No.

In the Supreme Court of the United States

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

Petitioners,

v.

JAY ALIX,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID A. O'NEIL
Counsel of Record
DEBEVOISE & PLIMPTON LLP
801 PENNSYLVANIA AVENUE N.W.
WASHINGTON, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

JOHN GLEESON
MARK P. GOODMAN
ERICA S. WEISGERBER
NATHAN S. RICHARDS
DEBEVOISE & PLIMPTON LLP
919 THIRD AVENUE
NEW YORK, NY 10022

ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
KRAMER LEVIN ROBBINS RUSSELL
2000 K STREET NW, 4TH FLOOR
WASHINGTON, D.C. 20006

REID M. FIGEL
BRADLEY E. OPPENHEIMER
ROBERT C. KLIPPER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK P.L.L.C.
1615 M STREET, NW, SUITE 400
WASHINGTON, D.C. 20036

JUNE 28, 2022

MATTHEW I. MENCHEL
JONATHAN D. COGAN
DANIELLE L. ROSE
KOBRE & KIM LLP
800 THIRD AVENUE
NEW YORK, NY 10022

CATHERINE L. REDLICH
DRISCOLL & REDLICH
110 WEST 40TH STREET,
SUITE 1900
NEW YORK, NY 10018

MICAH E. MARCUS
CHRISTOPHER G. DEAN
MCDONALD HOPKINS LLP
300 NORTH LASALLE STREET,
SUITE 1400
CHICAGO, IL 60654

QUESTION PRESENTED

This Court has repeatedly held—twice in reversing the Second Circuit—that private claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) may be brought only by plaintiffs injured "directly" by the alleged wrongdoing. Such claims therefore generally do not extend to injuries "beyond the first step" of the causal chain. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 269, 271 (1992); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010). This limitation "has particular resonance when applied to claims," like those here, "brought by economic competitors." *Anza*, 547 U.S. at 460. Applying this standard, the district court dismissed the plaintiff's RICO claims.

But the Second Circuit reversed, explicitly deviating from this Court's RICO proximate-causation precedents. It held that, because the plaintiff alleged fraud on bankruptcy courts, the allegations implicated the court's "supervisory responsibilities" and thus allowed the court to apply a relaxed proximate-cause rule that "differs somewhat from the analysis in" this Court's RICO decisions.

The question presented is:

Whether lower courts must follow the standard established by this Court's precedent for an element of a plaintiff's statutory claim, even if, in the court's judgment, the plaintiff's allegations implicate the court's "supervisory responsibilities."

PARTIES TO THE PROCEEDINGS

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

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

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

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

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

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

Respondent Alix and Petitioners Barton, Carmody, Garcia, Goldstrom, Proshan, Yerian, and Sternfels are individuals.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Alix v. McKinsey & Co.*, No. 20-2548-cv (2d Cir.) (opinion reversing decision of district court, issued Jan. 19, 2022); and
- *Alix v. McKinsey & Co.*, No. 18-CV-04141 (JMF) (S.D.N.Y.) (opinion and order granting motion to dismiss Respondent's RICO claims with prejudice, filed Aug. 19, 2019).

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Because a civil action under RICO is "the litigation equivalent of a thermonuclear device," *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991), Congress confined the drastic remedy the statute provides—treble damages and attorneys' fees—to plaintiffs injured in their "business or property by reason of" a RICO violation. This Court has held that this statutory limit on private RICO claims permits recovery only when the alleged racketeering is the direct cause of the plaintiff's alleged injury. Thus, liability generally does not extend to injuries "beyond the first step" of the causal chain. *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 271 (1992).

This Court has twice reversed Second Circuit decisions that did not honor that critical constraint on civil RICO claims. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 (2010).

In the decision below, the Second Circuit attempted for a third time to avoid this Court's RICO precedents. And it did so on a rationale that, if left unreviewed, would grant lower courts license to ignore this Court's precedent and the requirements of federal law whenever a plaintiff alleges wrongdoing relating to judicial proceedings.

The Second Circuit reasoned here that, because the alleged racketeering involved false statements to a bankruptcy court, the case triggered the court's "supervisory responsibilities" to "ensure the integrity" of bankruptcy proceedings. Based on that assessment, it applied a relaxed proximate-causation standard that it acknowledged "differs somewhat from the analysis in" this Court's controlling precedents—precedents that it relegated to "'ordinary' RICO cases where these responsibilities are not front and center." It then found proximate causation adequately alleged based on a "plausibility"-of-harm standard that is irreconcilable with this Court's jurisprudence.

The decision below merits this Court's review. It expands RICO's private cause of action in conflict with Congress's intent, this Court's decisions, and decisions of other circuits that have followed this Court's precedent. More fundamentally, the decision below permits lower courts to depart from this Court's controlling decisions and alter the substantive requirements of federal law whenever they deem a "differ[ent]" rule necessary to address "special considerations" arising from their "supervisory responsibilities." That expansive view of judicial power under the guise of "supervisory" authority invites disregard of countless Acts of Congress and decisions of this Court. And it conflicts with this Court's decisions—including, most recently, *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022)—defining the "clear limits" on any inherent supervisory power.

OPINIONS BELOW

The Second Circuit's decision, App. 1a–26a, is reported at 23 F.4th 196. The district court's decision, App. 27a–55a, is reported at 404 F. Supp. 3d 827.

JURISDICTION

The Second Circuit issued its judgment on January 19, 2022, and denied a timely petition for rehearing on March 30, 2022. App. 56a–57a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, is reproduced at App. 58a–84a.

STATEMENT OF THE CASE

A. Legal Background

RICO creates a private right of action for persons "injured in [their] business or property by reason of" conduct that violates the statute. 18 U.S.C. § 1964(c) (reproduced at App. 75a). This Court has held that by using the phrase "by reason of" to limit private claims under RICO, Congress mandated a requirement of proximate causation. *Holmes*, 503 U.S. at 268.

Whether an act is the *proximate* cause of harm under RICO depends on whether the act *directly* caused that harm. *Ibid.* "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 547 U.S. at 461. That standard "demand[s] . . . some direct relation between the injury asserted and the injurious conduct alleged." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 268).

Direct causation means harm that occurs not through multiple links in a causal chain but instead generally at the "first" causal step. *Hemi*, 559 U.S. at 10 (quoting *Holmes*, 503 U.S. at 271–72). A "link" between the alleged violation and the plaintiff's injuries "that is 'too remote,' 'purely contingent,' or 'indirect' is insufficient." *Id.* at 9 (alteration omitted) (quoting *Holmes*, 503 U.S. at 271, 274).

Beginning with its recognition of the statutory requirement of direct harm in *Holmes*, this Court has addressed that statutory requirement in four cases—*Holmes*, *Anza*, *Bridge*, and *Hemi*. In *Holmes*, this Court applied the "directness" requirement to reject an insurer's RICO claim against stock manipulators whose misconduct caused the insolvency of broker-dealers with customer accounts that the insurer covered. 503 U.S. at 271.

In *Anza*, this Court reviewed a Second Circuit decision that failed to follow *Holmes*. Reversing the reinstatement of a complaint, this Court emphasized the proximate-causation limitations on RICO suits brought by competitors for marketplace harms. 547 U.S. at 458–59. The plaintiff in *Anza* alleged that it lost business when its sole competitor did not pay state sales tax and thus undercut the plaintiff's prices. *Id.* at 454. This Court held that the plaintiff had not alleged direct causation because the "cause of [the plaintiff's] asserted harms" was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458.

Noting that "[b]usinesses lose and gain customers for many reasons," this Court reasoned that the plaintiff's alleged lost sales "could have resulted from factors other than petitioners' alleged acts of fraud." *Id.* at 459. For that reason, the Court emphasized, RICO's proximate-causation requirement "has particular resonance when applied to claims brought by economic competitors." *Id.* at 460.

