, under its precedent a plaintiff may prove a pattern by establishing "a series of related predicates extending over a substantial period of time." *Id.* "It is this factor of *continuity plus relationship* which combines to produce a pattern." *Id.* (emphasis in original).

In the case below, the Fifth Circuit, in no uncertain terms, affirmed the lower court's dismissal because the alleged acts were, in its view, part of a single scheme:

> Although D&T's complaint here cites several instances of fraud, the nature and singular objective of the underlying transaction do not support a finding of closed-ended continuity. This is because the unlawful actions all related to a single scheme targeted at Global.

Appendix, 15a (citing primarily to *Delta Truck & Tractor, Inc. V. J.I. Case Co.*, 855 F.2d 241, 244 (5th Cir. 1988), a decision that predates *H.J. Inc.*).[18] It so held despite finding that the alleged acts satisfied the relatedness

18. To the extent that the Fifth Circuit imported a number-of-victims or type-of-victim test/factor into its analysis, it is likewise inconsistent with *H.J Inc.* and other precedent from this Court. *E.g.*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (rejecting a requirement of a "direct" injury and rejecting the imposition of requirements that are not present in RICO's text).

test,[19] and expressly finding that the racketeering conduct occurred over a "substantial" period of time,[20]—the two constituent elements of a pattern under this Court's precedent. The Fifth Circuit's decisive multiple-scheme test and invocation of a "highly fact-intensive analys[i]s"—a freewheeling "framework" that is something of a cross between a multi-factor test and an "I know it when I see it" approach—flies in the face of this Court's decision in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989), looking beyond its clearly-enunciated constituent elements of a pattern. Unfortunately, numerous circuits have likewise shirked this Court's precedent in favor of more restrictive RICO tests—largely, it appears, driven by policy disagreements as to the proper role and availability of RICO.[21]

More than three decades ago, this Court recognized that the "pattern of racketeering activity" requirement had given rise to divergent approaches among the courts of appeal. Indeed, Justice Scalia described the phenomenon as "a kaleidoscope of Circuit positions," *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring in judgment), characterizing

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19. Appendix, 9a.

20. Appendix, 11a.

21. This Court, for its part, has repeatedly admonished lower courts against such policy-driven holdings. *E.g.*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008) (citing prior holdings and stating, "Whatever the merits of petitioners' arguments as a policy matter, we are not at liberty to rewrite RICO to reflect their—or our—views of good policy. We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe.")

the chaotic pre-*H.J. Inc.* circuit split as "the widest and most persistent Circuit split on an issue of federal law in recent memory." *Id.* at 251. It was against this backdrop that the Court granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Co.*, seeking to bring clarity to RICO's "pattern" requirement.

In *H.J. Inc.*, this Court set forth two, and only two, requirements to establish a "pattern" for closed-ended conduct: (i) relatedness and (ii) continuity. A party, it held, "demonstrate[s] continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 242.

H.J. Inc. also expressly rejected the multiple-scheme approach. *Id.* at 237, 240-41. Indeed, Justice Scalia, in his concurring opinion, interpreted the Court's discussion of multiple schemes as a rejection of the multiple-scheme concept "not merely as the exclusive touchstone of RICO liability, but in all its applications. . . . " *Id.* at 253 (Scalia, J., concurring) (citations omitted).

But contrary to this Court's guidance in *H.J. Inc.*, lower courts—such as the Fifth Circuit here—have since reimported the multiple-scheme test, wielding it as a decisive ground to limit RICO cases in a manner that is contrary to this Court's guidance. As commentators have recognized, "[u]nder the guise of applying *H.J. Inc.'s* framework, but against its express direction, courts have effectively reinstated the condemned single scheme exclusion to RICO's pattern requirement." Kevin J. Murphy, *The Resurrection of the Single Scheme Exclusion to Rico's Pattern Requirement*, 88 Notre Dame L. Rev. 1991, 2008 (2013). Indeed, several lower courts

have dismissed RICO cases by relying on the absence of "multiple schemes."[22]

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22. Kevin J. Murphy, *The Resurrection of the Single Scheme Exclusion to RICO's Pattern Requirement*, 88 Notre Dame L. Rev. 1991, 2009, n. 96 (2013) (compiling a list of such cases, including *W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 635 (D.C. Cir. 2001) (holding that a single scheme of racketeering activity across eight years was insufficient to prove continuity); *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549–51 (4th Cir. 2001) (finding several acts of fraud across eighteen months designed to inflate company value before selling it to be insufficient for continuity and stating that "[w]here the fraudulent conduct is part of the sale of a single enterprise, the fraud has a built-in ending point, and the case does not present the necessary threat of long-term, continued criminal activity"); *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 17–21 (1st Cir. 2000) (finding that a single scheme of seventeen acts of racketeering across 21 months is insufficient for continuity and arguing that the Court's emphasis on temporal factors "did not mean that other considerations were to be entirely ignored"); *Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995) (holding that fifteen predicate acts across three years had insufficient continuity and claiming that "the combination of these factors (single scheme, single injury, and few victims) makes it virtually impossible for plaintiffs to state a RICO claim"); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133–35 (6th Cir. 1994) (finding several acts of fraud, extortion, and obstruction of justice across seventeen months insufficient because it involved only "a single victim and a single scheme for a single purpose"); *U.S. Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266–69 (7th Cir. 1990) (finding seventeen months of mail and wire fraud offenses insufficient for a "pattern" because of the character of the offenses and the absence of multiple schemes); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683–85 (4th Cir. 1989) (finding that several acts of commercial fraud across a year were insufficient to meet the continuity bar because the actions "were narrowly directed towards a single fraudulent goal" and

This is problematic for several reasons. First, as this Court has recognized, the term "scheme" "appear[s] nowhere in the language or legislative history of the Act." *H.J. Inc.*, 492 U.S. at 241.[23] The plain text of the RICO statute makes no reference to a multiple-schemes requirement. And the plain meaning of the term "pattern" does not evoke a requirement of separate and distinct schemes.

Second, the concept of a "scheme"—and just where one ends and another begins—"is in the eye of the beholder," making for an unworkable and unpredictable framework. *Id.* at 241. The infusion of the concept muddies the water with vague, ambiguous terminology, engendering analysis that is guided by a gut instinct as to whether a case should or should not be a RICO one.

"involved a limited purpose"); *Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 74–75 (D.D.C. 2009) (finding that a series of related acts across three years had insufficient continuity because they formed a "single scheme" and had only one victim); *Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104, 115 (D.D.C. 2009) (finding that even if the defendant's alleged scheme was construed to have lasted twenty four months, this "one scheme, spanning about two years, with only four identified victims" did not have the requisite continuity); *Zandford v. Nat'l Ass'n of Sec. Dealers, Inc.*, 19 F. Supp. 2d 4, 11 (D.D.C. 1998) (finding a single scheme of racketeering with one victim that continued for two years to have insufficient continuity).

23. See also Michael Goldsmith, R*ICO and "Pattern:" The Search for "Continuity Plus Relationship,*" 73 Cornell L. Rev. 971, 986 (1988) ("The multiple scheme requirement also finds no support in [RICO's] legislative history.")

And third, engrafting the "scheme" concept onto the pattern framework directly conflicts with this Court's precedent and forces plaintiffs to jump through hoops to specifically plead something that this Court unmistakably found unnecessary.[24] Requiring multiple schemes to establish a pattern improperly excludes many cases from RICO because where the purposes, results, participants, victims, etc. are sufficiently similar and related, they are less apt to being characterized as arising from multiple schemes, resulting in dismissal. If, however, they are dissimilar and separate, they will no longer satisfy the relationship prong. This anomalous result is illogical.

As commentators have recognized, this Court has consistently rejected lower courts' attempts to import limitations into RICO that are not found in the statute's language. Kevin J. Murphy, *The Resurrection of the Single Scheme Exclusion to Rico's Pattern Requirement*, 88 Notre Dame L. Rev. 1991, 2013-14 (2013).[25] The Fifth

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24. Kevin J. Murphy, *The Resurrection of the Single Scheme Exclusion to Rico's Pattern Requirement*, 88 Notre Dame L. Rev. 1991, 2016 (2013).

25. See, e.g., *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008) ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (holding that a RICO violation does not require an "economic motive"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493–94 (1985) (rejecting the requirement that civil RICO can only proceed against a defendant who already has a criminal conviction and rejecting the requirement of a "racketeering injury," relying heavily on the plain language of RICO's text in both instances); *United States v. Turkette*, 452 U.S. 576, 580–81 (1981) (rejecting

Circuit's re-imposition of a multiple-schemes requirement should likewise be rejected, as it results in the dismissal of RICO cases that satisfy the express language of *H.J. Inc.*

B. The Fifth Circuit's Decision Creates a Deeper Conflict Among the Circuits.

The Fifth Circuit's decision highlights an entrenched split in the circuit courts. Indeed, by drawing a distinction between its approach and the multi-factor approach, its decision further exacerbates that split.

