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| STATE OF NEW JERSEY,<br><br>v.<br><br>GEORGE E. NORCROSS, III, PHILIP A. NORCROSS, WILLIAM M. TAMBUSSI, DANA L. REDD, SIDNEY R. BROWN, and JOHN J. O'DONNELL,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION – MERCER COUNTY<br><br>DOCKET NO. MER-24-001988<br>INDICTMENT NO. 24-06-00111-S |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT SIDNEY R. BROWN'S SUPPLEMENTAL MOTION TO DISMISS THE INDICTMENT**

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## PRELIMINARY STATEMENT

Defendant Sidney Brown joined a single telephone conference more than eight years ago during which a number of real estate co-investors determined to request, through their counsel, that the municipal government initiate what the Indictment refers to as a "condemnation action," Ind. ¶ 144, with respect to a view easement that was blocking their ability to support the ongoing, badly needed rehabilitation of Camden, New Jersey. Mr. Brown was also, according to the Indictment, the CEO of a company that, also in furtherance of Camden's redevelopment, sought entirely lawful, legislatively-approved tax credits to relocate to Camden, instead of to other, traditionally more attractive locales. Based upon these facts, which Mr. Brown accepts as true for purposes of this motion, the State—rather than being grateful for Mr. Brown's efforts to contribute to the renaissance of Camden—charges him with a racketeering conspiracy, and aiding and abetting official misconduct, among other crimes. But, as happens when prosecutors try to make cases based upon such unmeritorious claims, the Indictment in this case is plagued with fatal deficiencies.

Many of these deficiencies, which highlight that the facts alleged do not come anywhere close to charging a crime, are fully described in the motion to dismiss in which all Defendants join, and in the brief and, now, reply brief filed in support of that joint motion. *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Indictment (hereinafter, "Joint Br."); Reply Memorandum in Support of Defendants' Motion to Dismiss the Indictment (hereinafter, "Joint Reply"). But common allegations aside, the allegations against Defendant Brown suffer from perhaps even more fundamental flaws: The allegations do not include essential elements of the offenses in which he is charged, as indictments have been required to do since time immemorial. They also do not include the factual basis supporting the elements of those offenses that are alleged, itself an actionable deficiency but also fatal in that it deprives Mr. Brown of notice of what

he purportedly did wrong, which he could, if he had it, use to defend himself. And even if satisfactory in form, the allegations—like those discussed in the Defendants' joint brief and reply—do not amount to the crimes charged: for example, there is simply no way that participating in a single phone call with a narrow, lawful, and even constitutionally protected purpose can support an allegation of a racketeering conspiracy.

This Court, in the exercise of the gatekeeping function that the law reposes in Judges to assure that only properly pled allegations that amount to crimes become the subject of criminal prosecution, has the authority, the discretion, and indeed, the obligation to act. And it should do so here: to protect an innocent Defendant from being forced to trial on insufficient and old, statute-barred allegations that nonetheless risk his precious liberty; to protect our system from the waste of resources that such a flawed set of allegations entails, and with it the more profound costs to the integrity of our system of justice that inevitably follows from prosecuting crimes which do not exist; and to ensure that the State's charging instruments provide the requisite notice and do not violate the rules that have always applied to criminal cases. For these reasons, as set forth in Mr. Brown's prior brief and amplified here in response to the State's cursory, conclusory and almost disinterested brief seeking to justify Mr. Brown's prosecution, all of the counts against him should be dismissed.

## LEGAL ARGUMENT

### A. The Court Can And Should Dismiss The Indictment Against Defendant Brown Because It Is Facially Invalid.

The State asserts that the Court must deny Mr. Brown's motion to dismiss the Indictment, however meritorious, because the "grand jury properly alleged each of the crimes it charged" and it would be extraordinary "for a single judge to cast aside the grand jury's work at the outset of the case." *See* Brief on Behalf of the State of New Jersey in Opposition to Defendants' Motion to

Dismiss the Indictment (hereinafter "Opp.") 1-2, 29-30. However, that is precisely what judges are not only *authorized*, *see, e.g.*, *State v. Bennett*, 194 N.J. Super. 231, 233 (App. Div. 1984) (holding that courts have discretion to dismiss an indictment), but are *obligated* to do when presented with a valid motion to dismiss the indictment, as is the case here, *see State v. Abbati*, 99 N.J. 418, 425 (1985) ("It is, of course, true that a trial court must dismiss an indictment if prosecution would violate the defendant's constitutional rights."); *see also State v. Gelman*, 195 N.J. 475, 481 (2008) (concluding that it "must dismiss defendant's indictment" where defendant's prior conviction did not fit within the statute permitting elevation from petty offense to indictable crime). Although, as the State contends, an indictment is presumed valid, "a defendant with substantial grounds for having an indictment dismissed"—like Mr. Brown—"should not be compelled to go to trial to prove the insufficiency." *Bennett*, 194 N.J. Super. at 233-34 (internal quotations omitted). To that end, there are five separate grounds on which a Court—always, contrary to the State's argument, in the person of a single Judge—is permitted to dismiss an indictment at the outset of the case; three of those grounds are applicable with regard to Mr. Brown's pending motion to dismiss.[1]

[1] The fourth and fifth grounds, not discussed here, permit a defendant to seek dismissal where the State's presentation to the grand jury did not make out a *prima facie* case, *see, e.g.*, *State v. Morrison*, 188 N.J. 2, 5, 12 (2006) (affirming trial court's dismissal of the indictment where the State failed to present evidence to the grand jury to support the crime charged); *State v. Hogan*, 144 N.J. 216, 227 (1996) ("[T]he grand jury must determine whether the State has established a *prima facie* case that a crime has been committed and that the accused has committed it."), or where the prosecution committed misconduct before the grand jury by, for example, failing to present exculpatory evidence, *see, e.g.*, *Hogan*, 144 N.J. at 228 (holding that the State has an obligation to present evidence that "directly negates the guilt of the accused and is clearly exculpatory"); *see also State v. Saavedra*, 222 N.J. 39, 63 (2015) (same); *State v. Womack*, 145 N.J. 576, 589 (1996) (dismissing portion of indictment related to the exculpatory evidence the State failed to provide to the grand jury). Per the parties' agreement, and with the endorsement of the Court, *see* Oct. 16, 2024 Tr. 33:2-22 (THE COURT: "Today's motion is this application to say the indictment is basically facially . . . invalid, needs to be dismissed because of that, and the statute of limitations problems. . . . [The Grand Jury] could be the next wave of motions if this motion

*First*, a Court should dismiss an indictment, or any count thereof, which fails to allege each and every element of the offense purportedly charged. *See, e.g.*, *State v. Jeannotte-Rodriguez*, 469 N.J. Super. 69, 103 (App. Div. 2021) ("It is fundamental that an indictment . . . must . . . contain all the elements of the offense charged."); *see also State v. Algor*, 26 N.J. Super 527, 531 (App. Div. 1953) (dismissing indictment because, "[h]owever progressively liberal has become the legislative and judicial attitude toward the literal composition of indictments . . . and the discretionary disinclination to quash them unless palpably defective . . . yet it is basically imperative that an indictment allege every essential element of the crime sought to be charged"). Thus, as this Court well knows, "the State must present proof of every element of an offense to the grand jury and specify those elements in the indictment." *State v. Fortin*, 178 N.J. 540, 633 (2004); *see also State v. Salter*, 425 N.J. Super. 504, 514 (App. Div. 2012) ("It is axiomatic that an indictment 'must charge the defendant with the commission of a crime in reasonably understandable language setting forth all . . . essential elements' of the alleged offenses so as to enable defendant to prepare a defense." (quoting *State v. Wein*, 80 N.J. 491, 497 (1979))). As discussed in the moving brief and below, in this case, the State failed even this most basic test, as its Indictment simply does not allege essential elements of the counts against Mr. Brown. With respect to the RICO conspiracy charge in Count One, the Indictment fails to allege the essential element of Defendant Brown's knowledge of the extent of the enterprise. Brown Br. 11-17. As for the official misconduct crimes, as applied to Mr. Brown in Counts Three and Thirteen by way

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isn't successful."), Mr. Brown does not now seek dismissal for either of those reasons, and instead limits this motion to dismiss to the face of the Indictment, while reserving his right to raise such arguments, which would require a complete review of the State's presentation to the grand jury, if any charges against him should survive this motion to dismiss. *See* Memorandum of Law in Support of Defendant Sidney R. Brown's Supplemental Motion to Dismiss the Indictment (hereinafter, "Brown Br.") 1 n.1.

of an aiding and abetting theory, this requires that Mr. Brown share the intent of the official at issue, an element again not here alleged. Brown Br. 23-27; *infra*, Section C.

*Second*, a Court should grant a motion to dismiss where beyond alleging the essential elements of the offense, the indictment fails to set forth a sufficient *factual basis* to provide adequate notice of what the defendant is alleged to have done with regard to each essential element of the offense charged. *See Wein*, 80 N.J. at 497 ("The indictment must charge the defendant with the commission of a crime in reasonably understandable language setting forth all of the critical facts and each of the essential elements which constitute the offense alleged."); *see also State v. D'Amato*, 218 N.J. Super. 595, 605 (App. Div. 1987) ("An indictment must serve as notice to the accused of the charge against him and must apprise him sufficiently so that he may prepare an adequate defense."); *State v. Lisa*, 391 N.J. Super. 556, 578 (App. Div. 2007) ("[A]n indictment must be sufficiently clear to apprise a defendant of 'that against which he must defend.'"). To this end, an indictment must allege "all the essential *facts* of the crime." *State v. Dorn*, 233 N.J. 81, 93-94 (2018) (emphasis added); *see also* R. 3:7-3 ("The indictment or accusation shall be a written statement of the essential facts constituting the crime charged."). That is, the indictment must include "a satisfactory response to the questions of who . . ., what, where, and how." *Jeannotte-Rodriguez*, 469 N.J. Super. at 103 (internal quotations omitted); *see also State v. L.D.*, 444 N.J. Super. 45, 55 (App. Div. 2016) ("[T]he reviewing court's responsibility remains to examine whether 'an indictment alleges all the essential facts of the crime[.]'" (quoting *State v. New Jersey Trade Waste Ass'n*, 96 N.J. 8, 19 (1984))); *State v. Campione*, 462 N.J. Super. 466, 491 (App. Div. 2020) (An "indictment must allege all the essential facts of the crime."). Here too, as explained in Mr. Brown's moving brief, Brown Br. 7-23, and below, Section B, the Indictment is facially deficient because it does not allege sufficient facts with regard to at least two essential elements of

the RICO conspiracy charge: that an enterprise existed in which Mr. Brown was a member, or that Mr. Brown agreed to the commission of at least two predicate acts as part of a pattern of racketeering activity. *See State v. Ball*, 141 N.J. 142, 176 (1995) (recognizing that an enterprise is an essential element of a RICO conspiracy); *id*. at 168, 179-80 (recognizing that a RICO conspiracy requires a pattern of racketeering activity).

*Third*, even accepting all of the facts alleged in the indictment as true, a Court should dismiss charges where the indictment's allegations simply do not state an offense as a matter of New Jersey law. *See, e.g.*, *State v. Perry*, 439 N.J. Super. 514, 532 (App. Div. 2015) (affirming dismissals of indictments charging driving-while-suspended offenses where the facts alleged in the indictments established that "[n]one of these offenses occurred during the relevant court-imposed period of suspension"); *State v. Riley*, 412 N.J. Super 162, 169, 191 (Law Div. 2009) (dismissing indictment where facts alleged, even after viewing the facts most favorably to the State, did not "fall within the statute invoked"). This constitutes the central basis of the Joint Moving Brief, and now the Joint Reply Brief in support thereof, which powerfully demonstrate, among other things, that none of the "threats" alleged in the Indictment constitute extortion or coercion as a matter of statutory and common law. Thus, the alleged threats are not covered by New Jersey's theft by extortion and coercion statutes because they concern conduct such as, for example, hard bargaining and the business consequences thereof, for which "theft penalties would be quite inappropriate," *see, e.g.*, II Final Report of the New Jersey Criminal Law Revision Comm'n, Commentary 227-28 (1971), *cited in* Joint Br. 14, 21-24; Joint Reply 2, 12, 25, and indeed, some of the acts at issue (including those alleged as against Mr. Brown) seek to punish the Defendants for petitioning the government of the City of Camden to take certain actions, impinging upon a constitutionally protected right, *see* Joint Br. 24-26 (citing U.S. Const. amend. I; N.J.

Const., art. I, § 18); Joint Reply 16-20. Mr. Brown adopts the arguments in both the moving and reply briefs in support of that motion fully.

But moreover, and specific to Mr. Brown, the factual allegations—even taken as true[2]—simply do not amount to a valid, triable charge that he engaged in a conspiracy in violation of the RICO statute, N.J.S.A. 2C:41-2(c) and (d). That is, because the Indictment alleges that Mr. Brown entered into only a *single* agreement to proceed with a condemnation action in order to pressure Developer-1, it plainly cannot satisfy the "pattern" or "continuity" that RICO demands. The State counters, for example, that it need not include all of its evidence in the Indictment, and that it will adduce sufficient evidence at trial. *See* Opp. 34-35, 40. However, as the case law cited makes clear, the question is not one of fact but of whether the *theory* alleged in the Indictment, assuming the facts alleged to be true, and whether all facts in support of that theory are presented or not, amounts to a crime. Thus, where, as here, the State's legal theory with respect to the crimes alleged

[2] The State argues that Defendants are not actually accepting the factual allegations as true because they fail to accept the Indictment's legal conclusions. Thus, for example, the State claims that Defendants' motions should be denied because they do not actually accept as true that George Norcross "led a criminal enterprise whose members and associates agreed the enterprise would extort others through threats and fear of economic and reputational harm and commit other criminal offenses to achieve the enterprise's goals." *See* Opp. 35 (quoting Indict. ¶ 1). But, of course, this allegation is the legal conclusion that the State wishes to achieve at trial, acceptance of which would, as the State concedes, amount to a concession of guilt. *Id*. at 35-36 ("Here, in contrast to cases like *Perry*, to accept all the facts alleged is simply to concede guilt."). And, obviously, the law is not that, for purposes of a motion like this one, a defendant must accept the State's legal conclusions as true. *See State v. W. Union Tel. Co.*, 13 N.J. Super. 172, 220 (Cnty. Ct. 1951) (considering but ultimately denying motion to dismiss the indictment because indictment alleged only conclusions rather than essential facts); *accord United States v. Harder*, 168 F. Supp. 3d 732, 737 (E.D. Pa. 2016) (explaining that in deciding a motion to dismiss an indictment, the court "must accept factual allegations and disregard legal conclusions to determine whether the alleged facts constitute a crime"). Were it otherwise, the legal standards here at issue—particularly, the requirement that the State provide sufficient factual allegations to substantiate its legal conclusions, *see Jeannotte-Rodriguez*, 469 N.J. Super. at 103—would be totally eviscerated and no such motion could ever succeed. That is obviously not the case. *See id*. at 104 (holding that the trial court did not err in dismissing the indictment on the grounds it omitted sufficient factual details to enable defendants to prepare a defense); *see also* Joint Reply 6-7 (citing cases).

is evident from the face of the Indictment, but that theory does not amount to the offense charged, the Court can and really must dismiss the indictment, or relevant parts thereof. *See, e.g.*, *United States v. Brewbaker*, 87 F.4th 563, 572 (4th Cir. 2023) ("[C]ourts have as much of a responsibility to police criminal indictments as they do civil complaints," and must dismiss if allegations, "even if true, would not state an offense."); *State v. Bleichner*, 11 N.J. Super. 542, 547 (App. Div. 1951) ("Every constituent element of the crime charged must be set forth in the indictment and not left to intendment. It is fundamental, of course, that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; *if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient.*" (emphasis added; citation omitted)). Here, as set forth in further detail in Mr. Brown's moving brief, Brown Br. 7-23, and below, Section B, the RICO conspiracy allegations against Mr. Brown do not amount to a crime because, at best, the Indictment alleges that Mr. Brown participated in a single predicate act and, thus, the Indictment lacks, with respect to Mr. Brown, the requisite "pattern of racketeering activity." *See Ball*, 141 N.J. at 168.

Thus, because—as set forth in further detail below—the Indictment fails to allege each and every element of the offenses charged, fails to set forth a sufficient factual basis with regard to each of those essential elements, and, even accepting that factual basis as true, fails to state that a crime occurred, the Indictment against Mr. Brown must be dismissed in its entirety.

**B. Count One Should Be Dismissed For Failure To Properly Charge Sidney Brown With A RICO Conspiracy.**

The State's opposition fails to meaningfully respond to any of Mr. Brown's reasons for dismissal of Count One of the Indictment charging him with RICO conspiracy, and instead focuses on a number of contentions that are not in dispute. For example, the State contends that it need

not allege a substantive RICO violation to maintain a RICO conspiracy charge, Opp. 48-49, that the defendant need not agree to personally commit two or more predicate acts, Opp. 43-46, and that it need not allege that the conspirators were "involved in all aspects of the conspiracy," "know each other," "have personal knowledge of the outcome of the plan," or have "join[ed] in the common purpose at the same time," Opp. 44. But Mr. Brown has never argued to the contrary and even acknowledged these unremarkable propositions in his moving brief. *See* Brown Br. 8-10. Rather, Mr. Brown's position is that the State's RICO conspiracy charge fails to satisfy pleading standards for each of the three reasons set forth above: First, the Indictment fails to allege that Mr. Brown was aware of the extent of the alleged enterprise, and therefore does not, as it must, include an essential element of the RICO offense. *See Ball*, 141 N.J. at 176 ("A defendant must have some minimal knowledge of the extent of enterprise."). Second, the Indictment does not include the critical facts necessary to allege that Mr. Brown was a member of the purported enterprise. *See id*. And third, even accepting all of the facts set forth in the Indictment as true, the allegations of Mr. Brown's participation in a single conference call and subsequent receipt of entirely lawful tax credits fail to allege any crime because this single call can, under no circumstances, amount to the pattern of racketeering activity necessary to allege a RICO offense.[3] *See id*. Because of these critical failures, and for the reasons discussed in Mr. Brown's moving brief and below, the Indictment should be dismissed.

*First*, the State provides nothing more than a cursory—and unhelpfully conclusory—response to Mr. Brown's position that the Indictment fails to allege that he was aware of the extent

[3] The State's failure to allege a pattern of racketeering activity as against Mr. Brown personally is also addressed to the second basis for dismissal—that the Indictment fails to set forth a factual basis adequate to support the essential element that Mr. Brown engaged in a pattern of racketeering activity or to provide him constitutionally adequate notice with regard to this allegation.

of any enterprise, as it is required by law to do. *See* Brown Br. 11-17. In a footnote, the State claims, without citation or other support, that Mr. Brown's argument concerns the sufficiency of the evidence rather than the validity of the Indictment. Opp. 66 n.10. The State's position disregards the governing legal standard outlined in Mr. Brown's moving brief and reiterated above—a valid indictment *must* allege the essential elements of the offense. *See, e.g.*, *Salter*, 425 N.J. Super. at 514 (an indictment must set forth all essential elements of the alleged offense). Here, an essential element of Count One is that Mr. Brown had the requisite intent, which means at least "some minimal knowledge of the extent of [the] enterprise," including "that the enterprise extend[ed] beyond his individual role." *See Ball*, 141 N.J. at 176 (citation omitted). For the reasons set forth in Mr. Brown's moving brief, Brown Br. 11-17, the Indictment is completely devoid of any such allegations.

Importantly, and critically for this motion, the inquiry into whether a multi-defendant, multi-count indictment alleges the essential elements of an offense is an exacting and granular one. Each count, and the quantum of allegations against each defendant named in any given count, must be examined carefully and individually. It is not enough for the State, as it does in its opposition brief, to blast buckshot into the dark night, hoping to nick as many defendants as possible with broad brushed and conclusory allegations. When the proper standard is applied, the paucity of the allegations against Mr. Brown is stark. Specifically, the Indictment alleges a single interaction between Mr. Brown and the other Defendants: an October 22, 2016 conference call wherein the parties discussed potential litigation regarding Developer-1's property interests. Ind. ¶¶ 142-49. The conference call solely concerned the Triad1828 Centre and 11 Cooper. *See id*. The Indictment nowhere alleges that Mr. Brown had any involvement whatsoever in, or any knowledge at all of, other purported aspects of the enterprise, including the L3 Complex transaction or the Radio Lofts

matter, and he is not charged in the related counts of the Indictment. *See* Brown Br. 12-16; Ind. Counts 2, 4, 7, 8, & 11.

Nevertheless, in an effort to show that Mr. Brown had the requisite knowledge of the extent of the enterprise, the State claims that "the grand jury validly charged [Mr. Brown] with participating in *this scheme*." Opp. 66 n.10 (emphasis added). But the State does not explain what "scheme" it is referring to; in fact, the paragraph to which this footnote is attached concerns the Radio Lofts matter, as to which there is no allegation whatsoever that Mr. Brown had any involvement or knowledge (which the State, if it is candid with the Court, will admit he did not). Entirely to the contrary, the Indictment expressly refers to the Radio Lofts matter as "unrelated" to Developer-1's view easement, contains no allegations that Mr. Brown had any knowledge of the extent of or any involvement in the Radio Lofts matter, and does not charge Mr. Brown in the Radio Lofts count. *See* Ind. ¶ 147 (discussing the October 22, 2016 conference call and stating that during the call George Norcross "raised the issue of having the CRA take away Developer-l's Radio Lofts redevelopment option, an issue unrelated to his group's negotiations with Developer-1, as another way to apply 'pressure' and 'attack'") & Count 4 (charging only George Norcross, Philip Norcross, and William Tambussi with conspiracy to commit theft by extortion and criminal coercion with respect to the Radio Lofts). Indeed, the most that can be said for the Indictment as it relates to Mr. Brown is the single allegation that he agreed that the lawyers for the co-investors should request that the City of Camden bring a perfectly legal action to extinguish Developer-1's view easement, an action that could have benefited the investor group of which he was a part. But absolutely nowhere in the Indictment does the State allege that Mr. Brown had any knowledge of any of the other projects which the Indictment alleges formed the extent of the supposed enterprise.