In *Bridge*, by contrast, this Court applied the same principles and found proximate causation adequately alleged. The defendants had improperly submitted multiple bids in a tax-lien auction that allocated liens "on a rotational basis," and the defendants' additional bids thus directly and automatically reduced the number of liens allocated to the plaintiff bidders. 553 U.S. at 643. The plaintiffs were "the *only* parties injured," and "no independent factors" accounted for their harm. *Id.* at 658. As the plurality in *Hemi* later explained, proximate causation existed only because the defendants' increased bids "necessarily" lowered the plaintiffs' share of liens, without any further causal step. *Hemi*, 559 U.S. at 14.

In *Hemi*, this Court again reversed a Second Circuit decision for not properly applying RICO's proximate-causation requirement. *Id.* at 6. Plaintiff New York City had claimed it lost tax revenue because the defendant did not file required reports with New York State identifying in-state cigarette sales. *Ibid.* But the "disconnect between the asserted injury and the alleged fraud" precluded direct causation: The "conduct directly responsible" for the lost tax "was the customers' failure to pay their taxes," whereas "the conduct constituting the alleged fraud was [defendant's] failure to file [the] reports" listing cigarette sales. *Id.* at 11. The plaintiff's causal theory could not "meet RICO's direct relationship requirement" because it went "well beyond the first step." *Id.* at 10. Specifically, the plaintiff's "theory of liability" rested on "separate actions carried out by separate parties." *Id.* at 11 (emphasis omitted).

B. The Plaintiff's RICO Claims

Jay Alix, as purported assignee of AlixPartners, LLP, asserts RICO claims in this action against McKinsey and current and former McKinsey employees. His complaint alleges that McKinsey is one of AlixPartners' competitors in a "bankruptcy advising market involving estates with assets in excess of one billion dollars." App. 3a. Between 2001 and 2018, chapter 11 debtors engaged McKinsey as one of their advisors in 13 bankruptcy cases. App. 6a n.2.

After a debtor chooses the professionals that will serve as its advisors in its bankruptcy case, the bankruptcy court must approve the debtors' selections. 11 U.S.C. §§ 327, 330. To assist the court in determining whether the chosen advisors are qualified and disinterested, the debtor must state its "reasons for [] select[ing]" the advisor, including each advisor's experience, proposed fees, and scope of work, as well as the advisor's "connections" to other interested parties. Fed. R. Bankr. P. 2014(a).

Alix alleges that in each of the 13 bankruptcies, after debtors selected McKinsey as an advisor, McKinsey filed disclosures that were insufficient under Rule 2014, which Alix claims, constituted racketeering. App. 6a–7a. He claims injury by asserting that AlixPartners would have earned additional fees but for McKinsey's alleged wrongdoing. App. 4a, 7a.

Alix's causal theory postulates that, if McKinsey had filed (in Alix's view) better disclosures, then a series of steps would have occurred:

i. parties to the bankruptcy would have objected to McKinsey's retention (despite not objecting before);

ii. bankruptcy courts would have disqualified McKinsey from serving the debtor (including rejecting any curative measures that McKinsey might have proposed), instead of approving McKinsey's retention, as they had in each of the bankruptcy cases;

iii. the debtor would have hired someone else and would have chosen AlixPartners in at least some cases (based on AlixPartners' alleged 24% share of the claimed market); and

iv. bankruptcy courts would have approved AlixPartners' retention and fees. App. 6a–7a, 19a, 40a.

Alix also asserts that McKinsey made referral offers to bankruptcy attorneys, promising introductions to potential clients if they recommended McKinsey to debtors. Alix speculates that, in three of the 13 bankruptcies, those referrals caused debtors not to invite AlixPartners to pitch for the work. App. 7a, 25a n.6.

C. Proceedings Below

1. The district court dismissed Alix's RICO claims for lack of proximate causation. App. 29a. In a careful opinion that faithfully applied this Court's decisions, Judge Jesse M. Furman explained that, "[i]n light of binding Supreme Court and Second Circuit precedent," the claims failed because "the conduct that directly caused the alleged harm to AlixPartners" (the debtors' decisions "not to hire AlixPartners") was "distinct from the conduct giving rise to McKinsey's alleged fraud" (the allegedly deficient disclosures in bankruptcy cases in which

AlixPartners was not even a party). App. 29a, 39a–40a.

That disconnect between alleged wrongdoing and harm, Judge Furman reasoned, was "the same flaw that the Supreme Court found to be fatal" in *Anza* and *Hemi*. App. 39a. Judge Furman further explained that any link between McKinsey's supposed misconduct and AlixPartners' alleged injury depended on the independent decisions of both bankruptcy courts and debtors, "render[ing] the link far too indirect to satisfy the [RICO] statute's proximate-cause requirement." App. 41a. Judge Furman also reasoned that Alix's limited and non-specific referral allegations did not close the causal "gap" and in any event were conclusory. App. 44a.

2. The Second Circuit vacated the dismissal. Although the parties had not mentioned the concept of supervisory power in their briefs or during oral argument, the Second Circuit reasoned that, because Alix alleged a purported fraud targeting bankruptcy courts, the panel could invoke its "supervisory responsibilities" to excuse Alix from alleging the kind of direct injury required by this Court's decisions. App. 13a, 19a.

In particular, the Second Circuit opined that Judge Furman "gave insufficient consideration to the fact that McKinsey's alleged misconduct targeted the federal judiciary." App. 13a. On that basis, the Second Circuit claimed that "supervisory responsibilities" permitted it to depart from this Court's decisions.

Noting that "none of these prior cases involved allegations of fraud on a court whose operations we superintend," the panel created a "proximate cause analysis [that] differs somewhat from the analysis" in controlling Supreme Court and Second Circuit precedent. App. 13a, 16a–17a; *see also* App. 16a (declining to apply *Anza* because the defendants there did not "allegedly defraud[] one of the courts we oversee"). Applying its new and relaxed standard—which asked only whether Alix's alleged harm was "implausible or speculative," App. 18a—the Second Circuit held that Alix had alleged proximate causation "in light of these special considerations," "our supervisory responsibilities," and the "Court's responsibility to oversee the integrity of the bankruptcy process." App. 13a, 26a.[1]

REASONS FOR GRANTING THE WRIT

This Court's review is warranted to compel compliance with this Court's precedent on the proximate-causation requirements for a private RICO claim and on the clear limitations on any "supervisory" power. The Second Circuit expressly departed from this Court's controlling decisions. And its decision conflicts with those of numerous other circuits.

Contrary to the Second Circuit's reliance on its "supervisory responsibilities" to justify disregarding this Court's decisions, this Court has held that supervisory power, to the extent it exists at all, does not permit a court to contravene binding precedent or the requirements of federal law. The issue presented is critically important: Such an expansive

---

[1] The panel also found the referral allegations adequately pleaded because Alix "identif[ied] several engagements" that he "believe[d]" that McKinsey had "influenced." App. 23a.

conception of "supervisory" authority would permit wholesale disregard not only of this Court's decisions but also of the substantive requirements of Acts of Congress.

Indeed, because the Second Circuit's decision explicitly disregards this Court's precedent, and does so on a basis that this Court recently rejected in *Tsarnaev*, this case is a candidate for summary reversal as an alternative to plenary review.

I. The Second Circuit's Decision Explicitly Conflicts with This Court's Precedent on the Proximate-Causation Limit on Civil RICO Claims.

A. The Second Circuit's Proximate-Causation Analysis Is Irreconcilable with This Court's Precedent.

The Second Circuit explicitly applied a "proximate cause analysis [that] differs somewhat from the analysis in" controlling decisions. App. 13a. The panel proffered only one reason for departing from this Court's precedent: Because this case involved allegations of fraud on a court, the Second Circuit could use its "supervisory responsibilities" to change and loosen the proximate-causation requirement for Alix's claims. App. 13a, 19a.

On the basis of that purported "supervisory" power to depart from controlling law, the panel held that Alix adequately pleaded proximate causation merely because it was not "implausible or speculative" that "AlixPartners and [McKinsey's] competitors would have secured additional engagements absent McKinsey's alleged misconduct." App. 18a. The Second Circuit thus accepted as sufficient a "plausible" claim that AlixPartners, in the absence of the alleged violation, eventually would have been retained "roughly in accordance with [its] historical market share[]." App. 19a.