Some circuits apply a multi-factor approach to determine whether closed-ended continuity exists to establish a pattern. *Home Orthopedics Corp. v. Rodriguez*, 781 F.3d 521, 530 (1st Cir. 2015); *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 804 (6th Cir. 2015); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1289 (6th Cir. 1989); *Moon v. Harrison Piping Supply*, 465 F.3d 719, 726 (6th Cir. 2006); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134-35 (6th Cir. 1994); *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 828 (7th Cir. 2016); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528

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a construction of RICO which would limit its application to only "legitimate enterprises" and noting that this construction "clearly departed from . . . the statutory language [of § 1964(4)]"); see also G. Robert Blakey & Scott Cessar, *Equitable Relief Under Civil Rico: Reflections on* Religious Technology Center v. Wollersheim: *Will Civil Rico Be Effective Only Against White-Collar Crime?*, 62 Notre Dame L. Rev. 526, 533–34 (1987) (describing the "extreme hostility" from the district courts that greeted civil RICO's rise in popularity and analyzing their attempts to "redraft the statute in a concerted effort to dismiss civil suits in all possible ways").

(9th Cir. 1995); *Kan-Di-Ki, LLC v. Sorenson*, 723 F.App'x 432, 434 (9th Cir. 2018); R*esolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543-44 (1993); *Western Assocs. Ltd. Pshp. v. Market Square Assocs*., 235 F.3d 629, 633-34 (D.C. Cir. 2001). Thus, in the First, Sixth, Seventh, Ninth, and D.C. circuits, courts utilize a multi-factor test to determine whether a "pattern" exists.

In contrast, other circuits employ a strictly durational approach. *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2nd Cir. 2008); *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2nd Cir. 2004); *Tabas v. Tabas*, 47 F.3d 1280, 1293 (3d Cir. 1995); *Yucaipa Am. Alliance Fund I, LP v. Ehrlich*, 716 F.App'x 73, 78 (3d Cir. 2017); *Hughes v. Consol-Pennsylvania Coal Company*, 945. F.2d 594, 611 (3d Cir. 1991); *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 550-51 (4th Cir. 2001); *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989); *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688, 690 (4th Cir. 1989); *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988); *Stonebridge Collection, Inc. v. Carmichael*, 791 F.3d 811, 824 (8th Cir. 2015); *United States v. Hively*, 437 F.3d 752, 761 (8th Cir. 2006); *Jackson v. BellSouth Telecoms.*, 372 F.3d 1250, 1266-67 (11thth Cir. 2004). Thus, the Second, Third, Fourth, Eighth, and Eleventh circuits eschew a factor-based test and look instead to the length of time in order to determine whether a pattern exists.

The Fifth Circuit's decision below appears to deepen the conflict among the circuits by distinguishing its "highly fact-intensive analys[i]s"—which avoids committing to

"specific factors"—from other circuits that consider an "explicit range of factors."[26]

C. The Question Presented Has Great Significance.

The Fifth Circuit's decision below narrows the scope of viable RICO claims and does so in a manner that not only gives rise to confusion and unpredictability, but that is also contrary to Congressional intent and this Court's precedent. RICO provides for both civil and criminal sanctions. It serves as a tool for aggrieved plaintiffs and prosecutors alike. The Fifth Circuit's approach weakens RICO for both civil and criminal enforcement. And because RICO's "pattern" requirement applies to its use as a criminal statute, the need for clarity is even greater, given the heightened degree of certainty necessary in criminal law. *See FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (holding that a Federal Communications Commission regulation with both civil and criminal penalties must be construed in accord with "well established principle that penal statutes are to be construed strictly"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (Scalia, J., concurring) (observing that "clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal law. . . . ").

The lower court's decision further warrants this Court's attention because it is recurring and important. Given the frequent use of RICO's provisions, both by the

26. Appendix, 10a.

government and private litigants, the questions presented here stand to recur frequently.

Moreover, the question presented affects a considerable volume of state-court litigation as well. Many states have enacted their own versions of RICO and those states' courts look to federal authority in applying those statutes. See, e.g., *Arthur v. JP Morgan Chase Bank, N.A.*, 569 F. App'x 669, 681 & n.12 (11th Cir. 2014) (federal law is "persuasive when interpreting the Florida RICO Act").

D. This Case Presents an Ideal Vehicle to Address the Question Presented.

This case presents a perfect vehicle to address the standard that is necessary to plead a RICO pattern: the various arguments were exhaustively developed below, and the issue, which will recur frequently, is squarely presented and was the sole basis for the appellate court's decision.

First, the issue was exhaustively developed below. At the district court level, the litigants engaged in two rounds of fulsome motions to dismiss and counter briefing, with multiple parties filing briefs covering an array of party perspectives. The district court issued two opinions focusing on the pattern issue.

Likewise, the parties engaged in detailed appellate briefing and oral argument that focused on the RICO "pattern" requirement. The Fifth Circuit squarely premised its decision on the pattern element. There was no alternative or secondary holding with respect to its closed-ended pattern holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 3, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-11148

D&T PARTNERS, L.L.C., SUCCESSOR IN INTEREST TO ACET VENTURE PARTNERS, DIRECTLY AND DERIVATIVELY ON BEHALF OF ACET GLOBAL, L.L.C. AND BAYMARK ACET HOLDCO, L.L.C.; ACET GLOBAL, L.L.C.,

Plaintiffs—Appellants,

versus

BAYMARK PARTNERS MANAGEMENT, L.L.C.; SUPER G CAPITAL, L.L.C.; SG CREDIT PARTNERS, INCORPORATED; BAYMARK ACET HOLDCO, L.L.C.; BAYMARK ACET DIRECT INVEST, L.L.C.; BAYMARK PARTNERS; DAVID HOOK; TONY LUDLOW; MATTHEW DENEGRE; WILLIAM SZETO; MARC COLE; STEVEN BELLAH; ZHEXIAN "JANE" LIN; DANA MARIE TOMERLIN; PADASAMAI VATTANA; PAULA KETTER; VANESSA TORRES; WINDSPEED TRADING, L.L.C.; JULIE SMITH; HALLET & PERRIN, PC; BAYMARK MANAGEMENT, L.L.C.,

Defendants—Appellees.

Appendix A

April 4, 2024, Filed

Appeal from the United States District Court
for the Northern District of Texas.
USDC No. 3:21-CV-1171.

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges*.

DANA M. DOUGLAS, *Circuit Judge*:

A group of individuals allegedly sought to steal the assets and trade secrets of an e-commerce company. They did so with shell entities, corrupt lending practices, and a fraudulent bankruptcy. The question in this case is whether the scheme, as alleged, violates the Racketeer Influenced and Corrupt Organizations Act (RICO). We hold that it does not. While the complaint alleges coordinated theft, the alleged victims are limited in number, and the scope and nature of the scheme was finite and focused on a singular objective. Because this does not constitute a "pattern" of racketeering conduct sufficient to state a RICO claim, we AFFIRM the district court's judgment.

I

D&T Partners, LLC (D&T) operated a successful company that specialized in online retail. Perhaps encouraged by D&T's success, another company, Baymark Partners (Baymark), approached D&T with a proposition it could not refuse: Baymark sought to purchase D&T's assets in exchange for a sum of money and multimillion-dollar promissory note. To effectuate the sale, Baymark

created a new company, ACET Global (Global), to take the operational reins from D&T, hold the transferred assets, and pay the substantial promissory note.

Following the sale from D&T, Global took out a separate term loan from another entity, Super G3 (Super). D&T agreed to subordinate its security interest to Super as part of that transaction. It did so after Baymark insisted that D&T's former management would remain at the helm of Global.

But less than a year after the sale, things began unraveling. Baymark reneged on its assurances to D&T and replaced Global's CEO with an alleged crony, who accepted the new role free of charge. According to the complaint, this new executive caused Global to default on its payment to Super and enter a forbearance agreement, waiving loan payments until just days before the D&T promissory note would become due. In the meantime, the same CEO created another company named "Windspeed"—an entity in which Baymark and Super both had an ownership interest.

After Windspeed's creation, next began the "critical steps of Global's 'wind down' plan." The scheme involved transferring Global's assets, operations, inventory, customer lists, marketplaces, and employees to Windspeed. Super, for its part, gave this new assetless entity $200,000 with the expectation that Windspeed would eventually acquire Global's assets.

Problems only compounded for Global. When the forbearance period with Super ended, Global defaulted on

the loan. It then defaulted on the promissory note payment due to D&T. Purporting to respond to the nonpayment, Super issued a faux notice of forfeiture to take possession of Global's assets. There was, however, a problem: D&T no longer had anything to foreclose on after the transfers to Windspeed. Making matters worse, the same law firm—Hallett & Perrin—authored Windspeed's company agreement, discussed the fraudulent asset transfer with Baymark, drafted the foreclosure sale agreement for Super, and represented Baymark, Global, and Windspeed during the foreclosure sale.

Global declared bankruptcy shortly after the default. In doing so, it filed a petition in bankruptcy court with several misrepresentations. Numbered among them, Global representatives distorted the value of its assets and lied about its finances. When interested parties got wind of these problems, Defendants undertook an extensive cover-up. Emails and electronic documents went missing, and websites and other online traces mysteriously vanished from the internet. According to the complaint, Defendants destroyed evidence, obstructed legal proceedings, and contradicted their own testimony.