*Second*, the State's opposition reinforces that the Indictment, in addition to failing to allege certain elements of the offense at all, also fails to provide an adequate factual basis for other elements—specifically that there was an enterprise of which Mr. Brown was a member. *See* Opp. 42-43.[4] Specifically, the State is wrong that an enterprise "requires only a group of people, however loosely associated, whose existence provides the common purpose of committing two or more predicate acts." Opp. 42 (quoting *State v. Ball*, 268 N.J. Super. 72, 107 (App. Div. 1993)). The State's error in this regard flows from its misunderstanding of the law, based as it is upon not the Supreme Court decision but the Appellate Division decision in *Ball*, which states that

> [t]he "enterprise" element will be satisfied if there exists a group of people, no matter how loosely associated, whose existence or association provides or implements the common purpose of committing two or more predicate acts. We go so far as to hold the "enterprise" element is satisfied if the "enterprise" is no more than the sum of the racketeering acts. Thus, the "enterprise" does not have to be an organization whose purpose is greater than the predicate acts, nor does it have to evidence any definable structure.
>
> [268 N.J. Super. at 143.]

Of course, the New Jersey Supreme Court adopted a more careful, more detailed, and more demanding definition of "enterprise," which the State does not address at all. *See Ball*, 141 N.J. at 160; Brown Br. 8-9 (discussing the Supreme Court's definition of "enterprise"). That is, the Supreme Court, assuring that the "enterprise" element be regarded as a separate requirement from the "pattern of racketeering activity" (though evidence of one may support the other), *id.* at 161-62, nonetheless concluded that the enterprise must have an "organization," the hallmark of which is interactions of the sort necessary to accomplish a common goal:

> The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The

[4] The State does not dispute that the Indictment must allege the existence of an enterprise. *See Ball*, 141 N.J. at 176 (Under New Jersey law, a racketeering conspiracy has two essential elements: "an agreement to violate RICO and the existence of an enterprise.").

> division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."
>
> [*Id*. at 162.]

Thus, although an enterprise need not have a particular structure, it must have an organization consisting of different people, each fulfilling specific roles within the enterprise. *See id*.; *see also Marshall v. Fenstermacher*, 2007 U.S. Dist. LEXIS 74263, at *74 (E.D. Pa. Oct. 2, 2007) (recognizing that on appeal the New Jersey Supreme Court in *Ball* clarified the lower court's ruling as requiring an "organization").[5] For example, in *Ball*, in furtherance of their criminal purpose to operate an illegal dumping scheme, the defendants took on various roles: "dirt brokers," who arranged for and operated the illegal dumping sites; public officials, who accepted cash bribes to protect and promote the illegal dumping sites; haulers, who transported the waste; lookouts; a money launderer; and a "fixer" to address any problems that arose. *Id.* at 150-51.

In contrast to *Ball*, the Indictment here does not set forth any such organization, let alone Mr. Brown's role in it and how that role was fulfilled by his participation in a single conference call. No allegations regarding the division of tasks or the undertaking of certain functions in furtherance of a common criminal purpose are set forth, all of which are "essential facts," necessary to provide Mr. Brown with the constitutionally required notice of how he violated this statute.[6] *See id*. at 161; *see also L.D.*, 444 N.J. Super. at 55 ("[T]he reviewing court's responsibility

[5] *See also* Model Jury Charges (Criminal), "Racketeering (N.J.S.A. 2C:41-2(c))" (approved February 14, 2011) (stating the same). *See State v. Brady*, 452 N.J. Super. 143, 159 (App. Div. 2017) (relying on model jury charges to state the elements of the crime alleged when deciding a motion to dismiss the indictment).

[6] To make matters worse, the State argues that the enterprise pursued "licit and illicit objectives, in both licit and illicit ways," Opp. 29, without specifying which illicit objectives or methods Mr. Brown allegedly knew about, endorsed, or participated in, leaving him entirely bereft of any idea

remains to examine whether 'an indictment alleges all the essential facts of the crime[.]'"); *D'Amato*, 218 N.J. Super. at 607 (recognizing that the indictment must provide notice to the defendant so that he may prepare a defense).

The State, however, points to certain paragraphs in the Indictment and argues that Mr. Brown was a businessman who (1) participated in the plan to file a condemnation action against Developer-1; (2) through his company NFI, applied for and received tax credits; and (3) "supplied financial capital." Opp. 43 (citing Ind. ¶¶ 159-160); *see also* Opp. 12; Brown Br. 20, 22. But these claims cannot possibly support a RICO conspiracy charge. With regard to the planned court action against Developer-1, Mr. Brown's actions, per the Indictment itself, were limited to a single conference call, during which Mr. Brown first asked questions about the action under consideration, *see* Ind. ¶ 146, and then expressed his view that it would be beneficial to pursue that course. Ind. ¶ 149. But as set forth below, that does not a pattern make. And with regard to Mr. Brown's receipt and sale of tax credits, there is no allegation—and there could be none—that this was criminal. Brown Br. 21-22. Finally, the State's claim that Mr. Brown "supplied financial capital" is completely without citation or support in the Indictment. In sum, the State's bare assertions with respect to Mr. Brown fall far short of the pleading demanded in *Ball*, and do not come close to adequately alleging the existence of an enterprise of which he somehow became a member. *Cf. United States v. McClendon*, 712 F. Supp. 723, 728 (E.D. Ark. 1988) (dismissing indictment for failure to allege an enterprise separate from the pattern of racketeering activity and because the "group of legal entities" at issue did not fit the statutory definition of an enterprise).

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of what he is alleged to have done wrong, other than the (entirely lawful) plan to seek to bring court action against Developer-1 in connection with the Triad1828 Centre and 11 Cooper. *See* Joint Reply, Section III (explaining that the Indictment does not allege any criminally extortionate threats and that Defendants' actions were entirely lawful).

*Third*, as explained in Mr. Brown's moving brief, the State was required to—but did not—allege that Defendants "conspire[ed] to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, *i.e.*, two acts of racketeering activity within at least ten years of each other." *See Ball*, 141 N.J. at 179-80; N.J.S.A. 2C:41-1(a). For the reasons articulated in the Joint Moving Brief, the Indictment must be dismissed because it fails to allege that any of the Defendants engaged in any acts of racketeering—*i.e.*, criminal—activity. *See* Joint Br. 15-27, 31-35. But for purposes of Mr. Brown's motion, and specific to him, the Indictment's sole allegation—viewed in the light most favorable to the State—is that he entered into a single agreement to commit a single act, and not the two acts required for a RICO conspiracy charge. *See* Brown Br. 20-21. In response, the State repeats its usual, conclusory claim that Mr. Brown is making a "sufficiency of the evidence argument" that is inappropriate at this stage. Opp. 48 n.7. But that is an inaccurate and completely unfair characterization. To the contrary, Mr. Brown's argument is that the Indictment, relying as it does on his participation in a single meeting, lacks any allegation that he agreed (*i.e.*, conspired) to the commission of at least *two* incidents of racketeering conduct. Accordingly, a RICO conspiracy is simply not alleged as against him, and Count One against him must accordingly be dismissed. *See Riley*, 412 N.J. Super at 169, 191 (dismissing indictment where facts alleged, even after viewing the facts most favorably to the State, did not "fall within the statute invoked").[7]

[7] The State's failure to allege a pattern of racketeering activity also goes to the second basis for dismissal. By doing nothing more than tracking the statutory language, and not specifying the two incidents of racketeering conduct which are required for the RICO conspiracy to be adequately alleged, the Indictment is completely deficient, including that it does not provide Mr. Brown with notice of the racketeering activity against which he must defend. *See D'Amato*, 218 N.J. Super. at 607 ("The main purpose of the indictment is to provide adequate notice so that the defendant can prepare a defense, and 'the indictment must clearly identify and charge the criminal offense.'"); *Lisa*, 391 N.J. Super. at 578 ("[A]n indictment must be sufficiently clear to apprise a defendant of 'that against which he must defend.'"); *Jeannotte-Rodriguez*, 469 N.J. Super. at 103 ("It is

The State's brief confirms that the only act to which Mr. Brown allegedly agreed is the proposal to bring a court action against Developer-1 in order to pressure him to sell certain property rights. Opp. 48 n.7; Brown 20-21. Regardless of whether this agreement amounts to racketeering activity—and as previously stated, Brown Br. 20-21, it does not—this single agreement is utterly insufficient, as a matter of law, to allege that Mr. Brown participated in a *pattern* of racketeering activity. *See Ball*, 141 N.J. at 179-80 (RICO conspiracy requires at least two acts of racketeering activity); *see also United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1147 (E.D.N.Y. 1992) ("Clearly, the RICO conspiracy claims cannot be maintained against [defendants] on the basis of only one allegation that they agreed to commit one predicate act; the forty-fifth and the forty-sixth claims for relief must therefore be dismissed as against these two defendants.").

Moreover, and again, as a matter of law accepting all of the facts—no matter how wrong—as true, the Indictment lacks the requisite "degree of continuity, or threat of continuity" required by the statute and inherent in the "relatedness" requirement of the "pattern of racketeering activity" element. *Ball*, 141 N.J. at 168; *State v. Cagno*, 211 N.J. 488, 509 (2012) ("[A] RICO conspiracy is never simply an agreement to commit specified predicate acts that allegedly form a pattern of racketeering. Nor is it merely an agreement to join in a particular enterprise. Rather, it is an

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fundamental that 'an indictment . . . must not only contain all the elements of the offense charged, but must also provide the accused with a sufficient description of the acts [s]he is alleged to have committed to enable h[er] to defend h[er]self adequately.'" (quoting 5 Wayne R. LaFave *et al*., *Criminal Procedure*, § 19.3(c) (4th ed. 2020))); *see also United States v. Rabbitt*, 2024 U.S. Dist. LEXIS 159079, at *3-4 (D.N.J. Sep. 4, 2024) ("[A]n indictment that recites the statutory language of the offense charged is adequate 'so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution.'" (quoting *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989))); *Russell v. United States*, 369 U.S. 749, 765 (1962) ("It is an elementary principle of criminal pleading, that where the definition of an offence … includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars.").

agreement to conduct or to participate in the conduct of a charged enterprise's affairs through a pattern of racketeering."). The State claims, without any citation, that it is not required to allege some threat of continuity in the Indictment. Opp. 48 n.7. However, the threat of continuity is, as the New Jersey Supreme Court decision that the State ignored makes clear, "required and inherent" for "relatedness," an essential element of a RICO conspiracy, *Ball*, 141 N.J. at 168, and thus must be alleged, *see Algor*, 26 N.J. Super at 531.

The State, however, argues that the threat of continuity is satisfied because, in addition to agreeing to bring court action against Developer-1, Mr. Brown "cash[ed] out on the scheme using Brown's own capital and company through obtaining and selling credits." Opp. 48 n.7. *See also id.* at 12. But Mr. Brown's receipt and sale of tax credits are nowhere (and could not be) alleged to be criminal, and thus cannot form the basis of any supposed racketeering activity. *See State v. Ball*, 268 N.J. Super. at 100 ("[P]redicate acts are those acts defined by statute to be illegal or 'Racketeering Activity' as set forth in N.J.S.A. 2C:41-1a(1) and (2)"). But beyond that truism, these tax credits are never tied to the purported extortion inherent in the condemnation action, which Mr. Brown allegedly approved; indeed, there is no allegation, and there could be none, that Mr. Brown would not have received the tax credit, or the benefits of their sale, without the condemnation action. As the State admits, no condemnation action was ever brought and none was actually threatened. *See* Opp. 79, 88-90. In the absence of such a connection, any allegation of a pattern is missing. *Ball*, 141 N.J. at 166 ("The [RICO] statute also *requires* that at least two of the 'incidents' of racketeering be related to each other." (emphasis in original)). According to the Indictment itself, shortly after Mr. Brown agreed to the initiation of the court action against Developer-1, but before any action was actually initiated, Developer-1 entered into an agreement to release his property rights in exchange for nearly $2 million. Ind. ¶¶ 151-52, 154. Whether or

not that bespoke extortion—and for the reasons set forth in Defendants' Joint Moving Brief and Joint Reply Brief, it did not—it certainly ended the matter; nothing happened thereafter, as would be required to establish the "pattern" or "continuity" that RICO demands. *See Cagno*, 409 N.J. Super. at 585 ("Moreover, and perhaps more important, where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated." (internal quotations omitted)); *see also Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C.*, 450 N.J. Super. 1, 38 (App. Div. 2017) ("The Legislature did not intend to punish mere repeated offenses, so the term 'pattern' also requires 'relatedness,' which means 'some temporal connection or continuity over time[.]'" (quoting *Ball*, 141 N.J. at 167-69)); *see also United States v. Pinson*, 860 F.3d 152, 163 (4th Cir. 2017) (stating that "[t]o prove 'a pattern of racketeering activity,' the evidence 'must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity'"; and concluding that no pattern of racketeering activity existed because the state failed to prove the necessary relationship or continuity (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989))).

* * *

In sum, having failed to allege (1) an essential element, that Mr. Brown was aware of the extent of the enterprise, (2) essential facts to support that Mr. Brown was a member of the enterprise, and (3) that Mr. Brown engaged in any unlawful RICO activity by agreeing to the commission of at least two predicate acts as part of a pattern of racketeering activity, *see Ball*, 141 N.J. at 176, the Indictment fails as a matter of law to properly charge Mr. Brown in Count One. Accordingly, the RICO conspiracy charge against Mr. Brown must be dismissed.

### C. Counts Three And Thirteen Should Be Dismissed For Failure To Charge Sidney Brown With Official Misconduct.

As articulated in Mr. Brown's moving brief, Brown Br. 23-27, among the requirements of any indictment in New Jersey is that it set forth each and every element of every offense charged. *See Fortin*, 178 N.J. at 633 ("[T]he State must present proof of every element of an offense to the grand jury and specify those elements in the indictment."); *Salter*, 425 N.J. Super. at 514 ("It is axiomatic that an indictment 'must charge the defendant with the commission of a crime in reasonably understandable language setting forth all . . . essential elements' of the alleged offenses so as to enable defendant to prepare a defense." (quoting *Wein*, 80 N.J. at 497)). Thus, to sufficiently charge a non-public official with official misconduct under an aiding and abetting theory of liability—the theory of liability that the State has now clarified it is seeking to utilize here, Opp. 69 n.12, 81—the indictment must allege that the non-public official (i) "acted with the purpose of promoting or facilitating the substantive offense for which he is charged," *State v. Tolotti*, 2019 WL 692300, at *9 (N.J. Super. Ct. App. Div. Feb. 20, 2019) (citation omitted), and (ii) shared with the public official the intent to abuse the public official's office, *State v. Hinds*, 143 N.J. 540, 551 (1996). These requirements are, as the case law makes clear, essential elements of the aiding and abetting official misconduct crimes brought against Mr. Brown in Counts Three and Thirteen. *See Hinds*, 143 N.J. at 551 ("[Defendant] should not be liable for official misconduct in the absence of proof that he shared with [the public official] the intent to abuse [the public official's] office"); *Tolotti*, 2019 WL 692300, at *9 (affirming dismissal of second-degree conspiracy to commit official misconduct and second-degree official misconduct charges against a private citizen where there was no allegation or evidence presented to the grand jury that the private citizen was aware of the regulations governing the public officials' employment); *State v. Ruiz-Vidal*, 2021 WL 222737, at *5 (N.J. Super. Ct. App. Div. Jan. 22, 2021) (finding that "there

was a reasonable probability that the defendant [a non-public official] would have been successful in moving to dismiss [a] second-degree official misconduct charge[]" where there was no indication that defendant worked to further the alleged scheme or was aware of an intermediary's agreement with the public servant to violate his office); *see generally State v. Whitaker*, 200 N.J. 444, 459 (2009) (noting that accomplice liability requires a defendant "share the *same* intent as the principal who commits the crime" (emphasis in original)). In accordance with this fundamental principle of law, Mr. Brown, in his moving brief, joined his co-defendants' argument that the Indictment fails to sufficiently charge an official misconduct charge against former-Mayor of Camden, Dana Redd. Brown Br. 25, 27; Joint Br. 27-35; Joint Reply 9-10; Redd Br. 14-19.

Additionally, Mr. Brown contends that, to the extent the Indictment does sufficiently charge Mayor Redd with official misconduct, it nonetheless fails to properly charge Mr. Brown—whom the State concedes is *not* a public official, *see* Opp. 69 n.12, 81, with official misconduct under an aiding and abetting theory of liability. Tellingly, the State's opposition, which focuses almost entirely on Mayor Redd's purported culpability, fails to meaningfully consider, let alone refute, the official misconduct arguments specific to Mr. Brown.[8] Indeed, the State acknowledges that its discussion of official misconduct "focuses on the direct allegations against Redd," but claims in conclusory fashion that its analysis equally applies to Mr. Brown's liability for official misconduct as an accomplice to Mayor Redd. Opp. 69 n.12. In support of this proposition, the State baldly claims that Mr. Brown's arguments "contradict[] the accomplice liability that the

[8] The State spends no more than half a page of its 133-page brief addressing Mr. Brown's official misconduct arguments. *See* Opp. 81. With respect to Mayor Redd, the State claims that Mayor Redd engaged in unauthorized access of her official functions by participating in the crimes in which she is charged. *Id*. at 69-81. However, as thoroughly set forth in Defendants' joint moving brief, and now in its reply, the State fails to sufficiently allege that Mayor Redd engaged in any "unauthorized" acts constituting misconduct. Brown Br. 25; Joint Reply 9-10.

grand jury charged" and "invite[] a factual dispute about Brown's subjective state of mind" that cannot be resolved on a pre-trial motion to dismiss. *Id*. at 81.

The State is wrong. Obviously Mayor Redd and Sidney Brown are different defendants, each entitled to individual consideration of their argument. And it is no response to the lack of factual allegations against Mr. Brown on the official misconduct counts to simply repeat Mayor Redd's alleged conduct. That is because it is fundamental that each count of the Indictment must be sufficiently pled as to each defendant named in that count. *See State v. Saavedra*, 433 N.J. Super. 501, 530 (App. Div. 2013) (recognizing "that a dismissing court must 'accord careful consideration to the status of the individual defendant'" (quoting *Abbati*, 99 N.J. at 435)). The mere fact that the grand jury returned an indictment charging accomplice liability against Mr. Brown does not insulate the State from a challenge to the sufficiency of the allegations in the Indictment as they relate to him personally and specifically, and it certainly cannot save this count of the Indictment from dismissal. *See Tolotti*, 2019 WL 692300, at *9 (affirming dismissal of second-degree conspiracy to commit official misconduct and second-degree official misconduct charges against a private citizen where there was no allegation or evidence that the private citizen was aware of the regulations governing the public officials' employment); *Ruiz-Vidal*, 2021 WL 222737, at *5 (finding that "there was a reasonable probability that the defendant [a non-public official] would have been successful in moving to dismiss [a] second-degree official misconduct charge[]" where there was no indication that defendant worked to further the alleged scheme or was aware of an intermediary's agreement with the public servant to violate his office).

Nor does this motion raise any factual dispute about Mr. Brown's subjective state of mind; and it could not, given that such state of mind is simply not alleged, at all, in the Indictment—the very deficiency to which this motion points. Lest it not be clear: for purposes of his motion to

dismiss, Mr. Brown does not dispute the factual allegations underlying Counts Three and Thirteen. Mr. Brown's argument is simply that the Indictment is devoid of any allegation whatsoever that he shared in Mayor Redd's intent to abuse her office or commit any allegedly improper acts, as is required under the law. *See* Brown Br. 24-27. Though clearly put on notice of this argument in Mr. Brown's prior submission, the State declined to substantively address Mr. Brown's argument that the Indictment fatally fails to allege this essential element of an aiding and abetting official misconduct charge, as any count of any indictment must. *See Fortin*, 178 N.J. at 633 ("[T]he State must present proof of every element of an offense to the grand jury and specify those elements in the indictment."); *Salter*, 425 N.J. Super. at 514 ("It is axiomatic that an indictment 'must charge the defendant with the commission of a crime in reasonably understandable language setting forth all . . . essential elements' of the alleged offenses so as to enable defendant to prepare a defense." (quoting *Wein*, 80 N.J. at 497)).

For purposes of this count as well, the State appears to rely entirely on an October 22, 2016 conference call attended by Mr. Brown, George Norcross, Philip Norcross, Mr. Tambussi, and John O'Donnell, to support the notion that "Defendants plotted to use Redd, in her role as mayor, to implement the Victor Lofts view-easement condemnation plot." Opp. 79 (citing Ind. ¶¶ 134, 149). But the Indictment at no point alleges that Mayor Redd ever had the intent to take any action with respect to the Defendants' alleged condemnation plan whatsoever. Indeed, as the Indictment subsequently explains "[t]his planned court action orchestrated by the Norcross Enterprise did not ultimately occur." Ind. ¶ 151. Without any facts alleged in the Indictment, to support even an inference that Mayor Redd intended to violate her office in this regard,[9] the Indictment cannot

[9] Mr. Brown maintains that this requirement is an essential element of an aiding and abetting official misconduct charge, and thus, must be directly stated in the Indictment. *See State v. De Vita*, 6 N.J. Super. 344, 347 (App. Div. 1950) ("The omission of an essential element cannot be

sufficiently allege that Mr. Brown shared in Mayor Redd's intent; such intent (Mayor Redd's) simply does not exist. Nor, in any event, does the Indictment even try to allege this essential element.

Other than this insufficient allegation, the Indictment does no more than track the statutory language of the official misconduct statute, N.J.S.A. 2C:30-2, and cite to N.J.S.A. 2C:2-6, to support the aiding and abetting official misconduct charges brought against Mr. Brown. But as Mr. Brown has explained, *see* Section A, *supra*, a bare recitation to the language of the underlying statute, or citation to the aiding and abetting provision, especially in the absence of sufficient allegations of intent, renders an allegation inadequate and unable, therefore, to survive a motion to dismiss. *See Jeannotte-Rodriguez*, 469 N.J. Super. at 103 ("It is fundamental that 'an indictment . . . must not only contain all the elements of the offense charged, but must also provide the accused with a sufficient description of the acts [s]he is alleged to have committed to enable h[er] to defend h[er]self adequately.'" (quoting 5 Wayne R. LaFave *et al*., *Criminal Procedure*, § 19.3(c) (4th ed. 2020))); *see also Algor*, 26 N.J. Super. at 535 ("It is basic that when a statute requires a specific criminal intent, the indictment charging the commission of the offense must allege the existence of such intent."); *State v. Faison*, 452 N.J. Super. 390, 393 (App. Div. 2017) ("[T]he absence of evidence to establish an element of the charged offense renders an indictment 'palpably defective and subject to dismissal.'" (quoting *State v. Morrison*, 188 N.J. 2, 12 (2006))).