The Second Circuit's "plausibility" standard is irreconcilable with this Court's decisions requiring direct causation. The number of causal steps and the presence of independent, third-party conduct in Alix's causal theory—the precise factors this Court deemed fatal in prior cases—did not matter under the Second Circuit's broad concept of RICO proximate causation. The Second Circuit's decision does not suggest that AlixPartners' claimed injury occurred at the "first step" (or even the second or third) of the causal chain. Indeed, the opinion uses "[i]n turn" to explain the sequential steps in Alix's alleged causal theory. App. 4a. And the decision ignores the fact that AlixPartners' claimed injury relies on independent and variable determinations within that causal chain by both bankruptcy courts and debtors.

Given *Anza*'s admonition that RICO's proximate-causation limits have "particular resonance when applied to claims brought by economic competitors," 547 U.S. at 460, the Second Circuit's disregard of this Court's precedent is especially egregious. As the plurality opinion in *Hemi* explained, "*Anza* teaches that the competitors' injuries in such a case [of alleged fraud to gain business from competitors] are too attenuated to state a RICO claim." 559 U.S. at 13 n.1.

The panel's "plausibility" standard, by contrast, could allow any competitor alleging fraud on a court to file RICO claims simply based on its alleged market share. Indeed, the panel's reliance on the mere "plausibility" of allegations requiring a long causal chain reimagines a focus on foreseeability that this Court rejected in *Hemi* and *Anza*. *See Hemi*, 559 U.S. at 12 (noting that the "dissent would have RICO's proximate cause requirement turn on foreseeability," which was "precisely the argument lodged against the majority opinion in *Anza*").

The Second Circuit's decision in this case did not mention *Hemi*, and its discussion of *Anza* ignored this Court's holding that proximate causation was lacking because the harm and wrongdoing were "distinct." 547 U.S. at 458. Similarly, the Second Circuit's only support for its remark that the district court here "conflated proof of causation and proof of damages," App. 12a, was a later citation to *Anza* that was not to the majority opinion but instead to its dissent, which criticized the "stringent proximate-causation requirement" that the *majority* adopted. *Compare Anza*, 547 U.S. at 463, *with* App. 19a (citing *Anza*, 547 U.S. at 466).

And whereas the Second Circuit cited *Bridge* to support a "flexible" approach to proximate causation, App. 18a, *Bridge* actually "reaffirmed the requirement" of directness and did not endorse a standard of mere plausibility. *Hemi*, 559 U.S. at 14. In *Bridge*, no further step or independent conduct was needed to ensure that the plaintiff received fewer tax liens in a zero-sum tax-lien auction; that harm was guaranteed once the defendant fraudulently increased its number of bids, a harm that involved "no independent factors." 553 U.S. at 658. As *Hemi* later explained, in contrast to the "straightforward" connection in *Bridge*, proximate causation is lacking where "[m]ultiple steps . . . separate the alleged fraud from the asserted injury." 559 U.S. at 14–15.

The conflict between the decision below and this Court's precedents is especially worthy of review because it is the third time that the Second Circuit has failed to apply the direct-causation requirement. Indeed, the Second Circuit's reasoning that proximate causation was properly pleaded based on Alix's claimed lost market share echoes the flawed approach that court took in *Anza*. There, the Second Circuit deemed proximate causation satisfied because the alleged misconduct "was intended to and did give the defendant a competitive advantage." *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 263 (2d Cir. 2004), *rev'd in part*, *vacated in part*, *Anza*, 547 U.S. at 462. Likewise, by permitting Alix to allege proximate causation merely if his claimed causal chain is plausible and not "speculative," App. 18a, the Second Circuit reverted to its overruled approach in *Hemi*, where it found proximate causation adequately alleged because there were "no speculative steps in th[e] chain of causation." *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 443 (2d Cir. 2008), *rev'd*, *Hemi*, 559 U.S. at 11.

This Court reversed that approach. "[I]n the RICO context," this Court reaffirmed, "the focus is on the directness of the relationship between the conduct and the harm" and *not* on "the concept of foreseeability." *Hemi*, 559 U.S. at 12.

B. The Second Circuit's Decision Conflicts with Decisions of Other Circuits.

1. Numerous other courts of appeals have understood proximate causation under RICO exactly the same way as Judge Furman and petitioners. Therefore, even if some doubt existed as to the correctness of that analysis—and there is no doubt—it would be appropriate to take this case to resolve the circuit conflict created by the decision below. Specifically, decisions from the First, Fourth, Fifth, Seventh, and Ninth Circuits have dismissed RICO claims because, like those here, they were premised on marketplace harm or long causal chains.

In a case factually similar to this one in the relevant respects, the Ninth Circuit affirmed the dismissal of a RICO claim based on alleged unfair competitive conduct because "the court would have to engage in a speculative and complicated analysis to determine what percentage" of the plaintiff's claimed lost sales were caused by the alleged racketeering. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1148 (9th Cir. 2008). The Ninth Circuit—exactly like Judge Furman here—observed that the "case would require an even more speculative analysis than *Anza* because," unlike the *Anza* plaintiff, the *Sybersound* plaintiff there had "more than one principal competitor." *Ibid.*

The First Circuit, in *Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31 (1st Cir. 2021), recently affirmed the dismissal of a RICO claim because the plaintiff's "theory of causation" went "'beyond the first step' of the injuries from the alleged RICO scheme." *Id.* at 36 (quoting *Hemi*, 559 U.S. at 10).

The Fifth Circuit, in *Molina-Aranda v. Black Magic Enters.*, 983 F.3d 779 (5th Cir. 2020), affirmed the dismissal of a RICO claim where the plaintiffs' alleged harm was "several steps in the causal chain away" from the alleged racketeering. *Id.* at 785. In that case, the wrongdoing did not "necessar[ily]" cause the plaintiff's alleged harms. *Ibid.* In those circumstances, the Fifth Circuit correctly explained, this Court's precedent dictated dismissal because "[i]f some other conduct directly caused the harm, the plaintiff cannot sustain a RICO claim." *Ibid.*

The Fourth Circuit, in *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489 (4th Cir. 2018), affirmed the dismissal of a RICO claim because the plaintiff's alleged harm occurred through "a chain of causation that extend[ed] significantly beyond 'the first step.'" *Id.* at 494. The Fourth Circuit emphasized that RICO proximate causation requires "that the injury is sequentially the direct result," and explained that the requirement applies "regardless of how foreseeable a plaintiff's claimed injury might be or even what motive underla[y] the conduct that caused the harm." *Ibid.*

In an opinion by Judge Easterbrook for a unanimous panel, the Seventh Circuit affirmed the dismissal of a RICO claim because the plaintiffs' claimed harm was "several levels removed in the causal sequence." *Sidney Hillman Health Center v. Abbott Lab'ys.*, 873 F.3d 574, 578 (7th Cir. 2017); *see also James Cape & Sons Co. v. PCC Constr. Co.*, 453 F.3d 396, 403 (7th Cir. 2006) (affirming dismissal where "[a] court could never be certain whether [plaintiff] would have won any of the contracts that were the subject of the [bid-rigging] conspiracy 'for any number of reasons unconnected to the asserted pattern of fraud'" (quoting *Anza*, 547 U.S. at 458)).

2. That the plaintiff here alleges wrongdoing in litigation does not diminish the conflict. Nothing in the RICO statute suggests a different proximate-causation analysis depending on which predicate act or type of racketeering is alleged.

Not surprisingly, other courts addressing alleged racketeering in judicial proceedings have applied this Court's precedent on RICO proximate causation without alteration. In *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292 (11th Cir. 2003), for instance, the plaintiffs alleged that the defendant committed RICO predicate acts of obstruction and witness tampering by defrauding them into settling their case by withholding information and making false statements in a similar litigation that they monitored. *Id.* at 1307. The Eleventh Circuit rejected that harm as "too remote to satisfy [RICO's] proximate cause requirements." *Ibid.* The court acknowledged that it did "not sanction [the defendant's] alleged conduct" but "note[d] that other penalties exist for such dishonest actions." *Id.* at 1310.