Citing Defendants'[1] nefarious scheme to loot Global's assets, D&T filed suit in federal court under RICO. After

1. The complaint lists several Defendants. Defendant-Appellees filed two separate briefs. One brief was filed on behalf of Marc Cole and SG Credit Partners, Inc. Defendants-Appellees Baymark Partners Management, L.L.C., Baymark ACET Holdco, L.L.C., Baymark ACET Direct Invest, L.LC., Baymark Partners, David Hook, Tony Ludlow, Matthew Denegre, and Baymark Management, L.L.C., and Julie Smith and Hallett & Perrin, P.C., filed a separate brief.

two amendments,[2] D&T's complaint spans 194 pages and alleges various unlawful racketeering acts, including wire fraud, mail fraud, obstruction of justice, bankruptcy fraud, and money laundering. Such conduct, according to D&T, resulted in several millions of dollars in unpaid debts due to D&T and other creditors. After D&T filed its second amended complaint, Defendants moved to dismiss the lawsuit, arguing that D&T failed to state a RICO claim. The district court agreed and dismissed all D&T's claims with prejudice, concluding that D&T was unable to plead a pattern of racketeering activity.[3] D&T says that the court's holding was in error and timely appealed.[4]

II

We review dismissal for failure to state a claim de novo. *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 116 (5th Cir. 2019). In doing so, we accept all well pled facts as true and determine whether plaintiff's complaint states a plausible claim for relief. *Id.*

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2. The district court granted Defendants' first rounds of motions to dismiss but gave D&T the opportunity to amend its complaint.

3. The district court dismissed as moot the motions to dismiss filed by the law firm, Hallett & Perrin, Julie Smith, the Windspeed Employees, Windspeed, and William Szeto.

4. Several weeks before oral argument, several parties to this appeal were involved in bench trial in a Texas state district court. Following oral argument, the district court issued a ruling finding several Defendants liable for, among other claims, breach of contract, breach of fiduciary duty, and violations for the Texas Uniform Fraudulent Transfer Act.

Appendix A

A

To eradicate "organized crime in the United States," Congress passed the Racketeer Influenced and Corrupt Organizations Act, a legislative package that provided the government "new weapons of unprecedented scope" targeting organized crime at "its economic roots." *Russello v. United States*, 464 U.S. 16, 26, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). Among the new tools for prosecutors, RICO established innovative evidence-gathering procedures, created criminal prohibitions, and provided enhanced sanctions and remedies for victims. *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Putting its provisions to use, the government has employed RICO to take down leaders from notorious crime outfits across the country. But even while "[o] rganized crime was without a doubt Congress' major target," *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), RICO's central aim is prohibiting "patterns" of crimes conducted through an "enterprise," no matter where or how such patterns occur.

RICO is also more than a criminal statute. When drafting the legislation, Congress incorporated provisions in RICO that allow private plaintiffs to seek redress in federal court. If their lawsuit succeeds, the statute provides a big payout: Plaintiffs are entitled to triple damages, court costs, and attorney's fees. 18 U.S.C. § 1964(c). Even so, pursuing that recovery is often a challenging undertaking. Problems typically arise at the pleadings stage, as courts are hesitant to find RICO violations, and plaintiffs have difficulty alleging them.

See Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 785 (7th Cir. 1994) (Cudahy, J., concurring) ("RICO is a judge's nightmare and doggedly persistent efforts to hammer it into a rational shape deserve the utmost respect even though they can rarely accomplish the impossible."). The root of the trouble stems from the statute's vague language. As explained in more detail below, the requisite RICO pleading standards are far from explicit, and the RICO jurisprudence offers courts (and plaintiffs) little guidance. *See H.J. Inc.*, 492 U.S. at 256 (Scalia, J., dissenting) ("[T]he highest Court in the land has been unable to derive from this statute anything more than . . . meager guidance.").

B

By its terms, RICO makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

Pointing to that language, D&T believes Defendants' actions fall "squarely within RICO's crosshairs." Over four years, D&T says Defendants engaged in a "series of elaborate, sophisticated, and coordinated acts of deception" with one mission in mind: "fraudulently siphon [Global's] trade secrets and assets for its own benefit, transfer those assets from the reach of creditors and hide and conceal their conduct." Such a scheme, D&T alleges,

caused harm to more than twenty-four RICO victims, including the bankruptcy trustee and Global's creditors.

In pursuing this action, D&T brings claims under three subsections of the RICO statute. *See id.* §§ 1962(a), (c) & (d).[5] Though the subsections are distinct, each shares three common elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (quoting *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996)).

The crux of this case involves element two—whether Defendants engaged in a "pattern of racketeering activity." A pattern, according to RICO, requires at least two predicate criminal actions. 18 U.S.C. § 1961. But that is where the statute's guidance ends. Even so, it is well established that the word "'pattern' . . . was meant to import," *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., dissenting), something more than simply "[e]stablishing the minimum number of predicates." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1140 (5th Cir. 1992). Yet determining what that "something" is "has proved to be no easy task." *H.J. Inc.*, 492 U.S. at 236. In attempting to fill the void, the Supreme Court has offered some contour: "To establish th[e] pattern [element,] a plaintiff must show both a

5. The claims under subsections (c) and (d) are against all Defendants, while the claim under subsection (a) is against Baymark Partners, Ludlow, Hook, Denegre, Super G, SG Credit, BP Management, Smith, and Hallett & Perrin. Because these claims have the same elements, we analyze them together.

relationship between the predicate offenses . . . and the threat of continuing activity." *Malvino v. Delluniversita*, 840 F.3d 223, 231 (5th Cir. 2016). These two elements are termed "relationship" and "continuity."

Predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 492 U.S. at 240 (citation omitted). "Continuity," by comparison, is a "temporal concept." *Id.* In noting Congress's goal of addressing "*continuing* racketeering activity," the Court offered a framework for putting the "continuity" principle into practice: A RICO plaintiff can prove "continuity" by alleging "a closed period of repeated conduct," or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Respectively, these precepts are known as "closed" and "open-ended" continuity. In utilizing this amorphous framework, however, the Supreme Court directed judges to employ a "commonsense approach" and consider the specific facts of each case. *Id.* at 237.

Though no one contests the "relationship element" of the pattern analysis, the parties here dispute whether D&T's complaint alleges closed or open-ended continuity. We address each theory in turn.

1

To start, a party can demonstrate continuity over a closed period by alleging a series of related criminal

acts extending over a "substantial period of time." *Id.* at 242. In pursuing this particular RICO theory, D&T says that Defendants engaged in a scheme involving several acts of deception over four years. D&T outlines over 100 predicate acts in its amended complaint, including mail and wire fraud, obstruction of justice, money laundering, and bankruptcy fraud.[6] D&T believes that allegations of such acts carried out over multiple years are sufficient to survive the pleading stage.

But pleading continuity is not as straightforward as D&T seems to suggest. Because continuity depends on the specific facts of each situation, no one test can be fixed "in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *Id.* at 243. While other circuits have considered an explicit range of factors, we have engaged in highly fact-intensive analyses to determine whether closed-ended continuity was present in any given case.

Even without specific factors, however, several recurrent principles have emerged. Perhaps unsurprisingly, one crucial consideration in the closed-ended continuity analysis is the duration of the alleged racketeering scheme. When drafting RICO, Congress sought to address "*long-term* unlawful conduct," not fraudulent acts "extending over a few weeks or months." *Id.* at 242. But what timeframe is prolonged enough to be considered "long-term"? For our part, we have presumed that more

6. For purposes of this analysis, we conclude that *at least two* of the nearly 100 alleged predicate acts meet the plausibility standard. *See* 18 U.S.C. § 1961.

than a year of racketeering acts constitute a "substantial period of time." *See, e.g., Abraham*, 480 F.3d at 356 (holding that two years was sufficient); *United States v. Bustamante*, 45 F.3d 933, 941-42 (5th Cir. 1995) (holding that racketeering acts extending nearly four years suffice).

In this case, D&T's complaint alleges racketeering conduct occurring over "four years." Taking those allegations as true, we presume that such a period is "substantial" for RICO purposes. Affording D&T this presumption, however, does not end the inquiry, for the duration of the alleged unlawful conduct is not a dispositive factor. *See H.J. Inc.*, 492 U.S. at 242. Though it certainly carries significant weight, we have, on several occasions, considered other facts when engaging in the RICO pattern analysis.

One consideration, for instance, is the number of victims injured by the alleged racketeering acts. Our opinion in *Abraham v. Singh*, 480 F.3d at 356, offers one example. In that case, we found continuity when an alleged racketeering scheme involved "systematic victimization." *Id.* The complaint alleged a two-year scheme to induce hundreds of Indian citizens to borrow money and travel to the United States for employment, only to find on arrival "things were not as they had been promised." *Id.* Specifically, the transplants were housed in poor conditions and unable to find jobs, or alternatively, "farmed out" for inadequate pay. In finding continuity, we stressed the plan's effect on "multiple victims," and concluded that the plaintiffs' complaint alleged "a continuity of racketeering activity, or its threat." *Id.* (quoting *H.J. Inc.*, 492 U.S. at

256); *see also Malvino*, 840 F.3d at 232 (noting the extent of the affected victims).