Indeed, as worded, the Indictment is even insufficient to give Mr. Brown basic notice of the charges against which he must defend at trial. *See State v. Thomas,* 187 N.J. 119, 130 (2006)

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supplied by inference or implication."). However, to the extent the Court looks to whether the factual allegations support an inference of shared intent, no such reasonable inference is possible from the allegations as they appear in the Indictment, for the reasons set forth herein, and previously.

("[A] defendant must have notice of the elements of the crime with which he is charged" (citation omitted)); *D'Amato*, 218 N.J. Super. at 605 ("An indictment must serve as notice to the accused of the charge against him and must apprise him sufficiently so that he may prepare an adequate defense."); *Lisa*, 391 N.J. Super. at 578 ("[A]n indictment must be sufficiently clear to apprise a defendant of 'that against which he must defend.'" (quoting *State v. Spano*, 128 N.J. Super. 90, 92 (App. Div. 1973))). In this case, N.J.S.A. 2C:2-6 sets forth four ways in which a defendant can be guilty of an offense that is committed "by the conduct of another person for which he is legally accountable." N.J.S.A. 2C:2-6(a) and (b). These ways include, among others, when a defendant "is an accomplice of such other person in the commission of an offense" and when a defendant "is engaged in a conspiracy with such other person." N.J.S.A 2C:2-6(b)(3), (b)(4); *see also State v. Samuels*, 189 N.J. 236, 254 (2007) ("N.J.S.A. 2C:2-6 recognizes both conspiracy and accomplice liability as principles by which a person may be held legally accountable for the conduct of another."). The Indictment, however, does not specify the manner, under N.J.S.A. 2C:2-6(b), in which Mr. Brown is purportedly "legally accountable for the conduct of another person." Although the State appears to rely on an accomplice theory of liability, *see* Opp. 69 n.12 ("This analysis applies equally, however, to the other defendants' liability for official misconduct as accomplices to Redd."); *id*. at 81 ("Brown's argument that he did not intend for Redd to commit official misconduct, and thus cannot be held vicariously liable for that crime, simply contradicts the accomplice liability that the grand jury charged." (internal citation omitted)), it fails to set forth the specific theory of accomplice liability on which it relies. Thus, the "[l]iability for conduct of another" statute sets forth three distinct types of accomplice liability under N.J.S.A. 2C:2-6(c)(1):

(A) "solicit[ing] such other person to commit [the offense]"; (B) "aid[ing] or agree[ing][[10]] or attempt[ing] to aid such other person in coming or committing [the offense]"; and (C) "fail[ing] to make proper effort" to "prevent the commission of the offense" when the defendant has a legal duty to do so.[11] The Indictment does not say which, if any of these provisions is applicable here, leaving Mr. Brown without notice of what he has done wrong, as is necessary to adequately defend himself against this claim. *See, e.g.*, *Spano*, 128 N.J. Super. at 92 ("The purposes of an indictment are: to enable a defendant to know that against which he must defend . . . and to preclude substitution by a trial jury of an offense for which the grand jury has not indicted."). And simply contending, as the State does here, that Mr. Brown is properly charged with accomplice liability because the Indictment charges it, *see* Opp. 81-82, is circular and plainly insufficient.

In sum, having failed to plead an essential element of an aiding and abetting official misconduct charge—that Mr. Brown shared in Mayor Redd's intent to abuse her office, or any facts to support such an inference—the Indictment fails as a matter of law to properly charge Mr. Brown in Counts Three and Thirteen or, for that matter, to provide him with constitutionally adequate notice of that which he is alleged to have done. Accordingly, the official misconduct charges against Mr. Brown (Counts Three and Thirteen), premised on conspiracy and aiding and abetting theories of liability must be dismissed.

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[10] This provision of law, mentioning an agreement, sounds in conspiracy, but as the Supreme Court has explained "[a]lthough there is 'a great deal of similarity between accomplice and conspirator liability and frequently liability may be found under both theories' the concepts are not identical." *Samuels*, 189 N.J. at 254 (quoting Cannel, *New Jersey Criminal Code Annotated*, comment to N.J.S.A. 2C:2-6c (2006)).

[11] The aiding and abetting statute also provides for accomplice liability for one whose "conduct is expressly declared to establish his complicity," N.J.S.A.2C:2-6(c)(2), which provision is neither invoked nor excluded by the Indictment, further leaving the basis for accomplice liability unalleged and unclear.

## CONCLUSION

For all of these reasons, and those set forth in the briefs of his co-defendants, Defendant Sidney Brown respectfully requests that the Court dismiss Counts One, Three, Five, Six, Nine, Ten, Twelve, and Thirteen of the Indictment against him.

Dated: December 19, 2024

Respectfully submitted,

*s/ Lawrence S. Lustberg*

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| STATE OF NEW JERSEY<br><br>v.<br><br>GEORGE E. NORCROSS, III, PHILIP A. NORCROSS, WILLIAM M. TAMBUSSI, DANA L. REDD, SIDNEY R. BROWN, and JOHN J. O'DONNELL,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION - MERCER COUNTY<br><br>DOCKET NO. MER-24-001988<br>INDICTMENT NO. 24-06-00111-S<br><br>**CERTIFICATION OF LAWRENCE S. LUSTBERG IN SUPPORT OF DEFENDANT SIDNEY R. BROWN'S REPLY MEMORANDUM IN FURTHER SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS** |

I, **LAWRENCE S. LUSTBERG, ESQ.**, hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and a member in good standing of the bar of this Court. I am a Director with the law firm of Gibbons P.C., attorneys for Sidney R. Brown, in the above-captioned matter. In this capacity, I am personally familiar with the matters asserted herein. I submit this certification in support of Mr. Brown's Reply Memorandum Of Law In Further Support Of Supplemental Motion to Dismiss the Indictment, pursuant to New Jersey Court Rule 1:36-3.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the unpublished decision in *Marshall v. Fenstermacher*, 2007 U.S. Dist. LEXIS 74263 (E.D. Pa. Oct. 2, 2007).

3. Attached hereto as **Exhibit 2** is a true and correct copy of the unpublished decision in *United States v. Rabbitt*, 2024 U.S. Dist. LEXIS 159079 (D.N.J. Sep. 4, 2024).

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 19, 2024

*s/ Lawrence S. Lustberg*

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# Exhibit 1

# *Marshall v. Fenstermacher*

United States District Court for the Eastern District of Pennsylvania

October 2, 2007, Decided

CIVIL ACTION NO. 04-3477

**Reporter**
2007 U.S. Dist. LEXIS 74263 *; 2007 WL 2892938

ELLEN C. MARSHALL, Plaintiff, vs. RONALD FENSTERMACHER, HIGH SWARTZ ROBERTS AND SEIDEL, EMMA DAWSON, ESTATE OF DAVID BURGESS, HETHERINGTON & COMPANY, Defendants.

**Prior History:** *Marshall v. Fenstermacher, 388 F. Supp. 2d 536, 2005 U.S. Dist. LEXIS 18408 (E.D. Pa., 2005)*

**Counsel:** **[*1]** For ELLEN C. MARSHALL, Plaintiff: CLARK E. ALPERT, LEAD ATTORNEY, ALPERT BUTLER & SANDERS PC, WEST ORANGE, NJ, DAVID H. WEINSTEIN, WEINSTEIN KITCHENOFF ASHER LLC, PHILADELPHIA, PA, ROBERT S. KITCHEOFF, WEINSTEIN KITCHEOFF LLC, PHILADELPHIA, PA.

For RONALD FENSTERMACHER, HIGH SWARTZ ROBERTS AND SEIDEL, A PENNSYLVANIA LIMITED LIABILITY PARTNERSHIP, Defendants: ARTHUR W. LEFCO, LEAD ATTORNEY, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, PHILADELPHIA, PA, DAVID S. MAKARA, LEAD ATTORNEY, DAVID BUCCO & ARDIZZI, CONSHOHOCKEN, PA, ANDREW M. SCHWARTZ, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, PHILADELPHIA, PA.

For RONALD FENSTERMACHER, HIGH SWARTZ ROBERTS AND SEIDEL, A PENNSYLVANIA LIMITED LIABILITY PARTNERSHIP, Cross Claimants: DAVID S. MAKARA, LEAD ATTORNEY, DAVID BUCCO & ARDIZZI, CONSHOHOCKEN, PA, ANDREW M. SCHWARTZ, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, PHILADELPHIA, PA.

**Judges:** GENE E.K. PRATTER, United States District Judge.

**Opinion by:** GENE E.K. PRATTER

## Opinion

MEMORANDUM

PRATTER, DISTRICT JUDGE

This case presents such a complicated, convoluted and contentious dispute over unpaid legal fees that the legal issues at the core of the dispute are virtually obscured. At a minimum, this dispute exemplifies why there are **[*2]** reports of the public's disdain for lawyers. Ellen C. Marshall is an attorney who represented Warren Matthei in his divorce proceedings in 1992. Mr. Matthei is not a party to this action but nevertheless is the focal point of all Ms. Marshall's allegations. Mr. Matthei never paid the bill for Ms. Marshall's services and Ms. Marshall has spent the last 14 years and reportedly hundreds of thousands of dollars chasing Mr. Matthei from New Jersey to the Bahamas, to England, and back to Pennsylvania seeking to collect approximately $ 76,000 in unpaid legal fees.

In this action, Ms. Marshall alleges in lengthy pleadings described immediately below that Ronald Fenstermacher, Esquire and High Swartz Roberts & Seidel, the law firm with which Mr. Fenstermacher is affiliated (together, the "Defendants"), along with Mr. Matthei, Emma Dawson, David Burgess, Esquire, and Hetherington & Company, the British law firm that employed Mr. Burgess, [1] acted in concert to deprive her

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[1] Mr. Fenstermacher, the High Swartz firm, Ms. Dawson, Mr. Burgess and **[*3]** Hetherington & Company originally were named as defendants in this action. Mr. Fenstermacher and High Swartz are the only defendants that have appeared in this case. Since this case began, David Burgess passed away and his estate has been substituted as a defendant. Summonses associated with the Second Amended Complaint were issued on November 19, 2004 with respect to the Estate of Mr. Burgess, Ms. Dawson, and Hetherington & Company. Of these defendants, the docket reflects that the Second Amended Complaint was served on Ms. Dawson on April 20, 2005. When Ms. Dawson failed to appear, on May 18, 2005, upon Ms. Marshall's request, the Clerk of Court entered a default against Ms. Dawson. As of the date of this Memorandum and Order, according to the docket, no service has been made on the Burgess Estate or Hetherington &

of her ability to enforce an $ 85,000 judgment against Mr. Matthei in New Jersey State court. Ms. Marshall now seeks over one million dollars in damages. [2]

**PROCEDURAL BACKGROUND**

The Defendants previously moved to dismiss Ms. Marshall's 203-paragraph Second Amended Complaint, and the Court granted that motion in part, dismissing counts I, II, V, VI, VII and VIII. See *Marshall v. Fenstermacher, 388 F. Supp. 2d. 536 (E.D. Pa. 2005)*. **[*5]** Seven counts remain, consisting of allegations of civil conspiracy against all defendants (Count IV), violations of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962(c)* and *(d)*, and New Jersey's RICO counterpart, *N.J. Stat. Ann. § 2C:41-2(c)* and *(d)*, against all defendants (Counts IX through XII), respondeat superior liability against High Swartz (Count XIII), and ratification/equitable estoppel against High Swartz (Count XIV).

Following discovery, Mr. Fenstermacher and High Swartz submitted a Motion for Summary Judgment (Docket No. 84), which the Court denied by Order dated November 16, 2006 (Docket No. 110). Defendants then submitted a Motion for Reconsideration (Docket No. 111), fairly described as imploring the Court to reconsider its November 16 Order denying Defendants' Motion for Summary Judgment only with respect to Plaintiff's claims under the federal and New Jersey RICO statutes.

For the reasons stated below, Defendants' Motion for Reconsideration will be granted insofar as the Court will enter summary judgment in favor of the Defendants on Counts IX and X -- the federal RICO claims -- of Plaintiff's Second Amended Complaint. Summary **[*6]** judgment will be denied in all other respects.

**FACTUAL BACKGROUND**

The facts underlying Plaintiff's various causes of action are set forth in detail in the Court's previous opinion, see *Marshall, 388 F. Supp. 2d. at 543-46*, and will not be repeated here in toto. The facts presented below relate to Defendants' motion for summary judgment on Ms. Marshall's RICO claims. The following facts are undisputed unless otherwise indicated. Where there is a dispute, the Court considers those facts in the light most favorable to Ms. Marshall. See *Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 267 (3d Cir. 2001)*.

**I. The Matthei--Dawson Relationship**

In 1992, Mr. Matthei divorced his previous wife, Susan Kelley, in New Jersey. (Def. Statement of Facts P 2.) Ms. Marshall was Mr. Matthei's lawyer during these divorce proceedings. (Pl. Statement of Facts P 8.) In 1993, Mr. Matthei received a large settlement related to a lawsuit against his former employer. (Pl. Statement of Facts P 9.) Although a court order required Mr. Matthei to share the proceeds of this settlement with Ms. Kelley (and the couple's two children), Mr. Matthei diverted these funds to his own off-shore accounts. (Pl. Statement **[*7]** of Facts PP 10-11.) Mr. Matthei also failed to pay Ms. Marshall's legal fees. (Pl. Statement of Facts P 28.) Ms. Marshall sued Mr. Matthei in New Jersey state court, and obtained a default judgment against him in April 1995. (Pl. Statement of Facts P 29.)

In 1993, Mr. Matthei moved to London, England. (Def. Statement of Facts P 3.) Mr. Matthei met Emma Dawson in England in September 1994, and the two became romantically involved. (Pl. Statement of Facts P 19; Def. Statement of Facts P 6.) On December 14, 1995, they entered into a "prenuptial agreement," under the terms of which Mr. Matthei transferred (or at least attempted to transfer) all of his assets to Ms. Dawson.

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Company.

[2] Ms. Marshall represented Mr. Matthei in his divorce proceedings in New Jersey in 1992. In 1993, Ms. Marshall sued Mr. Matthei for more than $ 76,558.30 in unpaid legal fees related to that action, and in 1995 she won a default judgment against him in the amount of $ 85,553.87. (Pl. Statement of Facts P 29; Def. Statement of Facts P 4.) According to the Defendants, **[*4]** after the instant suit commenced, certain of Mr. Matthei's bank accounts were recovered and the amounts were paid to Ms. Marshall. (Def. Statement of Facts P 41.) In addition, Defendants aver that a piece of property Mr. Matthei owned in Virginia was sold, and that the after-tax proceeds of this sale of $ 63,000 were paid to Ms. Marshall. (Def. Statement of Facts P 41.) Thus, according to the Defendants, Ms. Marshall has received over three-quarters of the aggregate amount of her judgment against her former client. Ms. Marshall concedes that such proceeds were paid to her, but claims that such proceeds were but a "drop in the bucket" in relation to the damages she has suffered. (Pl. Response P 42.) Ms. Marshall now claims to have suffered over $ 1 million in damages during the 12 years she has spent seeking to recover on the $ 85,000 judgment. These damages include those "engendered by the litigation defendants caused." (Pl. Statement of Facts P 129.)

(Def. Statement of Facts P 6.) [3] Mr. Matthei and Ms. Dawson were married in England on December 19, 1995. (Def. Statement of Facts P 6.)

Mr. **[*8]** Matthei returned to the United States in August 1996, and was arrested in New Jersey for failing to pay alimony and child support to Ms. Kelly. (Pl. Statement of Facts P 30; Def. Statement of Facts P 11.) According to the record before the Court, Mr. Matthei has been incarcerated in the United States since that date. (Def. Statement of Facts P 18.) The Matthei-Dawson marriage was terminated under the laws of England in 1998. (Def. Statement of Facts P 26.)

**II. Lepanto and the Mayfair Flat**

In 1993, before Mr. Matthei became acquainted with Ms. Dawson, he formed Lepanto Company Limited ("Lepanto") as a Bahamanian corporation. (Pl. Statement of Facts P 12.) During discovery in this case, Mr. Matthei testified that he originally formed Lepanto for the purpose of operating a hedge fund. (Pl. Statement of Facts PP 12-16.) Mr. Matthei later abandoned the idea operating Lepanto as a hedge fund, and Lepanto never actually operated as such. (Pl. Statement of Facts P 16.)

In 1994, Mr. Matthei arranged for Lepanto to purchase an apartment, or "flat," in the Mayfair section of London (the "Mayfair Flat"). (Pl. Statement of Facts P 16.) The Mayfair Flat was owned in Lepanto's name; in other words, **[*9]** at least for appearances, Mr. Matthei did not himself "own" the flat. Mr. Matthei and Ms. Dawson lived together in the Mayfair Flat from 1994 until Mr. Matthei returned to the United States in August 1996 and went to prison. Ms. Dawson lived in the Mayfair Flat following Mr. Matthei's incarceration until she eventually sold it in or around 2002. During Mr. Matthei's incarceration in the United States, both before and after the marriage ended in 1998, Ms. Dawson handled certain financial affairs for Mr. Matthei, including paying bills, maintaining insurance policies, and maintaining the Mayfair Flat.

The record contains a copy of the "First Resolutions" of Lepanto, dated June 3, 1993. (See Butler Decl. Ex. CC.) These corporate resolutions, in which Mr. Matthei is named as the sole director of Lepanto, appoint Mr. Matthei as Lepanto's President and Secretary. [4] The Record contains an unsigned version of these resolutions, and another version signed by Mr. Matthei. (See Butler Decl. Ex. CC.)

Another "corporate **[*10]** resolution," dated November 4, 1998, identifies "Emma Dawson Matthei" as the "owner and holder of all shares" of Lepanto. (See Butler Decl. Ex. CC.) Further, the resolution purports to give Ms. Dawson the authority to execute documents on behalf of Lepanto as of December 19, 1995. The resolution is signed by Mr. Matthei in his capacity as Lepanto's Secretary, President, Chairman and Managing Director. The record does not indicate whether Lepanto had any officers or directors other than Mr. Matthei. The November 1998 resolution granted certain authority to Ms. Dawson but does not name her as a corporate officer of Lepanto.

Also included in the record is a "Confirmation of Transfer," dated April 22, 2001, signed by Mr. Matthei. (See Butler Decl. Ex. CC.) In this 2001 document, Mr. Matthei purports to attest that he transferred his beneficial interest in Lepanto to Ms. Dawson in November 1998 by executing the November 4, 1998 Lepanto resolution. Notably, Mr. Matthei also tendered his resignation as "Director or other officer" of the Company "with immediate effect." (Butler Decl. Ex. CC.)

**III. Mr. Fenstermacher's Representation of Mr. Matthei**

Mr. Fenstermacher is an attorney licensed to practice **[*11]** law in Pennsylvania, whose practice is concentrated in the area of tax, trusts, and estates. (Def. Statement of Facts P 19.) Mr. Fenstermacher became involved in Mr. Matthei's affairs when Ms. Dawson called him from England in September 2000 (some five years after Ms. Marshall obtained the default judgment against Mr. Matthei) to discuss retaining him. (Def. Statement of Facts P 20.) Mr. Fenstermacher then corresponded with Ms. Dawson, Mr. Matthei and Mr. Burgess (Ms. Dawson's attorney in England) in order to determine the subject and the scope of any potential

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[3] Ms. Marshall argues that this "prenuptial agreement" was a mere device used by Mr. Matthei as a scheme to defraud his creditors by transferring all of his assets to Ms. Dawson, thereby divesting himself of all valuable assets. Mr. Matthei's attempt to transfer his assets to Ms. Dawson by way of this prenuptial agreement appears to be one of the initial acts in his alleged "scheme."

[4] The various resolutions relating to Lepanto refer to the Articles of Association and Bylaws of Lepanto. Neither of these documents has been submitted as part of the record in this case.

representation. (See Butler Dec. Exs. P, W.) Mr. Fenstermacher subsequently agreed to represent Mr. Matthei, and confirmed by letter dated March 1, 2001 that his representation would be in connection with preparing a "Consent Order" to be filed with the courts in the United Kingdom. (See Butler Dec. Ex. TT.)

At the time Mr. Fenstermacher became involved in the Matthei-Dawson matters, Mr. Matthei and Ms. Dawson's marriage had been over for approximately three years. As noted above, however, Ms. Dawson retained certain financial responsibilities with respect to Mr. Matthei, namely, she paid the premiums on Mr. Matthei's insurance **[*12]** policies, and agreed to pay the costs of Mr. Fenstermacher's representation. (See Butler Dec. Ex. TT.) As Mr. Burgess described the Consent Order to Mr. Fenstermacher in a letter, by executing the Consent Order Mr. Matthei and Ms. Dawson intended to give legal effect to the basic terms of the previously executed but unenforceable prenuptial agreement between them. Specifically, the Consent Order would legally confirm the division of assets between Mr. Matthei and Ms. Dawson, and specify any financial obligations going forward. (See Butler Decl. Ex. P.) Most notably, the parties anticipated that when the Consent Order was finally approved by the courts in England, Mr. Matthei will have transferred any assets of value, including the Mayfair Flat, to Ms. Dawson, and he would not hold title to any assets in his name.