II. The Second Circuit's Decision Directly Conflicts with This Court's Precedent on Supervisory Power.

By relying on "supervisory responsibilities" to disregard binding authority and lower the statutory threshold for a private claim, the Second Circuit's opinion in this case conflicts with this Court's decisions that strictly limit the use of supervisory power (and question whether such a power even exists).

This Court has emphasized that any supervisory power that federal courts *might* have is subject to "clear limits." *Tsarnaev*, 142 S. Ct. at 1036. The Second Circuit cited no authority to support its reliance on supervisory power, and its decision conflicts with at least two of those clear limits.[2]

1. First, a court cannot invoke supervisory power to "circumvent or supplement legal standards set out in decisions of this Court." *Ibid*. Using supervisory power to "disregard the considered limitations of the law [the judiciary] is charged with enforcing" "amounts to a substitution of individual judgment for the controlling decisions of this Court." *United States v. Payner*, 447 U.S. 727, 737 (1980).

Recently, in *Tsarnaev*, this Court reversed the First Circuit where it had likewise invoked supervisory power as grounds for "declin[ing] to apply" Supreme Court precedent. 142 S. Ct. at 1036. This Court explained that the First Circuit could not craft a "rule" "pursuant to its 'supervisory authority'" that required specific jury-selection questions when this Court had previously held "that a district court enjoys broad discretion to manage jury selection." *Id.* at 1035–36.

---

[2] This Court decided *Tsarnaev* while Petitioners' petition for panel rehearing and rehearing *en banc* was pending in the Second Circuit. Petitioners notified the panel and *en banc* court of this Court's decision in *Tsarnaev*. *See* CA2 ECF No. 153. But the Second Circuit denied rehearing without changing the panel's opinion. App. 56a–57a.

Relying on supervisory authority to depart from Supreme Court precedent is precisely what the Second Circuit did here. It invoked its "supervisory responsibilities" to create a new "proximate cause analysis [that] differs" from the standard this Court applies. App. 13a. As *Tsarnaev* makes clear, "supervisory power does not extend so far." 142 S. Ct. at 1036 (quoting *Payner*, 447 U.S. at 737).

2. Second, the supervisory power cannot "conflict with or circumvent . . . [a] federal statute." *Tsarnaev*, 142 S. Ct. at 1036; *see also United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 589 (1948).

In *Bank of Nova Scotia v. United States*, for instance, this Court held that a federal court could not, in response to prosecutorial misconduct, use its supervisory power to "circumvent the harmless-error inquiry prescribed by" the Federal Rules of Criminal Procedure. 487 U.S. 250, 254 (1988). A court could not "overlook[]" the "balance struck" by the rule merely because a court chose "to analyze the question under the supervisory power." *Id.* at 255 (quoting *Payner*, 447 U.S. at 736).

In *Law v. Siegel*, 571 U.S. 415 (2014), this Court similarly held that a bankruptcy court could not invoke inherent power to punish a debtor's litigation fraud by surcharging the full value of the debtor's home. Doing so conflicted with statutory provisions that permit debtors to retain some of the value of their home. *Id.* at 421–22. This Court again explained that "it is not for courts to alter the balance struck by the statute." *Id.* at 426–27.

Here, this Court's decisions requiring direct causation for RICO claims delineated the proper interpretation of that statute's standing requirements. Nothing in the RICO statute allows for a looser standard for private claims simply because the alleged racketeering involves federal courts. Bankruptcy fraud is one of many crimes involving wrongdoing in judicial proceedings, such as obstruction and witness tampering, that serve as predicate acts in the RICO statute. *See* 18 U.S.C. § 1961(1) (reproduced at App. 58a–61a). Congress did not empower courts to treat RICO allegations premised on bankruptcy fraud differently than other predicate acts.

Altering statutory requirements without even a pretense of a textual basis exceeds the power of federal courts. "[C]reating a cause of action," this Court reiterated *just this month*, "is a legislative endeavor." *Egbert v. Boule*, No. 21-147, slip op., at 6 (June 8, 2022). "Congress is 'far more competent than the Judiciary' to weigh [competing] policy considerations." *Ibid.* (quoting *Schweicker v. Chilicky*, 487 U.S. 412, 423 (1988)). "And the Judiciary's authority to do so at all is, at best, uncertain." *Ibid.* When a court acts based on its own perception of what is necessary rather than that of Congress, it "assign[s] new private rights and liabilities—a power that is in every meaningful sense an act of legislation." Slip op., at 2 (Gorsuch, J., concurring in the judgment).

Courts "cannot fashion new claims," and their "authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Hernández v. Mesa*, 140 S. Ct. 735, 742 (2020). It "is for Congress," not federal courts, to determine "who can seek a remedy" and decide whether "to extend [a] cause of action." *Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008); *see also*

Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1506 (1984) ("A remedial ruling that is grounded on supervisory power raises the same concerns about institutional competence and separation of powers that have been addressed in the cases involving the implication of civil remedies.").

Allegations of "fraud on a court," App. 17a, do not permit departure from controlling law on the basis of supervisory power. *Law* involved a multi-year fraud on a bankruptcy court, exactly what is (falsely) alleged in this case. Yet this Court unanimously held that the court could not use "inherent powers" to punish the fraud by contravening statutory requirements. 571 U.S. at 421. Similarly, the stated purpose for invoking supervisory power in *Payner* was "to protect the integrity of the federal courts." 447 U.S. at 746 (Marshall, J., dissenting). The same was said in *Bank of Nova Scotia*. *See* 487 U.S. at 250 (federal court could not use supervisory power to "safeguard the integrity of the judicial process" by circumventing a federal rule).

The Second Circuit's characterization of this case as a "one off," "*sui generis*," and not "ordinary" does not justify the refusal to apply this Court's binding precedent on a statutory requirement. App. 13a, 19a. Because RICO claims often involve allegations of wrongdoing within the purview of courts, that characterization is incorrect. *E.g.*, *Green Leaf Nursery*, 341 F.3d at 1307. But, in any event, "not even in 'rare cases'" can a federal court rely on inherent power to "'alter the balance struck by the statute'" it is enforcing. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017) (quoting *Law*, 571 U.S. at 427).

3. Above and beyond violating controlling authority, the Second Circuit exceeded the limited scope of inherent power. Nine of the bankruptcy cases at issue in Alix's allegations were litigated in courts outside the Second Circuit. App. 6a n.2. A court's "supervisory responsibilities" cannot possibly stretch beyond its boundaries.

Even for the four bankruptcies within the Second Circuit, if any court had authority to investigate Alix's allegations, it was the bankruptcy courts themselves—not an appellate court in a different case. *See, e.g.*, Fed. R. Bankr. P. 9024 (incorporating Federal Rule of Civil Procedure 60's provisions on relief from a judgment or order).[3] Supervisory authority is at most a narrow power that permits federal courts to formulate "'*procedural* rules'" to "control their *own* procedures." *United States v. Williams*, 504 U.S. 36, 45 (1992) (first emphasis add-

---

[3] Where Alix has brought his allegations directly to bankruptcy courts, they have declined to invoke inherent authority. *See* App. 33a n.2; *In re Edison Mission Energy*, 610 B.R. 871, 880 (Bankr. N.D. Ill. 2020); *In re SRC Liquidation LLC*, No. 15-10541, 2019 WL 4386373, at *6 (Bankr. D. Del. Sept. 12, 2019); Order Den. Mar-Bow Mot., *In re NII Holdings, Inc.*, No. 14-12611 (Bankr. S.D.N.Y. Aug. 15, 2019), ECF No. 1041; *In re SunEdison, Inc.*, No. 16-10992, 2019 WL 2572250, at *11 (Bankr. S.D.N.Y. June 21, 2019); *In re Old ANR, LLC*, No. 19-302, 2019 WL 2179717, at *8 (Bankr. E.D. Va. May 17, 2019), *appeal dismissed*, *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC*, 469 F. Supp. 3d 505, 535 (E.D. Va. 2020).

ed) (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

Federal courts have only "judicial Power," Art. III, § 1—"the power to decide, in accordance with law, who should prevail in a case or controversy." *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 816 (1987) (Scalia, J., concurring in the judgment). That "does not include the power to seek out law violators in order to punish them." *Ibid.*

Indeed, this Court has raised but not decided the question whether federal appellate courts even have supervisory power at all. *See Tsarnaev*, 142 S. Ct. at 1035 n.1 (noting that jurists have "questioned whether the courts of appeals" have supervisory power); *see also id*. at 1041 (Barrett, J., concurring) (expressing "skepticism" that any such power exists). To the extent it exists, supervisory power at the very least does not permit an appellate court to lessen the statutory requirements of a private cause of action as interpreted by this Court to remedy an alleged fraud in a different court (let alone in a different circuit).