By contrast, we—and our sister circuits—have been skeptical of RICO allegations when the victims of the alleged racketeering conduct are limited. *See W. Assocs. Ltd. P'ship, ex rel. Ave. Assocs. Ltd. v. Mkt. Square Assocs.*, 235 F.3d 629, 635 (D.C. Cir. 2001); *see also Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir. 1993) ("While the absence of multiple schemes or victims is not dispositive, it is instructive."); *Efron v. Embassy Suites, Inc.*, 223 F.3d 12, 19 (1st Cir. 2000) (concluding plaintiff failed to plead closed-ended continuity in part because of the limited number of victims). This is because the idea of "continuity" embraces "predicate acts occurring at different points in time or involving different victims." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). Though by no means conclusive, courts (including this one) have found the absence of multiple targeted victims relevant to the continuity inquiry. *See, e.g., Malvino*, 840 F.3d at 233 (considering evidence of "other victims" under the RICO pattern analysis); *see also Home Orthopedics Corp. v. Rodríguez*, 781 F.3d 521, 530 (1st Cir. 2015) (considering number of victims); *Grubbs v. Sheakley Grp.*, 807 F.3d 785, 804 (6th Cir. 2015) (same); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265, 310 U.S. App. D.C. 409 (D.C. Cir. 1995) (same); *Vicom*, 20 F.3d at 780 (same).

Here, D&T contends that Defendants' fraudulent scheme "duped" twenty-four victims in its effort to steal Global's assets. Notably, however, the complaint does not

allege that the victims were targeted repeatedly through broad-based criminal conduct. Instead, the alleged victims suffered a derivative injury stemming from Global, who was the only targeted victim of the underlying transaction. D&T implies as much in its second amended complaint: It recounts that the objective of Defendants' unlawful acts was to "siphon off [] Global's trade secrets and assets." Such a circumstance weighs against a finding of continuity. Unlike the "systematic victimization," discussed in *Abraham*, D&T and other creditors shared in a lone injury from a lone operation directed at a lone victim. *W. Assocs.*, 235 F.3d at 635 ("To the extent that Western's partners were injured, they were injured indirectly, which does not make them individual victims under RICO.").

Apart from the duration and the number of victims, another helpful consideration is whether the unlawful conduct concerns one or multiple schemes. If numerous schemes are alleged, such allegations are "highly relevant" to the continuity inquiry and tend to support such a finding. *H.J. Inc.*, 492 U.S. at 240. On the other hand, courts are reluctant to find a RICO violation when the complaint alleges unlawful conduct in pursuit of a "single effort, over a finite period of time." *Efron*, 223 F.3d at 21. To be clear, a viable RICO case need not involve multiple schemes. *H.J. Inc.*, 492 U.S. at 237. Nevertheless, courts have stressed that "a single scheme to accomplish 'one discrete goal,' directed at one individual with no potential to extend to other persons or entities" is not the type of racketeering "pattern" RICO seeks to prohibit. *See SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir. 1990); *see also Efron*, 223 F.3d at 19 ("Our own precedent firmly rejects

RICO liability where "the alleged racketeering acts . . ., 'taken together, . . . comprise a single effort' to facilitate a single financial endeavor." (quoting *Schultz v. Rhode Island Hosp. Tr. Nat. Bank, N.A.*, 94 F.3d 721, 732 (1st Cir. 1996))).

For our part, we have found that no RICO liability exists when a plaintiff alleges "multiple acts of fraud that were part and parcel of a single, discrete and otherwise lawful commercial transaction." *Word of Faith*, 90 F.3d at 123; *see Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 244 (5th Cir. 1988). This principle was made explicit in *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d at 123. There, the plaintiffs asserted RICO claims based on a network's critical investigation report of three televangelists. The racketeering acts alleged by the plaintiffs included "interstate transportation of stolen computer disks," "theft of donations, Church mail, and other Church property," "wire fraud," and "obstruction of justice." *Id.* at 121. Despite these allegations, we concluded that plaintiffs "failed to plead a 'continuity of racketeering activity or its threat.'" *Id.* at 123 (quoting *H.J. Inc.*, 492 U.S. at 241). In so holding, we reasoned that the alleged fraudulent acts were components of a broader plan with one single objective: producing "television news reports concerning a particular subject." *Id.* And such a "discrete," otherwise lawful endeavor posed no threat of "continuous activity" and was therefore insufficient for RICO purposes.

Relatedly, we have also examined the alleged objective of the scheme and whether its goals were finite. Consider

our ruling in *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d at 244. In that case, several plaintiffs accused an equipment dealer of numerous RICO violations concerning the acquisition of certain dealerships. The district court dismissed the complaint and we affirmed. In doing so, we concluded that the conduct did not constitute a RICO "pattern," in part, because the scheme came to its logical conclusion, and as a result, Defendants could not have posed a "continuous threat as RICO persons." *Id.; see also In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993) ("*All* of the alleged predicate acts took place as part of the *Burzynski I* litigation, which has ended.").

Although D&T's complaint here cites several instances of fraud, the nature and singular objective of the underlying transaction do not support a finding of closed-ended continuity. This is because the unlawful actions all related to a single scheme targeted at Global. By D&T's own admission, that finite scheme achieved its goal once Defendants transferred Global's assets to Windspeed Trading, LLC. Additionally, Defendants' criminal undertaking was part and parcel of an otherwise lawful commercial endeavor—that is, a loan default and its resulting foreclosure. *See Word of Faith*, 90 F.3d at 123. Though D&T has deconstructed several acts of fraud throughout the transaction, doing so was "a transparent effort to make [Defendants'] alleged fraudulent conduct seem more expansive." *See W. Assocs.*, 235 F.3d at 635.

D&T nevertheless counters that the Defendants' unlawful actions did not end with the transfer. It emphasizes that Defendants sought to "cover up" their

conduct by lying at depositions and deleting virtual files relevant to their liability. Yet the complaint only claims that Defendants were attempting to conceal the fraudulent predicates of their criminal undertaking. And such actions, "even if themselves illegal . . . 'do nothing to extend the duration of the underlying scheme.'" *Jennings v. Auto Meter Prods. Inc.*, 495 F.3d 466, 474 (7th Cir. 2007) (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992)).

Simply put, what began as an ordinary business transaction ended with stolen assets, a defunct company, and many unhappy creditors. Even if Defendants engaged in fraudulent acts in the interim, the complaint alleges that the acts arose in pursuit of a single end: transferring Global's assets to Windspeed. While the plan ultimately took several years to realize, the number of victims and the nature and objective of the alleged scheme do not support an inference of a closed-ended pattern of racketeering activity. On this basis, we must affirm the district court's ruling.

2

Without a closed-ended pattern, a plaintiff may nevertheless state a RICO claim by alleging "open-ended" continuity. This exists when a threat of continuing criminal activity extends indefinitely into the future. To establish this element, plaintiffs must show that the predicate acts "are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" *H.J.*

Inc., 492 U.S. at 243. In alleging an open-ended continuity theory here, D&T contends that Defendants' scheme to drain Global dry was not an isolated occurrence. It claims that Defendants engaged in similar schemes to advance a modus operandi: illegally acquiring significant equity stakes in companies for very little, or no, capital outlay.

Whether a plaintiff has alleged an open-ended pattern of continuity turns on whether the predicate acts themselves pose a "*threat* of continuity." *Id.* at 241. An open-ended pattern may exist when the predicates "involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Id.* at 242. To illustrate this point, the Supreme Court offered a hypothetical where a "hoodlum" extorted money from business owners, telling the businesses he would reappear each month to collect premiums that insured against window breakage. Even though these predicate acts were small and occurred close together, the Court reasoned that in time, the racketeering acts themselves had the threat of repetition extending indefinitely into the future. *Id.* at 242-43.

Pleading an identical or analogous fact pattern, however, is not the sole way to establish an indefinite threat of RICO activity. A plaintiff can also prove open-ended continuity by establishing that a defendant commits the predicate acts or offenses as its "regular way of doing business." *Id.* at 242. This may be done by showing that the entity repeats its fraud in similar business settings or would employ the underlying fraud against Defendants indefinitely. *See Efron*, 223 F.3d at 19.

D&T cites two other lawsuits against Defendants to show open-ended continuity here. These lawsuits, D&T asserts, support its theory that the scheme Defendants committed was all part of their ongoing fraudulent enterprise targeting select companies. The lawsuit D&T claims is most "strikingly similar" to the case at hand involved a borrower that had defaulted on multiple notes. *Greb v. Singleton*, No. 3:18-CV-01439, 2019 U.S. Dist. LEXIS 243991, 2019 WL 13210371, at *1 (N.D. Tex. Sept. 30, 2019). The creditor there sought foreclosure on the properties pledged as collateral. The borrower countered that the creditor had inflated the amount owed and was seeking millions more than it could get by simply collecting on the loans. *Id.* Despite seeking alternative financing and buyers, the borrower ultimately agreed to sell his interest to Baymark. 2019 U.S. Dist. LEXIS 243991, [WL] at *2. At the time of the sale, however, the borrower was unaware that the creditor and Baymark struck a deal where the creditor would advance Baymark the funds to purchase the borrower's interest, and the creditor would take an interest in the profits of any resale. *Id.* A short time later, Baymark resold the entity for more than double what it had paid the borrower. *Id.* The borrower sued, alleging violations under the RICO statute.

