**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JAY ALIX,

Plaintiff,

v.

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

Defendants.

Case No. 18-cv-04141 (JMF)

Oral Argument Requested

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Faith E. Gay
Jennifer M. Selendy
David S. Flugman
SELENDY & GAY PLLC
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 390-9000

Robert J. Cleary
Mark D. Harris
Brian S. Rosen
Jordan B. Leader
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000

Attorneys for All Defendants

Catherine L. Redlich
DRISCOLL & REDLICH
110 West 40th Street, Suite 1900
New York, New York 10018
Telephone: (212) 986-4030

Attorney for Defendant Dominic Barton

Richard A. Sauber
Ariel N. Lavinbuk
Michael L. Waldman
Lukman Azeez
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER, & SAUBER LLP
1801 K Street, NW, Suite 411L
Washington, D.C. 20006
Telephone: (202) 775-4500

Attorneys for Defendants Kevin Carmody, Jon Garcia, Alison Proshan, and Robert Sternfels

Reid M. Figel
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7968

Attorney for Defendant Seth Goldstrom

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants McKinsey & Co., Inc., McKinsey Holdings, Inc., McKinsey & Company Inc. United States ("McKinsey US"), and McKinsey Recovery & Transformation Services U.S., LLC ("McKinsey RTS" or "RTS") (collectively, "McKinsey" or the "Corporate Defendants"), and Dominic Barton, Kevin Carmody, Jon Garcia, Seth Goldstrom, Alison Proshan, and Robert Sternfels (collectively the "Individual Defendants"), respectfully move this Court to dismiss the above-captioned Complaint by Plaintiff Jay Alix ("Alix" or "Plaintiff") with prejudice for failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

Plaintiff Jay Alix has filed a RICO action—"the litigation equivalent of a thermonuclear device"[1]—against McKinsey and six innocent professionals, alleging that AlixPartners LLP ("AlixPartners"), a firm that competes with McKinsey in the bankruptcy advisory space, lost potential business opportunities to McKinsey. AlixPartners has not brought this suit on its own behalf, and it is easy to see why: there is not a single fact alleged in the 150-page Complaint and accompanying appendix that supports its incendiary headline accusation that McKinsey has "unlawfully schemed to harm AlixPartners." (Complaint ¶ 1.)

The origin of the sprawling Complaint is simply stated: Alix disagrees with what he characterizes as McKinsey's inadequate conflicts disclosures under Bankruptcy Rule 2014(a). That rule requires professionals proposed to be hired by a debtor in chapter 11 bankruptcy cases to disclose "connections" to parties involved in that proceeding. It does not mandate specifically *how* those disclosures must be made, and McKinsey, to protect the confidentiality of its consulting

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[1] *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996) (citing *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)).

clients, listed its Rule 2014(a) "connections" by descriptive category rather than by name. While this practice has been accepted by bankruptcy courts, Alix insists that all Rule 2014(a) disclosures must be made by name and that McKinsey's failure to do so constitutes criminal racketeering.

Alix first made his case directly to McKinsey, which disagreed with him. He then formed a special purpose company solely to litigate his concerns about McKinsey's Rule 2014(a) disclosures in a Virginia bankruptcy case, where both the bankruptcy and district courts disagreed with him. In this action, he has aggressively transformed his dispute over the precise requirements of a bankruptcy disclosure rule into claims that the entire family of McKinsey companies and six professionals are racketeers who have engaged in, among other things, fraud, obstruction of justice, money laundering, bribery, and witness tampering. These allegations are baseless and reckless, and they threaten significant reputational harm to the Defendants.

The gravamen of Alix's Complaint is that AlixPartners, rather than McKinsey RTS (or any other firm), would have been retained and approved as the debtor's advisor in thirteen different chapter 11 bankruptcies if only McKinsey had not concealed purportedly disqualifying conflicts of interest from those debtors when it filed disclosure documents under Bankruptcy Rule 2014(a). The Complaint's RICO claims fly in the face of settled Supreme Court precedent that precludes a competitor like AlixPartners from suing under that statute for indirect harms like those of which Alix complains. Those claims also are predicated on an attenuated chain of causation that cannot hold given, among many other things, the absence of any allegation that AlixPartners even applied for the thirteen bankruptcy assignments won by McKinsey or that any debtor was interested in retaining it.

The Rule 2014(a) disclosure documents at issue, which are referenced throughout the Complaint but are not attached to it, defeat any inference of falsity or fraudulent intent. While the

Complaint characterizes McKinsey's disclosures as virtually non-existent, they are robust. They not only identified McKinsey US's and RTS's connections and those of their affiliates, but also describe, in great detail, the specific methodology employed to identify connections in each bankruptcy. They also provided sufficient information for Interested Parties (be they the debtor(s), creditors, the U.S. Trustee, or the bankruptcy court) to ask follow-up questions, if desired, without violating the confidentiality of McKinsey clients. What the disclosures typically did not do—and this is the crux of Alix's grievance against McKinsey—is publicly disclose the identity of McKinsey clients by name. While Alix may believe that McKinsey's decision to disclose by descriptive category rather than by name is insufficient under Rule 2014(a), the law is not so rigid. In any event, disagreement over the proper interpretation of Rule 2014(a) is not a sound or legally sufficient basis to allege that McKinsey and six of its professionals engaged in racketeering activity.

The Complaint is more than just an unfounded and reckless use of RICO by a competitor of McKinsey. It is a personal attack on the good names and reputations of the six McKinsey professionals named as Individual Defendants—Dominic Barton, Kevin Carmody, Jon Garcia, Seth Goldstrom, Alison Proshan, and Robert Sternfels—whom the Complaint accuses of committing hundreds of federal and state crimes. "[T]he mere assertion of a RICO claim has an almost inevitable stigmatizing effect on those named as defendants." *Sanchez v. ASA Coll., Inc.*, No. 14-cv-5006 (JMF), 2015 WL 3540836, at *5 (S.D.N.Y. June 5, 2015) (citing *Katzman*, 167 F.R.D. at 655). For that reason, "and because [of] the allure of treble damages [and] attorney's fees," this Court has recognized its "obligation to scrutinize civil RICO claims early in the litigation," *id.*, in order "to flush out frivolous" ones. *Katzman*, 167 F.R.D. at 655. This is just such a case.

The Complaint is deficient in numerous respects. *First*, it fails to plead proximate causation because, under settled Supreme Court law, AlixPartners has not alleged a direct injury caused by McKinsey's Rule 2014(a) disclosures. The direct victims of any fraud arising from the filing of a purportedly false disclosure would be those parties to whom the disclosures were addressed—namely, the debtor(s), creditors, the U.S. Trustee, and the bankruptcy court—not a competitor, like AlixPartners, who complains of lost potential business. The harm alleged by AlixPartners is distinct from any harm allegedly caused to parties involved in each of the bankruptcy cases by McKinsey's Rule 2014(a) disclosures and is too remote to satisfy the pleading requirements for proximate causation under the RICO statute. The Court should dismiss the RICO claims against all Defendants on this basis alone. (*See infra* at § I.A.)

Second, the Complaint fails to plead actual, "but-for" causation of the injury to AlixPartners. It does not, and cannot, allege facts necessary to overcome the long and tenuous string of assumptions necessary to link the purported shortcomings in McKinsey's disclosures to AlixPartners's alleged lost business opportunities. This too is an independent fatal defect in the RICO claims that requires dismissal as to all Defendants. (*See infra* at § I.B.)

Third, the Complaint fails to allege sufficiently any of the racketeering acts as against the Corporate Defendants. This Court may properly consider the actual Rule 2014(a) disclosures at issue, and when it does, we respectfully submit that it will conclude that the Complaint fails to allege facts giving rise to a plausible inference of fraud. Those disclosures further preclude any inference of fraudulent intent, let alone the "strong inference" required by the law of this Circuit. Moreover, Alix fails to meet the requirements of Federal Rule of Civil Procedure 9(b) with respect to his fraud-based claims (including the mail, wire, and bankruptcy fraud predicates) because he engages in impermissible group pleading and fails to plead with particularity. Alix also fails to

allege a cognizable property interest under the mail and wire fraud statutes. And his Complaint fails to plead any of the remaining predicate acts—for violations of the Travel Act, obstruction of justice, witness tampering, bribery, and money laundering—properly. (*See infra* at § I.C.)

Fourth, the Complaint fails to plead adequately any racketeering act against any of the Individual Defendants. While all the arguments advanced above are fully applicable to the individuals, the Complaint's pleading failures are particularly acute as to them, as the Complaint fails to allege facts giving rise to a plausible inference that the Individual Defendants engaged in any crimes at all, let alone facts of sufficient particularity to support the many fraud-based allegations. Indeed, the factual allegations leveled against each of the Individual Defendants are the very type found to be lacking in *Twombly* because they are equally consistent with innocent, good faith conduct and thus do not support an inference of wrongdoing. Accordingly, these allegations do not come close to meeting the higher pleading standard required under Rule 9(b):

- Dominic Barton, the former global managing partner of McKinsey, is not alleged to have had any involvement with McKinsey US's or RTS's Rule 2014(a) disclosures; indeed, Alix alleges that Barton did not even learn about any supposed issue until Alix approached him in September 2014, some thirteen years after the alleged criminal activity purportedly began. (*See infra* at § I.D.1.)

- Kevin Carmody, a senior McKinsey partner, is alleged only to have signed certain of RTS's disclosures. Beyond the fact that none of the disclosures were fraudulent (*see infra* at § I.C.1), there are no specific facts alleged to support an inference of fraudulent intent on his part. (*See infra* at § I.D.2.)

- Jon Garcia, another senior McKinsey partner, has no allegations leveled against him at all. Instead, he appears to be named solely because he was a founding partner of RTS and has legal training. (*See infra* at § I.D.3.)

- Seth Goldstrom, another senior McKinsey partner, is alleged to have signed RTS's disclosures in just two bankruptcies, both of which occurred beyond the applicable statute of limitations for Alix's RICO claims. (*See infra* at § I.H.) As with Carmody, none of the disclosures were fraudulent (*see infra* at § I.C.1), and there are no specific facts alleged to support an inference of fraudulent intent on his part. (*See infra* at § I.D.4.)

- Alison Proshan, a McKinsey associate general counsel, is alleged only to have assisted in the preparation of certain Rule 2014(a) disclosures, and nothing else. There are no facts indicating that her legal work was wrong or improper, or that she acted with fraudulent intent. (*See infra* at § I.D.5.)

- Robert Sternfels, another senior McKinsey partner, is alleged only to have been a passive participant on two phone calls between Alix and Barton in September 2014. There are no allegations that he took any action whatsoever, let alone engaged in unlawful conduct with a specific intent to defraud. (*See infra* at § I.D.6.)

Because the Complaint fails to meet even the most basic pleading standards as to each of the Individual Defendants, the Complaint should be dismissed as to them on this basis as well. (*See infra* at § I.D.)

Fifth, the Complaint fails to allege a viable RICO enterprise operated by the Corporate Defendants. (*See infra* at § I.E.)

Sixth, the Complaint fails to allege that any of the Individual Defendants conducted or participated in the conduct of any RICO enterprise. (*See infra* at § I.F.)

Seventh, the RICO conspiracy claim should be dismissed as to all Defendants not just for lack of a viable substantive RICO claim, but also because it fails to allege an agreement to engage in a racketeering violation and because it is invalid under the intracorporate conspiracy doctrine. (*See infra* at § I.G.)

Eighth, the four-year statute of limitations applicable to RICO claims renders the substantial part of the four RICO claims untimely as to all Defendants, and alone mandates dismissal of Goldstrom and Garcia, as to whom the Complaint pleads no timely facts. (*See infra* at § I.H.)

Finally, the common law claims, asserted against only the Corporate Defendants, should be dismissed. Alix's attempt to manufacture an oral contract requiring McKinsey to leave the bankruptcy business based upon a handful of vague discussions with McKinsey's then-global managing partner fails to meet the basic elements of contract law, including an agreement on

definite terms and harm flowing from any purported breach. Alix's attempt to enforce the subject matter of these discussions through a breach of contract (Count 5) or promissory estoppel (Count 6) theory fails. And his claim for tortious interference with business expectancy (Count 7) is both inadequately pleaded and preempted by federal bankruptcy law. (*See infra* at § II.)

For all the reasons discussed below, the Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND[2]

McKinsey and Its Client Service Model

McKinsey & Co., Inc. is a global management consulting firm with almost 30,000 employees working in more than 120 cities worldwide. For nearly a century, some of the world's most well-known institutions have relied upon McKinsey's broad industry and functional expertise to enhance their performance. Typically, these clients require that McKinsey's involvement with their organizations remain confidential, so as not to adversely affect their operations and business strategies. McKinsey's consulting contracts, therefore, often include confidentiality provisions limiting McKinsey's ability to disclose, among other things, the identity of the client absent client consent or other narrow exceptions (such as when such disclosure is required by law).

As part of its diverse and wide-ranging client service portfolio, McKinsey serves chapter 11 debtors. McKinsey began doing so in 2001 through its wholly-owned subsidiary McKinsey US. Since 2011, it has done so through another wholly-owned subsidiary, McKinsey RTS. (Complaint (hereinafter "Compl." ¶ 48.) McKinsey has been retained as a bankruptcy professional in thirteen chapter 11 cases to date. (*Id.*) As Alix acknowledges, McKinsey US and RTS have been successful in helping distressed companies emerge from bankruptcy. (*Id.* at ¶ 4.) With deep

[2] For purposes of this motion to dismiss, McKinsey accepts the well-pleaded facts as alleged in the Complaint. To the extent any portion of this case survives this motion, McKinsey can and will demonstrate the falsity of the allegations in the Complaint.

functional and industry expertise and unmatched scale, McKinsey has much broader experience than other restructuring advisors, which positions it well to advise chapter 11 debtors.

Disclosures Required by Bankruptcy Rule 2014(a)

The retention of qualified and disinterested professionals in chapter 11 cases is overseen by the bankruptcy court. (*Id*. at ¶¶ 52-53.) Section 327 of the Bankruptcy Code, which governs such retentions, requires professionals to submit a "verified statement" pursuant to Bankruptcy Rule 2014(a) "*setting forth the person's connections* with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a) (emphasis added). Rule 2014(a) contains no specific requirements about the content of professionals' disclosures: it is silent on the form they must take, does not detail how connections should be identified, does not specify whether indirect relationships create connections, and sets forth no required process for the professional to employ to identify connections. *See id*.

Any party to the bankruptcy—including the debtor(s), creditors, and the U.S. Trustee—and of course the bankruptcy court itself, is authorized to oppose, question the contents of, or seek additional information with respect to, any professional's Rule 2014(a) disclosure. (Compl. ¶ 176.) The U.S. Trustee plays a particularly important role in this process, as it is empowered with "important oversight and watchdog responsibilities to ensure honesty and fairness in the administration of bankruptcy cases and to prevent and ferret out fraud." H.R. REP. 99-764, 99th Cong., 2d Sess. at 18 (1986). Among these is "monitoring applications filed under section 327 of title 11." 28 U.S.C. § 586(a)(3)(I).