III. The Question Presented Is Important and Worthy of Certiorari.

The question presented is certworthy. The Second Circuit's departure from this Court's precedent was explicit. And its improper reliance on supervisory power was determinative. Had the Second Circuit faithfully applied this Court's precedent—as Judge Furman did—the RICO claims would be dismissed.

The issue is also important. The Second Circuit transparently attempted to shield its decision from review by describing its "supervisory-responsibility" carveout as "*sui generis*" and a "one off." App. 13a, 19a. But as noted, *see supra* at 16, 18–20, there is nothing unusual about basing a RICO claim on alleged wrongdoing in judicial proceedings; RICO includes as predicate offenses a number of crimes that necessarily entail such conduct. And more broadly, the Second Circuit did not limit its reasoning to RICO claims or proximate causation.[4] Instead, the decision opens the door to courts, whenever they conclude that "special considerations" "invoke[] [their] supervisory responsibilities," App. 13a, to bypass this Court's jurisprudence or loosen statutory restrictions on private claims. That is no "one off."

Any federal court could claim the inherent power that the Second Circuit did here. Stretching that power as far as the Second Circuit did would represent a fundamental reallocation of authority among Congress, this Court, and lower courts. Notably, not only did the decision below not cite any support for its invocation of supervisory power, but it also offered no principle to cabin that power in future cases. It has long been understood that, unless constrained by clear limits, unstated judicial powers can be "confused or manipulated, with the result that inherent power remains available to justify judicial action in an undesirably large class of cases." Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 312 (2010); *see also* Robert J. Pushaw, Jr., *The Inherent Powers of Feder-*

---

[4] In fact, Alix has since argued that "the clear tenor of the Second Circuit's opinion overrides" Defendants' alternate arguments for dismissal, including that RICO's statute of limitations bars Alix's claims and that Alix fails to adequately allege predicate acts or a RICO enterprise. D. Ct. ECF No. 157.

al Courts and the Structural Constitution, 86 IOWA L. REV. 735, 738 (2001) ("[F]ederal judges have repeatedly cited 'inherent powers' as a catch-phrase to rationalize a wide range of actions that are not essential to (indeed, that often seem antithetical to) the proper exercise of judicial authority.").

This Court's review of such unbridled power is of fundamental importance. "[T]he notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth . . . the prospect of 'the most tyrannical licentiousness.'" *Young*, 481 U.S. at 822 (Scalia, J., concurring in the judgment) (quoting *Anderson v. Dunn*, 19 U.S. 204, 228 (1821)). Inherent power "must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen v. United States*, 517 U.S. 820, 823 (1996).

Review is also important to enforce the critical proximate-causation limits that this Court's decisions require, especially in cases brought by economic competitors. Permitting competitors to bring RICO claims and satisfy proximate causation on the mere plausibility of claimed lost market share—so long as they allege wrongdoing in a federal court—increases uncertainty and risk for businesses and brings forth the exact anticompetitive concerns that this Court sought to avoid in *Anza*.

New York is a center of the world economy, and businesses already face numerous RICO claims in the Second Circuit.[5] That will only increase after the decision below. RICO has a nationwide venue provision, under which a plaintiff can file a civil RICO claim in any "district in which [the defendant] resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965 (reproduced at App. 76a–77a). Given the frequency with which companies have contacts with New York, the decision below will make the Second Circuit the preferred forum for anticompetitive RICO claims, with plaintiffs citing "special considerations" that warrant relaxing RICO's statutory requirements. App. 13a. Indeed, commentators have warned that the decision creates "a separate avenue to encourage RICO suits" and "opens the door for plaintiffs to allege causation based on market share."[6]

This Court frequently grants certiorari to reaffirm an important legal principle that a court of appeals did not follow. *E.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (reversing where court of appeals "failed to follow two basic and well-established principles of law"); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.5 (11th ed. 2019) (noting that "direct conflict" with "a decision of

---

[5] Based on an analysis of the Federal Judicial Center's Integrated Database of federal cases, even excluding opioid-related cases, well over one thousand RICO cases have been brought against businesses since 2019, and more than one-fifth of those have been filed in the Second Circuit.

[6] Callan G. Stein & Stephen G. Rinehart, *Second Circuit Decision Potentially Broadens RICO Proximate Cause Element* (Feb. 14, 2022) https://www.troutman.com/insights/second-circuit-decision-potentially-broadens-rico-proximate-cause-element.html.

the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari"). Here, a court of appeals openly deviated from this Court's precedent and invented a specious basis for doing so. The Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted. Although plenary review would be appropriate, the Court may wish to consider summary reversal.

Respectfully submitted,

DAVID A. O'NEIL
Counsel of Record
DEBEVOISE &
PLIMPTON LLP
801 PENNSYLVANIA
AVENUE N.W.
WASHINGTON, D.C. 20004
(202) 383-8000
daoneil@debevoise.com

JOHN GLEESON
MARK P. GOODMAN
ERICA S. WEISGERBER
NATHAN S. RICHARDS
DEBEVOISE &
PLIMPTON LLP
919 THIRD AVENUE
NEW YORK, NY 10022

ROY T. ENGLERT, JR.
ARIEL N. LAVINBUK
KRAMER LEVIN ROBBINS
RUSSELL
2000 K ST. NW, 4TH FL.
WASHINGTON, D.C. 20006
(202) 775-4500

REID M. FIGEL
BRADLEY E.
OPPENHEIMER
ROBERT C. KLIPPER
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK
P.L.L.C.
1615 M STREET, NW,
SUITE 400
WASHINGTON, D.C. 20036

MATTHEW I. MENCHEL
JONATHAN D. COGAN
DANIELLE L. ROSE
KOBRE & KIM LLP
800 THIRD AVENUE
NEW YORK, NY 10022

MICAH E. MARCUS
CHRISTOPHER G. DEAN
MCDONALD HOPKINS LLP
300 NORTH LASALLE
STREET, SUITE 1400
CHICAGO, IL 60654

CATHERINE L. REDLICH
DRISCOLL & REDLICH
110 WEST 40TH STREET,
SUITE 1900
NEW YORK, NY 10018

June 28, 2022

APPENDIX

TABLE OF APPENDICES

Appendix A

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

In the
United States Court of Appeals
For the Second Circuit

August Term 2020

No. 20-2548-cv

Jay Alix,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York
No. 18-cv-4141, Jesse M. Furman,
District Judge, Presiding.

(Argued June 22, 2021; Decided January 19, 2022)

B e f o r e:

NEWMAN, CABRANES, PARKER, *Circuit Judges*.

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

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

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

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

ROY T. ENGLERT, JR. (Ariel N. Lavinbuk, Richard A. Sauber, *on the brief*), Robbins, Russell, Englert, Orseck, Untereiner & Sauber, LLP, Washington, DC, *for* Defendants-Appellees Kevin Carmody, Jon Garcia, Alison Proshan, and Robert Sternfels.