That case was dismissed at the pleadings stage, and in D&T's 194-page complaint, it hardly describes the alleged similarities or underlying predicate acts that resemble D&T's allegations.[7] The other RICO lawsuit D&T cites was

7. In its brief, D&T raises another case involving Super, not included in its complaint. But we will not address the new unpled facts, as appellate courts may not consider new evidence furnished

based on "healthcare fraud"—an issue wholly unrelated to the claims in this complaint. In any event, the complaint again provides limited facts. As we have recognized, "[p]leading the mere existence of lawsuits is not the same as pleading the facts that demonstrate predicate illegal acts as the defendant's regular way of doing business." *Word of Faith*, 90 F.3d at 124.

Above all, D&T has not alleged how Defendants' criminal activity would continue in the future. As noted above, Defendants' scheme was finite and reached its "natural conclusion" once it drained Global's assets. And because Global "became economically defunct" once its assets were "siphon[ed] off," there was nothing more for the Defendants to loot. *GICC Cap. Corp. v. Tech. Fin. Grp.*, 67 F.3d 463, 466 (2d Cir. 1995) ("It defies logic to suggest that a threat of continued looting activity exists when, as plaintiff admits, there is nothing left to loot."). Though D&T contends that Defendants seek new fraudulent acquisition opportunities, D&T has not identified any other target companies. At best, there is the allegation that Defendants may, at some point, foreclose on collateral again in another transaction. But absent additional facts, the complaint does not plead a threat of future criminal conduct. That reality also requires that we affirm the district court's ruling.

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for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling. *See Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999).

III

Finally, D&T contends that the district court erred in dismissing the complaint without granting leave to amend. We review "the district court's decision to grant a motion to dismiss with or without prejudice only for abuse of discretion." *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 215 n.34 (5th Cir. 2009). D&T's claim is meritless for a least two reasons. For one thing, D&T's argument is based on the general principle that leave to amend should be "freely given." FED. R. CIV. P. 15(a)(2). But no mention is made of the district court's several reasons for dismissing D&T's complaint with prejudice. In relevant part, the district court concluded that doing so was "appropriate in this case" because,

> Plaintiffs' Second Amended Complaint [was] their third bite at the apple and the second time the Court [had] assessed the sufficiency of their allegations. Moreover, Plaintiffs [] opted for volume over clarity in their amendments by adding more to the complaint—including, at times, full pages of deposition transcripts—without establishing how the facts fit into their RICO claims. More importantly, the Court [found] that given the nature of Plaintiffs' allegations, further attempts to replead the singular transaction at issue as a "pattern of racketeering" would be futile and a waste of the parties' and Court's resources.

"A party forfeits an argument . . . by failing to adequately brief the argument on appeal." *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). "To be adequate, a brief must address the district court's analysis and explain how it erred." *Guillot ex rel. T.A.G. v. Russell*, 59 F.4th 743, 751 (5th Cir. 2023) (citation omitted). Because D&T does not address the district courts stated reasons for dismissal, it forfeits any argument that the district court abused its discretion. *Id.*

And even if its argument was not waived, D&T had no right to amend its complaint for a third time. This is particularly so after the court cautioned D&T that, after the first amendment, it had "one chance" to rectify its deficient pleadings. "[L]eave to amend properly may be denied when the party seeking leave has repeatedly failed to cure deficiencies by amendments previously allowed and when amendment would be futile." *U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387 (5th Cir. 2003). Having made such an express finding in the record, the district court did not err in concluding that an amendment would be futile.

IV

For the reasons above, we AFFIRM the district court's ruling in all respects.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-11148

D&T PARTNERS, L.L.C., SUCCESSOR IN INTEREST TO ACET VENTURE PARTNERS, DIRECTLY AND DERIVATIVELY ON BEHALF OF ACET GLOBAL, L.L.C. AND BAYMARK ACET HOLDCO, L.L.C.; ACET GLOBAL, L.L.C.,

Plaintiffs—Appellants,

versus

BAYMARK PARTNERS MANAGEMENT, L.L.C.; SUPER G CAPITAL, L.L.C.; SG CREDIT PARTNERS, INCORPORATED; BAYMARK ACET HOLDCO, L.L.C.; BAYMARK ACET DIRECT INVEST, L.L.C.; BAYMARK PARTNERS; DAVID HOOK; TONY LUDLOW; MATTHEW DENEGRE; WILLIAM SZETO; MARC COLE; STEVEN BELLAH; ZHEXIAN "JANE" LIN; DANA MARIE TOMERLIN; PADASAMAI VATTANA; PAULA KETTER; VANESSA TORRES; WINDSPEED TRADING, L.L.C.; JULIE SMITH; HALLET & PERRIN, PC; BAYMARK MANAGEMENT, L.L.C.,

Defendants—Appellees.

Appendix B

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-1171

Before JONES, HAYNES, and DOUGLAS, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* FED. R. APP. P. 41(b). The court may shorten or extend the time by order. *See* 5TH CIR. R. 41 I.O.P.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FILED OCTOBER 24, 2022

U.S. DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered on 10/24/2022 at 10:29 AM CDT and filed on 10/24/2022
Case Name: D&T Partners LLC v. Baymark Partners LP et al
Case Number: 3:21-cv-01171-B
Filer:
WARNING: CASE CLOSED on 10/24/2022
Document Number: No document attached

Docket Text:
Civil Case Terminated per chambers. (svc)

3:21-cv-01171-B Notice has been electronically mailed to:

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3:21-cv-01171-B Notice required by federal rule will be delivered by other means (as detailed in the Clerk's records for orders/judgments) to:

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED OCTOBER 21, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:21-CV-1171-B

D&T PARTNERS (SUCCESSOR IN INTEREST TO ACET VENTURE PARTNERS, LLC), DIRECTLY AND DERIVATIVELY ON BEHALF OF ACET GLOBAL, LLC AND BAYMARK ACET HOLDCO, LLC,

Plaintiffs,

v.

BAYMARK PARTNERS LP; BAYMARK PARTNERS MANAGEMENT, LLC; SUPER G CAPITAL LLC; SG CREDIT PARTNERS, INC.; BAYMARK ACET HOLDCO, LLC; BAYMARK ACET DIRECT INVEST, LLC; BAYMARK PARTNERS; DAVID HOOK; TONY LUDLOW; MATTHEW DENEGRE; WILLIAM SZETO; MARC COLE; STEVEN BELLAH; ZHEXIAN "JANE" LIN; DANA MARIE TOMERLIN; PADASAMAI VATTANA; PAULA KETTER; VANESSA TORRES; WINDSPEED TRADING, LLC; JULIE SMITH; AND HALLETT & PERRIN P.C.,

Defendants.

Appendix D

MEMORANDUM OPINION & ORDER

Before the Court are Defendants SG Credit Partners, Inc. ("SG Credit") and Marc Cole's (Doc. 96); Hallett & Perrin, P.C. ("Hallett & Perrin") and Julie A. Smith's (Doc. 97); Super G Capital LLC ("Super G") and Steven Bellah's (Doc. 98); Zhexian Lin, Dana Marie Tomerlin, Padasamai Vattana, and Vanessa Torres (collectively, "Windspeed Employees")'s (Doc. 101); Windspeed Trading, LLC ("Windspeed") and William Szeto's (Doc. 102); Baymark ACET Holdco, LLC ("Holdco")'s (Doc. 103); Baymark Partners Management, LLC ("BP Management"), Baymark Management, LLC, Baymark ACET Direct Invest, LLC, Baymark Partners ("Baymark"), and Matthew Denegre (collectively, the "Baymark Defendants")'s (Doc. 105); David Hook and Tony Ludlow's (Doc. 107) Motions to Dismiss. Because Plaintiffs have not established a "pattern of racketeering activity" as required under the statute, the Court **DISMISSES WITH PREJUDICE** Plaintiffs' RICO claims and **DISMISSES** Plaintiffs' state-law claims for lack of federal jurisdiction.

I.

BACKGROUND[1]

This is a business dispute between a former secured creditor and a newly formed company and its associated

1. The facts are as Plaintiffs allege in the Second Amended Complaint. But given the factual overlap between the First and Second Amended Complaints, the Court borrows from its previous Order (Doc. 89) where appropriate.

parties. The secured creditor, D&T Partners, LLC ("D&T Partners"), alleges that the Defendants executed a scheme to avoid liability from a $3.2 million loan by "fraudulently transferring" the assets from the foreclosed company, ACET Global, LLC ("ACET Global"), to the new company, Windspeed, through multiple acts of wire fraud, mail fraud, bankruptcy fraud, and obstruction of justice. Doc. 91, Second Am. Compl., ¶¶ 1-25.

In 2017, Baymark, a Texas-based "general partnership between Hook and Ludlow" of which Denegre is also a director, approached Tomer Damti of D&T Partners[2] to purchase D&T Partners because of its "successful e-commerce business." *Id.* ¶¶ 45-49, 60. Baymark purchased D&T Partners through a newly formed entity, ACET Global, on July 14, 2017. *Id.* ¶¶ 61-62. Hook and Ludlow represented that Damti would be the CEO of ACET Global (the "Damti representation"). *Id.* ¶¶ 71, 389. Under the Asset Purchase Agreement (the "APA"), "ACET Global agreed to (1) pay $850,000 to D&T Partners, subject to certain adjustments; (2) provide a subordinated secured promissory note in the amount of $3,230,000 in favor of D&T Partners [(the 'D&T Note')]; and (3) to provide D&T Partners with a 25% common membership interest in Baymark ACET Holdco, LLC." *Id.* ¶ 68. The first payment for the D&T Note was due in October 2018. *Id.* ¶ 69.