McKinsey's Rule 2014(a) Disclosures

Alix alleges that McKinsey US and RTS have "submitted false and materially misleading declarations" in thirteen chapter 11 cases.[3] (Compl. ¶ 2.) He asserts, among other things, that McKinsey US and RTS "failed to name almost every one of [their] connections, relationships, and conflicts," (*id*. at ¶ 68), failed to be "exhaustive" and "voluminous" in their disclosures (*id*. at ¶¶ 69-70), "failed to describe [connections] with adequate detail" (*id*. at ¶ 68), and failed to set forth—*that is, identify by name*—any connections to "Interested Parties."[4] (*See, e.g.*, *id*. at ¶¶ 72, 76, 79.) Alix asserts that McKinsey acted to "unlawfully conceal" its connections to avoid "disqualification from employment." (*Id*. at ¶¶ 2, 103.)

Alix did not append any of McKinsey US's or RTS's allegedly deficient disclosures to his pleading, and he skips quickly past their actual content. The Rule 2014(a) disclosures, which are submitted with this motion,[5] show that McKinsey made robust and comprehensive disclosures. Across the thirteen bankruptcies where McKinsey US or RTS was retained, it submitted 39

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

[4] In each bankruptcy proceeding, the debtor produces a list of "Interested Parties," which includes creditors, major customers, law firms, and other parties who have connections to the debtor. This list may change over time.

[5] In ruling upon Defendants' motion to dismiss under Rule 12(b)(6), this Court may consider documents referenced in the Complaint and those that are "integral" to it. *DiFolco v. MSNBC Cable L.L.C*., 622 F.3d 104, 111 (2d Cir. 2010) (holding that in deciding a motion to dismiss, "a district court may consider . . . documents incorporated by reference in the complaint" and those the plaintiff "relies heavily upon . . . thereby rendering the document 'integral' to the complaint") (citing *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006)). The McKinsey US and RTS affidavits and declarations referenced in the Complaint are attached as Exhibits 1-A through 13-D to the Declaration of Jennifer M. Selendy dated July 30, 2018. All exhibits to the Selendy Declaration are referred to herein as "Ex. __."

declarations, totaling more than 498 pages, that both disclosed its connections to Interested Parties and set forth the process it undertook to identify them. (*See, e.g.*, *id.* at ¶¶ 71, 75, 78, 83, 89.) Each declaration was filed publicly on the bankruptcy court docket and was available to be scrutinized by the U.S. Trustee, the debtor(s), the creditors, and the highly sophisticated counsel representing each of these various parties.[6] None of the debtors could have retained McKinsey US or RTS without having obtained the approval of the presiding bankruptcy judge. *See* 11 U.S.C. § 327(a).

McKinsey was transparent in its disclosures about the fact that it was disclosing connections to Interested Parties by descriptive categories, rather than by name. (*See, e.g.*, Ex. 5-A, *Harry & David* Doc. 105-3 ¶ 9; Ex. 6-A, *AMR* Doc 581 ¶ 19; Ex. 9-A, *NII Holdings* Doc. 153 ¶ 26.) McKinsey also was forthright in disclosing that it routinely serves multiple clients who are business competitors, a fact that also is known widely in the marketplace. (*See, e.g.*, Ex. 5-A, *Harry & David* Doc. 105-3 ¶ 9; Ex. 6-A, *AMR* Doc. 581 ¶ 19; Ex. 9-A, *NII Holdings* Doc. 153 ¶ 26.) To ensure that they nonetheless met their disclosure obligations, McKinsey US and RTS set out the multi-step process they used to identify possible connections to Interested Parties in each initial Rule 2014(a) declaration.[7]

[6] The debtors in these cases were represented by some of the most highly-skilled bankruptcy counsel available, including Skadden (*Hayes Lemmerz* and *SunEdison*), Kirkland & Ellis (*United*, *Edison Mission*, and *GenOn*), White & Case (*Mirant*), Jones Day (*Harry & David*, *NII Holdings*, and *ANR*), Gibson Dunn (*Standard Register*), and Weil Gotshal (*American*).

[7] For example, in *AMF Bowling*, RTS disclosed that it: (1) emailed employees of RTS and employees of RTS affiliates "to determine the existence of any client service provided by such employees within the last three years to parties-in-interest" (Ex. 7, *AMF Bowling* Doc. 125 ¶ 17); (2) emailed employees of RTS and RTS affiliates to "determine the existence of client services provided by such employees within the last three years to any client that focused on a direct commercial relationship or transaction with the Debtors," (*id.*); (3) emailed "all employees of McKinsey RTS and its affiliates to request information on any relationships with the Debtors, the U.S. Trustee and the Bankruptcy Court, as well as equity ownership in the Debtors," (*id.*); (4) "made inquiry to all partners at its client service affiliates worldwide about whether they currently provide consulting services to entities that focus on a direct commercial relationship or transaction with the Debtors," (*id.* at ¶ 23(a)); (5) emailed "all employees at all its client service affiliates worldwide as to whether such employee or a member of his/her immediate family is related to or employed by the Debtors, the U.S. Trustee, and/or the Court . . . [or] whether such employee or a member of his/her immediate family owns equity securities of the Debtors," (*id.* at ¶¶ 23(b), (d)); and (6) inquired with partners at RTS affiliates "responsible for those clients appearing on the [Interested Parties List]" to determine the scope of such services within the past three years, (*id.* at ¶ 23(b)).

McKinsey US and RTS then disclosed the results of those searches in a manner that would maintain client confidentiality—that is, by disclosing their connections by descriptive category (*e.g.*, "Major Customer" or "Major Bank Lender"), but not by name. For example, in *Hayes Lemmerz*, McKinsey US disclosed that "it has served or currently does serve several of the Searched Parties [from the Interested Parties list] on various matters but does not serve and has not served such parties in connection with matters directly involving or adverse to the Debtors." (Ex. 1-A, *Hayes Lemmerz* Doc. 103-3 ¶ 11.) Similarly, in *NII Holdings*, McKinsey RTS disclosed that it "provided services to certain of the Debtors' non-Debtor affiliates;" that "[e]leven members of McKinsey RTS currently serve or in the past three years have served one affiliate of one of the Major Bank Lenders of Non-Debtor Affiliates . . . ;" and that "McKinsey RTS serves or in the past three years has served one portfolio company of an affiliate of one of the Major Current Business Affiliations of Debtors' Current Directors. . . ." (Ex. 9-A, *NII Holdings* Doc. 153 ¶¶ 25(a), (e), (f).) The declarations also made explicit, among other things, that McKinsey advises Interested Parties in matters unrelated to the bankruptcy. (*See, e.g.*, *id.*)[8]

Jay Alix's Campaign to Drive McKinsey Out of the Market

From 2001, when McKinsey entered the restructuring advisory market, until 2014, McKinsey US's (and later RTS's) method of disclosing connections by descriptive category was accepted—without exception—by all parties to each bankruptcy in which it was retained as debtor's advisor. After RTS's market share began to grow,[9] however, Alix—acting alone and without the support of any of the hundreds of Interested Parties in these bankruptcies—began a

[8] *See also* Ex. 1-A, *Hayes Lemmerz* Doc. 103-3 ¶¶ 11, 12; Ex. 7, *AMF Bowling* Doc. 125 ¶ 27; Ex. 6-A, *AMR* Doc. 581 ¶ 30; Ex. 10, *Standard Register* Doc. 87-3 ¶ 33.

[9] From 2001 until McKinsey RTS was formed in 2011, McKinsey was retained in just four bankruptcies. In the seven years since it was formed, RTS has been retained in nine bankruptcies.

campaign to undermine McKinsey's ability to provide consulting services to chapter 11 debtors and to eliminate it as one of AlixPartners's principal competitors. (*Id*. at ¶¶ 1, 46.)

a. Alix Lectures McKinsey's Managing Partner

Starting in September 2014, Alix began "confront[ing]" McKinsey leaders about RTS's Rule 2014(a) disclosures. (Compl. ¶ 111.) In the first such encounter, Alix took it upon himself to lecture Dominic Barton, McKinsey's then-managing partner, about Alix's interpretation of Rule 2014(a)'s requirements. (*Id*. at ¶ 115.) Alix "provided a lengthy and detailed exposition of the relevant legal principles" underlying the disclosure obligations in bankruptcy cases, and "demonstrated how [in his view] all of McKinsey's past disclosure declarations were non-compliant and illegal because they failed to identify connections by name and failed to describe connections in sufficient detail." (*Id*. at ¶ 115.) A month later, Alix flew to London to "confront" Barton about RTS's disclosures and to press McKinsey to "exit the RTS business." (*Id*. at ¶ 125.) Alix continued to hector Barton over the next year (*id*. at ¶¶ 128, 136, 150), repeating his claim that RTS was failing to comply with Rule 2014(a)—or, more accurately, Alix's uniquely personal interpretation of that rule.

Despite eleven "interactions" with Barton (all initiated by Alix), including three in-person meetings, McKinsey did not "shutter McKinsey RTS and abandon bankruptcy consulting," as Alix demanded. Rather, McKinsey RTS continued to formulate Rule 2014(a) disclosures as it believed appropriate and to seek court approval to advise debtors in chapter 11 cases. (*Id*. at ¶¶ 136, 312.) And bankruptcy courts continued to approve McKinsey RTS to provide such advice.

b. Alix Forms Mar-Bow to Continue His Attacks on McKinsey's Disclosure Practices

After failing to persuade McKinsey's leadership to shut down RTS, Alix shifted tactics. He decided to challenge McKinsey's bankruptcy disclosures in bankruptcy court. To obtain the

standing required to do so, Alix formed Mar-Bow Value Partners, LLC ("Mar-Bow")[10] in 2016 and purchased a $1.25 million creditor claim for pennies on the dollar in the *Alpha Natural Resources* bankruptcy. (Compl. ¶ 179; Ex. 14, *ANR* Doc. 2603); *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US, LLC*, 578 B.R. 325 (E.D. Va. 2017). In that proceeding, the debtors, Alpha Natural Resources and its affiliates, had filed an application requesting permission to employ RTS as an advisor "to assist the Debtors with the development and refinement of their strategic business plan." *Id*. at 330.

Consistent with its Rule 2014(a) obligations, RTS provided a declaration explaining the process it undertook to identify connections with Interested Parties. As was its practice, RTS disclosed connections by descriptive category. (Compl. ¶¶ 155, 159); *Mar-Bow Value Partners*, 578 B.R. at 332. The bankruptcy court, like every other court in which McKinsey US's or RTS's retention had been considered, examined RTS's disclosures, determined that RTS was a "disinterested person," and granted the unopposed application to retain RTS. *Id*. at 333.

Through Mar-Bow, Alix began complaining to the U.S. Trustee about McKinsey's disclosures. (Compl. ¶ 176.) No other parties to the proceeding joined Alix's complaint. On May 3, 2016, nine months after the bankruptcy proceeding began, but two days after Mar-Bow appeared in the case, the U.S. Trustee filed a motion to compel McKinsey to make additional disclosures, including the disclosure of Interested Parties by name. (*Id*.)[11] McKinsey promptly engaged with the U.S. Trustee, and sixteen days later, the U.S. Trustee filed a stipulation resolving its motion

[10] Underscoring the obsessive nature of his conduct, Alix named his special-purpose company after Marvin Bower, one of McKinsey's iconic senior leaders during the 1930s.

[11] The district court's subsequent written decision rejecting Mar-Bow's challenges states that Alix was in contact with the U.S. Trustee even before Mar-Bow appeared in the case. *See Mar-Bow Value Partners*, 578 B.R. at 333 n.19*; see also id.* (noting that "[t]he record indicates that the U.S. Trustee filed its Motion to Compel at least partially at Mar-Bow's urging").

and stating that McKinsey had agreed to make a supplemental disclosure that "satisfied" the U.S. Trustee that McKinsey's disclosures "complied with Rule 2014."

Alix was the only party unsatisfied by this result. On June 6, 2016, Mar-Bow filed a motion to compel additional disclosures (Compl. ¶ 179) and also asked the bankruptcy court to "suspend payment of McKinsey's fees, and to disgorge all of McKinsey's previously paid fees. . . ." *Mar-Bow Value Partners*, 578 B.R. at 335. In response to Mar-Bow's motion, the court required RTS to disclose additional confidential information *in camera*. *Id*. at 336. RTS immediately complied. *Id*. Upon submission of those materials, the court stated that it was "completely satisfied that there is not any type of disinterested problem with McKinsey going forward" and that it was "very satisfied with the information" McKinsey had furnished. *Id.* at 338.

Undeterred, Mar-Bow then filed a motion to "clarify," which asked the bankruptcy court for the right to review McKinsey's confidential and competitively sensitive client information that RTS had submitted *in camera*. *Id.* at 337. Moreover, Alix, through Mar-Bow, escalated the dispute and challenged the debtor's *entire plan of reorganization*, which left the court "confus[ed]" and the debtor's counsel "bewildered." *Id.* The court rejected both of Alix's challenges.[12]

Still undeterred, Mar-Bow moved to stay the implementation of the plan. That too failed, with the court noting that Mar-Bow "threaten[ed] to disrupt the hard-fought global peace achieved among the Debtors and all of their major stakeholders." *Id*. at 343. Mar-Bow then brought a flurry

[12] McKinsey RTS made *yet another* supplemental disclosure after the *in camera* review, revealing the names of Interested Parties that McKinsey RTS had served in the three years prior to the debtor's petition date, as well as any such connections attributable to the RTS or other McKinsey professionals working on the assignment (the "Client Service Team"), and any connections between Interested Parties and an RTS affiliate where the affiliate's work "focused on a direct commercial relationship with the Debtor." (Ex. 11-E, *ANR* Doc. 3223.) RTS disclosed these connections by name. (Compl. ¶ 179.) This practice guided RTS in the subsequent *GenOn* and *SunEdison* bankruptcies. Notably, because the Client Service Team changes from assignment to assignment (and may actually change during the course of an assignment), a connection to a particular Interested Party may be disclosed by name in one bankruptcy case (or disclosure) but not another.

of appeals to the district court, once again challenging McKinsey's disclosures. *Id.* at 342-44. In a thirty-page reported opinion, the district court recounted the history of Alix-*qua*-Mar-Bow's failed attempts to obtain access to the names of McKinsey's confidential clients in the form of further public disclosures. *Id.* It then rejected all of Mar-Bow's appeals on the grounds of equitable mootness or standing, and expressly stated that it had "no reservation about," among other things, the Bankruptcy Court's decision to refuse to require the public filing of RTS's full list of *in camera* disclosures. *Id.* at 349, 354 n.46. Mar-Bow then appealed to the Fourth Circuit, where the case remains pending.

c. Alix Escalates His Attack on McKinsey by Filing This Civil RICO Action

The district court decision rejecting Alix's attack (through Mar-Bow) on McKinsey RTS's Rule 2014(a) disclosures in the *Alpha Natural Resources* case issued on September 30, 2017. Having first failed to impose his will on McKinsey directly, and then having failed to get two courts in the *Alpha Natural Resources* case to do it for him, Alix next went to work ratcheting up the intensity of the dispute with McKinsey. What began in 2014 as a disagreement over how McKinsey complies with a bankruptcy rule has metamorphized into an incendiary RICO Complaint. Specifically, McKinsey's practice of disclosing its connections to the parties involved in bankruptcy cases by category rather than by name has now been recast as a breathtaking, decades-long crime spree engaged in by racketeers.