Ms. Marshall describes Mr. Fenstermacher's involvement as consisting of three "Fenstermacher Transactions": (1) the transfer of Mr. Matthei's shares of Lepanto to Ms. Dawson to facilitate liquidation of the Mayfair Flat; (2) concealment of the proceeds of the sale of the flat; and (3) preparation of the Consent Order. (See 2d Am. Compl. P 52). [5]

A. *The First "Fenstermacher Transaction" -- Transfer of Lepanto*

In April 2001, Ms. Dawson sent a letter to Mr. Fenstermacher that enclosed certain documents related to Lepanto. The main document at issue is the "Confirmation of Transfer" described above. (See Butler Decl. Ex. CC.) [6] Ms. Dawson represented to Mr. Fenstermacher that Mr. Matthei had transferred his shares in Lepanto to her in 1998, but that the company records did not reflect that transfer. In other words, Mr. Matthei's previous attempts to transfer his assets to Ms. Dawson were not legally valid. Accordingly, Ms. Dawson requested that Mr. Fenstermacher have Mr. Matthei sign the Confirmation of Transfer, in which Mr. Matthei would affirm that he previously had transferred his interest in Lepanto to Ms. Dawson in 1998, through his execution of the November 4, 1998 Lepanto corporate resolution. (Def. Mem. Summ. J. Ex. E; Butler Decl. Ex. KK.)

Mr. Fenstermacher complied and forwarded these documents to Mr. Matthei in prison. (See Butler Decl. Ex. LL.) Mr. Matthei signed them and returned them to Mr. Fenstermacher (see Butler Decl. Ex. FF), and Mr. Fenstermacher returned the executed documents to Ms. Dawson (see Butler Decl. Ex. HH).

B. *The Second "Fenstermacher Transaction" -- Concealment of Proceeds*

Next, Ms. Marshall alleges that Mr. Fenstermacher assisted in concealing the proceeds of the sale of the Mayfair Flat. However, Ms. Marshall has not introduced any evidence into the record that supports this allegation. [7]

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[5] See also *Marshall, 388 F. Supp. 2d at 545-46* **[*13]** (describing Ms. Marshall's allegations involved the so-called "Fenstermacher Transactions").

[6] The record does not contain an intact version of the April 5, 2001 letter that Ms. Dawson sent to Mr. Fenstermacher that includes the various attachments. Both parties introduced into the record **[*14]** a copy of the April 5, 2001 letter alone, without the attachments. (See Def. Mem. Summ. J. Ex. E; Butler Decl. Ex. KK.) It appears that Ms. Dawson sent Mr. Fenstermacher the "Confirmation of Transfer" with the November 4, 1998 resolution attached, along with the Lepanto stock certificate number three, the first resolution of Lepanto, and the written consent of the sole director. (See Butler Decl. Ex. KK (letter from Ms. Dawson to Mr. Fenstermacher without attachments); Butler Decl. Ex. CC (sheaf of documents including those referenced in Ms. Dawson's April 5, 2001 letter).)

[7] In her statement of facts, Ms. Marshall **[*15]** does not provide the exact day or month when the Mayfair Flat was sold; she merely states that it was sold in 2002. (Pl. Statement of Facts P 107.) Mr. Fenstermacher claims that his representation of Mr. Matthei ended on October 11, 2002. (Def. Statement of Facts P 34.) Although Ms. Marshall alleges that Mr. Fenstermacher somehow concealed the proceeds of the sale of the Mayfair Flat, she never explains how Mr. Fenstermacher supposedly was involved in the sale of the Mayfair Flat, or that he was ever involved in disbursing the proceeds from its sale. Ms. Marshall does not aver that Mr. Fenstermacher had any further contact with Mr. Matthei or Ms. Dawson relating to the Mayfair Flat after the Consent Order was approved by the courts in England subsequent to October 2002.

C. *The Third "Fenstermacher Transaction" -- The Consent Order*

Finally, Mr. Fenstermacher assisted in preparing the Consent Order. Specifically, Mr. Fenstermacher sent a letter to Mr. Matthei that enclosed a work paper relating to a "Statement of Information for a Consent Order," which solicited the information necessary in order to prepare the Consent Order. (Def. Mem. Summ. J. Ex. I at 11.). He instructed Mr. Matthei **[*16]** to review the document, supply the relevant information and return the completed document to him. Mr. Matthei complied and, upon receipt of the completed work paper, Mr. Fenstermacher prepared the Statement of Information and signed it in his capacity as Mr. Matthei's counsel.

Ms. Marshall admits that Mr. Matthei was the one who actually supplied the substantive information that Mr. Fenstermacher used to prepare the Consent Order, and that Mr. Fenstermacher was not involved in the drafting. (See Pl. Statement of Facts P 102 ("If Fenstermacher were providing legitimate legal services to Matthei, Fenstermacher would have been involved in the drafting [of the revised U.K. Consent Order]."). Mr. Fenstermacher then forwarded a copy of the completed Statement of Information to Ms. Dawson (see Butler Decl. Exs. Q, GG), and also sent a copy directly to Mr. Burgess, stating that it had been "completed by Mr. Matthei," and that he (Fenstermacher) had signed it for Mr. Matthei as his attorney. (Def. Mem. Summ. J. Ex. I at 17.)

The Consent Order was eventually submitted to the courts in the United Kingdom in October 2002. In the Statement of Information, Mr. Matthei represented to the courts of **[*17]** the United Kingdom that he did not possess any assets. Further, the Consent Order provided that, upon approval by the courts, virtually any assets that had been owned by Mr. Matthei and Ms. Dawson while they were married, including the Mayfair Flat, would belong to Ms. Dawson. The British courts approved the Consent Order sometime after October 2002. (Pl. Statement of Facts P 106.) Thereafter, in late 2002, Ms. Dawson sold the Mayfair Flat for approximately $ 900,000, and the furnishings therein for approximately $ 100,000. (Pl. Statement of Facts PP 107-108.) According to Ms. Marshall, Mr. Matthei never accounted for the proceeds of the sale of the Mayfair Flat. She alleges that he testified falsely that he never discussed the sale of the Mayfair Flat with Ms. Dawson. (Pl. Statement of Facts P 109.)

**STANDARDS**

**I. Motion for Reconsideration**

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)*, cert. denied, *476 U.S. 1171, 106 S. Ct. 2895, 90 L. Ed. 2d 982 (1986)*. A court should grant a motion for reconsideration only "if the moving party establishes **[*18]** one of three grounds: (1) there is newly available evidence; (2) an intervening change in the controlling law; or (3) there is a need to correct a clear error of law or prevent manifest injustice." *Drake v. Steamfitters Local Union No. 420, No. 97-585, 1998 U.S. Dist. LEXIS 13791, at *7-8 (E.D. Pa. Sept. 3, 1998)* (citing *Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994)*). "Because federal courts have a strong interest in finality of judgments, motions for reconsideration should be granted sparingly." *Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995)*.

**II. Motion for Summary Judgment**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "material" if it might affect the outcome of the case **[*19]** under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id. at 325*. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must

set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*. Under *Rule 56*, the Court must view the evidence presented on the motion in the light most favorable **[*20]** to the party opposing summary judgment. *Anderson, 477 U.S. at 255*.

**DISCUSSION**

The Court's Trial and Pretrial Procedures require a party moving for summary judgment to provide a numbered paragraph-by-paragraph recitation of the facts relevant to the motion with specific citations to the record to support such facts. These procedures also require a party opposing summary judgment to respond by stating whether it agrees or disagrees with the moving party's stated facts. The opposing party must also include citations to the record to support its factual positions.

The Defendants' initial motion for summary judgment did not include a statement of facts in the format the Court requires. In fact, Defendants' motion did not include any recitation of the facts whatsoever.

Responding to Defendants' motion, Ms. Marshall fared only slightly better. She presented a 32-page melodramatic narrative that, instead of demonstrating any grasp of the events that underlie this action, of the testimonial and documentary evidence in the record, or of the legal issues involved in this case, actually obscured the facts and issues in a blinding fog of far-fetched inferences and attenuated legal conclusions that **[*21]** had little or no relevance to the Plaintiff's remaining claims in this case.

After the parties submitted their initial briefs, the Court scheduled a conference call to advise counsel that they had not complied with the Court's summary judgment procedures. During this call, the Court gave the parties the opportunity to provide supplemental recitations of facts that would comply with the Court's procedures.

The Defendants squandered this opportunity and filed a grossly insufficient statement of facts that largely provided either useless background facts or bare details of the Defendants' actions and communications underlying the Plaintiff's claims or supporting Defendants' arguments for summary judgment. In her second attempt at reciting the facts, Plaintiff again missed the point. Instead of highlighting the disputed facts in an effort to convince the Court that genuine disputes of material facts remain thereby precluding summary judgment, Plaintiff attempted to best Defendants' paltry submission by presenting a 129-paragraph statement of "facts," which again constituted a rambling, largely incoherent collection of inferences and legal conclusions.

On November 16, 2006, the Court issued **[*22]** an Order denying Defendants' Motion for Summary Judgment (Docket No. 110). The papers Defendants' submitted in support of their motion simply did not provide a sufficient factual basis upon which the Court could grant summary judgment on the grounds argued by Defendants.

Shortly after the Court denied Defendants' Motion for Summary Judgment, Defendants timely moved for reconsideration of that Order. Defendants do not argue that reconsideration is appropriate based on any of the three justifications cited in *Drake, supra.* Instead, Defendants essentially argue that Ms. Marshall has not offered any additional evidence than she had produced when the Court considered the defense motion to dismiss. Defendants argue that while Ms. Marshall's allegations may have survived a motion to dismiss, she has not risen to the task of actually producing evidence to substantiate her allegations at the summary judgment phase. Accordingly, Defendants now argue that Ms. Marshall's claims under the federal and New Jersey RICO statutes fail as a matter of law.

After a great deal of contemplation, the Court concludes that, notwithstanding certain deficiencies in the parties' moving and opposing papers, the interests **[*23]** of justice require the Court to reconsider its denial of summary judgment. Even though Defendants did not adequately provide a separate statement of facts pursuant to the Court's rules, Defendants' Motion for Summary Judgment is adequately based on a presentation of facts, many of which are not in dispute, that are supported by the record in this case. Furthermore, aside from transcripts from depositions taken during discovery, the record in this case has been fairly static since the Court considered Defendants' motion to dismiss. Ms. Marshall attached almost two dozen exhibits to her Second Amended Complaint, and many of the documents that the parties attached to their respective papers in order to produce a record for summary judgment are simply duplicate copies of those exhibits.

In Ms. Marshall's initial response to Defendants' summary judgment motion, she argued that the motion was a "motion for reconsideration" of the Court's denial of certain claims raised in the defense motion to dismiss, in lieu of a "true" summary judgment motion. She claimed that Defendants merely had presented the same arguments that the Court had already rejected in ruling upon the motion to dismiss. Regardless **[*24]** of whether this is an accurate observation, ultimately the shortcoming belongs to Ms. Marshall. After reviewing the parties' motion papers, and the record evidence presented, it can be said that the Defendants' arguments are practically identical because the record before the Court is likewise substantially identical. Only the burden has changed.

While Ms. Marshall's allegations may have survived Defendants' motion to dismiss, such allegations, absent any supporting evidence, are insufficient to withstand Defendants' motion for summary judgment with respect to Ms. Marshall's federal RICO claims. For the reasons set forth below, the Defendants' Motion for Reconsideration as to those claims will be granted, and summary judgment will be entered for the Defendants with respect to Ms. Marshall's claims under *18 U.S.C. § 1962(c)* and *(d)*. Defendants' Motion for Summary Judgment will be denied in all other respects.

## I. Count IX--Violation of *18 U.S.C. § 1962(c)*

Ms. Marshall alleges that Mr. Fenstermacher and his law firm High Swartz violated *Section 1962(c)* of the federal RICO statute, *18 U.S.C. § 1962(c)*. This section makes it unlawful "for any person employed by or associated with any enterprise **[*25]** 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 though a pattern of racketeering activity . . . ." *18 U.S.C. § 1962(c)*. To establish a *Section 1962(c)* violation, a plaintiff must allege (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity. [8] *United States v. Urban, 404 F.3d 754, 769 (3d Cir. 2005)*.

Defendants argue that Plaintiff has not established the existence of an "enterprise" and that, even if Plaintiff can establish a viable enterprise, Mr. Fenstermacher and High Swartz were not "employed by or associated with" any alleged enterprise and did not "participate in the conduct" of any alleged enterprise.

### A. The "Enterprise" Requirement

An "enterprise" may include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. It is an "entity made up of a group of persons associated together for the common purpose of engaging in a course of conduct." *United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. To establish the existence of an "enterprise," a plaintiff must prove (1) "an ongoing organization, formal or informal"; (2)

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[8] Defendants assail Ms. Marshall's allegations on a number of grounds, but they do not argue that Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz participated in the conduct or the affairs of the enterprise "through a pattern of racketeering activity." The federal RICO statute defines a "pattern" of racketeering activity as requiring "at least two acts of racketeering activity" within a ten year period. *18 U.S.C. § 1961(5)*. In her Second Amended Complaint, Ms. Marshall **[*26]** alleges that between 2000 and 2002 Mr. Fenstermacher committed multiple acts of mail fraud in violation of *18 U.S.C. § 1341* (2d. Am. Compl. PP 158(a), 159(b), 159(d)), made "numerous" telephone calls that constitute acts of wire fraud in violation of *18 U.S.C. § 1343* (2d. Am. Compl. PP 158(b), 160), and engaged in money laundering in violation of *18 U.S.C. §§ 1956-1957* (2d. Am. Compl. P 158(d)).

As an initial matter, Ms. Marshall has not provided any facts to support her allegation that Mr. Fenstermacher or the High Swartz firm engaged in money laundering. Moreover, as the Court noted in its ruling on the defense motion to dismiss, the Court has not been informed that either Mr. Fenstermacher or High Swartz have been charged with either mail fraud or wire fraud in relation to this case. See *Marshall, 388 F. Supp. 2d. at 561 n.28*. With respect to the mail fraud allegation, Ms. Marshall cites three specific examples of alleged mail fraud, namely, Mr. Fenstermacher's letter to Ms. Dawson dated April 30, 2001 (2d Am. Compl. Ex. I), his March 5, 2002 letter to Slough County Court in England (2d Am. Compl. Ex. S), and the Statement of Information that Mr. Fenstermacher sent to Mr. Burgess **[*27]** (and Ms. Dawson), which Mr. Burgess submitted to the courts in England (2d Am. Compl. Ex. W). As to her wire fraud allegations, Ms. Marshall states that Mr. Fenstermacher had perhaps as many as thirty telephone conversations with Ms. Dawson and others in furtherance of the alleged scheme.

"the various associates function as a continuing **[*28]** unit"; and (3) that the enterprise exists "separate and apart from the pattern of activity in which it is engaged." *Id.* (the " Turkette factors"); see also *Urban, 404 F.3d at 770* (citing *United States v. Irizarry, 341 F.3d 273, 286 (3d Cir. 2003)*). Proof of all three elements is required.

With respect to the first element, Ms. Marshall must present proof of an "ongoing organization with some sort of framework for making or carrying out decisions." *Urban, 404 F.3d at 770* (citing *Irizarry, 341 F.3d at 286*). The decision-making structure can be formal or informal, hierarchical or consensual. *Turkette, 452 U.S. at 583*; *United States v. Riccobene, 709 F.2d 214, 222 (3d Cir. 1983)* overruled on other grounds by *Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*. The enterprise must include "some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." *Riccobene, 709 F.2d at 222*. Factors to be considered in determining whether the requisite structure exists include whether there is a division of labor, a chain of command, and a structure for resolving disputes. *Harry Miller Corp. v. Mancuso Chems. Ltd., No. 99-2669, 468 F. Supp. 2d 708, 2006 U.S. Dist. LEXIS 93082, at *20-21. (E.D. Pa. Dec. 22, 2006)*. **[*29]** [9]

In order to prove the second element -- "associates function[ing] as a continuing unit" -- Ms. Marshall must show "'that each person perform[ed] a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.'" *Urban, 404 F.3d at 770* (citing *Riccobene, 709 F.2d at 223*).

The third element of the enterprise **[*30]** requirement demands proof that the enterprise is an "entity separate and apart from the pattern of activity in which it engages." *Turkette, 452 U.S. at 583, 101 S. Ct. at 2529*. The Court of Appeals for the Third Circuit has stated:

> As we understand this last requirement, it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

*Riccobene, 709 F.2d at 223-24*. The court of appeals has found this separateness requirement to be satisfied by evidence that the persons or entities that comprised the enterprise "coordinated the commission of multiple predicate offenses, and continued to provide legitimate services during the period in which they were engaged in racketeering activities." *United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993)* (citations omitted). [10]

**B. "Employed by," "Associated with" or "Participate in the conduct" of a RICO "Enterprise"**

Defendants argue that Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz was "employed by or associated with" an "enterprise," or "conduct[ed] or participate[d], directly or indirectly, in the conduct of such enterprise's affairs." *18 U.S.C. § 1962(c)*. Specifically, Defendants claim that under *Reves v. Ernst & Young, 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)*, Defendants are not liable under RICO because neither Mr. Fenstermacher nor High Swartz "participated" in the "operation and management" of any alleged RICO enterprise.

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[9] In Harry Miller Corp., the court addressed the "structure" requirement for a RICO enterprise, and provided a well-organized analysis of the Third Circuit's requirements. The court discussed the court of appeals' decisions in *Riccobene, supra*, *Town of Kearny v. Hudson Meadows Urban Renewal, 829 F.2d 1263 (3d Cir. 1987)*, and another recent case from this district, *Price v. Amerus Annuity Group Co. (In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.), MDL Doc. No. 1712, 2006 U.S. Dist. LEXIS 35980 (E.D. Pa. June 2, 2006)*. Read together, these cases affirm the importance of a producing evidence of a division of labor, a chain of command, and a structure for resolving disputes in establishing the requisite "structure" of a RICO enterprise. *Harry Miller Corp., 468 F. Supp. 2d 708, 2006 U.S. Dist. LEXIS 93082, at *20-21*.

[10] In Console, the court of appeals **[*31]** reviewed an appeal of convictions under RICO where the jury found that members of a law firm and members of a medical practice colluded to commit insurance fraud. The court held that the prosecution had met the three Turkette factors in proving that an enterprise existed, and, with respect to the separateness requirement, held that the law firm and the medical practice concurrently "coordinated the commission of multiple predicate offenses" while maintaining their respective practices during the period in which they were engaged in racketeering activities. *Console, 13 F.3d at 652*.

**[*32]** (Def. Mot. Reconsideration 5, Def. Mot. Summ. J. 10.)

In Reves, the Supreme Court held that the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," found in *18 U.S.C. § 1962(c)*, requires that "one must have some part in directing those affairs." *Reves, 507 U.S. at 179, 185*. The Supreme Court adopted an "operation or management" test, holding that "Congress did not intend to extend RICO liability under *§ 1962(c)* beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity." *Id. at 184*. In Reves, the Supreme Court applied the "operation or management" test and held that an auditor's failure to inform the board of directors of a farmers' cooperative that a certain asset should have been given its fair market value, when doing so would have resulted in the asset being insolvent, did not constitute "participating in the operation or management" of the cooperative, such that liability would arise under *§ 1962(c)*. *Id. at 186*. [11]

Several courts, following Reves, have held that professionals such as accountants or lawyers are not immune from liability under RICO. Those courts have often acknowledged, however, that it is difficult for an attorney to be liable for performing ordinary legal tasks because such tasks often do not entail the "operation or management" of an enterprise. For example, in *Handeen v. LeMaire, 112 F.3d 1339, 1349 (8th Cir. 1997)*, the Court of Appeals for the Eighth Circuit stated:

> It is a good thing, we are sure, that we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney). This result, however, is not compelled by the fact that the person happens to be a lawyer, but for the reason that these actions do not entail the operation or management of an enterprise. [12]

*Id. at 1349*. The plaintiff in **[*34]** Handeen was a creditor in a Chapter 13 bankruptcy action who alleged that a debtor-in-bankruptcy engaged the defendant law firm essentially to "navigate[] the estate through the bankruptcy system" in an effort to defraud the creditors. *Id. at 1350*. The plaintiff argued the law firm's level of involvement in the scheme satisfied Reves' "operation or management" test. Id. While the court of appeals emphasized that it had no basis for speculating as to whether the plaintiff could ultimately prove that the defendant attorneys actually "conducted" the bankruptcy estate, it offered the following narrative in describing the attorneys' involvement:

> [T]he Firm directed Gregory [Lemaire] and his parents to enter into a false promissory note and create other sham debts to dilute the estate, the Firm represented the elder Lemaires and defended their fraudulent claims against objections, the Firm prepared Lemaire's filings and schedules containing erroneous information, the Firm formulated and promoted fraudulent repayment plans, and the Firm participated in devising a scheme to conceal Gregory's new job from the bankruptcy trustee. In short, Handeen might prove that Lemaire, who was, after all, **[*35]** ultimately interested solely in ridding himself of the oppressive judgment, controlled his estate in name only and relied upon the Firm, with its legal acuity, to take the lead in making important decisions concerning the operation of the enterprise.

Id. The Handeen court emphasized the essential features of a Chapter 13 bankruptcy, noting that the debtor exercises a great degree of "control" over such proceedings, and stated that if the plaintiff could produce substantial evidence, it was "comfortable that [plaintiff] will have succeeded in proving that the attorneys conducted the bankruptcy estate," which could satisfy Reves' "operation and management" test. Id. The

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[11] However, the Supreme Court specifically stated that:

> An enterprise is "operated" not just by upper management but also by lower rung participants in the **[*33]** enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

*Reves, 507 U.S. at 184*.

[12] Ms. Marshall cited the court's holding in Handeen as having "held liable under RICO attorneys who had participated in a client's fraudulent efforts to impede a creditor's ability to collect on its judgment." (Pl. Mem. Opp'n Summ. J. 47.) Contrary to Plaintiff's assertion, the appellate court in *Handeen* did not "hold" the attorneys liable but only reversed the district court's grant of summary judgment in defendants' favor on plaintiff's state law and RICO claims (and affirmed other aspects of the district court's opinion). *Handeen, 112 F.3d at 1350*. The court remanded the case to the district court for further proceedings.

court noted, however, that its reversal of summary judgment against the defendant attorneys was consistent with the way other courts had applied the "operation or management" test in the attorney-client context. Id. The court distinguished its case from other actions where "a lawyer merely extended advice on possible ways to manage an enterprise's affairs" or "where counsel issued an opinion based on facts provided by a client." *Handeen, 112 F.3d at 1350* (citing *Azrielli v. Cohen Law Offices, 21 F.3d 512, 521 (2d Cir. 1994)* **[*36]** (foreclosing liability where defendant only acted as attorney in illicit transactions); *Reves, 507 U.S. at 185-86* (holding that accounting firm did not violate RICO when it prepared audits in reliance upon a client's existing records); *Nolte v. Pearson, 994 F.2d 1311, 1316-17 (8th Cir. 1993)* (refusing to impose RICO liability where attorney had generated documents based on facts provided by client)).