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2. At the time, the company was known as ACET Venture Partners, LLC. Doc. 91, Second Am. Compl., ¶ 60. However, the successor in interest is D&T Partners, *id.* ¶ 36, so the Court will refer to the entity singularly as D&T Partners to minimize confusion.

Appendix D

After the APA, ACET Global took on another loan. Specifically, "Hook caused ACET Global to enter into a Collateral Assignment ('the Collateral Assignment')" with the lender Super G[3] in return for a $1,000,000 term loan facility. *Id.* ¶ 72. As part of this agreement, D&T Partners subordinated its security interest to Super G based on the Damti representation and ACET Global's representation that it did not intend to default on either loan. *Id.* ¶ 81.

But in February 2018, Denegre, director of Baymark, terminated Damti as CEO of ACET Global and replaced him with Szeto. *Id.* ¶¶ 83-85. The following month, ACET Global defaulted on its note to Super G. *Id.* ¶ 89. Because of the default, in April 2018 ACET Global and Super G entered into a forbearance agreement to waive loan payments "until October 25, 2018—just days before the D&T Note payments would become due." *Id.* ¶¶ 89-90.

Approximately five months later, "Szeto filed a Certificate of Formation for a Limited Liability Company for Windspeed . . . at the behest of Baymark Partners." *Id.* ¶ 126. Windspeed's company agreement, drafted by the law firm Hallett & Perrin, provided for an ownership split between BP Management (a shell entity owned by Ludlow and Hook), Super G, and Szeto. *Id.* ¶¶ 127, 161. Super G also gave Windspeed, a then-assetless company, a $200,000 loan with the expectation that Windspeed would ultimately acquire ACET Global's assets. *Id.* ¶¶ 176-79.

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3. Super G's Chief Financial Officer was Marc Cole. Doc. 91, Second Am. Compl., ¶ 75. When Cole transitioned to SG Credit, the Collateral Assignment also transferred from Super G to SG Credit. *See id.* ¶ 80.

Appendix D

In September 2018, ACET Global, through Denegre and Szeto, executed a "wind down" plan to transfer its assets to the newly formed company, Windspeed (the "fraudulent transfer"). *Id.* ¶¶ 100, 104. An employee of ACET Global rented a temporary storage unit to store ACET Global's physical assets and inventory and later moved these assets and inventory into Windspeed's new office and warehouse. *Id.* ¶¶ 197-98. On October 9, 2018, Szeto emailed ACET Global employees retroactively terminating their employment for ACET Global as of September 28, 2018. *Id.* ¶ 183. Szeto also instructed Windspeed's accountant, "to maintain 'two sets of books,'" one set for ACET Global and one for Windspeed. *Id.* ¶ 185. During the "wind down" in late October 2018, ACET Global transferred all assets, business operations, and employees to Windspeed. *Id.* ¶¶ 182, 196.

At the same time, Windspeed assumed ACET Global's business operations as its own. *Id.* ¶¶ 194, 199, 204. "Windspeed's website was a carbon copy of the . . . ACET Global website" and Windspeed sold "the inventory with the same customer marketplaces and the same software used at ACET Global." *Id.* ¶ 199. Windspeed continued ACET Global's business operations, "pocket[ed] the revenues" from the sale of ACET Global's unsegregated inventory, closed ACET Global's bank accounts, and assumed ACET Global's other accounts. *Id.* ¶¶ 206-08, 210, 213-17.

"On October 31, 2018, the first monthly installment under the D&T Note became due," but "[a]ccording to the Defendants' plan, they purposefully caused ACET Global

to fail to pay [D&T Partners]" and the other creditors. *Id.* ¶ 228. Baymark discussed the risks of a possible fraudulent transfer of assets with its legal counsel Hallett & Perrin in December 2018. *Id.* ¶ 122. Hallett & Perrin further discussed the issue with Super G's counsel. *Id.*

"On January 31, 2019, Super G . . . issued a Notice of Forfeiture," and Baymark sought to move forward with the foreclosure. *Id.* ¶¶ 231, 233. Hallett & Perrin drafted the foreclosure sale agreements, backdated to March 1, 2019, and "ensure[d] that Windspeed . . . did not assume the liability" of the D&T Note. *Id.* ¶¶ 247-50. Under the agreement, Super G sold ACET Global's assets to Windspeed "for a loan in the amount of $514,144.86," which closely matched the $514,515 amount due on the ACET Global loan from Super G. *Id.* ¶ 254. During the Super G foreclosure sale agreement, Hallett & Perrin represented Baymark, BP Management, ACET Global, and Windspeed—parties with competing interests. *Id.* ¶¶ 218-20.

On October 23, 2019, ACET Global filed a Voluntary Petition for Bankruptcy that listed the $3,200,000 D&T Partners liability, $30,000 in transferred property, and contained multiple false representations to the bankruptcy court about the attributes of ACET Global. *Id.* ¶¶ 257, 266-98. The bankruptcy court closed the case on January 29, 2020 without discharging ACET Global. Order Closing the Case, *In re ACET Global, LLC*, No. 19-42878 (Bankr. E.D. Tex. Jan. 29, 2020).

Since the "fraudulent transfer," Defendants have attempted to obstruct and cover the alleged fraud. In

March 2021, counsel for Super G and Cole emailed D&T Partners' counsel stating that Super G "is no longer in business" and was in "the process of liquidating all assets." *Id.* ¶ 300. Several individual Defendants stonewalled or changed their testimony after being presented with conflicting evidence during depositions in another related case. *Id.* ¶¶ 101-02, 109-13, 116-18, 246, 253, 302-06. Shortly after defaulting on the D&T Note, Szeto and Baymark deliberately "caused the loss and destruction of" ACET Global's emails and electronic records. *Id.* ¶¶ 307-08. Windspeed deleted its website. *Id.* ¶ 309.

D&T Partners, as the successor in interest to ACET Venture Partners, LLC, sues directly and derivatively on behalf of ACET Global[4] and Baymark ACET Holdco, LLC. *Id.* at 1-2. D&T Partners brings claims for civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), common law fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duties, violation of the Texas Uniform Fraudulent Transfer Act, civil conspiracy, and respondeat superior and/or agency liability. *Id.* ¶¶ 322-467.

The Court previously ruled on several Defendants' Motions to Dismiss (Doc. 89). In that order, the Court dismissed all the claims without prejudice because Plaintiffs had not pleaded a "pattern of racketeering activity" as required under RICO. *Id.* at 11. Plaintiffs were given an additional 30 days to file a second amended

4. D&T Partners is the "sole manager of ACET Global" and has "legal ownership" of ACET Global. Doc. 91, Second Am. Compl., ¶ 6 n.10.

complaint, *id.* at 17, which Plaintiffs filed on June 8, 2022 (Doc. 91). Defendants again filed eight separate motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

Plaintiffs' updated complaint, which now spans 194 pages and 476 paragraphs, alleges many of the same facts as the Original and First Amended Complaints (Docs. 1, 36). Plaintiffs' primary changes are, first, to the number and span of predicate acts alleged. The Court in its previous order identified eighteen predicate acts, which it pulled primarily from the Plaintiffs' Response. *See* Doc. 89, Order, 9 n.2. Plaintiffs now allege a list of approximately 100 predicate acts, including mail fraud, wire fraud, theft of trade secrets, bribery, lying under oath, bankruptcy fraud, obstruction of justice, concealment, and money laundering. Doc. 91, Second Am. Compl., ¶¶ 317-18.

The predicate acts also span a longer period than the eighteen months pleaded in the First Amended Complaint. *See* Doc. 89, Order, 12. Specifically, Plaintiffs' list now contains wire fraud beginning in June 2017 and ends with obstruction of justice and wire fraud in May 2021. *See* Doc. 91, Second Am. Compl., ¶¶ 317-18. The predicate acts, Plaintiffs say, span nearly four years and "continue[] through the present based on Defendants' recent actions." *Id.* ¶ 318. Defendants' scheme also presents a "continuing threat" because "Defendants have testified to regularly evaluating new businesses to expand Windspeed's operations—businesses that would suffer the same fate as ACET Global based on Defendants' actions." *Id.* ¶ 320.

Second, Plaintiffs point to two other lawsuits involving Hook, Ludlow, and Baymark Partners. *Id.* ¶¶ (iii)-(iv). These lawsuits, Plaintiffs assert, show the Baymark Defendants operate with the "primary purpose of illegally acquiring equity stakes in target companies and siphoning off their assets and value at the expense of their creditors and stakeholders." *Id.* ¶ (iii).