ARGUMENT

To survive a Rule 12(b)(6) motion, a plaintiff must plead facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By contrast, a court must dismiss the complaint where a plaintiff has

failed to "nudge" a claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The Supreme Court's holdings and concerns in *Twombly* "are equally, if not more-so, applicable to civil RICO claims," because "[i]f *Twombly* means anything, it means that bald assertions and conclusions of law will not suffice." *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 536 (S.D.N.Y. 2009). RICO pleadings, like others, "must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 182 (2d Cir. 2008). Moreover, Alix's allegations that sound in fraud—including the predicate acts of bankruptcy fraud, mail fraud, wire fraud, and violations of the Travel Act—must be pleaded with particularity, as mandated by Rule 9(b). *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004).

While a court must accept well-pleaded allegations as true in considering a motion to dismiss, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555. As noted above, on a motion made pursuant to Rule 12(b)(6), this Court may consider documents referenced in the Complaint and those upon which a plaintiff "relies heavily . . . thereby rendering the document 'integral' to the [C]omplaint." *DiFolco*, 622 F.3d at 111 (internal quotation and citation omitted). The Court also may take judicial notice of court filings. *See, e.g.*, *Nightingale Grp., LLC v. CW Capital Mgmt., LLC*, No. 11-cv-9293 (PAE), 2012 WL 2674539, at *4 n.9 (S.D.N.Y. July 5, 2012) ("On a motion to dismiss, the Court may take judicial notice of court filings, including from related litigation.").

Each of Alix's claims fails to meet the applicable standards and should be dismissed.

I. ALIX FAILS TO PLEAD ANY RICO CLAIM (COUNTS 1-4).

The RICO statute provides a private civil cause of action to a person who has been "injured in his business or property *by reason of* a violation of" section 1962, 18 U.S.C. § 1964(c) (emphasis added), and requires a plaintiff to plead "(1) a substantive RICO violation under § 1962;

(2) injury to the plaintiff's 'business or property;' and (3) that such injury was 'by reason of' the substantive RICO violation." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 86 (2d Cir. 2015). To establish causation, a RICO plaintiff must demonstrate both proximate and but-for causation. *Holmes v. Secs. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). To state a violation of Section 1962(c), a RICO plaintiff must plead, among other things, that a person conducted or participated in the conduct of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c); *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013). Each of these requirements must be established as to each defendant. *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001). As set forth below, Alix has not alleged any of these elements adequately and, therefore, all his RICO claims (Counts 1 through 4) should be dismissed.

A. Alix Fails to Plead Proximate Causation.

To plead proximate causation, a RICO plaintiff must allege that the defendant's violation "led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Alix's Complaint lacks *any* well-pleaded allegations that any of the Rule 2014(a) disclosures filed by McKinsey US or RTS directly injured AlixPartners. The harm Alix alleges is lost revenue that AlixPartners "otherwise would have earned" had McKinsey "truthfully disclosed its disqualifying conflicts of interest" and had the debtor retained AlixPartners instead of McKinsey US or RTS. (Compl. ¶ 5; *see also id*. at ¶¶ 335, 348, 357 (alleging, in conclusory fashion, damages consisting of fees AlixPartners would have earned but for Defendants' conduct and other lost business opportunities).) The direct victims of McKinsey's alleged conduct, if any, would have been the entities that Rule 2014(a) was designed to protect—such as the debtors themselves and, perhaps, certain Interested Parties. *See, e.g.*, *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32034346, at *5 (Bankr. S.D.N.Y. May 23, 2002). Thus, even if Alix's view of Rule 2014(a) were correct

and McKinsey's Rule 2014(a) disclosures were inadequate (which they were not), and even if he had alleged adequately that those disclosures actually caused injury to AlixPartners through an actual lost business opportunity (which he has not), Alix cannot allege that McKinsey's purported violation led *directly* to those injuries. "A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming"—as Alix has here—"that the defendant's aim was to increase market share at a competitor's expense." *Anza*, 547 U.S. at 460. This defect is incurable and, standing alone, requires the Court to dismiss all of Alix's RICO claims as to all Defendants.

The Supreme Court's decision in *Anza* compels this result. In *Anza*, Ideal Steel Supply Corp. ("Ideal") brought a RICO claim against the owners of its principal competitor, National Steel Supply, Inc. ("National"), contending that National systematically failed to collect sales tax on cash sales, in violation of New York state tax law. Ideal argued that by under-paying sales tax, National could lower its prices while maintaining its profit margin, thereby depriving Ideal of market share it otherwise would have obtained. *Id*. at 454. The Supreme Court affirmed the dismissal of this RICO claim because it failed to allege a direct injury to Ideal: "[t]he direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue as a result." *Id*. at 458. The Court explained that, although "Ideal asserts it suffered its own harms when [its competitor] failed to charge customers for the applicable sales tax," the "cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* The Court's conclusion was "confirmed by considering the directness requirement's underlying premises"—the difficulty of ascertaining the portion of damages attributable to the defendant's conduct given the "attenuated connection" between such alleged conduct and injury, and the fact that the more immediate victim (the State) could itself vindicate the law. *See id.* at 458–60.

As in *Anza*, AlixPartners was not the direct victim of McKinsey's alleged conduct, and "[t]he cause of [AlixPartners's] alleged harms . . . is a set of actions"—*i.e.*, not being selected by a debtor—that is "entirely distinct from the alleged RICO violations"—*i.e.*, supposedly defrauding the parties to the bankruptcy by filing misleading Rule 2014(a) disclosures. *Id*. at 458; *see also, e.g.*, *Holmes*, 503 U.S. at 268 (proximate causation not satisfied in RICO suit alleging defendants' stock manipulation caused broker-dealer bankruptcies and thereby caused harm to broker-dealer customers); *Hemi Grp. LLC v. City of N.Y.*, 559 U.S. 1, 14 (2010) (defendants' failure to file required reports to state did not lead directly to city's injuries); *cf. Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 658 (2008) (defendants' scheme to unlawfully submit multiple bids in tax auction directly injured losing bidders who were "the *only* parties injured" by the misrepresentations (emphasis in original)).

The purpose underlying the Supreme Court's directness requirement is well served by rejecting Alix's claims. *Anza*, 547 U.S. at 458. *Anza* instructs that "[o]ne motivating principle [of the directness requirement] is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.*; *see also Holmes*, 503 U.S. at 271-72 ("[T]he general tendency of the law, in regard to damages at least, is not to go beyond the first step."). The alleged connection between McKinsey's conduct and AlixPartners's harm is equally "attenuated" as that alleged in *Anza*, if not more so.[13] To credit Alix's theory, this Court would have to find, among other things, that McKinsey would have been disqualified by the bankruptcy court based on a

[13] Alix's allegations regarding the *SunEdison* bankruptcy highlight the fact, that to the extent any parties would be injured directly here, it was the debtor and creditors. Alix contends that in order to "avoid disqualification," McKinsey "orchestrat[ed] a series of improper and deceptive pre-petition transfers from the debtor and non-debtor affiliates totaling at least $10 million." (Compl. ¶ 186(b).) In other words, Alix contends that McKinsey conspired to remove $10 million from the estate and misrepresented that fact in its disclosures in order to obtain the assignment. Even if these allegations were true (which they are not), AlixPartners does not factor in at all; it would have been SunEdison and its creditors that were the directly injured parties.

conflict, that the debtor would have, instead, sought AlixPartners's services, and that AlixPartners would have been qualified and disinterested—thirteen times over. *See Anza*, 547 U.S. at 460 (proximate causation "is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation"); *Hemi Grp.*, 559 U.S. at 11 (the "disconnect" between injury and a RICO violation is particularly attenuated when plaintiff's theory of liability "rests not just on separate *actions*, but separate actions carried out by separate *parties*" (emphasis in original)). In addition to subjecting a court to the "speculative nature" of adjudicating what decisions bankruptcy courts would have made in Alix's counterfactual, *Anza*, 547 U.S. at 459, the business decisions of debtors to hire McKinsey instead of AlixPartners could have occurred for a host of reasons wholly unrelated to McKinsey's disclosures, such as AlixPartners's own failure to compete for the business, conflicts or lack of experience that disqualified AlixPartners, or a preference for the skills or expertise of McKinsey.[14] *See id.* at 458 (plaintiff's competitor "could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud"); *see also id.* at 458-59 ("Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [plaintiff's] lost sales were the product of [defendant's] decreased prices."). The proximate causation requirement "has particular resonance when applied to claims brought by economic competitors" because such claims of competitive harm, "if left unchecked, could blur the line between RICO and the antitrust laws." *Id.* at 460.

Anza further instructs that the "requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate

[14] Tellingly, in many of the bankruptcies at issue in this case, the debtors had hired *multiple* restructuring advisors, such that RTS would work alongside another competitor, such as Alvarez & Marsal. (Ex. 15, *Harry & David* Doc. 101 (Application to Employ/Retain Alvarez & Marsal North America, LLC as Interim Chief Executive Officer and Chief Restructuring Officer).) This belies Alix's contention that McKinsey US's or RTS's retention necessarily precluded retention of AlixPartners.

the laws by pursuing their own claims." *Id.* at 460. The parties to a bankruptcy proceeding—the debtor(s), creditors, and the U.S. Trustee—are fully capable of enforcing Rule 2014(a) and are best situated to do so. Indeed, there is a specific statutory provision empowering these parties to challenge the disclosures at issue here.[15] *See* 11 U.S.C. §§ 307, 1109(b) (permitting "any party in interest," including the U.S. Trustee and the "debtor, the [debtor's] trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee" to appear in the bankruptcy court and be heard on any matter). Moreover, the bankruptcy court and U.S. Trustee are directed under Section 327 to determine whether bankruptcy advisors are disinterested. *See* 11 U.S.C. § 327(a). A challenge to McKinsey's disclosures by the parties to the bankruptcy or the bankruptcy court would not involve any of the causal gymnastics presented by Alix's claims. "There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Anza*, 547 U.S. at 460.

Other courts in this circuit have dismissed Section 1962(c) RICO claims premised upon proximate causation theories analogous to the one Alix advances here. For example, in *4 K & D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525 (S.D.N.Y. 2014), Grand Estates, a real estate company, brought a RICO claim against a competitor, Concierge, claiming that Concierge fraudulently misrepresented itself to potential customers and that, as a result, Grand Estates lost business. *Id*. at 540-41. Dismissing the claim, the court found that Grand Estates had "suffered only indirect injury that was derivative of the injury to the property sellers. Grand Estates was injured only because the property owners were allegedly deceived into using Concierge's auction services." *Id*. at 541. The court noted that *Anza* presented an "analogous" factual scenario and,

[15] Not included on this list are firms offering services to debtors who do not ultimately get retained for the chapter 11 case in question, like AlixPartners.

applying its reasoning, explained that "there could be many reasons for which [the] property sellers did not choose Grand Estates, and there was no guarantee that those who contracted with Concierge would otherwise have chosen Grand Estates." *Id.* The court reached this conclusion notwithstanding that "the number of auction houses in the business of luxury estate auctions may not be large" and further found that the "defrauded seller is presumably capable of bringing suit on his or her own." *Id*. at 541-42.

Similarly, in *Medgar Evers Houses Tenants Association v. Medgar Evers Houses Associates, L.P.*, 25 F. Supp. 2d 116, 121 (E.D.N.Y. 1998), the court rejected a RICO claim premised on allegedly false statements made in regulatory filings to the U.S. Department of Housing and Urban Development ("HUD") on the basis that the plaintiffs were not directly injured. There, a group of tenants in a federal housing project filed a RICO action against the housing project's owner and its former and current operators, claiming that the defendants were operating an association-in-fact RICO enterprise by submitting false declarations to HUD about the good condition of the living conditions when, in fact, the conditions were far worse. *Id*. at 119-20. Applying the reasoning of *Holmes* that guided *Anza*, the court noted that the "false and misleading statements that constitute the acts of racketeering activity were all made to HUD" and not to the plaintiffs. *Id*. at 121. To adjudicate the plaintiffs' "second-level injuries,"

> [T]he fact-finder would be required to determine whether the complained of conditions at the Medgar Evers Houses in fact resulted from the false statements to HUD, as opposed to, for example, the defendants' poor management of the housing project. . . . [T]he law need not shoulder these difficulties. HUD itself can deter fraudulent statements to HUD.

Id. at 121-22. Because the plaintiffs suffered no direct injury from the filings, the court concluded that proximate cause was lacking and dismissed the RICO claims. *Id*. at 124.

The same result should follow here. There is no direct injury to AlixPartners from McKinsey's purportedly inadequate Rule 2014(a) disclosures. This defect is fatal and cannot be cured through amendment. Counts 1 through 4 should therefore be dismissed with prejudice.

B. Alix Fails to Plead Actual Causation.

The Complaint also fails to adequately plead actual—or "but for"—causation, an independent element of the RICO claims. As an initial matter, the Complaint does not allege that AlixPartners suffered any cognizable injury, as it lacks any allegation that AlixPartners was in contention to be retained by any debtor in any of the thirteen bankruptcy assignments at issue in this case.[16] This alone is fatal: Alix cannot claim to have suffered injury in connection with chapter 11 cases in which AlixPartners did not bid for the position of advisor to the debtor.

Moreover, Alix's claim that McKinsey's disclosures were the "but-for" cause of AlixPartners's alleged injury is rendered untenable by the multitude of intervening events that would have had to occur for the debtor to retain AlixPartners instead of McKinsey in each respective bankruptcy proceeding. As Alix recognizes, bankruptcy court approval of an advisor to a chapter 11 debtor is not automatic, but rather is subject to statutory requirements and the discretion of the bankruptcy court. (Compl. ¶ 53.) Before AlixPartners could have been retained in any of the bankruptcies, all the following would have had to occur:

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[16] The closest Alix comes to such an allegation are the vague and speculative assertions that (1) AlixPartners "*likely* would have been employed in Standard Register" because of its "market position" and the fact that AlixPartners had "provided services to Standard Register in the past," (Compl. ¶ 149 (emphasis added)); and (2) in *NII Holdings* AlixPartners "sought an opportunity to bid or make a pitch" but "was never given the opportunity to do so." (*Id.* at ¶ 130.) Alix also pleads in Count 7 that AlixPartners had an "expectancy that it would be retained by Alpha Natural Resources, Inc. and/or AMF Bowling Worldwide to provide services in connection with their respective bankruptcy proceedings." (*Id.* at ¶ 373 (emphasis added).) This allegation is not only speculative and devoid of any support in the Complaint, it is also a tacit admission that AlixPartners had no such expectancy in any of the other eleven bankruptcies, further undermining the Complaint's allegations of actual causation. What is more, public filings show that Alix could not have been retained to advise the debtor in some of these bankruptcies *as it already was advising other Interested Parties in the case*. (*See, e.g.*, Ex. 16, *Sun Edison* Doc. 50 at 4 (stating that Sun Edison's non-debtor affiliates had "[r]etain[ed] Alix Partners, LLP ("AlixPartners") . . . to assist the[m] with their contingency planning for a SunEdison restructuring or bankruptcy").)