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

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

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

BARRINGTON D. PARKER, *Circuit Judge*:

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

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

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

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

BACKGROUND

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

In order to secure engagements, bankruptcy advisors must demonstrate that they "do not hold or represent an interest adverse to the estate" and are "disinterested persons" within the meaning of the Bankruptcy Code. 11 U.S.C. § 327(a); *see also id.* § 101(14).[1] When these requirements are satisfied, a

---

1 "The term 'disinterested person' means a person that (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the

bankruptcy professional may be retained "with the court's approval." *Id*. § 327(a). In addition, bankruptcy courts require that an application for retention be "accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditor, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a). The statements requiring these detailed disclosures are submitted under penalties of perjury and are subject to the bankruptcy fraud statute. *See* 28 U.S.C. § 1746; 18 U.S.C. §§ 152(2)-(3).

Alix alleges that McKinsey violated these disclosure requirements by submitting to the Bankruptcy Court false statements in thirteen bankruptcy proceedings in which it was appointed advisor.[2] Specifi-

---

petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14).

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

cally, Alix alleges that, despite "the size and complexity of McKinsey's business and business relationships" as one of the world's largest consulting firms, it "disclosed **no** connections by name in its initial declarations for these eight cases" and disclosed only a few in supplemental declarations filed in only two of the cases. Given AlixPartners's significant market share, Alix argues, if McKinsey had filed compliant disclosure statements, it would have been disqualified from certain assignments and AlixPartners would have secured at least some of the assignments from which McKinsey would have been disqualified. In other words, Alix contends that AlixPartners's injury was a foreseeable and direct consequence of McKinsey's failure to follow the law and a fraud on the Bankruptcy Court.

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

The following month, Barton allegedly admitted the existence of, and McKinsey RTS's participation in, the scheme and also admitted that his outside

(Bankr. E.D. Va. Jul. 15, 2016); *In re GenOn Energy, Inc.*, No. 17-BK-33695 (Bankr. S.D. Tex. Jun. 14, 2017); and *In re SRC Liquidation LLC*, No. 15-BK-10541 (Bankr. D. Del. Sep. 12, 2019).

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

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

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

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

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

DISCUSSION

I.

This case comes to us on an unusual procedural path; thus, we first consider whether we have jurisdiction to review it. *See New York State Dep't of*

---

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

Env't Conservation v. Fed. Energy Regul. Comm'n, 991 F.3d 439, 445 (2d Cir. 2021).

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

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

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

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

II.

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

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

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

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

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

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

The district court held that Alix failed to plead proximate cause because intervening events might have broken the chain of causation, such as the Bankruptcy Judge determining whether an advisor was necessary at all and the Trustee selecting a particular advisor, which might not have been AlixPart-

---

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

ners. We agree that these might have been intervening events if Alix had somehow learned, before any assignments had been made, that McKinsey had been filing false statements and then sued for the fees it anticipated it would have received if McKinsey had told the truth.

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

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

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

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

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

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

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

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

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

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

Alix alleges that if McKinsey had disclosed what it was required to disclose, McKinsey would have been disqualified and the thirteen assignments would have been added to the pool available to Alix Partners and McKinsey's other competitors. McKinsey's three largest competitors would have received 75% of these assignments (and revenue), just as they historically received 75% of assignments and revenue.

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

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

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

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

---

[5] The *GenOn* bankruptcy matter, for example, is closed and has not been active since June 30, 2020, when the Final Decree was filed. Final Decree Closing the Remainder of the Chapter 11 Cases, *In re: GenOn Energy, Inc., et al.* (S.D. Tx. June 30, 2020) (No. 17-33695), ECF No. 2176. Even when the case was active, nothing in the record suggests that the U.S. Trustee or any of the private parties with pecuniary interests filed an objection or otherwise tried to vindicate the integrity of the bankruptcy system in that case.

we are not persuaded that, under the circumstances presented here, either the Bankruptcy Court or the U.S. Trustee would be in a superior position to find out what McKinsey did (or did not do). In other words, adjudicating any potential claims of the U.S. Trustee or the Bankruptcy Court would not be more "straightforward" than adjudicating Alix's claims. *See Empire Merchants*, 902 F.3d at 144 (quoting *Anza*, 547 U.S. at 460). For these reasons, we conclude that Alix has alleged a sufficiently direct relationship between the asserted injury to AlixPartners and McKinsey's purported racketeering activities in all thirteen bankruptcies.

III.

The district court dismissed Alix's RICO claims predicated on the pay-to-play scheme because it found that the allegations failed to meet the pleading and proximate cause standards. It concluded that the pay-to-play allegations were "devoid of any supporting specifics" and inadequate to meet the pleading requirements, and that even if they did, that they failed to show a sufficiently direct link between the allegedly unlawful conduct and injury. We disagree. We hold that Alix adequately pleaded bankruptcy fraud under Federal Rule of Civil Procedure 9(b) and that the allegations show a sufficiently direct link between the alleged fraud and injury.

A.

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

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

Moreover, the details that the district court found lacking are rarely within the knowledge of a victim of fraud and are more appropriately left for discovery. At this stage, Alix's pay-to-play allegations need only suggest "a strong inference of fraud." *Wexner*, 902 F.2d at 172. The allegations in the complaint about specific cases, when combined with the unusually detailed allegations (*see* pp. 8-10) regarding Alix's meetings with Barton, one of which allegedly led to Barton admitting McKinsey's role and participation in an illegal scheme and supposed agreement to take steps to end that scheme, easily raise a strong inference of fraud. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171 (2d Cir. 2015) ("In determining the adequacy of [a plaintiff's] fraud pleading[] . . . [a court] view[s] the alleged facts in their totality, not in isolation."). Accordingly, we conclude that Alix's detailed pay-to-play allegations comfortably meet the Rule 9(b) standard.

B.

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

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

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

In view of Alix's allegations that competitors had been bought off, we, in the absence of discovery and

---

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

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

CONCLUSION

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

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<table>
<tr><td>-- X</td><td></td></tr>
<tr><td>JAY ALIX,

Plaintiff,

-v-

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

Defendants.</td><td>18-CV-4141 (JMF)

<u>OPINION AND ORDER</u></td></tr>
<tr><td>-- X</td><td></td></tr>
</table>

JESSE M. FURMAN, United States District Judge:

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

Id. ¶¶ 32-33, 48-49. Those McKinsey entities are Defendants here, as is a third subsidiary, McKinsey Holdings, Inc. (collectively, "McKinsey" or the "McKinsey Defendants"), and various McKinsey employees (the "Individual Defendants"). *Id.* ¶¶ 30-40.

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

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

BACKGROUND

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

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

Alix's allegations concern thirteen of the bankruptcy proceedings in which McKinsey has been employed as a bankruptcy professional since it first entered the market. *See* Am. Compl. ¶¶ 16, 48, 67, 136, 143.[1] Alix alleges that, in each of those cases,

[1] The thirteen cases are as follows: *In re GenOn Energy, Inc.*, No. 17-BK-33695 (Bankr. S.D. Tex. June 14, 2017); *In re SunEdison, Inc.*, No. 16-BK-10992 (Bankr. S.D.N.Y. Apr. 21, 2016);

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

Additionally, in highly general terms, Alix alleges an "unlawful 'pay-to-play' scheme whereby McKinsey made offers to bankruptcy attorneys to

---

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

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

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

---

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

LEGAL STANDARDS

In evaluating a motion to dismiss pursuant to Rule 12(b)(6), a court must accept all facts set forth in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *See*, *e.g.*, *Empire Merchants*, 902 F.3d at 139; *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, —F. Supp. 3d —, No. 14-MD-2589 (JMF), 2019 WL 2269929, at *4 (S.D.N.Y. May 28, 2019). The Supreme Court has made clear, however, that a court should not accept *non*-factual matter or "conclusory statements" set forth in a complaint as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). And the Court must "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully," *id.*, and cannot rely on mere "labels and conclusions" to support a claim, *Twombly*, 550 U.S. at 555. If the plaintiff's pleadings "have not nudged [his or her] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Id.* at 570.