The first lawsuit, *Greb v. Singleton*, involved a borrower that had defaulted on multiple notes. 2019 U.S. Dist. LEXIS 243991, 2019 WL 13210371, at *1 (N.D. Tex. Sept. 30, 2019) (Lynn, C.J.).[5] The creditor sought foreclosure on the properties and business pledged as collateral, but the borrower alleged that the creditor had inflated the amount owed and was seeking millions more than it could get by simply collecting on the loans. *Id.* Despite seeking alternative financing and buyers, the borrower ultimately agreed to sell his interest to Baymark for $15 million. 2019 U.S. Dist. LEXIS 243991, [WL] at *2. The borrower alleged he was unaware, however, that the creditor and Baymark had struck a deal in which the creditor would advance Baymark the funds to purchase the borrower's interest, and the creditor would take a 7.5% interest in the profits of any resale. *Id.* Four months later, Baymark resold the entity for $32 million, more than double what it had paid the borrower. *Id.* The borrower sued, alleging violations under the RICO statute. *Id.* But

5. The Court draws on the facts as provided in the complaints of the respective lawsuits, since the lawsuits are incorporated by reference into the Plaintiffs' Second Amended Complaint and are part of the public record. *See, e.g.*, *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011).

the court dismissed the claims, holding that the borrower had failed to adequately plead fraud and continuity sufficient for RICO, among other infirmities. 2019 U.S. Dist. LEXIS 243991, [WL] at *4-5.

The second case, *State Farm Mutual Automobile Insurance Co. v. Complete Pain Solutions, LLC*, also involves RICO claims and is still ongoing, but neither Baymark, Hook, nor Ludlow are named as defendants in the suit. *See* Doc. 1, Compl., 4:20-CV-2606 (S.D. Tex. filed July 23, 2020). Rather, the RICO claims are against two doctors who allegedly submitted fraudulent medical bills to an insurance company. *Id.* ¶¶ 74-85. Hook, Ludlow, and Baymark are only tangentially connected, in that Baymark purportedly owns the medical entity for which the doctors worked and Hook and Ludlow serve on its Board of Managers. *Id.* ¶ 21. The only claim against the two medical entity defendants, however, is a state-law claim for "money had and received." *Id.* ¶¶ 86-91.

Despite Plaintiffs' expansion of both the number of predicate acts and the time frame during which they took place, the Court still finds the allegations insufficient to support a "pattern of racketeering activity" as required under the statute. The Court draws such a conclusion even assuming all allegations are viable predicate acts under the RICO statute—a generous assumption at best.[6]

6. Plaintiffs have not, for example, pleaded facts sufficient to establish the elements of mail or wire fraud for many of the supposed predicate acts in the list. Mail and wire fraud require, among other things, that the mailing be "incident to an essential part of the scheme." *See United States v. Ingles*, 445 F.3d 830, 835 (5th Cir. 2006).

Likewise, Plaintiffs' references to two related lawsuits do not plead facts to establish a pattern.

II.

LEGAL STANDARD

A. Rule 12(b)(6) Standard

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) authorizes a court to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal quotations omitted). But the court will "not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts." *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the plaintiff

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

III.

ANALYSIS

A. RICO

D&T Partners brings three RICO claims for violations of 18 U.S.C. § 1962(a), (c), and (d). Doc. 91, Second Am. Compl., ¶¶ 322-467. The claims under subsections (c) and (d) are against all Defendants, while the claim under subsection (a) is against Baymark Partners, Ludlow, Hook, Denegre, Super G, SG Credit, BP Management, Smith, and Hallett & Perrin. *See id.* Because there are common elements in each subsection, *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995), the Court will analyze the RICO claims together.

All four subsections of § 1962 have three common elements: "1) a person who engages in 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Id.* (emphasis omitted). The statute broadly defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3); *Boyle v. United States*, 556 U.S. 938, 944, 129

S. Ct. 2237, 173 L. Ed. 2d 1265 (2009). "To establish th[e] pattern [element], a plaintiff must show both a relationship between the predicate offenses . . . and the threat of continuing activity." *Malvino v. Delluniversita*, 840 F.3d 223, 231 (5th Cir. 2016). "[A]n enterprise . . . 'is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *Boyle*, 556 U.S. at 945.

Several Defendants reiterate the argument raised in their prior motions to dismiss that D&T Partners fails to plausibly plead the second element—a pattern of racketeering activity. *E.g.*, Doc. 107, Hook & Ludlow's Mot., 3-14; Doc. 99, Super G & Bellah's Br., 7, 10-11; Doc. 105, Baymark's Mot., 1 n.1 (adopting and incorporating other Defendants' arguments by reference); Doc. 96-1, SG Credit & Cole's Br., 11 (same). The Court agrees.

Congress intended a "natural and commonsense approach to RICO's pattern element." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). "A pattern is not formed by sporadic activity, and a person cannot be subjected to the sanctions of [RICO] simply for committing two widely separated and isolated criminal offenses." *Id.* at 239 (internal quotations and citations omitted). Rather, a "pattern" of racketeering activity exists when the racketeering predicate acts are (1) related and (2) "amount to or pose a threat of continued criminal activity." *Id.*

Predicate acts are related if they "have the same or similar purposes, results, participants, victims, or

methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240. A "threat of continued criminal activity," or "continuity," "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Aside from the "closed-end" and "open-end" framework, the Fifth Circuit has held that "where alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction, a 'pattern of racketeering activity' has not been shown." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 123 (5th Cir. 1996).

Several cases provide color. In *Word of Faith*, for example, a church sued ABC network for RICO violations after a broadcast criticized the church's handling of donations. *Id.* at 120-21. The church alleged a list of predicate acts including wire fraud, mail fraud, theft, and obstruction of justice. *Id.* at 121. The Fifth Circuit, however, held that the alleged acts lacked continuity and instead "were part of a single, lawful endeavor—namely the production of television news reports concerning a particular subject." *Id.* at 123.

By comparison, the Fifth Circuit found continuity sufficient for a pattern in *Abraham v. Singh*, 480 F.3d 351 (5th Cir. 2007). There, the defendants were accused of recruiting Indian citizens under false pretenses to become steelworkers in Louisiana. *Id.* at 353. Upon the Indian citizens' arrival, they were stripped of their passports, housed in poor conditions, and had their

wages skimmed. *Id.* at 354. The pattern, the court held, involved the defendants' "repeated international travel" followed by the poor working conditions they imposed in the United States. *Id.* at 356. Perhaps most importantly, the allegations amounted to "systematic victimization" that would have likely "continue[d] indefinitely had the Plaintiffs not filed this lawsuit." *Id.*

Here, Plaintiffs have failed to allege the "threat of continued criminal activity" necessary to establish a pattern. *See H.J. Inc.*, 492 U.S.S at 239. Rather, the alleged predicate acts are "part and parcel of a single, otherwise lawful transaction," namely, a loan default and purported foreclosure sale. *See Word of Faith*, 90 F.3d at 123. Indeed, upon closer examination, the predicate acts all wrap up into a singular fraudulent scheme: The Baymark Defendants, with the help of a law firm, colluded with a senior creditor to fraudulently transfer ACET Global's assets to a different entity and used a sham foreclosure, fraudulent bankruptcy, and obstruction of justice to cover their tracks. Doc. 91, Second Am. Compl., ¶¶ 1-25. Unlike the repeated and "systematic victimization" in *Abraham*, the victims here are limited to the subordinated creditors of ACET Global. The scheme came to its natural conclusion—whether there was a foreclosure sale or not—when the assets were siphoned out of ACET Global. Beyond the singular scheme, Plaintiffs' assertion of a "continuing threat" because Defendants regularly seek out new business opportunities and these "businesses [] would suffer the same fate as ACET Global" is entirely conclusory. *See id.* ¶ 320.

Appendix D

Plaintiffs argue the list of roughly 100 predicate acts spanning over four years is enough to establish continuity. *Id.* ¶ (i). But Plaintiffs' predicate acts rely heavily on instances of alleged mail and wire fraud. "RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000). Indeed, upon closer inspection, of the list of "at least 100 predicate acts," roughly 60 are premised exclusively on supposed mail or wire fraud. *See* Doc. 91, Second Am. Compl., ¶¶ 317-18. The Court resists Plaintiffs' attempt to establish a pattern of racketeering simply by tallying every back-and-forth email Defendants sent. As several circuits have observed:

> Virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are "related" by purpose and spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions [under RICO] dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time. Given its "natural and common sense approach to RICO's pattern element," we think it unlikely

> that Congress intended RICO to apply in the absence of a more significant societal threat.

U.S. Textiles, Inc. v. Anheuser-Busch Cos., 911 F.2d 1261, 1268 (7th Cir. 1990) (quoting *Marshall-Silver Const. Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1990)); *see also Schlaifer Nance & Co. v. Est. of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) ("[C]ourts must take care to ensure that the plaintiff is not artificially fragmenting a singular act into multiple acts simply to invoke RICO.").

Nor do Defendants' fraudulent acts relating to the bankruptcy proceedings transform a single fraudulent transaction into an ongoing scheme or pattern of racketeering. Plaintiffs cite to *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004) to support the proposition that bankruptcy fraud can serve as a predicate act. *See* Doc. 91, Second Am. Compl., ¶¶ 335-37. But in that case, the Second Circuit also went on to rule *against* a finding of continuity despite defendants' fraudulent conveyances and subsequent misrepresentations to the bankruptcy court. *Satinwood*, 385 F.3d at 182. The court instead held that defendant had "engaged in a single scheme to defraud two creditors by quickly moving his assets to his relatives and then concealing the existence of those assets during his bankruptcy proceeding." *Id.* The scheme was "inherently terminable" and it "defie[d] logic to suggest that a threat of continued looting activity exists when . . . there is nothing left to loot." *Id.* at 181-82. Like in *Satinwood*, the fraudulent bankruptcy at issue here represents a continuation of a "single scheme" to defraud creditors

which was "inherently terminable" when the assets were siphoned off to Windspeed. *See id.*

Finally, Plaintiffs point to two previous lawsuits involving Defendants as evidence of a pattern of racketeering activity, but Plaintiffs have not adequately pleaded the underlying facts. In *Word of Faith*, the Fifth Circuit briefly addressed the use of prior lawsuits in pleading a pattern of racketeering activity and noted that "[p]leading the mere existence of lawsuits is not the same as pleading the facts that demonstrate predicate illegal acts as the defendant's regular way of doing business." 90 F.3d at 124.