1. Had McKinsey disclosed its connections as Alix contends it should have, someone with standing (*e.g.*, the U.S. Trustee, the debtor, or a creditor) would have objected;
2. McKinsey would not have been able to mitigate the concern raised by the objector, including through screens or other prophylactic procedures;
3. Considering the disclosure and any available mitigation efforts, the bankruptcy court, in its discretion, would have disqualified McKinsey from the assignment;
4. With McKinsey unavailable, the debtor would have chosen to hire a different advisor rather than complete the work itself;
5. The debtor would have considered AlixPartners, and not one of its many other competitors, as its second choice for the consulting work for which McKinsey had been selected;
6. AlixPartners would have been qualified for the assignment;
7. AlixPartners would not itself have been conflicted from taking the assignment;
8. No interested party would have objected to AlixPartners's disclosures, or any such objections would have been overruled; and
9. The bankruptcy court, in its discretion, would have approved AlixPartners as the debtor's advisor and approved its fee application.

Finding the requisite causal connection between McKinsey's alleged misconduct and AlixPartners's purported injury, thus, would require a series of speculative steps and a retrospective determination of the judgments that would have been made by third parties such as bankruptcy courts and debtors. Each such step in this chain of conjecture is an intervening cause of the alleged injury that requires dismissal. *See Intimate Bookshop v. Barnes & Noble, Inc.*, No. 98-cv-5564 (WHP), 2003 WL 22251312, at *6, *8 (S.D.N.Y. Sept. 30, 2003) (rejecting antitrust claim based on lost business where plaintiff could not show that "other intervening market factors" were not the cause of the alleged harms, noting that plaintiff's "unsupported assumption of causation" and "failure to account for defendants' lawful conduct and intervening market factors are fatal to its claim"); *cf. World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486,

523 (S.D.N.Y. 2007) ("Plaintiff does not have a crystal ball or any plausible way to allege facts that would establish the outcome of the bidding process.").

The Complaint fails to sufficiently allege that "but-for" McKinsey's allegedly incomplete disclosures, AlixPartners would have been retained in each of the thirteen bankruptcies. Accordingly, the RICO counts should be dismissed for this independent reason.

C. Alix Fails to Plead Any RICO Predicate Acts Against the Corporate Defendants.

While the Complaint's failure to plead both proximate and actual causation constitute two independent grounds for disposing of Alix's RICO claims (Counts 1 through 4) in their entirety, the Complaint separately fails to plead any of the underlying predicate acts necessary to state a RICO claim against any of the Corporate Defendants. *See Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 168 (E.D.N.Y. 2010), *aff'd*, 443 F. App'x 582 (2d Cir. 2011). That is so for three reasons.

First, the contents of the disclosures upon which Alix's fraud-based claims rest directly contradict his allegations of falsity and scienter and are thus fatal to his claims as a matter of law. *See NYSA Series Tr. v. ESPSCO Syracuse, LLC*, No. 14-cv-1089 (DNH), 2015 WL 457691, at *4-5 (N.D.N.Y. Feb. 3, 2015) (dismissing fraud claim alleging misstatements and omissions in offering documents where allegations contradicted plain language of the offering documents); *Phillips v. Am. Int'l Grp., Inc.*, 498 F. Supp. 2d 690, 693 (S.D.N.Y. 2007) (same with respect to contract). *Second*, Alix fails to plead those same fraud-based predicates with the particularity required under Rule 9(b). *Third*, Alix fails to state a claim as to any of his non-fraud-based predicate acts.

1. Alix's Allegations of Fraudulent Misrepresentation and Omission, as Well as Scienter, are Affirmatively Precluded by the Disclosures That Form the Basis of All His Claims.

A plaintiff cannot allege claims arising from a document, decline to attach that document, and then survive a motion to dismiss where the document directly contradicts essential allegations in the complaint. "If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true." *Roberts v. Bliss*, 229 F. Supp. 3d 240, 248 (S.D.N.Y. 2017); *see also DiFolco*, 622 F.3d at 111. Here, the Rule 2014(a) disclosures filed by McKinsey in each of the thirteen bankruptcy cases at issue preclude Alix from adequately alleging two independent elements of his fraud-based claims: (1) an actionable false statement or material omission, and (2) fraudulent intent. Measured either against the heightened pleading standards of Rule 9(b) applicable to fraud claims, or even the ordinary standards applicable under *Iqbal* and *Twombly*, the Complaint fails to allege fraud. Instead, it alleges a dispute between competitors—and no one else—about the form and adequacy of McKinsey's Rule 2014(a) disclosures. *Compare In re Progress Energy, Inc.*, 371 F. Supp. 2d 548, 552 (S.D.N.Y. 2005) *with In re TVIX Secs. Litig.*, 25 F. Supp. 3d 444, 450 (S.D.N.Y. 2014).

a. The Fraud Allegations are Insufficient.

The contents of McKinsey's Rule 2014(a) disclosures affirmatively refute Alix's allegation that they include actionable falsehoods or material omissions. Alix's principal attack on McKinsey's disclosures is that for many years they did not "identify . . . connection[s] by name." Exhibit A to the Complaint goes on for page after page listing supposedly false McKinsey statements where the "reason [it is] false or misleading" is that the declaration "failed to identify connections by name." Yet, in his zeal to convert a dispute over how to comply with Rule 2014(a) into claims of criminal fraud under RICO, Alix has overreached and misled. Over and over again,

the Complaint alleges that McKinsey, acting with intent to defraud, "failed to name a ***single*** connection to any Interested Parties." (*Id.* at ¶ 72 (*Hayes Lemmerz*), *see also*, *e.g.*, *id.* at ¶ 79 (*Mirant*), ¶ 84 (*Lyondell*), ¶ 90 (*Harry & David*), ¶ 93 (*AMR*), ¶ 101 (*Edison Mission Energy*).) If all the Court had to go on was the Complaint, it might conclude that McKinsey filed nothing at all in some of the cases at issue, or filed declarations stating that it had no connections to Interested Parties. According to Alix, the failure to use names "conceal[ed] connections to likely dozens of Interested Parties" (*id.* at ¶ 101) and was "unlawfully vague" (*id.* at ¶ 138). (*See also id.* at ¶¶ 133, 155, 173, 186.)

However, the very documents on which Alix's allegations are based cannot be reconciled with his stark allegations of fraud. For example, in the *NII Holdings* bankruptcy, RTS disclosed, in ten paragraphs, thirty-eight connections to Interested Parties and two personal McKinsey connections to board members of the debtors. (Ex. 9-A, *NII Holdings* Doc. 153 ¶¶ 25(b)-(k).) RTS further disclosed that "McKinsey RTS and its affiliates serve or have served in the last three years various parties included on the Interested Parties List, but other than as may be described herein, such client service has not focused on a direct commercial relationship or transaction with the Debtors." (*Id.* at ¶ 30.) These and similar disclosures in the other bankruptcies at issue lay bare the real nature of Alix's dispute with McKinsey, which is that he has a different view from McKinsey on what *form* of disclosure Rule 2014(a) requires. Put another way, Alix has not alleged false disclosures that misstate connections to Interested Parties. Rather, he has dressed up in fraud garb his unsubstantiated assertion that McKinsey may only make its disclosures by name, rather than by category.

Nor has Alix sufficiently alleged that the disclosures reflect material omissions. In every proceeding, McKinsey US and RTS explicitly told debtors, creditors, the U.S. Trustee, and the

court precisely what it was disclosing (*i.e.*, connections to "Major Customers" or other categories of Interested Parties) and not disclosing (*i.e.*, names), and why (*i.e.*, confidentiality commitments to consulting clients).[17] When supposed omissions of facts are transparently disclosed and explained, those omissions cannot be false or misleading. *See In re TVIX Secs. Litig.*, 25 F. Supp. 3d at 450 (rejecting a Section 11 securities claim premised on material omissions in offering documents where the issuer laid out the methodology by which it disclosed potential risks); *In re Progress Energy, Inc.*, 371 F. Supp. 2d at 552 ("[I]t is indisputable that there can be no omission where the allegedly omitted facts are disclosed."); *In re Royal Bank of Scot. plc Secs. Litig.*, No. 09-cv-300 (DAB), 2012 WL 3826261, at *8 (S.D.N.Y. Sept. 4, 2012) ("[A] plaintiff challenging a defendant's disclosures regarding its . . . processes must allege facts showing that the descriptions of the processes were false or misleading . . . or facts showing that the processes were not followed."); *United States ex rel. Englund v. L.A. County*, No. Civ. S-04-282 (LKK), 2006 WL 3097941, at *7 (E.D. Cal. Oct. 31, 2006) (holding, under the False Claims Act, that "imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false").[18]

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[17] McKinsey also regularly disclosed that it only searched for connections to Interested Parties maintained by McKinsey entities that provide consulting services. (*E.g.*, Ex. 7, *AMF Bowling* Doc. 125 ¶ 23(a) ("McKinsey RTS made inquiry to all partners at its client service affiliates worldwide . . . ."); Ex. 8-A, *Edison Mission* Doc. 175-3 ¶ 20(a) (same); Ex. 9-A, *NII Holdings* Doc. 153, ¶ 29(a) ("McKinsey RTS made inquiry to all partners at its affiliates world-wide that provide consulting services . . . ."); Ex. 12-A, *SunEdison* Doc. 153, ¶ 58(a) (same).) Yet, without alleging any facts that demonstrate why the scope of McKinsey's searches were inadequate or out of step with similarly-situated parties, Alix counts among McKinsey's fraudulent omissions the failure to disclose investments by the McKinsey entity that manages and invests employee and former employee retirement funds. In light of McKinsey's actual disclosure of the entities it searched, Alix's conclusory allegations that McKinsey failed to search the correct entities cannot amount to fraud. (Compl. ¶¶ 105, 108-09, 159.)

[18] Alix cannot allege fraud by innuendo by pointing out alleged "inconsistencies" in roughly contemporaneous disclosures in different bankruptcies because the Rule 2014(a) disclosures explain, among other things, that the Client Service Teams change from bankruptcy to bankruptcy. Nor is there anything nefarious in McKinsey's filing of supplemental disclosures; if anything, they demonstrate McKinsey's continuing diligence.

b. The Scienter Allegations Are Insufficient.

Just as the Rule 2014(a) disclosures negate Alix's ability to establish a fraudulent misrepresentation or omission, they also negate his ability to allege scienter—that is, that McKinsey US or RTS intentionally defrauded anyone. The law of this Circuit requires Alix to plead facts giving rise to a "strong inference of fraudulent intent." *First Capital Asset Mgmt.*, 385 F.3d at 179; *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993) (same); *see also PetEdge, Inc. v. Garg*, No. 15-cv-9606 (GHW), 2017 WL 564088, at *12 (S.D.N.Y. Feb. 10, 2017) (dismissing fraud claim where pleading did not give rise to "a strong inference of fraudulent intent"). McKinsey US's and RTS's Rule 2014(a) disclosures defeat any inference—let alone a legally cognizable one—that either entity intended to defraud anyone. To the contrary: each of the disclosures is transparent about how connections to Interested Parties were identified. For example, in the *NII Holdings* bankruptcy, RTS disclosed that it:

1. Emailed members of RTS and members of McKinsey and RTS serving the debtors (the "RTS Team") "to determine the existence of any client service provided by such employees within the last three years to . . . Interested Parties," (Ex. 9-A, *NII Holdings* Doc. 153 ¶¶ 3, 23);

2. "[S]earched its global client database to determine the existence of any client service provided by such employees within the last three years to . . . Interested Parties," (*id*. at ¶ 23);

3. Emailed members of RTS, the RTS Team, and "partners at affiliates that provide consulting services to determine the existence of client services provided by employees within the last three years to any client that focused on a direct commercial relationship or transaction with the Debtors," (*id*.);

4. Emailed "all employees of McKinsey RTS and its affiliates to request information on any relationships with the Debtors, the U.S. Trustee and the Bankruptcy Court, as well as equity ownership in the Debtors," (*id*.);

5. "[M]ade inquiry to all partners at its affiliates world wide that provide consulting services to entities that focus on a direct

commercial relationship or transaction with the Debtors," (*id*. at ¶ 29(a)); and

6. Inquired with partners at RTS affiliates "responsible for those clients appearing on the Interested Parties List" to determine the scope of such services within the past three years," (*id*. at ¶ 29(b)).

The *NII Holdings* Rule 2014(a) disclosure further made explicit that McKinsey advises Interested Parties in matters unrelated to the bankruptcy. (*See, e.g.*, *id*. at ¶ 26.)

Thus, even if disclosure by category rather than by name could somehow be characterized as a false statement or material omission, the disclosure of McKinsey's process and rationale preclude any inference of intent to defraud. Indeed, the disclosures make clear that the reason McKinsey US and RTS used that form of disclosure was a good faith effort to honor the contractual confidentiality obligations owed to its consulting clients. Alix does not even acknowledge these explanatory disclosures, let alone allege that they were false or pretextual. In these documents, incorporated into Alix's pleading, McKinsey indisputably attempted to reconcile its clients' legitimate confidentiality interests with the bankruptcy court's equally legitimate interest in the appropriate disclosure of McKinsey's connections to Interested Parties. Even if (contrary to the determinations made in all thirteen cases thus far) Alix is correct that McKinsey's method of reconciling those interests runs afoul of Rule 2014(a), it is not fraud, and the Complaint sets forth no facts that make Alix's contrary allegation even plausible. *See Twombly*, 550 U.S. at 564-66 (dismissing antitrust conspiracy claim where defendants' good faith economic incentives could have resulted in the same conduct alleged to constitute the antitrust claim and noting that the allegations were consistent with both liability and with innocent behavior).

Separate and apart from their content, the context in which these Rule 2014(a) disclosures were filed negates any inference that McKinsey acted with intent to defraud. Each of the thirteen bankruptcies concerned estates valued in excess of $1 billion (Compl. ¶ 1) and involved scores of

seasoned participants in chapter 11 cases represented by sophisticated counsel. (*See, e.g.*, *supra* at note 6.) Under these circumstances, where McKinsey US and RTS knew that their detailed Rule 2014(a) disclosures would be scrutinized by experienced bankruptcy counsel, there is not a single factual allegation in the Complaint that supports *any* inference that McKinsey's detailed disclosures were intended to defraud—let alone a strong one.

In sum, reading the allegations in the Complaint in conjunction with the Rule 2014(a) disclosures on which they are based, it is clear that Alix has failed to plead either an affirmative falsehood or a material omission. Setting those deficiencies aside, the Complaint fails to allege fraud because the disclosures also establish an innocent reason for the challenged conduct—one that plainly was accepted by thirteen different bankruptcy courts. As such, the transparency of McKinsey's conduct, the content of its disclosures, and the context in which they were made preclude the "strong inference of fraudulent intent" that Alix's allegations of fraud require. For this additional reason, the Complaint's allegations of fraud should be dismissed.