Most courts that have considered whether a professional can be liable under *§ 1962(c)* in light of Reves' "operation or management" test have held that performing professional **[*37]** services for an enterprise, i.e., facilitating an enterprise's activities by such services, does not give rise to liability under *§ 1962(c)*. See *University of Md. v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1539 (3d Cir. 1993)* (stating that "simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO"); *Stone v. Kirk, 8 F.3d 1079, 1092 (6th Cir. 1993)* (holding that defendant "who was associated with the enterprise" and "engaged in a pattern of racketeering activity when he repeatedly violated the anti-fraud provisions of the securities laws" was not liable under *§ 1962(c)* because he "had no part in directing" the enterprise's affairs); *Goren v. New Vision Int'l, 156 F.3d 721, 728 (7th Cir. 1998)* ("[S]imply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under *§ 1962(c)*; instead, the individual must have participated in the operation and management of the enterprise itself."); *Nolte v. Pearson, 994 F.2d 1311, 1317 (8th Cir. 1993)* (holding that attorneys who prepared allegedly false opinion letters **[*38]** and informational memoranda regarding a music recording leasing program had not participated in operation or management of enterprise); *Baumer v. Pachl, 8 F.3d 1341, 1344-45 (9th Cir. 1993)* (holding that attorney who simply provided legal services to corporation did not participate in operation or management of enterprise regardless of whether he performed those services "well or poorly, properly or improperly"); *Redtail Leasing, Inc. v. Bellezza, No. 95-5191, 1997 U.S. Dist. LEXIS 14821, at *15 (S.D.N.Y. Sept. 30, 1997)* ("A defendant does not 'direct' an enterprise's affairs under *§ 1962(c)* merely by engaging in wrongful conduct that assists the enterprise."); Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 590-91 (E.D.N.Y. 1993) (holding that provision of legal services did not extend to operation or management of enterprise under *§ 1962(c)*, despite the fact that the attorney knowingly assisted enterprise in execution of fraudulent scheme); *Gilmore v. Berg, 820 F. Supp. 179, 183 (D.N.J. 1993)* (holding that attorney who allegedly prepared false private placement memoranda regarding limited partnership did not conduct affairs of enterprise because **[*39]** he did not "direct[] the legal entities he represented to engage in particular transactions").

The Court of Appeals for the Third Circuit considered the potential RICO liability of an accounting firm in *Peat Marwick*, stating:

> Simply because one provides goods or services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus. In other words, the person must knowingly engage in "directing the enterprise's affairs" through a pattern of racketeering activity.

*996 F.2d at 1539* (citation omitted). The Peat Marwick court held that the defendant accounting firm was not liable under RICO where plaintiffs had not averred that defendants participated in the operation or management of the enterprise. The court specifically rejected plaintiff's arguments that the accounting firm "directed" the enterprise's affairs simply because its services were "indispensable," stating:

> The plaintiffs have nowhere averred that Peat Marwick had any part in operating or managing the affairs of Mutual Fire. Although they make much **[*40]** ado about how important and indispensable Peat Marwick's services were to Mutual Fire, the same can be said of many who are connected with Mutual Fire. Similar to the allegation against the accounting firm in Reves, the plaintiffs' amended complaint, when distilled to its essence, is nothing more than an allegation that Peat Marwick performed materially deficient financial services.

*Id.*

**C. Ms. Marshall's Alleged "Enterprises"**

In this case, Ms. Marshall has cast a wide net, at times offering arguments that as many as four alternative RICO "enterprises" exist within the fact pattern recited above. However, in her various responsive papers, she only presents thorough arguments as to two alternative enterprises, namely, (1) the association-in-fact of Matthei and Dawson, and (2) Lepanto. [13]

As a preliminary matter, the Court notes that Ms. Marshall has already obtained a judgment against Mr. Matthei. Therefore, while Mr. Matthei, according to Ms. Marshall, was the "constant fixture at the 'hub' of the broader enterprise" involved in this alleged conspiracy to defraud her, he is not a defendant in this case. (Pl's Mem. Opp'n Mot. Reconsideration **[*43]** 8.) The Court also notes that Ms. Dawson has failed to appear in this action, and the clerk of the court has entered a default against her. In addition, neither Mr. Burgess's estate nor his former employer, Hetherington & Co., has been served in this case. As far as the Court is aware, neither Ms. Dawson nor Mr. Burgess (before he passed away) were deposed in this action or have otherwise offered any testimonial evidence to assist the Court in deciding the pending motions. The parties have not informed the Court whether, if this matter proceeds to trial, Ms. Dawson (who lives in England) will be available to testify. However, based on the extensive opportunity for discovery in this case, and the duration of the proceedings thus far, the Court expects not. Thus, Mr. Matthei, the main "bad actor," is not a defendant; Ms. Dawson, the only person who arguably benefitted here by obtaining any assets of value that belonged to Mr. Matthei, apparently is no where to be found; and Mr. Burgess, Mr. Fenstermacher's English counterpart, who was involved in this matter long before Mr. Fenstermacher became involved, has died. That leaves Mr. Fenstermacher and High Swartz as the only viable defendants **[*44]** in this case, even though, by any reading of the facts presented, Mr. Fenstermacher had a relatively minute role in the alleged "scheme," and had the least to gain. [14]

However, even viewing the evidence presented in the light most favorable to Ms. Marshall, the Court finds that Ms. Marshall cannot establish the existence of an "enterprise" for federal RICO purposes. Further, even assuming, arguendo, that a viable "enterprise" exists under federal RICO laws, Ms. Marshall has not established that Mr. Fenstermacher or High Swartz conducted or participated in the "operation or management" of any such enterprise's affairs.

The Court will discuss the viability of the Matthei--Dawson association-in-fact and Lepanto as potential enterprises in turn.

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[13] Ms. Marshall has vacillated as to how many alternative "enterprises" she claims exist here. Plaintiff's brief in response to Defendants' Motion to Dismiss, and Plaintiff's Amended Answers to the First Set of Interrogatories both allege the existence of three alternative enterprises: the two enterprises described above and the expanded association-in-fact of Ms. Dawson and Messrs. Matthei, Fenstermacher **[*41]** and Burgess. (Pl. Mem. Opp'n Mot. Dismiss 34; Def. Mot. Summ. J. Ex. B at 4.) However, Plaintiff's brief in response to Defendants' Motion for Summary Judgment only argues for the existence of the first two enterprises cited above. (Pl. Mem. Opp'n Summ. J. 39.) Then in Plaintiff's response to Defendants' Motion for Reconsideration, Plaintiff reverts back to the theory that a broader enterprise exists consisting of all of the defendants plus Mr. Matthei. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Plaintiff devotes one paragraph to support her argument that this third enterprise exists. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Without providing any factual or authoritative support, Plaintiff claims that "this broader enterprise has the requisite distinctiveness and structure as required" under law. (Pl. Mem. Opp'n Mot. Reconsideration 6.) Aside from this one paragraph and one passing reference to this broader enterprise in Plaintiff's response to Defendants' Motion for Summary Judgment, Plaintiff has not argued that this third "enterprise" exists or provided any evidence to support the existence of this association-in-fact as an "enterprise," aside from the mere allegation in her complaint. **[*42]** (Pl. Mem. Opp'n Summ. J. 43-44.)

Incredibly, in her Memorandum in Opposition to Defendants' Motion for Reconsideration, Plaintiff for the first time raises the possibility of a fourth alternative "enterprise" solely consisting of Mr. Matthei himself. (Pl's Mem. Opp'n Mot. Reconsideration 8.) Plaintiff contends that Mr. Matthei was a "constant fixture at the 'hub' of the broader enterprise." (Pl's Mem. Opp'n Mot. Reconsideration 8.)

At the summary judgment phase, Plaintiff's mere allegations, without more, that a third enterprise of all of the defendants plus Mr. Matthei or a fourth enterprise consisting solely of Mr. Matthei existed are insufficient. Therefore, the Court will consider Ms. Marshall's arguments only with respect to the two alternative enterprises of (1) the association-in-fact of Mr. Matthei and Ms. Dawson, and (2) Lepanto.

[14] According to Mr. Fenstermacher (and otherwise uncontested), he billed a total of $ 4,231.89 during his representation of Mr. Matthei.

1. *The Matthei--Dawson Association-in-Fact*

Ms. Marshall argues that the association-in-fact of Mr. Matthei and Ms. Dawson, as evidenced by their "ongoing relationship," constitutes an "enterprise" under RICO. The "structure" of this alleged enterprise, Plaintiff argues, can be inferred through a certain division of **[*45]** labor, i.e., because Mr. Matthei was incarcerated, Ms. Dawson managed certain assets, paid Mr. Matthei's bills, and paid expenses with respect to the Mayfair Flat. (Pl. Mem. Opp'n Summ. J. 41.) [15] The "goal" of this enterprise was, presumably, to bilk Mr. Matthei's ex-wife and his creditors, including Ms. Marshall, out of money and assets that rightfully belonged to them. In that regard, Ms. Marshall argues that Mr. Matthei and Ms. Dawson (with the assistance of Messrs. Fenstermacher and Burgess) conspired together to file the Consent Order in the United Kingdom in order to keep certain assets out of the grasp of those creditors.

In support of her argument that Mr. Matthei and Ms. Dawson's "ongoing relationship" constitutes a RICO enterprise, Ms. Marshall cites *American Manufacturers Mutual Insurance Co. v. Townson, 912 F. Supp. 291, 295 (E.D. Tenn. 1995)*, **[*46]** where the court found that a married couple who worked together to defraud their insurance company could constitute an "enterprise" under RICO. Defendants argue that American Manufacturers is distinguishable because the couple in that case was married throughout the time period that they committed the racketeering activities. Ms. Marshall argues that a RICO enterprise nonetheless exists here because Mr. Matthei and Ms. Dawson were engaged in an "ongoing relationship" from at least 1995 to 2002.

One of the hallmarks of a RICO enterprise consisting of an "association-in-fact" is that the participants must have associated together for a "common purpose of engaging in a course of conduct." *Turkette, 452 U.S. at 583*. While both Mr. Matthei and Ms. Dawson were certainly involved in a personal relationship, and were married for a short time, Ms. Marshall has not pointed to facts that support her argument that Mr. Matthei and Ms. Dawson shared a common purpose, namely, engaging in a scheme to defraud her. At best, the evidence permits competing inferences.

It seems clear that Mr. Matthei intended to engage, and did engage, in a course of conduct designed to defraud his creditors, including Ms. **[*47]** Marshall. As the Court noted in its prior opinion, a court in New Jersey found Mr. Matthei to have conveyed his property with the intent to defraud his creditors. See *Marshall, 388 F. Supp. 2d at 553* (citing *Marshall v. Matthei, 327 N.J. Super. 512, 518, 744 A.2d 209 (N.J. Super. Ct. 2000)*). Mr. Matthei sought to evade his creditors by moving his money and other assets, including the multi-million dollar settlement he received from his former employer, to overseas bank accounts, utilizing off-shore vehicles, such as Lepanto, or entering into the allegedly "sham" prenuptial agreement in order to shield his ownership of certain assets from his creditors. Mr. Matthei admitted that his purpose in executing the prenuptial agreement was to transfer his assets to Ms. Dawson so that his creditors could not access them. (See Butler Dec. Ex. A, Feb. 27, 2006 W. Matthei Dep. Tr. 65:19--66:3 (stating that the prenuptial agreement "was important for Emma [Dawson] to have assets that would be safe from the predations of Susan Kelly").)

However, Ms. Marshall has offered no evidence explaining what Ms. Dawson's purpose may have been. As noted above, Ms. Dawson has not testified in this action, so any **[*48]** evidence of her purpose would be circumstantial. Ms. Marshall asserts that because Ms. Dawson signed the prenuptial agreement, and she essentially agreed to receive any and all assets that Mr. Matthei chose to convey to her, she must have been complicit in Mr. Matthei's "scheme." Although Ms. Marshall tries very hard to establish the existence of a "scheme" that lasted seven years, from approximately 1995 to 2002, this "scheme" consists entirely of Mr. Matthei's constant, failed attempts to transfer his property to Ms. Dawson first via the prenuptial agreement, next by transferring ownership of Lepanto, and finally by executing the Consent Order.

Because Mr. Matthei constantly failed to successfully transfer his assets to Ms. Dawson, it could be said that his multiple attempts begin to resemble a "scheme." However, the steps in this alleged scheme are far-fetched to say the least. According to Ms. Marshall, as part of the elaborate scheme to defraud her, Mr. Matthei and Ms. Dawson entered into a prenuptial agreement in 1995, married shortly thereafter, divorced in 1998, and then entered into a post-divorce agreement in England in 2002, the Consent Order, that resulted in Mr. Matthei **[*49]** having almost no assets of value in his name. Ms.

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[15] As evidence of Mr. Matthei and Ms. Dawson's "continuing relationship," Ms. Marshall claims that after Mr. Matthei was incarcerated, Ms. Dawson continued to fund certain of Mr. Matthei's expenses, including membership fees in the Baltusrol Country Club in New Jersey, paying for certain publications, providing him with an annual stipend, and paying his legal expenses. (Pl. Statement of Facts P 125.)

Marshall alleges that Mr. Matthei and Ms. Dawson shared the common purpose of entering into this multi-step, seven-year course of conduct with the goal of frustrating her attempts to collect on an $ 85,000 judgment.

Moreover, the record evidence permits the inference that Mr. Matthei and Ms. Dawson not only did not share a common purpose but actually held positions that were adverse to one another. After all, a Consent Order is akin to a post-divorce settlement agreement under English law. In this case, the Consent Order executed by Mr. Matthei and Ms. Dawson confirmed that Mr. Matthei transferred all of assets to Ms. Dawson, and that Ms. Dawson had no further financial responsibilities or obligations towards Mr. Matthei. Numerous pieces of correspondence in the record indicate that Mr. Matthei and Ms. Dawson engaged in contentious back-and-forth negotiations over different aspects of the Consent Order that they eventually signed. Far from evincing a "common purpose," this evidence permits the inference that these two individuals were each protecting their own financial interests, without regard, at least directly, as to how the Consent **[*50]** Order would potentially affect Ms. Marshall. [16] The weight of the evidence representing communications between Mr. Matthei (often through Mr. Fenstermacher) and Ms. Dawson (often through Mr. Burgess), reveal communications between legal adversaries, who were addressing the particular details of a post-divorce settlement agreement, and who both sought to extricate themselves from the responsibilities attendant to this particular relationship. The fact that two adversaries communicated through their lawyers is hardly unusual, unconventional or actionable.

While there is ample evidence suggesting that Mr. Matthei's "purpose" in executing the Consent Order was to evade his creditors, the evidence **[*52]** suggests that Ms. Dawson's "purpose" was to protect her own financial interests and to extricate herself from her relationship with Mr. Matthei following the termination of their marriage. Thus, while Ms. Dawson and Mr. Matthei may have shared the same goal of executing the Consent Order, it seems that their motivations for wanting to do so may have been quite different.

However, viewing the evidence in Ms. Marshall's favor, and considering any potential inferences arising therefrom, Ms. Marshall points to certain facts that indicate that the "negotiations" over the Consent Order were far from arms-length. For example, Ms. Dawson and Mr. Fenstermacher frequently corresponded with one another directly, instead of Ms. Dawson contacting him through Mr. Burgess. Ms. Marshall alleges that these "improper" communications between counsel and his client's adversary, whom he knows to be represented by counsel, is evidence of the conspiratorial scheme. In addition, Ms. Marshall contends that if Mr. Matthei or Ms. Dawson truly sought to contest the divorce, or fight for a certain post-divorce allocation of assets, each of them could have pursued a route other than settling their dispute through **[*53]** execution of a "consent" order. Moreover, Ms. Marshall argues that the "prenuptial agreement" that the couple signed was unorthodox, as one does not often see (according to Ms. Marshall) the wealthier half of a soon-to-be-married couple transfer all of his assets to the poorer half.

While Ms. Marshall raises a disputed issue of fact as to whether the association-in-fact of Mr. Matthei and Ms. Dawson actually shared a common purpose, the Court finds that this association-in-fact fails to satisfy the requirements of a RICO "enterprise" for other reasons.

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[16] Numerous letters between Mr. Matthei and Mr. Fenstermacher provide evidence of a substantial back-and-forth negotiation between Mr. Matthei and Ms. Dawson with respect to the Consent Order. Each sought to further his or her own position as they vied for possession of money, property, or control of certain assets. For example, in a letter dated August 12, 2001, Mr. Matthei conceded that a certain insurance policy could not be reinstated, but demanded that in lieu of that policy he would accept $ 200,000 from Ms. Dawson. (See Butler Decl. Ex. YY.) In the same letter, Mr. Matthei stated his position that Ms. Dawson is a "golddigger who **[*51]** 'cut and ran' in record speed and who had dissipated the asset base." (Butler Decl. Ex. YY.) He further expressed his frustration that Ms. Dawson had delayed in handling post-divorce proceedings. He stated that "[Ms. Dawson] and her people have had years to sew this up, and the delay adds to my jail time. I have plans and no patience remaining, and owe no debt to [Ms. Dawson] any longer." (Butler Decl. Ex. YY.)

In an August 22, 2001 letter to Mr. Fenstermacher, Mr. Matthei wrote that "I consider that the Consent Order as proposed by Dawson is an abrogation of the verbal agreement." (Butler Decl. Ex. II.) He added, "I love Emma and want to take care of her, but this is ridiculous." (See Butler Decl. Ex. YY.) In an August 27, 2001 letter, while professing to love Ms. Dawson, Mr. Matthei refers to her and Mr. Burgess as "a couple of little sneaks." (Butler Decl. Ex. VV.) In a December 3, 2001 letter, Mr. Matthei wrote that he told Ms. Dawson to discontinue certain insurance policies, which Ms. Dawson had objected to paying. (See Butler Decl. Ex. JJ.)

As explained more fully above, to establish the existence of an "enterprise," Ms. Marshall must prove the existence of "an ongoing organization, formal or informal," *Turkette, 452 U.S. at 583*, which requires proof of an "ongoing organization with sort of framework for making or carrying out decisions." *Urban, 404 F.3d at 770* (citing *Irizarry, 341 F.3d at 286*).

Ms. Marshall's assertion that the Matthei-Dawson relationship constitutes an "ongoing organization" is tenuous at best. Mr. Matthei and Ms. Dawson were involved in a romantic relationship that evolved into a marriage, subsequently soured, and then legally terminated. After Mr. Matthei **[*54]** became incarcerated, communication between the two was limited. There is no evidence of an "ongoing organization" following the termination of the marriage aside from the fact that Mr. Matthei and Ms. Dawson intermittently contacted one another (often through their attorneys), in order to pursue the Consent Order. The evidence suggests that they stayed in touch until they were able to legally dissolve their marriage and resolve any attendant financial obligations toward one another. Furthermore, the evidence suggests that, after the marriage terminated, the two only communicated with respect to the Consent Order.

Ms. Marshall has not offered any evidence that this association-in-fact had either a formal or informal decision-making structure, or that it functioned through the use of a chain of command or any central decision-making function. She has offered no evidence indicating how decisions were made. This is not a case where one participant issued instructions and the other participant carried out those instructions. Rather, the evidence indicates that Ms. Dawson acted of her own accord and in her own interest, as did Mr. Matthei. This would tend to indicate either an unconventional **[*55]** "structure" or a complete absence thereof. Or, as the Court observed above, this indicates that Mr. Matthei's and Ms. Dawson's motives were not as aligned as Ms. Marshall would like them to be.

Certainly, some minimal "division of labor" can be adduced by the fact that for much of this "ongoing relationship" Mr. Matthei was in prison, and therefore required assistance, which Ms. Dawson provided, in order to pay bills, keep his financial affairs in order, keep insurance policies current, etc. Mr. Matthei indicated that he had reached a "verbal agreement" with Ms. Dawson whereby she would continue to assist him in this manner while he was incarcerated. However, this de facto "structure" does not rise to the level of qualifying this relationship as a RICO enterprise. [17]

For the reasons stated above, the Court concludes that the association-in-fact of Mr. Matthei and Ms. Dawson is not a viable enterprise under RICO. [18]

b. *Lepanto*

Defendants' Motion for Summary Judgment does not address in detail any argument that Lepanto fails to

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[17] As noted above, second *Turkette* factor requires Ms. Marshall to show that the participants in the alleged enterprise occupied continuing positions within the group consistent with the organizational structure established by the first element. *Riccobene, 709 F.2d at 223*. Because the Court found that the association-in-fact of Mr. Matthei and Ms. Dawson lacks sufficient structure to satisfy the first *Turkette* factor, the **[*56]** Court need not address the second factor. The Court notes, however, that because this association-in-fact does not have any discernable "organizational structure," it is not difficult to conclude that Mr. Matthei and Ms. Dawson did not occupy "continuing positions" consistent with any such "structure."

In addition, it would seem that Ms. Marshall's arguments fall short of establishing the third *Turkette* factor - that this association-in-fact is "separate and apart from the pattern of activity" in which it engages. Mr. Matthei and Ms. Dawson were married in December 1995, and their Consent Decree was entered in late 2002. In the interim, Mr. Matthei was incarcerated since August 1996. Therefore, for over six years of the couple's seven-year "ongoing relationship," Mr. Matthei was in prison. The only evidence of any communication between the two is Mr. Matthei's testimony, and the various correspondence between the two, at times involving Mr. Fenstermacher and/or Mr. Burgess. Based on this evidence, once Mr. Matthei was incarcerated, it seems the substance of communications, aside from a few communications of a personal nature, was restricted to financial responsibilities, terminating **[*57]** the marriage, and settling any financial matters attendant to the marriage. Under these circumstances, it seems unlikely that Mr. Matthei and Ms. Dawson's "ongoing relationship" had any real existence that was "separate and apart from" communicating in order to extricate themselves from one another by way of the Consent Order.