RICO CLAIMS

The Court begins with Alix's federal claims, brought under RICO.[1] RICO creates a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962" of the statute. 18 U.S.C. § 1964(c). Section 1962, in turn, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the

[1] Before turning to the parties' arguments, the Court is compelled to express its misgivings about one feature of Alix's briefing: its excessive use of footnotes. (The irony of doing so in a footnote is not, of course, lost on the Court, but—in contrast to many of the items relegated to footnotes in Alix's briefing—the point is indeed a marginal one here.) Alix's principal brief contains a whopping 154 footnotes that comprise, by the Court's calculation (assisted by Microsoft Word's word-count function), approximately forty-six percent of the brief's text. Making matters worse, despite having been granted leave to file a seventy-five page brief, *see* ECF No. 81, Alix does not even include a fact section in his brief, simply (and unhelpfully) "refer[ring] the Court" to the Amended Complaint "for the relevant facts." Alix Opp'n 2. The net result is that Alix's brief is approximately twenty-three percent longer (by word count) than Defendants' principal brief—tantamount to a self-granted enlargement of the page limits. This is, to put it mildly, an unacceptable abuse of the briefing limitations set by the Court (and the fact that those limitations are by page rather than by word), and the Court would be on firm ground either in striking Alix's brief or in disregarding all arguments relegated to footnotes. *See, e.g.*, *Gramercy Advisors, LLC v. Ripley*, No. 13-CV-9070 (VEC), 2014 WL 5847444, at *2 (S.D.N.Y. Nov. 12, 2014) ("[C]ourts generally do not consider an argument mentioned only in a footnote to be adequately raised." (collecting cases)); *Weslowski v. Zugibe*, 96 F. Supp. 3d 308, 314 (S.D.N.Y. 2015) (noting that courts are "under no obligation to consider" an argument mentioned only in a footnote (collecting cases)). Because Alix's arguments fall short even with all of the footnotes, the Court will do neither. But it cautions counsel that similar conduct will not be tolerated and may result in the imposition of sanctions.

activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). "[R]acketeering activity" is defined to include a wide variety of criminal offenses, including, as relevant here, bankruptcy fraud, wire fraud, and mail fraud. *Id.* § 1961(1); *see, e.g.*, *Empire Merchants*, 902 F.3d at 139.

A. The RICO Proximate Cause Standard

To show injury "by reason of" a statutory violation, a civil RICO plaintiff must allege and ultimately prove that the violation was both a "but-for" *and* a "proximate cause" of its injury. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 132 (2d Cir. 2010). Significantly, however, the term "proximate cause" in this context does not mean precisely what it means at common law. *See, e.g.*, *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 654-55 (2008); *see also, e.g.*, *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 24 (2010) (Breyer, J., dissenting) (recognizing "that some of our opinions may be read to suggest that the words 'by reason of' in RICO do not perfectly track common-law notions of proximate cause"); *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 754 (7th Cir. 2011) (Posner, J.) (noting that the term arguably "muddie[s] the waters"). Instead, it "requires some direct relation between the injury asserted and the injurious conduct alleged." *Empire Merchants*, 902 F.3d at 141 (internal quotation marks and alterations omitted); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."). Put differently, "a link that is too remote, purely contingent, or indirect is insufficient." *Empire Merchants*, 902 F.3d at 141 (internal quotation marks and alterations omitted).

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

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

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

B. Discussion

Applying the foregoing principles and cases here, the Court is compelled to conclude that Alix's claims fail as a matter of law. First and foremost, Alix's allegations share the same flaw that the Supreme Court found to be fatal in *Anza*, that a plurality of the Court found to be fatal in *Hemi*, and that the Second Circuit found to be fatal in *Empire Merchants*: the conduct that directly caused the alleged harm to AlixPartners was distinct from the conduct giving rise to McKinsey's alleged fraud. *See Empire*

Merchants, 902 F.3d at 142; *Hemi*, 559 U.S. at 11; *Anza*, 547 U.S. at 458-59. Put differently, Alix's alleged injuries were the result of independent, intervening third-party conduct. AlixPartners alleges that McKinsey filed fraudulent Rule 2014 statements in order to obtain court approval to work on behalf of the bankruptcy estates. But it was the decisions of those debtors' trustees not to hire AlixPartners that most directly inflicted harm to AlixPartners "business or property" (assuming, of course, that AlixPartners suffered such harm). Moreover, even before a trustee could "not hire" AlixPartners, the bankruptcy court would have had to reject the trustee's application for approval of its first choice, McKinsey.

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

First, two steps in the causal chain (rejection of the trustee's decision to retain McKinsey and approval of the trustee's alternative decision to retain AlixPartners) depend on a bankruptcy court's exercising its discretion in a particular way. Courts are understandably reluctant—and indeed generally refuse—to predict how other courts will decide issues presented to them. *See, e.g.*, *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 203 (2d Cir. 2006) ("We cannot guess with any degree of assurance what the Federal Circuit would have done . . . ."), *abrogated on other grounds by FTC v. Actavis, Inc.*, 570 U.S. 136 (2013); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 201 (E.D.N.Y. 2003); *see also, e.g.*, *Eddystone Rail Co., LLC v. Jamex Transfer Servs., LLC*, 289 F. Supp. 3d 582, 590 (S.D.N.Y. 2018); *In re Qualcomm Antitrust Litig.*, No. 17-MD-02773-LHK, 2018 WL 4110498, at *12 (N.D. Cal. Aug. 29, 2018); *Berrian v. Pataki*, 510 F. Supp. 2d 348, 355 (S.D.N.Y. 2007); *In re AlphaStar Ins. Grp. Ltd.*, 383 B.R. 231, 262 (Bankr. S.D.N.Y. 2008); *In re Malese 18 Corp.*, No. 8-02-80586-478, 2009 WL 1044556, at *6 (Bankr. E.D.N.Y. Apr. 16, 2009). That principle has even more force in an area where, as here, the decision of the other tribunal is one over which it has broad discretion. *See, e.g.*, *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999) (explaining that a bankruptcy court exercises "discretionary powers" in evaluating the proposed retention of bankruptcy professionals under Section 327); *see generally* 3 Collier on Bankruptcy ¶¶ 327.02, 327.04; 9 Collier on Bankruptcy ¶ 2014.05; *see also* Fed. R. Bankr. P. 2014 advisory committee's notes to 1991 amendments.

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

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

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

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

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

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

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

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

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

In sum, in every relevant respect, this case and the Second Circuit's decision in *Empire Merchants* are on all fours. In both cases, the plaintiff "was harmed by [a third party's] decisions to purchase less" from the plaintiff, decisions which are "not [themselves] racketeering activity"; in both cases, "the asserted causal relationship between the alleged racketeering and [third parties'] decisions to purchase less . . . from [the plaintiff] is intricate and uncertain, as in *Anza* and *Hemi*, and not *Bridge*"; and in both cases, there is "a better situated plaintiff that was more directly harmed by the defendants' alleged racketeering." *Empire Merchants*, 902 F.3d at 142. Accordingly, Alix's RICO claims must be and are dismissed. Further, that dismissal is without leave to amend. Among the many arguments hidden in Alix's footnotes is an assertion that any dismissal should be "without prejudice and with leave to amend." Alix Opp'n 75 n.154. Even had that request been raised properly, the Court would deny Alix leave to replead his RICO claims. *See, e.g.*, *Ritchie Capital Mgmt., LLC v. Gen. Elec. Capital Corp.*, 821 F.3d 349, 351-52 (2d Cir. 2016) (per curiam) (holding that it was not an abuse of discretion to deny the plaintiff an opportunity to amend its complaint *sua sponte*).