2. Alix Fails to Allege Fraud or Any Fraud-Based Predicate Act with Particularity as Required by Rule 9(b).

The fraud-based RICO predicates alleged in the Complaint also fail because they are not alleged with the particularity required by Rule 9(b). *See Sanchez*, 2015 WL 3540836, at *5; *see also D. Penguin Bros. Ltd. v. City Nat'l Bank*, 587 F. App'x 663, 666 (2d Cir. 2014) (noting that "a plaintiff must plead predicate acts sounding in fraud or mistake according to the particularity requirement of Rule 9(b)"); *Schmidt v. Fleet Bank*, No. 96-cv-5030 (AGS), 1998 WL 47827, at *5 (S.D.N.Y. Feb. 4, 1998) ("Rule 9(b)'s particularity requirements have 'even greater urgency' in civil RICO actions." (quoting *Morin v. Trupin*, 778 F. Supp. 711, 716 (S.D.N.Y. 1991))). And, as noted above, to plead scienter, Alix "must allege facts that give rise to a *strong* inference of fraudulent intent." *First Capital Asset Mgmt.*, 385 F.3d at 179. The Complaint does none of this,

and these pleading deficiencies constitute an independent basis for dismissing all the fraud-based predicate acts.

a. The Complaint Includes No Specific, Individualized Allegations as to the Corporate Defendants.

In order to meet the "rigorous standards that apply under Rule 9(b)," a complaint must place each Defendant on notice of the particular wrongs of which they are accused. *Sanchez*, 2015 WL 3540836, at *13. The Complaint fails this test with respect to each of the Corporate Defendants. Rather than provide the specifics of how each Corporate Defendant participated in the alleged fraud and in what capacity, the Complaint lumps all of them together and charges them collectively with the commission of hundreds of criminal acts. This style of collective pleading is inadequate under Rule 9(b). *See, e.g.*, *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 326 (E.D.N.Y. 2009) (dismissing RICO claim where the complaint "simply clumps together the more than 20 RICO defendants it sues and alleges, without any distinction among them, that all of these defendants committed all of the enumerated acts").

For example, the Complaint alleges generally that all the McKinsey entities other than RTS have been "active participant(s) and central figure(s) in the operation of McKinsey RTS and its affairs and in the orchestration, planning, perpetuation, and execution of the unlawful scheme to deprive [AlixPartners] of valuable bankruptcy consulting engagements." (Compl. ¶ 282.) That vague assertion falls far short of alleging what each entity did to participate in the affairs of the various alleged enterprises in thirteen separate bankruptcy cases spanning seventeen years.

It is telling that the Complaint collectively defines all the Defendants—including all the Corporate Defendants (except McKinsey Holdings, Inc.) and all six of the individuals—as "McKinsey" (Compl. ¶ 1) and then proceeds to indiscriminately accuse "McKinsey" of committing hundreds of crimes. To provide one of countless examples, the Complaint accuses

"McKinsey" of filing three disclosure affidavits in the *Hayes Lemmerz* bankruptcy in 2002 and goes on to charge "McKinsey" with "failing to name a single connection to any Interested Parties." (*Id*. at ¶¶ 71-72.) Exactly how any particular defendant participated in those events has not been alleged. RTS—an entity that did not even exist until 2011 (*id*. at ¶ 48)—is thrown in. So is Dominic Barton, even though the Complaint alleges elsewhere that he did not know of any alleged illegal activity until 2014 (*id*. at ¶ 111). Similar examples abound throughout the Complaint. (*See, e.g.*, *id*. at ¶¶ 2, 3, 4, 15, 20, 28, 68, 84, 95, 97, 103, 104, 154, 186, 209, 287-89, 293-94, 297.) Finally, there is not a single substantive allegation leveled against McKinsey & Co. Inc.—the ultimate parent company of the McKinsey family of companies—or McKinsey Holdings, Inc.—which is simply alleged to be a "wholly-owned subsidiary of McKinsey & Co." (*id*. at ¶ 31)—connecting them to any predicate acts whatsoever. These entities appear to have been named as Defendants solely because of their corporate relationships with McKinsey US (another wholly-owned subsidiary of McKinsey & Co. (*id*. at ¶ 32)) and RTS (a limited liability company whose sole member is McKinsey US (*id*. at ¶ 33)).

It no doubt serves other of Alix's purposes to make these blunderbuss allegations of serious fraudulent activity against the entire McKinsey family of companies and six McKinsey professionals in a setting he believes avails him of the litigation privilege. Such group pleading, however, defeats his lawsuit. Rule 9(b) not only serves a critical notice requirement, it also protects reputations—corporate and individual—"from improvident charges of wrongdoing." *Shields v. Citytrust Bancorp.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (internal quotation marks omitted). The Complaint's abject failure even to attempt to differentiate among the Defendants, let alone allege specifically who, where, and how they acted in ways that give rise to a strong inference of fraud, requires the dismissal of Alix's fraud allegations.

b. Alix Fails to Plead Mail Fraud or Wire Fraud.

"The elements of wire fraud under 18 U.S.C. § 1343 are (i) a scheme to defraud, (ii) to get money or property, (iii) furthered by the use of interstate wires." *Tymoshenko v. Firtash*, 57 F. Supp. 3d 311, 321 (S.D.N.Y. 2014) (quoting *United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000)). "The elements of mail fraud under 18 U.S.C. § 1341 are identical, except that mail fraud must be furthered by use of the mails." *Tymoshenko*, 57 F. Supp. 3d at 321 (citing *United States v. Vilar*, 729 F.3d 62, 91 n.26 (2d Cir. 2013)).

An additional ground for the dismissal of the mail and wire fraud racketeering acts is the Complaint's failure to plead the *sine qua non* of those crimes: that Defendants sought to deprive Alix of "[money or] property in the victim's [AlixPartners's] hands." *Pasquantino v. United States*, 544 U.S. 349, 355 (2005). The Complaint fails to allege that AlixPartners had any actual, protected property interest that McKinsey sought to misappropriate, much less that McKinsey's disclosures induced AlixPartners to part ways with money or other property already in its hands. The Complaint alleges only that McKinsey's Rule 2014(a) disclosures somehow deprived AlixPartners of the ability to bid on (and obtain) the bankruptcy assignments in question. Conspicuously absent is any allegation that any debtor had an interest in retaining AlixPartners. And even if the Complaint alleged that one of the debtors was considering AlixPartners for the services it obtained from McKinsey, a competitor's "interest in a fair bidding opportunity" is "not a property right." *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994) (finding that the right to a fair bidding process is not a type of property that "the law traditionally has recognized and enforced . . . as a property right." (citing *United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988))). Because Alix fails to "allege a scheme to defraud [AlixPartners] . . . of a property right, [he] therefore does not state offenses under the federal fraud statutes." *Henry*, 29 F.3d at 116; *see also*

Pierce, 224 F.3d at 165 ("A scheme to deceive, however dishonest the methods employed, is not a scheme to defraud in the absence of a property right for the scheme to interfere with.").

c. Alix Fails to Plead Bankruptcy Fraud or Bribery.

Alix's bankruptcy fraud predicate acts—which allege violations of 18 U.S.C. §§ 152(2) and 152(3)—fare no better.[19] Subsections 152(2) and 152(3) both require that Alix plead (1) that each Defendant submitted a materially false statement to the bankruptcy court and (2) did so knowingly, with fraudulent intent. *See United States v. Sabbeth*, 125 F. Supp. 2d 33, 43 (E.D.N.Y. 2000) (Subsection 152(2) prohibits "knowingly and fraudulently making a false oath [or account in or] in relation to a[ny] case under title 11" and requires a plaintiff to show (1) a bankruptcy proceeding under title 11, (2) a "statement under oath in or in relation to the proceeding," (3) that "the statement concerned a material fact," (4) that "the statement was false," and (5) that "the defendant acted knowingly and with the intent to defraud"); *United States v. Markiewicz*, No. 96-cv-122 (RSP), 1996 WL 663894, at *2 (N.D.N.Y. Nov. 6, 1996) (Subsection 152(3) prohibits "knowingly and fraudulently mak[ing] a false declaration . . . under penalty of perjury . . . in or in relation to any case under title 11" and requires a plaintiff to show that the defendant "knowingly and with an intent to defraud made a material false statement under oath in relation to a bankruptcy proceeding"). Alix has alleged neither a false statement nor fraudulent intent.

The fact that Alix disagrees with the form of McKinsey US's and RTS's Rule 2014(a) disclosures does not make them fraudulent, particularly given the substantial disclosures made including the process and methodology for gathering the disclosures and the precise identification

[19] Courts in this Circuit interpret the term "bankruptcy fraud" as the manifestation of a defendant's intent to frustrate or "defeat the provisions of the bankruptcy code," *First Capital Asset Mgmt.*, 385 F.3d 179, and are particularly wary of RICO claims premised on bankruptcy fraud, routinely dismissing them at the pleadings stage. *E.g.*, *id.*; *Ferri v. Berkowitz*, 678 F. Supp. 2d 66 (E.D.N.Y. 2009); *Ritter v. Klisivitch*, No. 06-cv-5511 (DRH), 2008 WL 2967627 (E.D.N.Y. July 30, 2008); *Baron v. Rabinovici*, No. 05-cv-110 (TCP), 2006 WL 1318426 (E.D.N.Y. May 12, 2006); *Burke v. Dowling*, 944 F. Supp. 1036 (E.D.N.Y. 1995).

of what information is and is not disclosed by McKinsey. (*Supra* at § I.C.1.) Separately, the Complaint fails to allege that either the Defendants generally, or any Defendant in particular, acted knowingly with the specific intent to defraud.

Nor has Alix alleged a violation of 18 U.S.C. § 152(6), which prohibits "knowingly and fraudulently" giving, offering, or receiving money or other remuneration for acting or forbearing to act in a case under title 11. Alix levels this accusation collectively against all Defendants based on the novel theory that McKinsey's offer to introduce bankruptcy attorneys to consulting clients if those attorneys would help McKinsey's efforts to be retained by the attorneys' debtor clients in chapter 11 cases constituted a "pay to play" scheme in violation of Section 152(6) and state bribery laws. (Compl. ¶¶ 295-301.) As the Department of Justice's United States Attorney's Manual makes clear, Section 152(6) is the "extortion and bribery" provision of the statute. USAM § 855. "For example," the manual instructs, "a bidder agreeing to withdraw the bid in return for money is covered" by the section. *Id*. (citing *United States v. Weiss*, 168 F. Supp. 728 (W.D. Pa. 1958)). Even taken as true and viewed in the light most favorable to Alix, a company offering to introduce a lawyer to the company's clients in exchange for the lawyer putting in a good word for the company with the lawyer's client—no matter what catchphrase Alix wants to give that activity—does not plausibly constitute extortion or bribery. Moreover, the allegations fail because they do not specify the alleged "bribes," the specific terms, the specific Defendants involved, or how or when any supposed *quid pro quo* occurred. *See Zigman v. Giacobbe*, 944 F. Supp. 147, 156 (E.D.N.Y. 1996) (rejecting bribery predicate act where complaint lacked "a single factual allegation of a specific bribe paid"); *Roberto's Fruit Mkt., Inc. v. Schaffer*, 13 F. Supp. 2d 390, 399-400 (E.D.N.Y. 1998) (rejecting bribery claims). In short, these, baseless and conclusory allegations fail to convert everyday professional conduct into a criminal bribery scheme.

d. Alix Fails to Plead Inducement to Violate 18 U.S.C. § 2314.

Alix's Travel Act predicate may be the most audacious of his audacious claims. He alleges that he traveled to New York to once again lecture Dominic Barton about McKinsey's purported misdeeds. During the course of that meeting, Barton allegedly offered to introduce AlixPartners to two McKinsey clients in need of consulting services. That, Alix asserts, violated the Travel Act. (Compl. ¶ 293.)

Alix is wrong. To state a Travel Act claim, Alix must allege with particularity "(1) that the defendant devised a scheme intending to defraud a victim of money or property of a minimum value of $5,000, and (2) that as a result of this scheme, a victim was induced to travel." *United States v. Myerson*, 18 F.3d 153, 164 (2d Cir. 1994); *Thai Airways Int'l v. United Aviation Leasing B.V.*, 891 F. Supp. 113, 118 (S.D.N.Y. 1994).

Preliminarily, Alix admits that *he* requested the meeting with Barton in order "to discuss remediation of McKinsey RTS's continued unlawful bankruptcy consulting engagements." (Compl. ¶ 293.) This allegation alone is fatal to the Travel Act claim, because such a claim requires a showing that the defendant was "the efficient cause" and "a motivating force in the victim's transportation." *Myerson*, 18 F.3d at 164. More to the point, this racketeering act, which is once again alleged indiscriminately against every single Defendant, is the absurd extension of the misguided events that led to this RICO action. Upset by the success of business competitor McKinsey, Alix advanced to McKinsey his interpretation of what Rule 2014(a) requires. Rebuffed, he advanced the same interpretation to a U.S. Trustee, a bankruptcy court, and a district court. Rebuffed again, he leveled wild accusations of criminal activity: merely by advancing its own interpretation of Rule 2014(a), McKinsey engaged for more than a decade in fraud; when McKinsey supplemented disclosures at the request of the U.S. Trustee, that was witness tampering by McKinsey; when McKinsey got paid for its services, that was money laundering; and when it

offered to introduce AlixPartners to two companies in need of consulting services, that was bribery. Against that backdrop, it follows that when Alix traveled to McKinsey and did not get what he wanted, Alix was the victim of a Travel Act violation. But the rhetorical consistency of Alix's allegations does not alter the fact that all of these claims are frivolous.

3. Alix Fails to Plead Any Non-Fraud-Based Predicate Acts.

Alix's remaining alleged predicate acts—for obstruction of justice, witness tampering, and money laundering—are devoid of factual support and should be dismissed.

a. Alix Fails to Plead Obstruction of Justice or Witness Tampering.

Alix contends that Defendants violated three separate obstruction of justice provisions—18 U.S.C. §§ 1503(a), 1512(b), and 1512(c)—based on a single absurd allegation: that RTS fraudulently induced the U.S. Trustee in the *Alpha Natural Resources* bankruptcy to withdraw its motion to compel a sworn supplemental disclosure by *providing the very information requested by the U.S. Trustee*. (Compl. ¶ 302.) In other words, Alix contends that RTS obstructed justice by doing precisely what the U.S. Trustee asked it to do.

18 U.S.C. § 1512 (b), which concerns witness tampering, is clearly inapplicable here. That section makes it a crime to "use intimidation, to threaten or corruptly persuade another person, or engage in misleading conduct toward another person, with intent to influence, delay or prevent the testimony of any person in an official proceeding." *Rambarran v. Mount Sinai Hosp.*, No. 06-cv-5109 (DF), 2008 WL 850478, at *7 (S.D.N.Y. Mar. 28, 2008). It requires that the defendant "knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to" prevent such testimony. *United States v. Gotti*, 459 F.3d 296, 343 (2d Cir. 2006). To show "corrupt persuasion," the plaintiff must show that the conduct was "motivated by an improper purpose."