Plaintiffs here cite to the lawsuits as evidence that Baymark Partners' primary purpose is to "illegally acquir[e] equity stakes in target companies and siphon[] their assets and value." Doc. 91, Second Am. Compl., ¶ (iii). But Plaintiffs' coverage of *Greb*—the case with facts most like those present here—consists of a single paragraph stating that the scheme was "strikingly similar" and describing the arrangement between the creditor and the borrower entity. *See id.* While the Court notes the facial similarity, without more, Plaintiffs have not pleaded facts sufficient to establish a pattern of racketeering. Additionally, the only defendants involved in *Greb* were Baymark Partners, Ludlow, and Hook. But Plaintiffs' claims here, and the purported RICO enterprise, involve a host of defendants stretching well beyond Baymark. Doc. 91, Second Am. Compl. The second lawsuit Plaintiffs cite stands on even weaker footing, as the RICO claims

are solely against the doctors in question. Baymark, Ludlow, and Hook are only tangentially involved through ownership of the entity, which in turn is being sued only for "money had and received." *See* Doc. 1, Compl., *State Farm*, 4:20-CV-2606 (S.D. Tex. filed July 23, 2020). The "mere existence" of these lawsuits, without facts demonstrating illegal predicate acts as Defendants' "regular way of doing business," cannot support a pattern. *See Word of Faith*, 90 F.3d at 124.

Therefore, because Plaintiffs have not established continuity sufficient for a pattern of racketeering under RICO, the Court **DISMISSES** all RICO claims.

B. State-law Claims

Plaintiffs pleaded the Court's subject matter jurisdiction under 28 U.S.C. § 1331, which grants the Court "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Doc. 91, Second Am. Compl., ¶ 26. Because the Court dismisses Plaintiffs' federal law claims, the Court must now analyze whether to retain jurisdiction of the state-law claims under supplemental jurisdiction.

"A district court has 'wide discretion' in deciding whether it should retain jurisdiction over state law claims once all federal claims have been eliminated." *Enochs v. Lampasas Cnty.*, 641 F.3d 155, 161 (5th Cir. 2011). The general rule in the Fifth Circuit "is to dismiss state claims

when the federal claims to which they are [supplemental][7] are dismissed." *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992). And "when the . . . federal-law claim[s] [are] eliminated at an 'early stage' of the litigation, the district court has 'a powerful reason to choose not to continue to exercise jurisdiction.'" *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)). In such a case, "the balance of factors to be considered under the [supplemental] jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims."[8] *Id.* at 586-87 (quoting *Carnegie-Mellon*, 484 U.S. at 350 n.7).

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7. "Supplemental jurisdiction" encompasses the former terms of "pendent" and "ancillary" jurisdiction. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005).

8. Under § 1367(c) the Court may decline supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). Section 1367(c)(3) applies because the Court dismisses the RICO claims, leaving only state-law claims. *See* Doc. 91, Second Am. Compl.

All factors counsel this Court to decline supplemental jurisdiction over Plaintiffs' state-law claims: the case is at the motion-to-dismiss stage, the parties can reuse any litigation work in the state court at little to no additional cost to the litigants, dismissal will not prejudice the parties, and state courts are more familiar with their respective jurisdiction's laws. *See Parker & Parsley*, 972 F.2d at 587-90. Accordingly, the Court declines to exercise supplemental jurisdiction over the state-law claims and **DISMISSES** them.

C. Leave to Amend

The liberal standard for leave to amend a complaint under Rule 15(a) is "tempered by the necessary power of a district court to manage a case." Fed. R. Civ. P. 15(a); *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003). In deciding whether to grant leave to amend, the district court may consider factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment." *Schiller*, 342 F.3d at 566.

The Court finds dismissal with prejudice appropriate in this case. Plaintiffs' Second Amended Complaint is their third bite at the apple and the second time the Court has assessed the sufficiency of their allegations. *See* Doc. 89, Order. Moreover, Plaintiffs have opted for volume over clarity in their amendments by adding more to the complaint—including, at times, full pages of deposition

transcripts—without establishing how the facts fit into their RICO claims. More importantly, the Court finds that given the nature of Plaintiffs' allegations, further attempts to replead the singular transaction at issue as a "pattern of racketeering" would be futile and a waste of the parties' and Court's resources. Plaintiffs' RICO claims are therefore **DISMISSED WITH PREJUDICE** and Plaintiffs' state-law claims are **DISMISSED** for lack of federal jurisdiction.

IV.

CONCLUSION

For the foregoing reasons, Defendants SG Credit and Marc Cole's (Doc. 96); Super G and Steven Bellah's (Doc. 98); Baymark Defendants' (Doc. 105); and Hook and Ludlow's (Doc. 107) Motions to Dismiss are **GRANTED**. Because the deficiencies in Plaintiffs' pleadings apply to all Defendants, all of Plaintiffs' RICO claims against each Defendant are **DISMISSED WITH PREJUDICE**, and all of Plaintiffs' state-law claims are **DISMISSED** for lack of federal jurisdiction. Hallett & Perrin and Julie A. Smith's (Doc. 97); Windspeed Employees' (Doc. 101); Windspeed and Szeto's (Doc. 102); and Holdco's (Doc. 103) Motions to Dismiss are **MOOT**.

SO ORDERED.

SIGNED: October 21, 2022

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT STATUTORY PROVISION

18 U.S.C. §1961

Definitions

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

1. So in original.

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)

2. *See* References in Text note below.

(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.

(Added Pub. L. 91–452, title IX, §901(a), Oct. 15, 1970, 84 Stat. 941; amended Pub. L. 95–575, §3(c), Nov. 2, 1978, 92 Stat. 2465; Pub. L. 95–598, title III, §314(g), Nov. 6, 1978, 92 Stat. 2677; Pub. L. 98–473, title II, §§901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub. L. 98–547, title II, §205, Oct. 25, 1984, 98 Stat. 2770; Pub. L. 99–570, title I, §1365(b), Oct. 27, 1986, 100 Stat. 3207–35; Pub. L. 99–646,

§50(a), Nov. 10, 1986, 100 Stat. 3605; Pub. L. 100–690, title VII, §§7013, 7020(c), 7032, 7054, 7514, Nov. 18, 1988, 102 Stat. 4395, 4396, 4398, 4402, 4489; Pub. L. 101–73, title IX, §968, Aug. 9, 1989, 103 Stat. 506; Pub. L. 101–647, title XXXV, §3560, Nov. 29, 1990, 104 Stat. 4927; Pub. L. 103–322, title IX, §90104, title XVI, §160001(f), title XXXIII, §330021(1), Sept. 13, 1994, 108 Stat. 1987, 2037, 2150; Pub. L. 103–394, title III, §312(b), Oct. 22, 1994, 108 Stat. 4140; Pub. L. 104–132, title IV, §433, Apr. 24, 1996, 110 Stat. 1274; Pub. L. 104–153, §3, July 2, 1996, 110 Stat. 1386; Pub. L. 104–208, div. C, title II, §202, Sept. 30, 1996, 110 Stat. 3009–565; Pub. L. 104–294, title VI, §§601(b)(3), (i)(3), 604(b)(6), Oct. 11, 1996, 110 Stat. 3499, 3501, 3506; Pub. L. 107–56, title VIII, §813, Oct. 26, 2001, 115 Stat. 382; Pub. L. 107–273, div. B, title IV, §4005(f)(1), Nov. 2, 2002, 116 Stat. 1813; Pub. L. 108–193, §5(b), Dec. 19, 2003, 117 Stat. 2879; Pub. L. 108–458, title VI, §6802(e), Dec. 17, 2004, 118 Stat. 3767; Pub. L. 109–164, title I, §103(c), Jan. 10, 2006, 119 Stat. 3563; Pub. L. 109–177, title IV, §403(a), Mar. 9, 2006, 120 Stat. 243; Pub. L. 113–4, title XII, §1211(a), Mar. 7, 2013, 127 Stat. 142; Pub. L. 114–153, §3(b), May 11, 2016, 130 Stat. 382; Pub. L. 117–159, div. A, title II, §12004(a)(3), June 25, 2022, 136 Stat. 1328.)

APPENDIX F — RELEVANT STATUTORY PROVISION

18 U.S.C. §1962

Prohibited activities

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

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise

which is engaged in, or the activities of which affect, interstate or foreign commerce.

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

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

(Added Pub. L. 91–452, title IX, §901(a), Oct. 15, 1970, 84 Stat. 942; amended Pub. L. 100–690, title VII, §7033, Nov. 18, 1988, 102 Stat. 4398.)