[18] For the same reasons, Ms. Marshall cannot establish that the expanded association-in-fact of Matthei-Dawson-Fenstermacher-Burgess is an "enterprise" under RICO. Because the evidence establishes that Mr. Matthei and Ms. Dawson did not occupy roles in an "enterprise" in furthering any scheme, the fact that Mr. Fenstermacher represented Mr. Matthei and Mr. Burgess represented Ms. Dawson in certain matters germane to this dispute, does not transform this group of individuals into an "enterprise" for RICO purposes.

satisfy the first or second of the *Turkette* factors, i.e., that it was an ongoing entity with **[*58]** a decision-making framework that functioned as a continuing unit. [19] Instead, Defendants argue that Lepanto is not a valid "enterprise" because Lepanto is not "separate and apart from the pattern of activity" in which it engages. Defendants argue that Lepanto "existed for no other reason than housing the fraudulently conveyed assets." Ms. Marshall argues that Lepanto was formed as a hedge fund, which constitutes a distinct purpose for purposes of establishing a RICO enterprise.

As discussed above, the Third Circuit does not require evidence "that the enterprise has some **[*59]** function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." *Riccobene, 709 F.2d at 223-24*.

Even under this liberal test, however, Lepanto cannot satisfy the separateness requirement. Every corporation, by its nature, has an "existence" that is separate from the acts that the corporation commits. Unless a corporation is dissolved or otherwise ceases to exist as a separate entity, it "exists." However, while Lepanto may have had a separate "existence," no evidence presented indicates that it ever had a separate function or purpose. In this case Ms. Marshall has not even alleged, and cannot prove, that Lepanto conducted any business or served any purpose other than the commission of two discrete acts: it bought and later sold the Mayfair Flat. It cannot be argued that Lepanto -- through its agents -- performed the "function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis." *Riccobene, 709 F.2d at 223-24*. Even though Lepanto may have technically "existed" apart from the **[*60]** commission of the predicate acts, there is no evidence that Lepanto had any function unrelated to such acts, any involvement in Mr. Matthei's affairs other than those acts, or that it provided any legitimate services at all during the period in question. See *Console, 13 F.3d at 652*.

This is not to say that Lepanto was not a cleverly-designed vehicle that Mr. Matthei used to shield his assets from his creditors. However, giving Ms. Marshall the benefit of every inference, the evidence suggests that Lepanto was at most a mere tool utilized by Mr. Matthei for those purposes. However Mr. Matthei may have conducted his affairs, it is clear that Lepanto was not the entity that provided the visual presence, legitimacy or organizational structure that enabled Mr. Matthei to carry out his goals. Therefore, the Court concludes that Lepanto does not constitute an "enterprise" under the RICO statutes.

Because Ms. Marshall has not established the existence of any RICO "enterprise," summary judgment will be granted for Defendants on Ms. Marshall's *§ 1962(c)* claims. In addition, the Defendants argue, and the Court agrees, that summary judgment also must be granted on Ms. Marshall's *§ 1962(c)* claims **[*61]** because, even if Ms. Marshall was able to establish that a viable RICO "enterprise" exists, she has failed to establish that either Mr. Fenstermacher or High Swartz "participated" in the "operation or management" of any such RICO enterprise.

**D. Mr. Fenstermacher's Alleged "Participation"**

While Plaintiff correctly asserts that *Reves*' "operation or management" test is not a "broad shield against attorney liability under RICO," Ms. Marshall has not provided any evidence that Mr. Fenstermacher or High Swartz participated in the "operation or management" of any alleged RICO enterprise. (Pl. Mot. Opp'n Summ. J. 46.) Notably, while at various stages of this litigation Ms. Marshall has alleged the existence of as many as four alternative "enterprises," she has failed to argue with any specificity which of her alleged enterprises Mr. Fenstermacher was employed by, associated with or participated in conducting the affairs of. As in *Peat Marwick*, Ms. Marshall's papers focus almost exclusively on the alleged importance and indispensability of Mr. Fenstermacher's services and the "power" Mr. Fenstermacher wielded over the alleged scheme, without addressing which alleged enterprise Mr. Fenstermacher's **[*62]** activities were supposedly advancing.

The Court is guided by our Court of Appeals' reasoning in *Peat Marwick* in holding that by any reading of the

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[19] Because Lepanto was a corporate structure, Mr. Matthei was its President and Director from at least 1993 until April 2001, and Ms. Dawson had the authority to take certain actions on behalf of the corporation, it appears that a basic "framework" for decision-making was in place. It also appears that Lepanto "existed" as a continuing unit throughout the period of time in question, even though it is not clear that Lepanto actually conducted any business or served any purpose at all. Because Defendants do not argue that Lepanto fails the first or second *Turkette* factor, the Court will presume that these factors are met.

evidence, Mr. Fenstermacher or High Swartz cannot be said to have participated in the "operation or management" of any alleged RICO enterprises.

1. *The Matthei--Dawson Association-in-Fact*[20]

Simply stated, Mr. Fenstermacher's participation in the affairs **[*63]** of the association-in-fact of Mr. Matthei and Ms. Dawson does not satisfy Reves' "operation and management" test. Viewing the "Fenstermacher Transactions" as a whole or as three discrete transactions yields the same conclusion: Fenstermacher acted as a mere "middleman," a conduit for communications between Mr. Matthei and Ms. Dawson. Mr. Fenstermacher provided certain professional (although largely ministerial) services that, although "indispensable" in that certain events may not have occurred without a lawyer's involvement, do not indicate that Mr. Fenstermacher was involved in the "operation or mangement" of any alleged enterprise.

Ms. Marshall consistently refers to Fenstermacher as a "middleman" who was hired "simply to ferry documents back and forth -- either in person or using the attorney-client imprimatur -- to keep the untoward secrets from being learned by the federal authorities." (Pl. Statement of Facts P 78; see also id. PP 1, 43, 47, 93.) A "middleman" is an "intermediary" or an "agent" between two parties. Mirriam-Webster Collegiate Dictionary (11th ed. 2003). Plaintiff has offered no evidence that Mr. Fenstermacher acted in any capacity other than as a mere "intermediary." **[*64]** She alleges that Mr. Fenstermacher's role was to "create secrecy for the communications between Matthei and Dawson" (Pl. Statement of Facts P 45), but she acknowledges Mr. Fenstermacher's admission that he "rendered no advice to Matthei." (Pl. Statement of Facts P 46.) [21] Ms. Marshall at once attempts to belittle his role in the allege scheme by asserting that he provided no legitimate legal services, while emphasizing the "control" he exercised over the scheme by misusing the attorney-client "imprimatur." Even if his conduct was improper, "[a] defendant does not "direct" an enterprise's affairs under *§ 1962(c)* merely by engaging in wrongful conduct that assists the enterprise." *Redtail Leasing v. Bellezza, No. 95 Civ. 5191, 1997 U.S. Dist. LEXIS 14821, at *14 (S.D.N.Y. Sept. 30, 1997)*.

Mr. Fenstermacher's role as a "middleman" was minimal, ministerial and falls far short of satisfying *Reves*'"operation and management" test. Unlike Handeen, there is no evidence that Mr. Fenstermacher "controlled" or "conducted" any material element of any scheme. See *Handeen, 112 F.3d at 1350*. Like *Peat Marwick*, although Mr. Fenstermacher's involvement may have been technically "indispensable," i.e., someone needed to assist Ms. Dawson, who resided in England, in communicating with Mr. Matthei, who was incarcerated in Philadelphia, Mr. Fenstermacher **[*66]** merely performed a ministerial service. There was not a sufficient nexus between his conduct and the alleged "enterprise" of Mr. Matthei and Ms. Dawson to satisfy the *Reves*' test. See *Peat, Marwick, 996 F.2d at 1539*.

In sum, Plaintiff's borderline derisive characterization of Mr. Fenstermacher as a "middleman" seems accurate, and is supported by evidence in the record. However, Mr. Fenstermacher's role as a "middleman," under the circumstances of this case, does not satisfy *Reves*' "operation or management" test. The record is devoid of any indication that Mr. Fenstermacher made any substantive decisions that advanced any scheme

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[20] Mr. Fenstermacher and High Swartz also argue that neither of them were "employed by" or "associated with" the association-in-fact of Mr. Matthei and Ms. Dawson. However, assuming that this association-in-fact constitutes a RICO enterprise, Mr. Fenstermacher admits that he was retained as counsel for Mr. Matthei in order to represent him in matters pertaining to filing the Consent Order in England. Mr. Festermacher communicated frequently with both Mr. Matthei and Ms. Dawson in pursuit of this goal. This representation satisfies the requirement that the participant be "employed by" or "associated with" a RICO enterprise. However, as explained above, Ms. Marshall has failed to establish that Mr. Fenstermacher or High Swartz participated in the "operation and management" of any such enterprise.

[21] Plaintiff argues that Mr. Fenstermacher exercised both "power" and "control" over the activities at play here. (Pl. Mem. Opp'n Summ. J. 48.) Plaintiff argues that Mr. Fenstermacher had the "power" to decide whether to execute the Statement of Information, and that he possessed "control of the scheme at various other points" including his decision to use the "attorney-client imprimatur" to process **[*65]** the Lopanto documents to further the backdating scheme. (Pl. Mem. Opp'n Summ. J. 48.) Surely, however, Plaintiff is required to prove that Mr. Fenstermacher's involvement amounted to more than making the decision to exercise free will. As discussed above, Mr. Fenstermacher's participation included nothing more than implementing requests from Mr. Matthei or Ms. Dawson.

Further, Plaintiff contends that the services that Mr. Fenstermacher played a "crucial role," that he was not a "helpless pawn" and that the services he provided were "indispensible." to the success of the scheme. (Pl. Mem. Opp'n Summ. J. 48; Pl. Statement of Facts P 110.)

devised by Mr. Matthei; he simply did what he was asked to do. The record evidence indicates that Mr. Fenstermacher's role was to provide other parties with a means of communication with Mr. Matthei and to facilitate the execution of certain paperwork by Mr. Matthei. Mr. Fenstermacher sent and received correspondence, the purpose of which was to convey a message to, or to forward documents between or among, Mr. Matthei, Ms. Dawson and Mr. Burgess. [22] This correspondence related to Mr. Fenstermacher's representation of Mr. Matthei in negotiating the Consent Order **[*67]** with Ms. Dawson. [23] No evidence has been introduced to suggest that Mr. Fenstermacher had any input in the drafting, editing or in any way determining the substance of the various documents that effectuated the transfer of Lepanto to Ms. Dawson. Further, there is no evidence that Mr. Fenstermacher played any role in devising any strategy, legal or otherwise, for furthering any alleged scheme in particular, or for generally evading Mr. Matthei's creditors. Indeed, it seems that the goal of entire "scheme" -- to represent to certain legal bodies in the United Kingdom that Mr. Matthei owned no assets by preparing and filing the Consent Order -- was devised before Mr. Matthei retained Mr. Fenstermacher as counsel. Mr. Fenstermacher merely served as a glorified messenger, albeit an arguably importantly placed one.

2. *Lepanto*

There is no question that Mr. Fenstermacher was only remotely affiliated with Lepanto. The most Ms. Marshall alleges is that Mr. Fenstermacher was "highly aware" of Lepanto. (Pl. Mem. Opp'n Mot. Summ. J. 45.) Mr. Fenstermacher was not "employed by" Lepanto, "associated with" Lepanto, and neither he nor High Swartz participated in the "operation or management" of Lepanto. [24] As noted above, Lepanto purchased the Mayfair Flat in 1994, six years before Mr. Matthei retained Mr. Fenstermacher, and Lepanto sold the flat in late 2002, after Mr. Fenstermacher's participation in Mr. Matthei's affairs had ended. In between those two dates, the evidence suggests that Mr. Fenstermacher sent certain documents to Mr. Matthei for him to sign -- or "backdate," as Ms. Marshall alleges -- which enabled Mr. Matthei to transfer the Mayfair Flat to Ms. Dawson. However, Ms. Marshall does not allege, and the evidence does not suggest, that Mr. Fenstermacher devised the alleged "backdating" scheme, that he drafted any of the **[*70]** pertinent documents, or that he added any substantive value to the scheme at all. As described above, Mr. Fenstermacher served as a mere "middleman," and any role Mr. Fenstermacher may have played in Lepanto's affairs, by virtue of his representation of Mr. Matthei, was incidental and minimal. In short, Ms. Marshall has failed to show that Mr. Fenstermacher participated in the "operation or management" of Lepanto.

Because Ms. Marshall has failed to establish that any "enterprise" exists and, even if any such enterprise did exist, that Mr. Fenstermacher or the law firm of High Swartz participated in the conduct or affairs of any such enterprise, summary judgment will be granted in favor of the Defendants as to Ms. Marshall's *§ 1962(c)* claims.

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[22] For example, Plaintiff includes in the record several typed letters and handwritten notes from Matthei to Fenstermacher (see Butler Decl. Exs. FF, II, JJ, MM (duplicate of Ex. JJ), SS VV, YY), typed letters and handwritten notes from Dawson to Fenstermacher (see Butler Decl. Exs. V, KK (duplicate of Ex. V), RR, AAA (duplicate of Ex. R)), letters from Burgess to Fenstermacher **[*68]** (see Butler Decl. Exs. P, EE, WW, ZZ), letters from Fenstermacher to Matthei (see Butler Decl. Exs. HH, LL, TT), letters from Fenstermacher to Dawson (see Butler Exs. BB, GG), and a letter from Fenstermacher to Burgess (see Bulter Decl. Ex. W).

[23] Ms. Marshall notes that although Mr. Fenstermacher represented Mr. Matthei, and Ms. Dawson had retained her own counsel in England, Mr. Fenstermacher and Ms. Dawson often corresponded with one another outside of the presence of her counsel. Ms. Marshall points to this interaction as evidence of the alleged scheme.

Ms. Marshall's arguments are unavailing because, even if there is a "scheme" at work here, it is clear that Mr. Fenstermacher played no operative or management role in it. While it is odd -- and under certain circumstances, professionally inappropriate -- that Mr. Fenstermacher would have frequently corresponded with Ms. Dawson while representing her ex-husband (and adversary) in a post-divorce proceeding, this oddity is partially explained by the fact that Ms. Dawson was paying Mr. Fenstermacher's bills due to Mr. Matthei's incarceration. Mr. Fenstermacher's contact with Ms. Dawson is consistent with Ms. Marshall's assertion that **[*69]** Mr. Fenstermacher was retained as an intermediary to allow Ms. Dawson to correspond with Mr. Matthei, via Mr. Fenstermacher, while Mr. Matthei was incarcerated in Philadelphia.

[24] Ms. Marshall notes that initially some confusion arose as to whether Mr. Fenstermacher would be representing Mr. Matthei or Ms. Dawson, but Ms. Marshall never alleges that Mr. Fenstermacher was engaged to provide legal services to Lepanto itself.

**II. Count X -- Violation of *18 U.S.C. § 1962(d)* -- RICO Conspiracy**

Defendants also argue that because Ms. Marshall has not established facts that can support a violation of *Section 1962(c)*, the Defendants **[*71]** could not have conspired to violate RICO. Therefore, Defendants argue, Ms. Marshall's *Section 1962(d)* claim must also fail.

*Section 1962(d)* provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this subsection." *18 U.S.C. § 1962(d)*. Under *Section 1962(d)*, "a defendant may be held liable for conspiracy to violate *section 1962(c)* if he knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise." *Smith v. Berg, 247 F.3d 532, 538 (3d Cir. 2001)*. Liability under *Section 1962(c)* is not a prerequisite for liability under *Section 1962(d)*. See *Salinas v. United States, 522 U.S. 52, 63, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997)*; see also *Smith, 247 F.3d at 537* ("Salinas makes clear that *§ 1962(c)* liability is not a prerequisite to *§ 1962(d)* liability"). However, because Ms. Marshall has failed to establish the existence of a RICO enterprise, she cannot prove that the Defendants knowingly agreed to facilitate any such enterprise's activities. See *Harry Miller Corp., 468 F. Supp. 2d 708, 2006 U.S. Dist. LEXIS 93082, at *30-31*. Therefore, Ms. Marshall's *Section 1962(d)* claim fails, and Defendants' motion for summary judgment will **[*72]** be granted as to that claim as well.

**IV. Counts XI and XII--New Jersey RICO and RICO Conspiracy**

Defendants argue that New Jersey courts construe the New Jersey RICO statute and the federal RICO statute in the same way, and, therefore, the same analysis applies to both statutes. Accordingly, Defendants argue, if the Court grants summary judgment in their favor on Ms. Marshall's federal RICO claims, then the Court must also find that Ms. Marshall's New Jersey RICO claims fail. Ms. Marshall argues that New Jersey court have interpreted its RICO statutes more broadly than the federal law. She argues that under New Jersey courts' more lenient interpretation of what constitutes an "enterprise," [25] any one of her alleged alternative enterprises satisfied New Jersey's standard. In addition, Ms. Marshall argues that the Reves ' "operation or management" test is not applied under New Jersey's RICO statute.

New Jersey's equivalent to *18 U.S.C. § 1962(c)* provides that it is "unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *N.J. Stat. Ann. § 2C:41-2(c)*. The New Jersey Supreme Court has recognized that the New Jersey RICO statute is modeled on the federal RICO statute, and that in the absence of New Jersey decisions applying a broader analysis of the New Jersey statute, courts interpreting that statute may look to opinions interpreting equivalent provisions of the federal statute. *Shan Indus., LLC v. Tyco Int'l (US), Inc., No. 04-1018, 2005 U.S. Dist. LEXIS 37983, at *47-48 (D.N.J. Sept. 12, 2005)* (citing *State v. Ball, 141 N.J. 142, 156, 661 A.2d 251 (N.J. 1995)* [hereinafter Ball II ]).

The Appellate Division of the New Jersey Superior Court acknowledged that the New Jersey and Federal RICO Statutes are very similar, but that "there are significant differences in their **[*74]** expressed purposes which demonstrate [the New Jersey] Legislature's willingness to fashion a state RICO law even broader in scope than its federal counterpart." *State v. Ball, 268 N.J. Super. 72, 105, 632 A.2d 1222 (App. Div. 1993)* [hereinafter Ball I]. [26] The court stated that "all that is required to satisfy the New Jersey RICO enterprise element is a group of people, however loosely associated, whose existence provides the common purpose of committing two or more predicate acts." *Ball I, 268 N.J. Super. at 107*. [27]

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[25] New Jersey law defines as enterprise as follows: "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well **[*73]** as licit enterprises and governmental as well as other entities." *N.J. Stat. § 2C:41-1(c)*.

[26] New Jersey's equivalent to *18 U.S.C. 1962(c)* states that "[i]t be unlawful for any person employed by or associated with any enterprise engaged in or activities of which affect trade or commerce to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *N.J. Stat. Ann. § 2C:41-2(c)*.

[27] In Ball I, the court acknowledged that the alleged enterprise

On appeal, the New Jersey Supreme Court clarified the lower court's ruling, requiring that an enterprise have "organization." *Ball II, 141 N.J. at 162*. The court stated that the RICO statute does not contain a requirement that an enterprise have a "distinct ascertainable structure," but that "it is framed broadly to include any group of persons 'associated in fact.'" *Id. at 160*. The court found that the New Jersey RICO statute "commands the liberal construction of 'enterprise,'" which encompasses less organized and non-traditional criminal entities, in addition to the typical "mafia" elements. *Id. at 160-61*. The Court further stated that:

> The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a **[*76]** group, to accomplish its goal, divides among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the "enterprise" because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an "organization."
>
> This understanding of the kind of organization that establishes an "enterprise" is different from, but not necessarily inconsistent with, that understanding of "enterprise" premised on an "ascertainable structure." Thus, evidence showing an ascertainable structure will support the inference that the group engaged in carefully planned and highly coordinated criminal activity, and therefore will support the conclusion that an "enterprise" existed. Apart from an organization's structure as such, however, the focus of the evidence must be on the number of people involved and their knowledge of the objectives of their association, how the participants associated with each other, whether the **[*77]** participants each performed discrete roles in carrying out the scheme, the level of planning involved, how decisions were made, the coordination involved in implementing decisions, and how frequently the group engaged in incidents or committed acts of racketeering activity, and the length of time between them.

*Ball II, 141 N.J. at 162-63*.

As *Ball II* makes clear, the New Jersey courts have interpreted New Jersey RICO's definition of an "enterprise" to be more broad than the federal counterpart. Therefore, "it is quite conceivable that one could fail to satisfy a federal RICO cause of action, yet meet the requirements for a successful [New Jersey] RICO claim." *Horowitz v. Marlton Oncology, P.C., 116 F. Supp. 2d 551, 554 n.1 (D.N.J. 1999)*.

Defendants have made no effort to argue that, despite some differences between courts' interpretations of the federal RICO statute and New Jersey's counterpart, Ms. Marshall has still failed to prove the existence of a viable "enterprise." Ms. Marshall on the other hand, has noted these differences in some detail and argued that her alternative enterprises satisfy New Jersey's more liberal tests. [28] Because Defendants have put forth no real

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was a "somewhat disorganized group of individuals" with "no real 'leader,'" and "no one to whom all members owed allegiance, or to whom all members are required to report." *Ball I, 268 N.J. Super. at 107*. Despite the fact that the groups **[*75]** members "did not even seem to like each other, and were often engaged in double-dealing and back-stabbing," the court concluded that an enterprise existed because the members of the group "deliberately associated themselves with one another in order to make money from illegal dumping" and "collectively agreed to take part in a number of criminal activities, including money laundering, forgery, theft of services, and bribery." Id.