Id. (finding corrupt persuasion satisfied where defendant suggested another person invoke the Fifth Amendment to prevent that person from implicating the defendant). Alix has come nowhere close to alleging any of these things; there is no allegation that any Defendant interfered with anyone's testimony, let alone did so with a corrupt purpose.

Nor has he pleaded a violation of Sections 1503(a) or 1512(c). 18 U.S.C. § 1503(a) applies where a defendant is alleged to have, or endeavored to have "corruptly . . . influenced [or] obstructed the due administration of justice." To plead a violation of Section 1503(a), a plaintiff must allege "that the defendant acted with wrongful intent or improper purpose to influence [a] judicial or grand jury proceeding." *Grewal v. Cuneo*, No. 13-cv-6836 (RA), 2015 WL 4103660, at *18 (S.D.N.Y. July 7, 2015) (a plaintiff failed to plead a violation of § 1503(a) where defendants were alleged to "falsely represent" to courts that they were partners when they were not). Likewise, 18 U.S.C. § 1512(c) prohibits falsification or tampering with evidence by "corruptly" tampering with a document or object with the intent to prevent its use in an official proceeding, or otherwise obstruct or impede an official proceeding. *See United States v. Reich*, 479 F.3d 179, 186 (2d Cir. 2007) (noting that the relevant language of Section 1512(c) "is substantially similar to the . . . language of Section 1503(a)").

There is no allegation that any Defendant tampered with a witness or intimidated, misled, or corrupted the U.S. Trustee in order to induce it to withdraw its motion to compel. Indeed, Alix fails to allege any actual interaction between any Defendant (including Kevin Carmody, who signed the disclosure) and the U.S. Trustee, let alone that anyone acted with a nefarious purpose in any such interaction. The best Alix can do is allege, without any explanation or support, that the supplemental disclosure McKinsey submitted continued to omit connections to Interested Parties. (Compl. ¶ 302.) Once again, the Complaint fails to attach the McKinsey disclosure in

question, which explains, in precise language, what it is and is not disclosing and why. (Ex. 11-D, *ANR* Doc. 2464; Ex. 11-E, *ANR* Doc. 3223.) This is the same kind of dispute over form that, as discussed above, cannot state a fraud. (*Supra* at § I.C.1.)

b. Alix Fails to Plead Money Laundering.

Alix also has not pleaded a money laundering violation; to do so, he would need to allege, that a Defendant, "(1) knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, (2) conducted or attempted to conduct a financial transaction, (3) which in fact involved the proceeds of that unlawful activity, (4) either (a) with the intent to promote the carrying on of that unlawful activity or (b) with the knowledge that the transaction was designed at least in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity." *Gotti*, 459 F.3d at 334. Because, as explained above, Alix has not pleaded that McKinsey obtained any money unlawfully, he cannot satisfy the core requirement of a money laundering claim. *See Tymoshenko*, 57 F. Supp. 3d at 322 (setting out elements, including that "the transaction in fact involved the proceeds of specified unlawful activity as defined in § 1956(c)(7)"). Moreover, Alix has not satisfied the intent requirement: the "transactions" Alix alleges constitute money laundering were ordinary course transfers between McKinsey entities of fees earned for legitimate work.[20] There is no suggestion that the purpose of these transactions was to disguise or conceal the source of the funds—indeed, the fees earned by McKinsey for its work were all approved by the bankruptcy courts after the

[20] Apart from the ordinary-course bankruptcy fees earned by McKinsey, the only other allegations Alix ties to purported money laundering are those involving purported "re-invoiced" and "round trip" payments in connection with the *SunEdison* bankruptcy. (Compl. ¶ 306.) These allegations fail to pass muster because the Complaint is bereft of facts explaining why the work that McKinsey did was not legitimate or why the affiliates of SunEdison should not have been billed for the work that McKinsey performed. And the pleadings actually negate the intent requirement of the money laundering statute by affirmatively stating why the invoices were re-issued: because the services were originally billed to the wrong entity. (*Id*. at ¶ 207.)

public filing of fee applications and a full opportunity for any party with standing to object. There is no plausible basis to infer that McKinsey's internal handling of money obtained as compensation for its professional services constituted anything other than the ordinary course of business.

D. Alix Fails to Plead any Racketeering Acts Against Any Individual Defendant.

All of the arguments advanced above, including those in Section I.C as to Alix's failure to allege racketeering acts against the Corporate Defendants, apply with equal force to the Individual Defendants and mandate their dismissal from this case. Beyond these fatal deficiencies, however, Alix also fails to plead facts showing that any Individual Defendant committed any predicate act—including any of the "individual roles" played in the alleged scheme, *see DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987)—and thus the Complaint fails for this additional reason against each of them.[21] *See Worldwide Directories, S.A. de C.V. v. Yahoo! Inc.*, No. 14-cv-7349 (AJN), 2016 WL 1298987, at *4 (S.D.N.Y. Mar. 31, 2016) ("Each element of a RICO violation . . . must be plausibly alleged as to each defendant rather than simply to the enterprise as a whole."); *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. De-Con Mech. Contractors, Inc.*, 896 F. Supp. 342, 347 (S.D.N.Y. 1995) (party must plead circumstances constituting fraud "for each individual defendant"); *Targum v. Citrin Cooperman & Co.*, No. 12-cv-6909 (SAS), 2013 WL 6087400, at *4 (S.D.N.Y. Nov. 19, 2013) (same with respect to fraudulent intent).

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[21] The group pleading deficiencies identified with respect to the Corporate Defendants above (*see supra* at § I.C.2.a) are equally applicable to the Individual Defendants, as they too are included in the overarching term "McKinsey." (*See* Compl. ¶ 1.) To the limited extent the Complaint includes allegations specific to any individual, it is in the form of matching the individual's corporate position with broad conclusory statements—the very formula this Court has rejected as inadequate under Rule 9(b). *Sanchez*, 2015 WL 3540836, at *10 ("[A] Complaint's mere recitation of fraudulent practices, coupled with conclusory allegations that [d]efendants were aware of these practices by virtue of their positions . . ., fails to state with particularity facts giving rise to a strong inference that any Defendant [made] false[] represent[ations], with scienter . . .").

1. Dominic Barton

The allegations against Dominic Barton, McKinsey's former global managing partner, not only are insufficiently particular to establish fraud, but also fail to allege plausibly any wrongdoing on Barton's part. The Complaint does not allege that Barton was involved in formulating or filing any of McKinsey's Rule 2014(a) disclosures, or that he played any role in any of the bankruptcy cases in which McKinsey US or RTS served as advisor to the debtor. To the contrary, Alix alleges that Barton had no knowledge of the firm's bankruptcy procedures and that Alix thus had to school Barton on U.S. bankruptcy law with an "exposition of the relevant legal principles." (Compl. ¶ 115.) Notably, when Alix phoned Barton to complain about RTS's disclosures in *NII Holdings* in 2014 and *Standard Register* in 2015, Barton stated that he was not even aware of McKinsey having been retained in those matters.[22] (*Id.* at ¶¶ 136, 150.) At best, the Complaint alleges that, during a handful of meetings and phone conversations, Alix complained about RTS's Rule 2014(a) disclosures and Barton "foster[ed] in Alix the false impression that McKinsey was pursuing corrective action in light of Alix's admonishments." (*Id.* at ¶ 289(c).) And while Alix claims that the calls were "substantive and lengthy" (*id.* at ¶ 111), he provides scant description of their content, largely reporting what he himself said. (*See, e.g.*, *id.* at ¶¶ 111-16.) Alix's fraud claim against Barton is, thus, entirely predicated on the notion that, following these conversations, Barton took no action after purportedly promising to do so. That inaction does not state a claim. *Fezzani v. Bear, Stearns & Co., Inc.*, 592 F. Supp. 2d 410, 423 (S.D.N.Y. 2008) ("Where a defendant owes no fiduciary duty to a plaintiff, mere inaction by the defendant cannot constitute actionable participation in [fraud].").

[22] This is not surprising, as McKinsey serves roughly 2,000 clients per year on average. The bankruptcy cases at issue here thus represented less than 0.1% of McKinsey's firmwide clients. As the global managing partner, Barton understandably was not involved on a granular level in the day-to-day operation of the firm's many functional and industry practices.

Moreover, the Complaint alleges no facts "giv[ing] rise to a strong inference of fraudulent intent" on Barton's part. *First Capital Asset Mgmt.*, 385 F.3d at 179. Alix's bald assertion that Barton in reality never intended to change RTS's bankruptcy procedures, but instead was intent on "forestalling remedial litigation by [AlixPartners] and Alix by means of [his] duplicitous" statements (Compl. ¶ 283), is unsupported by any factual pleading. Merely characterizing Barton's inaction as a manifestation of fraudulent intent, where other plausible and wholly innocent reasons for any purported change of mind exist, does not satisfy Rule 9(b). *Targum*, 2013 WL 6087400, at *4.

2. Kevin Carmody

The allegations against Kevin Carmody, a senior McKinsey partner, also fail to state a claim, whether under the plausibility standards articulated in *Iqbal* and *Twombly* or the particularity requirements of Rule 9(b). The only substantive allegation leveled against Carmody in the Complaint is that he signed certain of RTS's Rule 2014(a) disclosures. (Compl. ¶¶ 131-33, 138, 155-57, 227-28.) As explained above, the contention that those disclosures contained actionable misrepresentations or material omissions fails as a matter of law. (*See supra* at § I.C.1.)

The claims against Carmody rest on the suggestion that his signature on certain RTS disclosures is sufficient to plead that he intended to commit a series of frauds meant to injure AlixPartners. But that conclusion does not plausibly follow from the limited allegations against him. As the Complaint acknowledges, Carmody did not join McKinsey until 2011—meaning that the disclosures he signed utilized a methodology that McKinsey already had been using for a decade. That methodology reflected the *bona fide* business concern, disclosed in the Rule 2014(a) declarations, that McKinsey had committed contractually to serving its clients "in a manner that protects the confidentiality of each client's information (including the confidentiality of the engagement itself)." (*See, e.g.*, Ex. 11-A *ANR* Doc. 212 ¶ 21.) McKinsey's unchallenged use of

this methodology provides a "natural explanation" as to why Carmody would have relied upon it in good faith. *Twombly*, 550 U.S. at 567-68. And, as the Complaint acknowledges, McKinsey was advised by "some of the most sophisticated legal counsel in the world" (Compl. ¶ 117) and its methodology for disclosure had long been used without complaint from any court. Given these concessions, the Complaint offers "no reason to infer" that Carmody did anything other than "what was only natural anyway,"—*i.e.*, simply follow in good faith his employer's standard procedure for disclosure. *Twombly*, 550 U.S. at 566."[23]

What is more, the Complaint is completely silent about whether (and, if so, how) Carmody was aware of any alleged falsity in the submissions he signed. It fails to allege that Carmody had personal knowledge of any specific connections to Interested Parties, that he had any motive or reason to believe that Alix or AlixPartners posed a competitive threat to RTS in these engagements, that he believed that the form of RTS's Rule 2014(a) disclosures was inadequate, or that he believed RTS would be disqualified if different disclosures were made. This is fatal to Alix's attempt to plead that Carmody acted with the specific intent to defraud, as is required by Rule 9(b).[24] *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 184 (2d Cir. 1995) (intent requires allegation of either "a motive for committing fraud and a clear opportunity for doing so" or "circumstances indicating conscious behavior by the defendant").

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[23] Alix fares no better when he alleges that because Carmody previously had worked at AlixPartners he "would have known" that AlixPartners's Rule 2014(a) disclosures were "far more robust" than McKinsey's "bare-bones" disclosures. (Compl. ¶¶ 312(g).) Alleging that Carmody was aware that McKinsey's disclosures differed in form from those made by a competitor in other cases is hardly an allegation that Carmody knowingly submitted false declarations.

[24] Even assuming, *arguendo*, that the Complaint supports an inference that Carmody had a motive to obtain more business for McKinsey because of his status as a McKinsey partner, that fails to satisfy Rule 9(b). *Sanchez*, 2015 WL 3540836, at *20-21 ("[A] generalized profit motive that could be imputed to any company . . . has been consistently rejected as a basis for inferring fraudulent intent in mail fraud and wire fraud cases." (internal citations and quotations omitted)).

3. Jon Garcia

The allegations against Jon Garcia do not meet the pleading requirements of Rule 8, much less those of Rule 9(b). The Complaint mentions Garcia by name in just fourteen paragraphs—none of which allege that he actually did anything. (*See* Compl. ¶¶ 1, 36, 64, 106, 117, 121, 126-27, 151-52, 282, 312, 354, 360.) The Complaint alleges only that Garcia has legal training, is a founding executive of RTS, serves on its board, and "has a high degree of executive authority" at RTS. (*Id*. at ¶¶ 64, 106, 282(h).) The remaining factual allegations relate solely to detailing Alix's repeated attempts to get Garcia fired. (*Id*. at ¶¶ 121, 126-27, 151-52, 360.) That is the full extent of the allegations against Garcia. He is never alleged to have made a telephone call, sent an email, reviewed a document, or taken any other action. There are no facts connecting him to any Rule 2014(a) disclosure, let alone any from which one could infer that Garcia knew any such disclosures were false or that he possessed fraudulent intent. Garcia is smeared with the charge of being a racketeer engaged in a pattern of criminal activity, yet Alix fails to allege a single action by him, let alone one where he did something wrong.

4. Seth Goldstrom

The allegations against Seth Goldstrom, another senior McKinsey partner, also fail to state a claim under the requirements of both Rules 8 and 9(b). The Complaint's only substantive allegations regarding Goldstrom are that he signed Rule 2014(a) disclosures in the *Harry & David* and *AMR* bankruptcies in 2011 and 2013, respectively—well outside the statute of limitations period for RICO. (*See infra* at § I.H.) Stripped of conclusory rhetoric and legal argument, the Complaint's few scattered references to Goldstrom establish nothing more than that he signed disclosures as RTS's corporate representative in two bankruptcies. These allegations are wholly insufficient to state a plausible and particularized claim that he committed predicate violations of bankruptcy, wire, and mail fraud as part of the conduct of a racketeering enterprise.