Among other things, because the problems with those claims are substantive, amendment would be futile. *See, e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *Maragh v. Roosevelt Island Operating Corp.*, No. 16-CV-7530 (JMF), 2018 WL 6573452, at *6 (S.D.N.Y. Dec. 13, 2018); *Croft v. AXA Equitable Life Ins. Co.*, No. 17-CV-9355 (JMF), 2018 WL 4007646, at *5 (S.D.N.Y. Aug. 22, 2018). Moreover, Alix does not identify any additional facts he might add to an amended complaint, much less facts that might change the Court's conclusions set forth above. And finally, when Defendants moved to dismiss the original Complaint, the Court ordered that Alix file any amended complaint by August 20, 2018, and warned that he would "not be given any further opportunity to amend the complaint to address issues raised by the motion to dismiss." Docket No. 66. Among the issues raised by Defendants' motion to dismiss the original Complaint was that it failed to allege facts sufficient to satisfy the proximate-cause requirement. *See* Docket No. 63, at 17-23. Alix took advantage of that opportunity to amend, but it was his last one. *See Empire Merchants*, 802 F.3d at 146 (affirming a denial of leave to amend where the plaintiff "already had one opportunity to amend its complaint" and "identified no additional facts or legal theories it might assert if given leave to amend that would alter [the court's] proximate cause analysis" (internal quotation marks omitted). The Court will therefore dismiss Alix's RICO claims with prejudice.

STATE-LAW CLAIMS

That leaves Alix's state-law claims, which are asserted only against the McKinsey Defendants (that is, the corporate entities). Absent an independent basis for federal jurisdiction, the Court would ordinarily decline to exercise supplemental jurisdiction over state-law claims where, as here, it has dismissed all federal claims. *See, e.g.*, *Banco Safra S.A.-Cayman Islands Branch v. Andrade Gutierrez Int'l S.A.*, No. 16-CV-9997 (JMF), 2018 WL 1276847, at *5 (S.D.N.Y. Mar. 8, 2018). But Alix does invoke an independent basis for federal jurisdiction: the Court's diversity jurisdiction under 28 U.S.C. § 1332(a). Am. Compl. ¶ 42. For several reasons, however, it is not clear whether that invocation is proper.

First, and perhaps most easily cured, Alix does not actually allege the state of his citizenship; he merely alleges that he "resides in Michigan." *Id.* ¶ 29. That does not cut it. *See, e.g.*, *Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996) ("[A] statement of the parties' residence is insufficient to establish their citizenship."). Second, and potentially more substantial, it is not clear that Alix's citizenship is what matters because he brings his claims here as the assignee of AlixPartners. *See* FAC ¶ 29. Under 28 U.S.C. § 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. Applying that provision, the Second Circuit has held that assignments between parent companies and their subsidiaries should be treated as "presumptively ineffective" and that assignments between other entities with similarly "close ties" may also trigger the presumption. *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862-63 (2d Cir. 1995). Among the closely related pairs that draw such suspicion under Section 1359 are corporate entities and their directors, officers, and significant shareholders. *See, e.g.*, *Falow v. Cucci*, No. 00-CV-4754 (GBD), 2003 WL 22999458, at *6 (S.D.N.Y. Dec. 19, 2003) (citing cases); *see generally* 13F Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 3639 (3d ed. Westlaw 2019). That raises the prospect that, for purposes of diversity jurisdiction, the assignment to Alix is ineffective, as Alix is a director and substantial minority equity holder of AlixPartners. *See* Am. Compl. ¶ 29. And if it is AlixPartners's citizenship that matters, that raises a third complication: The citizenship of AlixPartners — which, as a limited liability partnership, is derivative of the citizenship of its partners, *see, e.g.*, *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 52 (2d Cir. 2000)—is not alleged in the Amended Complaint.

Although the parties do not address these issues, the Court has an independent obligation to confirm that it has jurisdiction before addressing the merits of Alix's claims. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S.83, 94-95 (1998)). Accordingly, the Court will defer ruling on Defendants' motion to dismiss Alix's state-law claims pending supplemental briefing on the foregoing issues. Specifically, no later than **two weeks** from the date of this Opinion and Order, Alix shall file a supplemental brief, not to exceed ten pages, addressing the Court's jurisdiction over the state-law claims. To the extent that an amendment of the complaint is necessary to establish such jurisdiction (as the Court suspects—

assuming jurisdiction is possible at all), Alix shall file a proposed amended complaint (limited to new jurisdictional allegations and showing any proposed changes in redline form) by the **same date**. The McKinsey Defendants shall file any response, not to exceed ten pages, within **two weeks** of Alix's supplemental submission. No reply may be filed absent leave of Court.

CONCLUSION

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

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

SO ORDERED.

Dated: August 19, 2019
New York, New York

/s/ Jesse M. Furman
JESSE M. FURMAN
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of March, two thousand twenty-two.

Jay Alix,

Plaintiff - Appellant,

v.

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

Defendants - Appellees.

ORDER
Docket No: 20-2548

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Appendix D

RELEVANT STATUTORY PROVISIONS

Title 18 United States Code — Crime and Criminal Procedures

Part I — Crimes

Chapter 96 — Racketeer Influenced and Corrupt Organizations

- § 1961. Definitions.
- § 1962. Prohibited activities.
- § 1963. Criminal penalties.
- § 1964. Civil remedies.
- § 1965. Venue and process.
- § 1966. Expedition of actions.
- § 1967. Evidence.
- § 1968. Civil investigative demand.

Sec. 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 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 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 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 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 phono records, 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), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B)..

- (2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;
- (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
- (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
- (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this

chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

- (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;
- (7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;
- (8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;
- (9) "documentary material" includes any book, paper, document, record, recording, or other material; and
- (10) "Attorney General" includes the Attorney General of the United States, the Deputy Attor-

ney 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.

Sec. 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.

Sec. 1963. Criminal penalties

- (a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—
    - (1) any interest the person has acquired or maintained in violation of section 1962;
    - (2) any—

- (A) interest in;
- (B) security of;
- (C) claim against; or
- (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

- (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

- (b) Property subject to criminal forfeiture under this section includes—
  - (1) real property, including things growing on, affixed to, and found in land; and
  - (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.
- (c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise

to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (I) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

- (d)
  - (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—
    - (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or
    - (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—
      - (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property

being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

- (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered: Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

- (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

- (3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

- (e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

- (f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

- (g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—
    - (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;
    - (2) compromise claims arising under this section;

- (3) award compensation to persons providing information resulting in a forfeiture under this section;
- (4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and
- (5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

- (h) The Attorney General may promulgate regulations with respect to—
  - (1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;
  - (2) granting petitions for remission or mitigation of forfeiture;
  - (3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;
  - (4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;
  - (5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and
  - (6) the compromise of claims arising under this chapter. Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds

from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

- (i) Except as provided in subsection (I), no party claiming an interest in property subject to forfeiture under this section may—
  - (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
  - (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.
- (j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.
- (k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or miti-

gation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

- (l)
    - (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.
    - (2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

- (3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.
- (4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.
- (5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.
- (6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—
    - (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the

right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

- (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

- (7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

- (m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

  - (1) cannot be located upon the exercise of due diligence;

  - (2) has been transferred or sold to, or deposited with, a third party;

  - (3) has been placed beyond the jurisdiction of the court;

- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Sec. 1964. Civil remedies

- (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
- (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
- (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate

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

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

Sec. 1965. Venue and process

- (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
- (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

- (c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.
- (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Sec. 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

Sec. 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Sec. 1968. Civil investigative demand

- (a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.
- (b) Each such demand shall—
  - (1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;
  - (2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;
  - (3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
  - (4) identify the custodian to whom such material shall be made available.
- (c) No such demand shall—

- (1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or
- (2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

- (d) Service of any such demand or any petition filed under this section may be made upon a person by—
  - (1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;
  - (2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or
  - (3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.
- (e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by

the return post office receipt of delivery of such demand.

- (f)
  - (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.
  - (2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.
  - (3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no

material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

- (4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

- (5) Upon the completion of—

  - (i) the racketeering investigation for which any documentary material was produced under this chapter, and

  - (ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

- (6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

- (7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

  - (i) designate another racketeering investigator to serve as custodian thereof, and

  - (ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

- (g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.
- (h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon

any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

- (i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

- (j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.