[28] As noted above, Ms. Marshall also argues that the Reves' "operation or management" test is not applied under New Jersey's RICO statute. In Ball II, the New Jersey Supreme Court held that New Jersey's RICO statute "does not contain a requirement that in order 'to conduct or participate in an enterprise,' a defendant must be found to exercise responsibilities of 'operation or management.'" *Ball II, 141 N.J. at 175*. The court further held that under *N.J. Stat. Ann. § 2C:41-2(c)*,

> a person is "employed by or associated with an enterprise" if he or she has a position or a functional connection with the enterprise that enables him or her to engage or participate directly or indirectly in the affairs of the enterprise. Further, we hold that to conduct or participate in the affairs of an enterprise means to act purposefully and knowingly in the affairs of the enterprise in the sense of engaging in activities that seek to further, assist or help effectuate the goals of the enterprise. Those activities may include acts that are managerial or supervisory **[*79]** or exercise control and direction over the goals, or over the methods used to achieve the goals, of the enterprise. Participatory conduct or activities also may be found in acts that are below the managerial or supervisory level, and do not exert control or direction

arguments as **[*78]** to why summary judgment should be granted in their favor on Ms. Marshall's New Jersey RICO claims, their motion will be denied as to these claims. [29]

**CONCLUSION**

For the reasons stated above, the Motion for Reconsideration filed by Mr. Fenstermacher and High Swartz will be granted. In reconsidering Defendants' Motion for Summary Judgment as to Ms. Marshall's RICO claims, the Court concludes that summary judgment is appropriate with respect to Ms. Marshall's claims under the federal RICO statutes. However, Defendants' Motion for Summary Judgment will be denied in all other respects.

Gene E.K. Pratter

United States District Judge

**ORDER**

**AND NOW**, this 2nd **[*81]** day of October, 2007, upon consideration of the Defendants' Motion for Reconsideration (Docket No. 111), and Plaintiff's response thereto (Docket No. 113), [30] for the reasons provided in the accompanying Memorandum, it is **ORDERED** that:

1. Defendants' Motion for Reconsideration (Docket No. 111) is **GRANTED**.

2. The Court's Order of November 16, 2006 (Docket No. 110) is **VACATED**.

3. Defendants' Motion for Summary Judgment (Docket No. 109) is **GRANTED** and summary judgement is entered as to Counts IX and X of Ms. Marshall's Second Amended Complaint.

4. Defendants' Motion for Summary Judgment is **DENIED** in all other respects.

**IT IS FURTHER ORDERED** that a status conference in this matter is scheduled for Thursday, **[*82]** November 15, 2007 at 1:00 p.m. in Chambers.

BY THE COURT:

GENE E.K. PRATTER

United States District Judge

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over the affairs of the enterprise, as long as the actor, directly or indirectly, knowingly seeks to carry out, assist, or further the operations of the enterprise or otherwise seeks to implement or execute managerial or supervisory decisions.

*Id.* Thus, even though the Court has found that Mr. Fenstermacher's participation in any of Ms. Marshall's failed to satsify the *Reves*' "operation and management" test under federal RICO laws, should Ms. Marshall prove to be successful in establishing an enterprise under New Jersey law, the Court cannot foreclose the possibility that Ms. Marshall could adduce evidence that may convince a factfinder that Mr. Fenstermacher "directly or indirectly, knowingly [sought] to carry out, assist, or further the operations of" an enterprise. *Id.*

[29] The Court suspects that, even under New Jersey's more liberal definition of "enterprise," the "hallmarks" of an enterprise nevertheless easily could **[*80]** prove to be missing from each one of Ms. Marshall's alleged "enterprises." The association-in-fact of Mr. Matthei and Ms. Dawson lacks the elements of an "organization" that the New Jersey Supreme Court discussed in *Ball II*, namely, the division of labor and separation of functions necessary to "engage in a high degree of planning, cooperation and coordination." *Ball II, 141 N.J. at 162-63*. Ms. Marshall has not offered any evidence that would indicate that any degree of planning was involved, that the participants performed discrete roles in carrying out the scheme, or that would indicate any semblance of coordination among the participants involved in implementing decisions. *Id. at 163*.

[30] In rendering its decision the Court also reviewed Defendants' Motion for Summary Judgment (Docket No. 84), Ms. Marshall's responses thereto (Docket Nos. 95, 97, 98), Defendants' Reply (Docket No. 105), Defendants' Proposed Statement of Facts in Support of Motion for Summary Judgment (Docket No. 106), Plaintiff's Response to Defendants' Proposed Statement of Facts (Docket No. 108), and Plaintiff's Statement of Facts in Opposition to Defendants' Motion for Summary Judgment (Docket No. 109).

# Exhibit 2

# *United States v. Rabbitt*

United States District Court for the District of New Jersey

September 4, 2024, Filed

Criminal Action No. 23-320 (MAS)

**Reporter**
2024 U.S. Dist. LEXIS 159079 *; 2024 WL 4041912

UNITED STATES OF AMERICA, v. JEAN E. RABBITT & KEVIN AGUILAR.

**Notice:** NOT FOR PUBLICATION

**Counsel: [*1]** For JEAN E. RABBITT, Defendant: LAURA C. SAYLER, LEAD ATTORNEY, OFFICE OF THE FEDERAL PUBLIC DEFENDER, UNITED STATE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NEWARK, NJ.

For KEVIN AGUILAR, Defendant: ALYSSA A. CIMINO, LEAD ATTORNEY, CIMINO LAW, LLC, FAIRFIELD, NJ.

For USA, Plaintiff: DAVID V. SIMUNOVICH, LEAD ATTORNEY, OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, NEWARK, NJ.

**Judges:** MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

**Opinion by:** MICHAEL A. SHIPP

## Opinion

**MEMORANDUM OPINION**

**SHIPP, District Judge**

This matter comes before the Court upon Defendant Jean E. Rabbit's ("Defendant" or "Rabbitt") omnibus motion (ECF No. 57). The United States of America (the "Government") opposed (ECF No. 66), and Rabbitt replied (ECF No. 67). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1, which is applicable to criminal cases under Local Civil Rule 1.1. For the reasons set forth herein, Rabbitt's omnibus motion is granted in part, denied in part.

### I. BACKGROUND

#### A. The Indictment

On April 19, 2023, Rabbitt and Kevin Aguilar ("Aguilar") (collectively, "Defendants") were indicted in the District of New Jersey by a grand jury for the following Counts: (1) Conspiracy to Commit **[*2]** Bank Fraud, in violation of *18 U.S.C. § 1349* (Count 1); (2) Bank Fraud, in violation of *18 U.S.C. §§ 1344* and *2* (Counts 2-8); (3) Conspiracy to Commit Wire Fraud, in violation of *18 U.S.C. § 1349* (Count 9); (4) Wire Fraud, in violation of *18 U.S.C. §§ 1343* and *2* (Counts 10-12); (5) Conspiracy to Engage in Monetary Transactions in Property Derived from Specified Unlawful Activity, in violation of *18 U.S.C. § 1956(h)* (Count 13); (6) Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, in violation of *18 U.S.C. §§1957* and *2* (Counts 14, 15[1]); and (7) Aggravated Identity Theft, in violation of *18 U.S.C. §§ 1028A(a)(1)* and *2* (Count 16). (Indictment ¶¶ 1-24, ECF No. 37.) Rabbitt was also indicted for False Statements in a Loan Application, in violation of *18 U.S.C. §§ 1014* and *2* (Count 17). (Indictment ¶ 24; *see also* Gov't's Opp'n Br. 4.)

#### B. The Instant Motion[2]

On May 1, 2024, Rabbitt filed an omnibus motion raising several requests. (Def.'s Moving Br., ECF No. 57.) Specifically, Rabbitt seeks to: (1) dismiss Counts 1-9 and 13 of the Indictment "for failure to state an offense and failure to charge essential elements"; (2) sever Rabbitt's trial from Aguilar's to protect Rabbitt's *Sixth Amendment* Rights; (3) require the Government to

[1] Count 14 is specific to Rabbitt only, and Count 15 is specific to Aguilar only. (Indictment ¶¶ 17-20.)

[2] Aguilar did not request to join in on Rabbitt's omnibus motion.

disclose unredacted copies of already produced discovery or produce a privilege log of **[*3]** the same; (4) require the Government to disclose all *Brady* material in advance of trial; and (5) be permitted to file any additional motions or join any of Aguilar's motions as necessary. (*Id.*)

The Government opposed (Gov't's Opp'n Br., ECF No. 66) and Rabbitt replied (Def.'s Reply Br., ECF No. 67).

## II. DISCUSSION

### A. Motion to Dismiss Counts 1-9 and 13

#### *1. Legal Standard*

An indictment is sufficient if it is "a plain, concise, and definite written statement of the essential facts constituting the offense charged." *Fed. R. Crim. P. 7(c)(1)*; *see also United States v. Resendiz-Ponce, 549 U.S. 102, 110, 127 S. Ct. 782, 166 L. Ed. 2d 591 (2007)* ("[D]etailed allegations ... are not contemplated by *[Federal] Rule [of Criminal Procedure] 7(c)(1)*."[3]). Nevertheless, a defendant may move to dismiss an indictment for "lack of specificity" or "failure to state an offense." *Fed. R. Crim. P. 12(b)(3)(B)*. In the Third Circuit, an indictment is facially sufficient to warrant a trial on the merits if it:

> (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.

*United States v. Vitillo, 490 F.3d 314, 321 (3d. Cir 2007)* (quoting *United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)*). Accordingly, an indictment that recites the statutory language of the offense charged is **[*4]** adequate "so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *Rankin, 870 F.2d at 112*; *see also Resendiz-Ponce, 549 U.S. at 109* ("[A]n indictment parroting the language of a federal criminal statute is often sufficient."); *but see Russell v. United States, 369 U.S. 749, 765, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962)* ("Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." (citations omitted)). Yet, "such dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges." *United States v. DeLaurentis, 230 F.3d 659, 661 (3d Cir. 2000)*; *United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990)* ("In considering a defense motion to dismiss an indictment, the district court accepts as true the factual allegations set forth in the indictment.").

#### *2. Motion to Dismiss Count 1*

First, Rabbitt argues that Count 1 of the Indictment, charging conspiracy to commit bank fraud, must be dismissed because: "(1) it fails to state an offense by charging conspiracy to attempt bank fraud, which is not a crime under a proper reading of the relevant statutes; (2) it omits the **[*5]** materiality element of bank fraud; and (3) it omits the intent-to-defraud element of *[§] 1344(1)*." (Def.'s Moving Br. 3.) The Court addresses each in turn.

##### a. Failure to State an Offense

Rabbitt asserts that Count 1 improperly charges her "not only with conspiring to commit bank fraud, but also conspiring to *attempt* bank fraud" which is "not a cognizable offense." (*Id.* at 4.) Specifically, Rabbitt states that *§ 1349* covers conspiracies and attempts, not *conspiracies to attempt* offenses or *attempts to conspire* to commit such offenses. (*Id.* at 5.) Rabbitt concedes that she is unaware of any caselaw on the particular question, but offers out-of-jurisdiction cases in other statutory contexts for support. (*Id.* at 5-6.)

As an initial matter, the Court clarifies that Count 1 charges Defendants with conspiracy to commit bank fraud. (Indictment ¶¶ 1-4.) In fact, plain reading of the Indictment reveals that Defendants are charged with *succeeding* in their conspiracy to commit bank fraud, which led to approval of approximately $3.3 million in PPP loans. (Indictment ¶¶ 2-4.) *See United States v. Menendez, 137 F. Supp. 3d 688, 692 (D.N.J. 2015)*, *aff'd*, *831 F.3d 155 (3d Cir. 2016)* ("[C]riminal indictments are to be read as a whole and interpreted in a common sense manner." (quoting *United States v. Lee, 359 F.3d 194, 209 (3d Cir. 2004)*)).

[3] All references to "Rule" or "Rules" hereinafter refer to the Federal Rules of Criminal Procedure.

Taking a closer read, **[*6]** the term "attempt" is included in the Indictment to track the statutory language. Conspiracy to commit bank fraud is prohibited by 18 U.S.C. § 1349, which provides that "[a]ny person who *attempts* or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense ...." 18 U.S.C. § 1349. To prove bank fraud, which is an offense under the relevant chapter,

> the evidence must establish beyond a reasonable doubt that a defendant "knowingly execut[ed], or *attempt*[*ed*] to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises."

United States v. Vargas, 629 F. App'x 415, 418 (3d Cir. 2015) (emphasis added) (quoting 18 U.S.C. § 1344).

More importantly, the Third Circuit has affirmed convictions charging defendants with the same charge that Defendants face under Count 1. *See, e.g.,* United States v. King, No. 18-379, 2021 U.S. Dist. LEXIS 161088, 2021 WL 3783157, at *1 (D.N.J. Aug. 24, 2021) (jury found defendant guilty on all counts, which included *conspiracy to commit bank fraud* in violation 18 U.S.C. § 1349 and three counts of bank fraud in violation of 18 U.S.C. § 1344), *aff'd sub nom.,* United States v. Kusi, No. 20-1095, 2021 U.S. App. LEXIS 34953, 2021 WL 5505399 (3d Cir. Nov. 24, 2021); United States v. Duncan, No. 21-187, 2022 U.S. Dist. LEXIS 74402, 2022 WL 1213466, at *2 (D.N.J. Apr. 22, 2022) ("Defendant pleaded guilty to a charge of conspiracy **[*7]** to commit bank fraud in violation of 18 U.S.C. §§ 1344 and 1349.").

As such, the Court finds Rabbitt's out-of-jurisdiction caselaw on other statutory contexts unconvincing to find that Count 1 must be dismissed.

**b. Materiality Element**

Next, Rabbitt asserts that the Government fails to charge the materiality element of bank fraud because "the word 'material'" is left out of Count 1. (Def.'s Moving Br. 7-8.) Rabbitt argues that any references to "materially fraudulent applications" or "materially false statements" in the Indictment are insufficient because "they appear in sections of the count that the [G]overnment is not strictly required to prove." (*Id.* at 8.)

Indeed, the Supreme Court has held that although the term "material" is not explicitly included in the statutory language, "materiality of falsehood is an element of the federal. . . wire fraud[] and bank fraud statutes." Neder v. United States, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). This is because "the word 'fraudulent' clearly encompasses the notion of materiality." United States v. Stewart, 151 F. Supp. 2d 572, 584 (E.D. Pa. 2001), *opinion corrected*, No. 96-583, 2007 U.S. Dist. LEXIS 50397, 2007 WL 2032930 (E.D. Pa. July 12, 2007);[4] *see also* United States v. Klein, 476 F.3d 111, 113 (2d Cir. 2007), *as corrected* (Mar. 8, 2007) ("It is true that a bank fraud conviction requires a showing that the fraudulent conduct was material, Neder, 527 U.S. at 25, although the bank fraud statute does not contain that actual word. 18 U.S.C. § 1344." (cleaned **[*8]** up))).

Critically, however, Rabbitt's argument is meritless because courts have held that an indictment is not defective just because it does not use the exact word "material" in allegations of fraud, as long as there are specific allegations of misrepresentation in the indictment.[5] Here, the Court finds that "by any

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[4] As aptly stated by a sister court,

> [t]he word "fraud" is a "legal term of art." United States v. Cefaratti, 221 F.3d 502, 507 (3d Cir. 2000). At common law, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." Neder, 527 U.S. at 22; *see* United States v. Coffman, 94 F.3d 330, 335 (7th Cir. 1996).

Stewart, 151 F. Supp. 2d at 584 (cleaned up).

[5] *See, e.g.,* Stewart, 151 F. Supp. 2d at 583-84 (declining to find the superseding indictment to be "fatally deficient" based on defendant's argument that the word "material" is omitted because the superseding indictment properly mirrored the statutory language and "identifie[d] misrepresentations that can only be characterized as material even though the word "material" is not used."); ***United States v. Solomon, 273 F.3d 1108, *2 (5th Cir. 2001)*** ("[I]n determining sufficiency of an indictment, the law does not compel 'a ritual of words.'... Though the indictment did not contain the word 'materiality,' it did allege many specific material omissions and misrepresentations made by [defendant]." (citations omitted)); *c.f.* United States v. Wecht, No. 06-26, 2007 U.S. Dist. LEXIS 79142, 2007 WL 3125096, at *5 (W.D. Pa. Oct. 24, 2007) ("Of course, materiality is an implicit element of honest services fraud under 18 U.S.C. §§ 1341, 1343 and 1346, but the failure

reasonable construction, the [Indictment] identifies misrepresentations that can only be characterized as material. . . ." Stewart, 151 F. Supp. 2d at 584. Specifically, the Indictment alleges that Defendants submitted: (1) Payroll Protection Program ("PPP") applications that contained "numerous *materially false statements*" to financial institutions on behalf of several corporate entities formed, owned, and controlled by Rabbitt ("Borrower Companies"), and (2) "materially false documentation to support the *fraudulent* PPP applications." (Indictment ¶¶ 1, 4(b), (c) (emphasis added).) The Indictment further provides that "*[b]ased on the materially false statements and documentation* in the applications, [the financial institutions] approved **[*9]** several PPP loans . . . lending the Borrower Companies over approximately $3,300,000." (*Id.* ¶¶ 4(d), (e) (emphasis added).) In short, the Indictment alleges that the misrepresentations made by Defendants in and for the PPP applications were objectively important, relevant, and material in influencing the decision of the financial institutions to grant the loans. *See* United States v. Santos, No. 18-585, 2022 U.S. Dist. LEXIS 96693, 2022 WL 1698171, at *3 (D.N.J. Mar. 22, 2022) ("A materially false statement has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'. . . [C]ourts assess materiality through an objective lens." (citing Neder, 527 U.S. at 16)); *see also* Klein, 476 F.3d at 114 ("If materiality can be inferred to be an element of criminal fraud because of the well-understood meaning of 'fraud' as a legal term, an allegation of materiality can be inferred from use of the word fraud in the indictment."). In turn, the Court finds that the Indictment fully apprises Rabbitt of the charges against her and does not hinder her from presenting a vigorous defense in this matter. *See* Rankin, 870 F.2d at 112; Stewart, 151 F. Supp. 2d at 585 (finding the same because "[t]here can be no doubt that a reasonable person would attach importance to the [relevant] misrepresentations").

The Court, therefore, **[*10]** declines to dismiss Count 1 based on Rabbitt's argument that the Government failed to plead a "materiality" element.

**c. Intent-to-Defraud Element**

Finally, Rabbitt argues that Count 1 must be dismissed because "it fails to properly allege the specific intent to defraud required to prove a violation of [§] 1344(1)." (Def.'s Moving Br. 9.) Specifically, Rabbitt asserts that the Indictment "fails to allege that [Defendants] acted with the specific intent to defraud the financial institution." (*Id.* at 10.)

"[T]he *first* clause of § 1344 ... includes the requirement that a defendant intend to 'defraud a financial institution.'" Loughrin v. United States, 573 U.S. 351, 357, 134 S. Ct. 2384, 189 L. Ed. 2d 411 (2014). "To act with an 'intent to defraud' means to act knowingly and with the intention or the purpose to deceive or to cheat." United States v. Andrews, 811 F. Supp. 2d 1158, 1171 (E.D. Pa. 2011) (citing Mod. Crim. Jury Instr. 6.18.1341-4)).

To the extent Rabbitt argues that the Indictment must be dismissed because it does not include a separate intent-to-defraud element, the argument fails. Here, the Indictment reads in relevant part, that Defendants "did knowingly and *intentionally* conspire . . . with each other . . . to execute and attempt to execute a scheme and artifice to *defraud* a financial institution . . . ." (Indictment ¶ 2.) In essence, the Indictment sufficiently "parrot[s] the **[*11]** language of [the relevant] federal criminal statute[s]"[6] and provides a general description of the offense charged. Resendiz-Ponce, 549 U.S. at 109; *compare* (Indictment ¶ 2), *with* 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."), *and* 18 U.S.C. § 1344 ("Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution . . . .").

Moreover, accepting the factual allegations in the Indictment as true, Besmajian, 910 F.2d at 1154, the Court finds that the statements of facts and circumstances as to Defendants' intent to defraud sufficiently inform Rabbitt of the accused offense charged. Rankin, 870 F.2d at 112; Russell, 369 U.S. at 765. In fact, there are multiple references to Defendants' intent to defraud the financial institutions to obtain approximately $3.3 million in PPP loans, including that: (1) Defendants "*agreed* to obtain multiple PPP loans

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of an indictment to allege materiality as an explicit element is not fatal to the indictment.").

[6] Rabbitt argues that the Indictment does not align with the Third Circuit Model Jury Instructions. (Def.'s Moving Br. 10-11; Def.'s Reply 5-7.) Importantly, however, Rabbitt fails to provide case law that requires an indictment to parallel model jury instructions, not just the language of the federal criminal statute.

from [the financial institutions] *based on false and fraudulent pretenses, representations, and promises*"; (2) Defendants "*submitted materially false documentation* to support the fraudulent PPP loan applications"; and (3) "To *conceal the fraud* ***[*12]*** . . . [Defendants] then transferred the [PPP] funds to [other] bank accounts that [Aguilar] had opened ... to make it appear as if the Borrower Companies were using the funds for [] permissible purpose[s] . . . ." (Indictment ¶¶ 4(a), (c), (g) (emphasis added).) *See* United States v. Beridze, 415 F. App'x 320, 326 (2d Cir. 2011) ("Both the existence of a conspiracy and a defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence, provided it is sufficient to prove these elements beyond a reasonable doubt.").

The Court, accordingly, denies Rabbitt's motion to dismiss Count 1.[7]

***3. Motion to Dismiss Counts 9 and 13***

Next, Rabbitt argues that Count 9 (conspiracy to commit wire fraud) and Count 13 (conspiracy to engage in monetary transactions in criminally derived property) of the Indictment should be dismissed because they fail to state a cognizable offense. (Def.'s Moving Br. 11-12.)

**a. Count 9**

As to Count 9, Rabbitt argues that "conspiracy to attempt wire fraud is not a federal offense," because "the wire fraud statute does not reference attempts at all." (*Id.* at 11.) As such, Rabbitt argues that the Indictment should have charged Defendants with "conspiracy to violate [§] 1343 by committing ***[*13]*** *completed* wire fraud." (*Id.*) For the same reasons the Court denied Rabbitt's motion to dismiss Count 1, the Court denies Rabbitt's motion to dismiss Count 9.