The Complaint includes, at most, seventeen paragraphs that even arguably could be read to describe *any* conduct by Goldstrom personally. (Compl. ¶¶ 37, 64, 89-96, 117, 127, 282, 284, 290, 312(f), 354(i).) The substance of these (largely repetitive) paragraphs, however, alleges nothing more than that Goldstrom is a lawyer (*id.* at ¶¶ 64, 117, 312(f)), is a "senior partner in McKinsey & Co. and Board member of McKinsey RTS" (*id.* at ¶ 282(i); *see also id.* at ¶¶ 37, 127), and that in that capacity he signed Rule 2014(a) disclosures on behalf of RTS in the *Harry & David* and *AMR* bankruptcies. (*Id.* at ¶¶ 89-96, 284, 290, 354(i).) These allegations are insufficient to state a claim against Goldstrom. There are no allegations that Goldstrom knew or believed the disclosures he signed were incomplete or misleading, or that he acted for the purpose of depriving AlixPartners of money or property (just as with Carmody, *see supra* at § I.D.2). The Complaint also does not allege that Goldstrom personally researched every potential connection in the disclosures he signed, drafted the disclosures, or had any reason to believe he could not rely in good faith on the judgment of the professionals who did.[25]

Moreover, the non-conclusory allegations in the Complaint regarding Goldstrom are fully consistent with a good faith belief that he was executing RTS's legitimate business activities. Among other things, the Complaint acknowledges that the methodology used to prepare RTS's disclosures in *Harry & David* and *AMR* had been in place for more than a decade before Goldstrom is alleged to have engaged in any bankruptcy-related services (*id.* at ¶¶ 71-82 & Ex. A), that McKinsey was advised by "some of the most sophisticated legal counsel in the world" (*id.* at ¶ 117), that McKinsey's business relationships were "complex[]" (*id.* at ¶ 70), and that

[25] Indeed, the disclosures Goldstrom signed expressly state that they are based on information compiled by other McKinsey employees. (*E.g.*, Ex. 5-A, *Harry & David* Doc. 105-3 ¶ 2 (disclosures based on "the knowledge of professionals working under my direction"); *id.* at ¶ 10 ("McKinsey RTS made inquiry to all of its partner professionals and its affiliates' partner professionals about whether they currently provide consulting services to entities with a direct commercial relationship with the Debtors.").)

AlixPartners did not question or challenge RTS's methodology until after the *Harry & David* and *AMR* cases. (*Id*. at ¶ 111.) The disclosures Goldstrom signed made clear that McKinsey disclosed its connections by descriptive category, rather than by name, and provided the *bona fide* reason for doing so (to maintain McKinsey's confidentiality obligations to its management consulting clients). (*E.g.*, Ex. 5-A, *Harry & David* Doc. 105-3 ¶¶ 6, 9 (describing confidentiality obligations associated with McKinsey's engagements), 10.) The specific allegations about Goldstrom are thus fully consistent with the conclusion that he signed the disclosures in a representative capacity on behalf of RTS, as part of a good faith effort to provide services to debtors who sought to retain McKinsey (and not AlixPartners) to provide management consulting services. These allegations are "not only compatible with, but indeed . . . more likely explained by, lawful, unchoreographed free-market behavior," and so cannot state a plausible racketeering claim. *Iqbal*, 556 U.S. at 680.

The Complaint also fails to provide the particularized allegations of specific intent to defraud as required by Rule 9(b). There are no allegations that Goldstrom was aware of any undisclosed connections, or that he believed that any of the Rule 2014(a) disclosures he signed, which were prepared with the advice of "some of the most sophisticated legal counsel in the world" (Compl. ¶ 117) were false or misleading. The Complaint fails to allege that Goldstrom even had reason to know that Alix believed RTS's disclosures to be inadequate, as the Complaint alleges that Alix did not raise this issue with any court or the U.S. Trustee until after the *Harry & David* and *AMR* bankruptcies. (*See* Compl. ¶ 111 (alleging that Alix raised concerns for the first time in September 2014).) Nor is there any allegation that Goldstrom had any motive or any reason to believe that Alix or AlixPartners posed any competitive threat to RTS in these two engagements, that Goldstrom believed disclosure of connections by name was required, or that McKinsey would

be disqualified if it had made its disclosures by name.[26] As a result, there are no facts in the Complaint that provide the "strong inference" of intent to defraud required by Rule 9(b).

5. Alison Proshan

The allegations against Alison Proshan likewise fail the pleading requirements of both Rules 8 and 9(b). The sum total of the allegations against Alison Proshan is that she is an "associate general counsel for McKinsey" who "assisted in the preparation of [Rule 2014] disclosures." (Compl. ¶¶ 282(h), 303.) There are no other allegations about her. Indeed, the Complaint mentions Proshan by name in only eight paragraphs—none of which is in the lengthy statement of purported "Facts." (*See id*. at ¶¶ 1, 38, 282, 290, 303-04, 312, 354.) The Complaint fails to allege the scope or nature of her "assistance," where it took place, when it occurred, with whom she worked, or any of the other specifics required by Rule 8, much less Rule 9(b). Nor is she alleged to have signed a single disclosure.

Indeed, the allegations in the Complaint do not even conceivably (much less plausibly) state a claim that Proshan engaged (and intended to engage) in a pattern of racketeering activity. Not only does the Complaint fail to allege any facts suggesting that she did anything wrong in the course of her legal work, it affirmatively alleges that the work she performed was reviewed both by "some of the most sophisticated legal counsel in the world" (*id*. at ¶ 117) and her supervisor, the General Counsel of McKinsey.[27] (*Id*. at ¶ 122.) Moreover, McKinsey's disclosure practices (justified by its *bona fide* commercial rationale) were established long before Proshan even joined McKinsey in 2009. The only plausible inference that can be drawn from the Complaint is that

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[26] Nor can fraudulent intent be inferred from the fact that Goldstrom is a McKinsey partner with a generalized profit motive. (*See supra* at note 24.)

[27] Indeed, Alix alleges that McKinsey's General Counsel not only was aware of his view that RTS's disclosures were inadequate, but purportedly "agreed with his assessment." (Compl. ¶ 122.)

Proshan was doing her job as a lawyer, assisting her client with its bankruptcy submissions in the manner directed by her employer. That cannot form the basis of any claim, let alone a fraud-based racketeering charge. *Morin v. Trupin*, 711 F. Supp. 97, 105 (S.D.N.Y. 1989) ("[A]lthough attorneys are not immune from liability simply because they represent a client, legitimate acts of attorneys on behalf of clients cannot form the basis of a RICO claim.").

Moreover, the Complaint also fails to allege that Proshan acted with the "fraudulent intent" required under Rule 9(b). Even assuming the Rule 2014(a) disclosures were false or misleading—and they were not (*see supra* at § I.C.1)—there is nothing in the Complaint that supports an inference that she knew it. Nor does the Complaint include a single allegation from which this Court could infer that, as a mere employee (and not partner) of McKinsey, she had any motive whatsoever for injuring Alix or AlixPartners or that she would profit from doing so.

6. Robert Sternfels

The Complaint contains only the slimmest of allegations as to Robert Sternfels, another senior McKinsey partner: that he purportedly listened to (not even participated in) two telephone calls between Alix and Mr. Barton in September 2014. (Compl. ¶¶ 111-19, 289(c).) That is it. The Complaint does not allege that he did *anything* with respect to any Rule 2014(a) disclosures. The Complaint does not attribute any improper actions to Sternfels at any time, including during the calls where he apparently was a passive participant. The Complaint does not allege any facts indicating wrongful knowledge or intent. Listening in on two conversations where one's business rival complains is not a sufficient basis to level accusations of participation in racketeering and certainly does not satisfy the Rule 9(b) standard for pleading fraud with particularity.

E. Alix Fails to Plead a Viable RICO Enterprise Against the Corporate Defendants.

When a plaintiff alleges a violation of 18 U.S.C. § 1962(c), the RICO "enterprise must be separate from the pattern of racketeering activity, and distinct from the person conducting the affairs of the enterprise." *In re GM LLC Ignition Switch Litig.*, No. 14-md-2543 (JMF), 2016 WL 3920353, at *12 (S.D.N.Y. July 15, 2016). The Second Circuit repeatedly has affirmed the requirement that "the same entity cannot be both the RICO person and the enterprise." *U1it4less, Inc. v. FedEx Corp.*, 871 F.3d 199, 205 (2d Cir. 2017) (citing *Anatian v. Coutts Bank (Switz.) Ltd.*, 193 F.3d 85, 89 (2d Cir. 1999)) (emphasis in original); *see also Bennett v. U.S. Tr. Co.*, 770 F.2d 308, 315 (2d Cir. 1985). Alix names the Corporate Defendants in two of the three substantive RICO counts—1 and 3. In Count 1, RTS is the purported enterprise and the remaining Corporate Defendants are accused of conducting RTS's affairs through a series of predicate acts. (Compl. ¶¶ 280-308.) In Count 3, all Defendants are accused of operating an enterprise consisting of "McKinsey and the bankruptcy consulting clients of McKinsey & Co. US, Inc. and McKinsey RTS" identified in the Complaint. (*Id.* at ¶ 341.) Because the Corporate Defendants named in each of these counts are not distinct from the alleged RICO enterprises, both counts fail as to them.

The Count 1 Enterprise fails under the well-established rule in this Circuit that "a corporation carrying out its own activities (even fraudulent ones) only through its agents and employees does not constitute an enterprise." *In re GM*, 2016 WL 3920353, at *12; *see also Cruz*, 720 F.3d at 120 (defendant corporation, its COO, and its corporate counsel cannot form an enterprise); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented."). A plaintiff cannot artificially manufacture

distinctness between a corporate subsidiary and its parents, affiliates, and employees by relying upon the fact of the subsidiary's separate incorporation. *U1it4less*, 871 F.3d at 206, 208 (collecting cases).

That is exactly what this Complaint attempts to do. In *U1it4less*, the plaintiff alleged that FedEx Corp. and FedEx Services conducted the affairs of FedEx Ground, FedEx Corp.'s wholly-owned subsidiary, through a pattern of racketeering activity. 871 F.3d at 206. The court dismissed the Section 1962(c) claim, holding that the three companies comprised a unified corporate structure "guided by a single corporate consciousness." *Id*. at 206-07. The same is true here. The alleged enterprise in Count 1 is RTS, a Delaware limited liability company whose sole member is McKinsey & Co. (US) (which, in turn, is a wholly-owned subsidiary of McKinsey Holdings, Inc., itself a wholly-owned subsidiary of McKinsey & Co., Inc.). (Compl. ¶¶ 30-33; *see also* Dkt. 58 (Rule 7.1 Corporate Disclosure Statement).) Nowhere does Alix allege facts giving rise to a plausible inference that RTS operated outside of the McKinsey & Co., Inc. corporate structure; to the contrary, he alleges that the Corporate Defendants (and the Individual Defendants) are liable as RICO persons because of their relationships or positions within the McKinsey corporate structure. (*Id*. at ¶ 282.) As such, under *U1it4less*, RTS is not distinct from the rest of McKinsey and, therefore, Count 1 must be dismissed as to the Corporate Defendants for failure to plead a proper RICO enterprise.

Alix's attempt to plead an association-in-fact enterprise in Count 3 consisting of "McKinsey" and the "bankruptcy consulting clients of McKinsey & Co. (US) and McKinsey RTS" also fails. Alix contends that this enterprise is structured around (1) the corporate relationships among McKinsey entities, (2) the "terms of the retention agreements" between McKinsey and its restructuring clients, and (3) the fact that some McKinsey personnel are sometimes placed onsite

at the client to assist with the restructuring assignment. (*Id*. at ¶ 342.) As explained above, there can be no RICO enterprise among corporations that are part of a unified corporate structure. *In re GM*, 2016 WL 3920353, at *14. Moreover, there is no basis to infer a RICO enterprise from the terms of a consulting contract or the fact that personnel may work onsite while completing an assignment. Indeed, the Complaint is devoid of any factual allegations explaining how or why any of McKinsey's restructuring clients—or any of the purported Count 3 Enterprise members—joined together with a "common purpose" to operate a RICO enterprise to deprive AlixPartners of bankruptcy assignments. *Id.* And without pleading any facts to show how McKinsey's clients joined McKinsey in any common purpose—other than for the legitimate business purpose of advising and restructuring the clients' businesses—the only entities left to occupy this purported enterprise "operate as part of a single, unified corporate structure and are, as such, not sufficiently distinct to demonstrate the existence of a RICO enterprise." *Cruz*, 720 F.3d at 121; *In re GM*, 2016 WL 3920353, at *14.

Because Alix does not and cannot plead a valid RICO enterprise, Counts 1 and 3 should be dismissed as to the Corporate Defendants for this additional reason.

F. Alix Fails to Plead that Any of the Individual Defendants Conducted or Participated in the Conduct of a RICO Enterprise.

To properly plead a violation of 18 U.S.C. § 1962(c), a plaintiff must allege that each defendant "conduct[ed], or participat[ed] in the conduct of the affairs of the enterprise" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). The Supreme Court held in *Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993), that this element of a Section 1962(c) claim limits liability to those persons who "operated or managed" the affairs of the enterprise. "[P]erformance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994). Moreover,

having a formal position in a corporate structure is not enough; rather, a plaintiff must make specific allegations showing that a defendant played "some part in directing the enterprise's affairs." *See Crab House of Douglaston Inc. v. Newsday, Inc.*, (*Crab House I*), 418 F. Supp. 2d 193, 206 (E.D.N.Y. 2006) (plaintiff did not satisfy the *Reves* test where it failed to attach any specific allegation to directors of a corporation). "The polestar is the *activity in question*, *not the defendant's status*," title, or position in the corporate structure. *Handeen v. Lamaire*, 112 F.3d 1339, 1349 (8th Cir. 1997) (emphasis added).

The Individual Defendants are named in all three of the substantive RICO counts. In addition to being named as participants in the Count 1 and Count 3 Enterprises described above, the Individual Defendants are also alleged, in Count 2, to have participated in an enterprise consisting of "Defendants McKinsey & Co., McKinsey Holdings, McKinsey & Co. (US) and (beginning in or about 2010) McKinsey RTS." (Compl. ¶ 319.) But Alix fails to allege facts sufficient to establish that any Individual Defendant operated or managed any of the three alleged criminal enterprises.

Alison Proshan. The Complaint is most obviously deficient under *Reves* in its allegations against Alison Proshan. It merely alleges that Proshan was "an associate general counsel [who] furnishes in-house legal services to McKinsey," including in connection with Rule 2014(a) disclosures. (Compl. ¶¶ 282(h), 303-04.) The Complaint does not allege she was an executive or partner of McKinsey or RTS or had any managerial responsibilities whatsoever (neither of which would be legally sufficient, in any event), much less that she supervised or directed the activities of the alleged enterprises. To the contrary, the Complaint acknowledges her supervision by a General Counsel. (Compl. ¶ 122.) Unlike its allegations as to other defendants, the Complaint does not even attempt to assert that Proshan exercised any "executive authority" at McKinsey or

RTS. (*See* Compl. ¶ 282(h).) There are simply no allegations that remotely suggest that Proshan operated or managed any aspect of the alleged enterprises—a fatal defect under *Reves*.