"Conspiracy to commit wire fraud is prohibited by 18 U.S.C. § 1349." United States v. Vargas, 629 F. App'x 415, 417 (3d Cir. 2015). Wire fraud, 18 U.S.C. § 1343, requires the Government to establish beyond a reasonable doubt: "(1) a scheme or artifice to defraud for the purpose of obtaining money or property, (2) participation by the defendant with specific intent to defraud, and (3) use of. . . wire transmissions in furtherance of the scheme." *Id.* (quoting Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 105 (3d Cir. 2012)).

The Court first notes that Count 9 sufficiently parrots the statutory language. *Compare* (Indictment ¶ 8 (charging Defendants with "knowingly and intentionally conspir[ing] with each other and others to devise a scheme and artifice to defraud the [U.S. Small Business Administration ("SBA")] and others . . . .")), *with* 18 U.S.C. § 1343 and § 1349. Further, reading the Indictment as a whole and in a common sense manner, Lee, 359 F.3d at 209, Defendants are charged with *succeeding* in their conspiracy to commit wire fraud, not with *attempt* to conspire or *attempt* to commit wire fraud. (Indictment ¶¶ 7-10.) Indeed, the Indictment alleges that "[b]ased on the materially false information that [Defendants] included ***[*14]*** in the [Economic Injury Disaster Loans ("EIDL")] applications, ... the SBA provided over approximately $445,000 in EIDLs to the Borrower Companies, which [Defendants] then diverted to their own use." (Indictment ¶¶ 10(d), (h).) As to the last element of wire fraud, the Indictment alleges that "[a]t least one of the EIDL applications that [Defendants] submitted to the SBA was sent by interstate wire . . . ." (*Id.* at ¶ 10(b).)

The Court, therefore, denies Rabbitt's motion to dismiss Count 9.

**b. Count 13**

As to Count 13, Rabbitt argues that the Indictment improperly charges "conspiracy to *attempt* to engage in monetary transactions in criminal deprived property" because it is not a cognizable offense. (Def.'s Moving Br. 11-12.)

For the same reasons stated regarding Counts 1 and 9, the Court reaches the same conclusion for Count 13. First, the Court finds that Count 13 sufficiently parrots the statutory language, which includes the word "attempt." *Compare* (Indictment ¶ 14), *with* 18 U.S.C. §§ 1956(h) and 1957. Second, reading the Indictment as a whole and in a common sense manner, Lee, 359 F.3d at 209, Defendants are charged with *succeeding* in their conspiracy to commit money laundering. In short, the factual allegations state that Defendants ***[*15]*** deposited the $3.3 million obtained through PPP loans

[7] Rabbitt argues—by adopting the same reasoning for the dismissal of Count 1—that Counts 2 through 8, charging bank fraud and attempted bank fraud, should be dismissed because the Counts also fail to charge the intent-to-defraud element. (Def.'s Moving Br. 10-11.) For the same aforementioned reasons, the Court denies Rabbitt's "intent-to-defraud" argument as to Counts 2 through 8.

into the respective Borrower Companies' bank accounts, which were then transferred generally by paper checks to several corporate entities,[8] that Aguilar opened and controlled, to make it seem as though Borrower Companies were legitimately using their PPP loans for business activities. (Indictment ¶ 16(c).) Thereafter, the Indictment states that "Aguilar transferred at least approximately $2.3 million from bank accounts [of the corporate entities]. . ." to other bank accounts; "[Defendants] [then] used the funds to pay their personal expenses." (*Id.* at ¶ 16(f))

The Court, accordingly, denies Rabbitt's motion to dismiss Count 13.

**B. Motion to Sever Trial**

Rabbitt moves to sever trial from Aguilar's on the ground that "a joint trial would result in the presentation of mutually antagonistic defenses, creating confusion with the jury and requiring [Rabbitt] and [Aguilar] to defend not only the [G]overnment's allegations but also each other's." (Def.'s Moving Br. 12-15.) Rabbitt also argues that a "joint trial could potentially violate [her] due process rights" because she will be prevented from calling Aguilar as a witness. (*Id.* at 15-18.) **[*16]**

***1. Legal Standard***

*Federal Rule of Criminal Procedure 8(b)* provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." *Fed. R. Crim. R 8(b)*. Relatedly, the Supreme Court maintains "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993)* (finding that joint trials "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (internal quotations and citations omitted)).

At the same time, however, "*Rule 14*[9] recognizes that joinder, even when proper under *Rule 8(b)*, may prejudice either a defendant or the Government," such as if "mutually antagonistic" or "irreconcilable" defenses are so prejudicial as to mandate severance. *Id. at 538*. As such, the Supreme Court has held that "a district court should grant a severance . . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id. at 539* ("[A] defendant might suffer prejudice if essential exculpatory evidence **[*17]** that would be available to a defendant tried alone were unavailable in a joint trial." (citation omitted)).

"*Rule [14*] places the burden of showing prejudice from the joinder on the defendant seeking severance." *United States v. Eufrasio, 935 F.2d 553, 568 (3d Cir. 1991)* (citing *United States v. De Peri, 778 F.2d 963, 983 (3d Cir.1985)*, *cert. denied*, *475 U.S. 1110, 106 S. Ct. 1518, 89 L. Ed. 2d 916 (1986)*). Notably, "[m]otions for severance rest in the sound discretion of the trial judge." *United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981)* (citing *United States v. Boyd, 595 F.2d 120, 125 (3d Cir. 1978)*); *see Zafiro, 506 U.S. at 539* ("The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in [various] situations").

***2. Mutually Antagonistic Defenses***

Courts generally agree that "[m]utually exclusive defenses . . . exist when acquittal of one co [-] defendant would necessarily call for the conviction of the other," such as "when one person's claim of innocence is predicated solely on the guilt of a co-defendant." *United States v. Voigt, 89 F.3d 1050, 1094 (3d Cir. 1996)* (citations omitted). "In determining whether mutually antagonistic defenses exist such that severance may be required, the court must ascertain whether 'the jury could reasonably construct a sequence of events that accommodates the essence of all [defendant's] defenses.'" *Id.* "Courts have consistently held that finger-pointing and blame-shifting among co[-]conspirators do not support a finding of mutually antagonistic defenses." *Id. at 1095*; *Reicherter, 647 F.2d*

[8] The Indictment refers to the corporate entities as "Sham Payroll Companies." (Indictment 1(d).) For the purposes of the instant omnibus motion, the Court will refer to them as "corporate entities."

[9] *Rule 14* provides: "If it appears that a defendant or the [G]overnment is prejudiced by a joinder of. . . defendants ... for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." *Fed. R. Crim. P. 14(a).*

at 400 (citations **[*18]** omitted) ("Mere allegations of prejudice are not enough; and it is not sufficient simply to establish that severance would improve the defendant's chance of acquittal.").

Here, Rabbitt asserts that "a joint trial would *likely* lead to the presentation of defenses that are truly antagonistic and cannot be mutually accommodated." (Def.'s Moving Br. 14 (emphasis added).) Rabbitt does not present any potential defenses and instead states that "discovery includes multiple recordings of [Aguilar] impersonating [Rabbitt]." (*Id.*) In turn, Rabbitt argues that a finding that she did not participate in the alleged conduct will "necessarily require a finding of guilt as to [Aguilar]." (*Id.*) Rabbitt, however, fails to provide any specific factual allegations to support that such an outcome is inevitable. To the contrary, it is possible that a jury could accept Rabbitt's defense without concluding that Aguilar is guilty. *See* Voigt, 89 F.3d at 1095 ("Far more frequently, courts have concluded that the asserted defenses, while in conflict with one another, are not so irreconcilable that '[t]he jury could not have been able to assess the guilt or innocence of the defendants on an individual and independent basis.'" (citation **[*19]** omitted)); *see also* United States v. Flanagan, 34 F.3d 949, 952 (10th Cir. 1994) (affirming denial of motion to sever because a jury "could logically" accept one defendant's defense without concluding that the co-defendant was guilty, and vice versa). Without more, Rabbitt falls short of demonstrating "clear and substantial prejudice [that will result] in a manifestly unfair trial" should her severance motion be denied. Reicherter, 647 F.2d at 400 (citations omitted) (affirming the trial judge's decision to deny defendant's motion for severance because the "[d]efendant pinpoints no specific instances of prejudice."); *see* Zafiro, 506 U.S. at 539-40 (finding that denial of defendants' severance motions was proper because defendants "d[id] not articulate any specific instances of prejudice. Instead they contend[ed] that the very nature of their defenses, without more, prejudiced them.").

In short, Rabbitt fails to carry her burden to demonstrate that mutually antagonistic or irreconcilable defenses are so prejudicial to warrant severance in this case.

***3. Calling Co-Defendant as a Witness***

The Third Circuit provides that four factors are to be considered "in determining whether the Court should grant a severance on the ground that a joint trial would deprive the movant of the ability to call a co[-]defendant **[*20]** as a defense witness:" United States v. Kozell, 468 F. Supp. 746, 748 (E.D. Pa. 1979) (United States v. Boscia, 573 F.2d 827, 832 (3d Cir. 1978)). The factors are: "(1) the likelihood of co-defendant's testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendants could be impeached; [and] (4) judicial economy." Boscia, 573 F.2d at 832. "More than the showing of a possibility that a co-defendant will testify is required." United States v. Vastola, 670 F. Supp. 1244, 1264 (D.N.J. 1987) (citing United States v. Provenzano, 688 F.2d 194, 198 (3d Cir. 1982)).

As to the first factor, Rabbitt fails to demonstrate (or even address) that there is "more than the showing of possibility," Vastola, 670 F. Supp. at 1264, or likelihood that Aguilar would testify, even if their cases were severed. Instead, Rabbitt focuses on an alternative, speculative scenario in which "[she] *may* find it necessary to call [Aguilar] as a witness" and "compel his testimony *if necessary*" because such "testimony *could be* critical to [Rabbitt]'s defense . . . ." (Def.'s Moving Br. 15-16 (emphasis added).) She then asserts that she "*could move* the Court to compel the [G]overnment to grant [Aguilar] testimonial immunity *if necessary* to protect [Rabbitt's] due process rights." (*Id.* at 16 (emphasis added).) In essence, Rabbit has "not made a strong showing of the likelihood that [her] co-defendant[] [will] testify." Boscia, 573 F.2d at 832.[10] Without more, the Court finds it **[*21]** inappropriate to sever based on such speculative and hypothetical events. *See* Vastola, 670 F. Supp. at 1264 ("The motion is not supported by [co-defendant] affidavits and the court finds that it would be highly speculative to sever on the basis of such limited information.").

Critically, Rabbitt also overlooks the fact that "[she] would be unable to compel testimony from a co[-]defendant even if their cases were severed [because]

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[10] *See, e.g.*, Kozell, 468 F. Supp. at 748 (denying defendant's motion for severance because "[w]hile it is not necessary that [defendant] show that [co-defendant] is 'certain' to testify at a later trial, United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), we find that [defendant] has not shown that [co-defendant] is 'likely' to testify due to the various conditions he has placed on his willingness to testify."); United States v. Finkelstein, 526 F.2d 517, 524 (2d Cir. 1975) *cert. denied*, ***425 U.S. 960, 96 S. Ct. 1742, 48 L. Ed. 2d 205 (1976)*** (denying severance even though a co-defendant signed an affidavit stating that he would testify for appellant because it was "unrealistic" to believe that the co-defendant would not invoke his Fifth Amendment privilege).

[t]he constitutional right of a defendant not to testify at the behest of a co[-] defendant remains his right despite the severance of their trials." *United States v. Somers, 496 F.2d 723, 731 (3d Cir. 1974)* (quoting *United States v. Barber, 442 F.2d 517, 529 n.22 (3d Cir. 1971)*) (finding denial of defendant's severance motion was proper because defendant "made no showing that [co-defendant] would have testified voluntarily in [defendant's] case had the defendants been severed."); *see Barber, 442 F.2d at 529* ("[A] defendant may not compel another defendant to take the stand" (citing *United States v. Hous. Found. of Am., 176 F.2d 665 (3d Cir. 1949)*)).

Regarding the second and third factor, Rabbitt's moving brief lacks any support to demonstrate the degree to which Aguilar's testimony would be exculpatory or to which Aguilar could be impeached. *See Barber, 442 F.2d at 530* ("[T]he mere presence of hostility among defendants or the desire of one to exculpate h[er]self by inculpating another have **[*22]** both been held to be insufficient grounds to require separate trials.").

As to the fourth factor, Rabbitt's arguments are weak at best. "[C]onsiderations of judicial economy weigh heavily against separate trials." *Boscia, 573 F.2d at 833* ("[W]here there is a reasonable assurance that defendants will be given a fair trial regardless of whether a severance is granted, judicial economy becomes a relevant factor."). With the exception of Counts 14, 15 and 17, Defendants are charged on all counts together (*see* Indictment) and thus a separate trial will unnecessarily require a substantial amount of evidence (including testifying witnesses) to be presented twice. *See Eufrasio, 935 F.2d at 569* (affirming the trial court's decision to deny severance of trial "[b]ecause there would have been substantial overlap in the evidence presented in separate trials"). Further, Rabbitt fails to demonstrate why jury instructions cannot remedy any potential prejudice against Rabbitt and Aguilar being tried together. *See Zafiro, 506 U.S. at 539* ("When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice." (citations omitted)). At this juncture, **[*23]** the Court finds no reason to doubt that a jury will be able to "compartmentalize the evidence as it relates to separate defendants." *See Somers, 496 F.2d at 730* (quoting *United States v. De Larosa, 450 F.2d 1057, 1065 (3d Cir. 1971)*, *cert. denied, Bashen v. United States, 405 U.S. 927, 92 S. Ct. 978, 30 L. Ed. 2d 800 (1972)*).

In sum, the Court finds that Rabbitt fails to satisfy her burden in demonstrating that severance of her trial from the trial of Aguilar's is warranted. Rabbitt's motion to sever trial is denied.

**C. Motion to Compel Unredacted Copies of Already Produced Discovery or a Privilege Log of the Same**

Next, Rabbitt moves to compel the Government to provide an unredacted version of a recorded statement made by an individual who is "allegedly the victim of identity theft under *18 U.S.C. 1028* A." (Def.'s Moving Br. 18.) Rabbitt states that in the recorded statement, the individual states her personal identifying information—including "her name, social security number, date of birth," "bank account numbers, and other financial information"—which are integral to the allegations of identity theft. (*Id.*) Further, Rabbitt flags that additional redactions have been identified in at least 67 documents produced as part of discovery in this matter, but for which no redaction log has been provided. (*Id.*) Rabbitt, accordingly, requests that the Court compel **[*24]** the Government to provide either: (1) "unredacted copies of all documents which contain redactions including the 67 documents" and "identify if exact copies of the listed documents have been produced elsewhere in the discovery and if so where"; or (2) "a privilege log for those documents so that their production may be litigated, if necessary." (*Id.* at 19.)

The Government argues that Rabbitt's motion to compel is misguided and premature. First, the Government asserts that the recorded statement only redacted "the victim's date of birth, social security number, home address, and driver's license number," which is not integral to Rabbitt's defense. (Gov't's Opp'n Br. 27-28.) Second, the Government asserts that redactions were made to Jencks material—such as those pertaining to a witnesses' personal identifying information, an agency's case file number, or an agent's phone number—which are "limited, self-explanatory, and irrelevant to any charges or defenses in this action." (*Id.* at 28.) Additionally, the Government asserts that redactions were made to select irrelevant material in *Rule 16* documents because they are not: (1) "material to preparing the defense"; (2) "not intended to be used in **[*25]** the [G]overnment's 'case in chief"; and (3) were not "obtained from or belong[ing] to the defendant." (*Id.* at 29 (quoting *Fed. R. Crim. P. 16(a)(1)(E)*).)

Here, the Court will compel the Government to make the necessary productions or alternatively produce a

privilege log. While the Court acknowledges that a defendant is not entitled to "all the minutia of [the prosecution's] evidence," the Third Circuit has recognized that "certain demands for evidentiary material may be within bounds of permissible discovery." *United States v. Fioravanti, 412 F.2d 407, 411 & n.10 (3d Cir. 1969)* (the government must "not frustrate the defense in the preparation of its case."). In the instant matter, the Court finds that there is "persuasive basis" for compelling the disclosure of personal identifying information pertaining to the alleged victim of identity theft—namely, Rabbitt avers that personal identifying information is integral to the identity theft charge. *See United States v. Hull, No. 21-39, 2023 U.S. Dist. LEXIS 206578, 2023 WL 8005251, at *9 (W.D. Pa. Nov. 17, 2023)* (denying defendant's request for the identity and addresses of all persons interviewed by the government on the basis that they "could *possibly* possess" helpful information because there was a lack of compelling circumstances and such information was already covered by the government's *Brady* disclosures); *see also Gregory v. United States, 369 F.2d 185, 188, 125 U.S. App. D.C. 140 (D.C. Cir. 1966)* ("A criminal trial, **[*26]** like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined"). Further, any privacy concerns regarding personal identifying information in the recorded statement (of the alleged victim) or Jencks material (of one or more witnesses) are adequately addressed by the Stipulated Protective Order that is in place. *See, e.g., Jane G.A. v. Rodriguez, No. 20-5922, 2021 U.S. Dist. LEXIS 193708, 2021 WL 2530849, at *2 (D.N.J. Mar. 11, 2021)*; *Strike 3 Holdings, LLC v. Doe, No. 18-12585, 2020 U.S. Dist. LEXIS 114598, 2020 WL 3567282, at *11 (D.N.J. June 30, 2020)* ("[A]ny concerns about. . . privacy exposure are easily assuaged through implementation of an appropriate protective order.").

As to the Government's assertions that certain material is not relevant or material to preparing the defense,[11] the Court finds the argument unpersuasive at this juncture. Without a privilege log, it is unclear as to what material was redacted and thus the Court has no means to evaluate the relevancy or materiality of the redactions. Notably, *Rule 16(a)(1)(E)* does not allow the Government to make ad hoc redactions as it sees best fit, nor has the Government demonstrated that the relevant materials are exempt from discovery and inspection, especially when the Government has already turned over Jencks materials. **[*27]** *See Fed. R. Crim. P. 16(a)(1)(E)*;[12] *Coles, 511 F. Supp. 3d at 574* (stating only that "the rule exempts government work product. . . . [and] the statements of prospective government witnesses, except as provided in the *Jencks Act*" from discovery and inspection).

The Court, accordingly, grants Rabbitt's motion to compel.

**D. Request for *Brady* Material in Advance of Trial**

Next, Rabbitt requests that the Government be compelled to produce exculpatory evidence as well as evidence that could be used for impeachment purposes. (Def.'s Moving Br. 19-22.) The Government states that it is "well aware of its obligations under *Brady*, which requires the Government to turn over [relevant evidence] at the earliest possible time.[13] (Gov't's Opp'n Br. 30.) As such, the Government contends that it will promptly disclose any exculpatory material and will also disclose *Giglio* material at the appropriate time. (*Id.* at 30.)

The Court, accordingly, finds Rabbitt's request to be moot.

**E. Request to File Additional Motions or Join Co-Defendant's Motions as Necessary**

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[11] To be clear, the Court does not compel the Government to produce materials: (1) not intended to be used in its case in chief at trial, or (2) not obtained from Defendants.

[12] *Rule 16(a)(g)(E)(i)* provides that "*[u]pon a defendant's request*, the government must permit the defendant to inspect [relevant materials] if the item is within the government's possession, custody, or control and the item is material to preparing the defense." *Fed. R. Crim. P. 16(a)(1)(E)* (emphasis added); *see also United States v. Hertel & Brown Physical & Aquatic Therapy, No. 21-39, 2024 U.S. Dist. LEXIS 98239, 2024 WL 2819301, at *2 (W.D. Pa. June 3, 2024)* (*Rule 16* "establishes six categories of information that the [G]overnment must produce to an individual defendant '[u]pon . . . request.' . . . "*Rule 16(a)(1)(E)* is the broadest provision" (citing *United States v. Coles, 511 F. Supp. 3d 566, 574 (M.D. Pa. 2021)*)).

[13] Moreover, the Court's scheduling order requires the Government to provide all materials to be disclosed under *Giglio* and the Jencks Act on or before September 24, 2024. (Scheduling Order ¶ 8, ECF No. 56.)

Lastly, the Court turns to Rabbitt's request that she be granted the right to file additional motions and be permitted to join in any and all motions filed by Aguilar. (Def.'s Moving **[*28]** Br. 22.) The Government argues that Rabbitt's request is premature and that she should be required to seek leave of Court before filing such additional pretrial motions. (Gov't's Opp'n Br. 30.)

Should Defendants or the Government seek to file any additional motions, the respective party is directed to immediately seek leave of Court and provide good cause as to why filing of the respective motion should be granted. The Court will consider the request at that time. As such, the Court reserves on Rabbitt's request and will further consider Rabbitt's request to join motions of Aguilar at the appropriate time.

## III. CONCLUSION

For the reasons set forth above, Rabbitt's omnibus motion is granted in part and denied in part. The Court will enter an Order consistent with this Memorandum Opinion.

/s/ Michael A. Shipp

**MICHAEL A. SHIPP**

**UNITED STATES DISTRICT JUDGE**

## ORDER

This matter comes before the Court upon Defendant Jean E. Rabbit's ("Rabbitt") omnibus motion. (*See* ECF No. 57.) The United States of America opposed (ECF No. *66*), and Rabbitt replied (ECF No. 67). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1, which is applicable **[*29]** to criminal cases in the District of New Jersey under Local Civil Rule 1.1.

For the reasons set forth in the accompanying Memorandum Opinion,

**IT IS** on this 4th day of September 2024, **ORDERED** that:

1. Rabbitt's omnibus motion (ECF No. 57) is **GRANTED** in part, **DENIED** in part.

    a. Rabbitt's motion to dismiss Counts 1 through 9 and Count 13 is **DENIED**.

    b. Rabbitt's motion to sever is **DENIED**.

    c. Rabbitt's motion to compel unredacted discovery or produce a privilege log is **GRANTED**.

    d. Rabbitt's request for *Brady* material in advance of trial is **MOOT**.

    e. The Court **RESERVES** on Rabbitt's request to file additional motions. The parties are directed to immediately seek leave of Court for any additional motions that they may seek to file.

/s/ Michael A. Shipp

**MICHAEL A. SHIPP**

**UNITED STATES DISTRICT JUDGE**

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