At most, the Complaint suggests that Ms. Proshan provided legal assistance in preparing the Rule 2014(a) disclosures as part of her responsibilities, conduct that is plainly "within the scope of [her] employment" as an associate general counsel. (Compl. at ¶ 282(d).) The "performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *Viola*, 35 F.3d at 41; *see also Vickers Stock Res. Corp. v. Quotron Sys., Inc.*, No. 96-cv-2269 (HB), 1997 WL 420265, at *4 (S.D.N.Y. July 25, 1997). ("RICO liability will not be imposed upon a defendant simply because [she] provides goods and services that benefit the RICO enterprise.").[28] Ms. Proshan's legal work in helping in the preparation of the Rule 2014(a) disclosures may or may not have been "necessary and helpful," but none of the Complaint's allegations support the inference that she played a role in managing or controlling the alleged RICO enterprises. *See Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993) (attorney's assistance in bankruptcy proceeding as part of limited partnership's fraudulent scheme did not satisfy *Reves*); *Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L.*, 832 F. Supp 585, 591 (E.D.N.Y. 1993) (no RICO liability even though enterprise was attorney's sole client and attorney incorporated two corporate defendants involved in scheme and then served as director and officer for both corporations).

Seth Goldstrom and Kevin Carmody. Similarly, the Complaint's only specific allegations regarding the involvement of Goldstrom and Carmody in operating the putative enterprises relate

[28] *See also Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 466 (S.D.N.Y. 1996) ("[P]roviding important services to a racketeering enterprise is not the same as directing the affairs of an enterprise."); *Redtail Leasing v. Bellezza*, No. 95-cv-5191 (JFK), 1997 WL 603496, at *5 (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.").

to their signing of Rule 2014(a) disclosures within the scope of their employment. (Compl. ¶¶ 282(d), (i), (j).) But, as previously noted, "performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." *Crab House I,* 418 F. Supp. 207 (quoting *United States v. Diaz,* 176 F.3d 52, 92 (2d Cir. 1999)).[29] There is no allegation that either Goldstrom or Carmody played any role in the alleged enterprises beyond this. The Complaint emphasizes the number of allegedly false Rule 2014(a) disclosures made by Goldstrom and Carmody (ignoring the fact that these submissions were made in only a handful of bankruptcy cases), but the number of signed declarations is legally irrelevant on this issue: "[i]n determining whether or not a defendant participated in the operation or management of the RICO enterprise, the . . . focus [is] on the *degree of control* the defendant exerted over the enterprise rather than the *amount of* defendant's involvement in the enterprise." *Vickers*, 1997 WL 420265, at *4 (emphasis in original). The Complaint fails under *Reves* for not alleging facts showing that Goldstrom or Carmody directed or managed any of the alleged RICO enterprises.

By way of comparison, although the Complaint alleges that Sternfels and Garcia had "a high degree of executive authority over the bankruptcy consultancy activities of McKinsey," it includes no such allegations as to Proshan, Goldstrom or Carmody. (*Compare* Compl. ¶¶ 282(e), (f), & (g) *with* ¶¶ 282(h), (i), & (j).) Alix thus implicitly admits that these three individuals are not at the level where they are directing or controlling the affairs of the purported enterprises. This concession should be dispositive as to Proshan, Goldstrom, and Carmody. The RICO claims against them therefore should be dismissed under *Reves*.

[29] As the *Crab House I* court recognized, the fact that individuals were acting within the scope of their employment, without more, "hardly conjures the specter of enterprise-conductor." 418 F. Supp. 2d at 208.

Jon Garcia and Robert Sternfels. The Complaint falls short in this regard for Garcia and Sternfels as well, despite the allegation that they had "a high degree of executive authority." *First*, the claim that these individuals possessed executive authority is conclusory. *See, e.g.*, *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 354 (S.D.N.Y. 1998) ("Bare and conclusory allegations are insufficient to withstand a motion to dismiss."). *Second*, the facts pleaded in the Complaint do not sufficiently allege that these two individuals actually directed or managed any of the alleged enterprises.

Garcia is not alleged to have done specific acts of any sort, much less acts that reflect the ability to direct or manage an enterprise. (Compl. ¶ 282(g).) Because there are no facts pleaded in the Complaint from which one could reasonably infer that Garcia exerted direction or control as required under *Reves*, the Complaint fails as to him.

The allegations against Sternfels are also deficient. Sternfels is alleged to have listened in on two telephone calls between Alix and Barton, and he "likely" was involved in some unidentified way in a business arrangement with former SunEdison CEO Ahmad Chatila almost one year after the SunEdison bankruptcy filing. These allegations, taken individually or together, do not amount to Sternfels directing or controlling a RICO enterprise. *See, e.g.*, *Biofeedtrac, Inc.,* 832 F. Supp. at 592 ("Plaintiff has adduced no facts to suggest that [defendant's] actual or projected role was to 'lead, run, manage, or direct' any part of the enterprise. Thus, he did not participate in the "conduct' of an enterprise and did not violate § 1962(c).").

Dominic Barton. Barton is alleged to have had "ultimate executive authority over McKinsey's [sic] as well as the individual defendants in this action," (Compl. ¶ 282(e)), a description by no means synonymous with directing the affairs of a RICO enterprise. Notably, Alix does not allege that Barton directly managed the bankruptcy consulting practice and concedes

that Barton first learned about the supposed falsity of McKinsey's bankruptcy disclosures in the latter half of 2014, some thirteen years after the inception of the purported criminal activity. (Compl. ¶¶ 114-16.) Nor is it alleged that, upon learning of an already existing RICO enterprise, Barton elected to join and direct its affairs. Being put on notice of a fraudulent scheme and doing nothing to put a stop to it are insufficient to satisfy the *Reves* "operation or management" test. *See Walter v. Drayson*, 538 F.3d 1244, 1248 (9th Cir. 2008) ("It is not enough that [defendant] failed to stop illegal activity, for *Reves* requires some degree of direction." (citation omitted)); *Amsterdam Tobacco Inc. v. Philip Morris Inc.*, 107 F. Supp. 2d 210, 218 (S.D.N.Y. 2000) ("[E]ven if it [is] accepted as true . . . that [defendant] w[as] aware of smuggling activity, that would not suffice to support a RICO claim."); *Walter v. Drayson*, No. 06-cv-00568 (SOM), 2007 WL 641413 at *8 (D. Haw. Feb. 23, 2007) ("[C]laims [that] are based on an alleged failure to act . . . do not satisfy *Reves's* 'operation or management' test"). Equally insufficient to satisfy *Reves* is the speculative claim that Barton sought to "deflect and delay" Alix's remediation efforts to prolong the life of the fraudulent scheme. Even if Barton harbored such an intent (which he did not) and acted on it, at best it might constitute assistance to the enterprise, not the management or direction of it. *Schmidt*, 16 F. Supp. 2d at 347 ("There is no doubt that plaintiffs have alleged wrongful acts that were allegedly of real importance to Schick's scheme . . . . However, when reduced to their essentials, these are really allegations of *assistance* to the alleged RICO enterprise, not direction of it.").

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Unable to plead any activity by the Individual Defendants that would show management and direction of a RICO enterprise, Alix is left to maintain that the Individual Defendants are "senior partners" (Sternfels, Goldstrom) or a "senior executive" (Carmody) or a "founding

executive" (Garcia) or "managing partner" (Barton). (Compl. ¶¶ 354(f)-(j).) (For Proshan, the Complaint cannot plead even any of that. (*Id.* at ¶ 354(h)).) But such "status" pleading is conclusory and insufficient. *Handeen*, 112 F.3d at 1349; *Sanchez*, 2015 WL 3540836, at *6 ("[P]laintiff may not rely solely upon . . . stating only that defendants were officers and shareholders of the organization." (quotation and citation omitted)); *Productores Asociados de Café Rio Claro, C.A. v. Barnett*, No. 98-cv-499 (DAB), 1999 WL 28739, at *3 (S.D.N.Y. May 7, 1999) (it is insufficient to conflate an individual's title or position in an organization with "directing" the affairs of the entirely separate RICO enterprise). Nor does the Complaint help its cause by pleading that Goldstrom is a "board member of McKinsey RTS." (Compl. ¶ 354(i).) "Alleged participation on the board of [a company] is not tantamount to participating in the operation or management of an enterprise as defined by the relevant case law." *Crab House of Douglaston Inc. v. Newsday, Inc.*, 801 F. Supp. 2d 64, 75 (E.D.N.Y. 2011) (*Crab House II*). A plaintiff must plead facts showing that each individual defendant actually exerted control over the enterprise, *see Vickers*, 1997 WL 420265, at *4, and the Complaint fails to do so here. It should be dismissed against the Individual Defendants for this additional reason.

G. Alix Fails to Plead a RICO Conspiracy Under Section 1962(d).

Alix has not pleaded any substantive RICO claim under Section 1962(c); accordingly, his "claim of conspiracy under Section 1962(d) must fail as well." *Sanchez*, 2015 WL 3540836, at *12; *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998). Moreover, the claim fails for two additional reasons.

First, the Complaint fails to plead that any Defendant "agreed with at least one other entity to commit a substantive RICO offense." *Crawford v. Franklin Credit Mgmt.*, 758 F.3d 473, 487 (2d Cir. 2014); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) ("Because the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil

conspiracy complaint, at the very least, must allege specifically such an agreement."). Nowhere does the Complaint allege a time, place, date, or other circumstance surrounding the formation of any purported conspiratorial agreement; therefore, it fails to plead a "conscious agreement" between any of the Defendants. *Id.* at 25 n.4; *Wood v. Gen. Motors Corp.*, No. 08-cv-5224 (PKC), 2015 WL 1396437, at *10 (E.D.N.Y. Mar. 25, 2015) (rejecting RICO conspiracy claim where plaintiff failed to allege a "meeting of the minds with respect to the alleged violations"). There is not a hint as to when each Defendant joined the alleged conspiracy, with whom he or she reached an agreement to join, what was agreed to, or any other specifics about circumstances by which each individual supposedly joined the conspiracy.[30] Rather, Alix alleges only, in conclusory fashion, that "[e]ach Defendant agreed to facilitate, conduct, and participate in the conduct, management, or operation of the affairs of McKinsey RTS, the Count 2 Enterprise, and/or the Count 3 Enterprise through a pattern of racketeering activity." (Compl. ¶ 353.) This formulaic recitation of the elements of a substantive RICO claim is no substitute for allegations of facts that, if taken as true, demonstrate that each Defendant understood the scope of the enterprise and knowingly agreed to conduct its affairs through the commission of two or more racketeering acts. *See Morin*, 711 F. Supp. at 111; *Naso v. Park*, 850 F. Supp. 264, 275 (S.D.N.Y. 1994) (rejecting 1962(d) claim that did "not make specific factual allegations from which [the court] can conclude that defendants consciously agreed to commit predicate acts with knowledge of the scope of the enterprise and intent to further its affairs").

Second, the RICO conspiracy claim is defeated by application of the intracorporate conspiracy doctrine. A plaintiff cannot sustain a RICO conspiracy claim naming only a

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[30] Nor can Alix establish a conspiracy by alleging that "each of the Defendants [had a] close business and employment relationship[ ] with one another." (Compl. ¶ 352.) Allegations about the business relationships of a company's employees are "not sufficient to establish that each defendant consciously agreed to commit the specified predicate acts." *4 K & D Corp.*, 2 F. Supp. 3d at 545.

corporation, its subsidiaries, and its agents. *See Kriss v. Bayrock Grp. LLC*, No. 10-cv-3959 (LGS), 2016 WL 7046816, at *19 (S.D.N.Y. Dec. 2, 2016) ("The intracorporate conspiracy doctrine holds that a corporation cannot conspire with its agents.") (citing *Turkmen v. Hasty*, 789 F.3d 218, 263 (2d Cir. 2015)); *Merhej v. I.C.S. Int'l Custody Sys., Inc.*, No. 13-cv-869 (JGK), 2014 WL 104908, at *4 (S.D.N.Y. Jan. 9, 2014) ("As a matter of law, a corporation cannot conspire with itself."); *Rite Aid Corp. v. Am. Express Travel Related Servs. Co., Inc.*, 708 F. Supp. 2d 257, 265 n.9 (E.D.N.Y. Mar. 3, 2010) ("[A] parent corporation cannot conspire with its wholly-owned subsidiary."); *Little v. City of N.Y.*, 487 F. Supp. 2d 426, 441-42 (S.D.N.Y. 2007) (finding that "officers, agents, and employees of a single corporate entity, each acting within the scope of [their] employment are legally incapable of conspiring together"). Here, all the Corporate Defendants are McKinsey entities, and all the Individual Defendants are McKinsey employees or partners alleged to have acted within the scope of their authority as McKinsey employees.[31] (*See* Compl. ¶¶ 282(d), 352.) As such, Count 4 should be dismissed on this independent basis as well.

H. Alix's RICO Claims Are Barred, In Substantial Part, By the Four-Year RICO Statute of Limitations.

RICO claims are subject to a four-year statute of limitations, running from the date the plaintiff discovered, or should have discovered, the injury. *Koch v. Christie's Int'l*, 699 F.3d 141, 148, 150 (2d. Cir. 2012). The clock begins running "when a reasonably diligent investigation would have revealed the injury to a person of reasonable intelligence." *Id.* at 153; *see also In re Integrated Res. Real Estate Ltd. P'ships Secs. Litig.*, 851 F. Supp. 556, 567 (S.D.N.Y. 1994) ("The

[31] Although some courts have recognized an exception to the intracorporate conspiracy doctrine where the corporate employees are acting for their own independent, personal reasons, *Reich v. Lopez*, 38 F. Supp. 3d 436, 463 (S.D.N.Y. 2014); *Kriss v. Bayrock Grp. LLC*, No. 10-cv-3959 (LGS), 2017 WL 1901966 at *3 (S.D.N.Y. May 8, 2017), this exception is not implicated here. The Complaint does not allege that any of the Individual Defendants' participation in the conspiracy was driven by any improper personal interest distinct from their employment by McKinsey, and it does expressly allege that the alleged predicate acts were committed by individuals acting within the scope of their employment. (Compl. ¶ 282(d).)

limitations period for a fraud-based RICO action commences when Plaintiffs are placed on notice of facts which should arouse suspicion."). This is the case even where a plaintiff has not actually discovered its injury yet and where "the full extent of the RICO scheme is not discovered until a later date." *Koch*, 699 F.3d at 153 (quoting *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 328 F. App'x 695, 697 (2d Cir. 2009)). Even where a "pattern of predicate acts may well be complex, concealed, or fraudulent," it nonetheless is "discovery of the injury, not discovery of the other elements of a claim [which] starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555-56 (2000).

The Complaint alleges that AlixPartners was injured when McKinsey—rather than AlixPartners—was approved to provide bankruptcy consulting services in each bankruptcy. (*See, e.g.*, Compl. ¶ 313 (identifying as damages "fees from bankruptcy consulting engagements [AlixPartners] would have earned in the absence of [McKinsey's] unlawful conduct").) Accordingly, the limitations period with regard to the alleged RICO predicates in connection with each bankruptcy began to run no later than the time McKinsey's fees were confirmed for those bankruptcies, because by each such date it was apparent—indeed, a matter of public record—that McKinsey was receiving consultancy fees for its work in that particular bankruptcy.

Alix filed this action on May 9, 2018; therefore, any RICO claim based on disclosures in the following bankruptcies must be dismissed as time-barred:

- *Hayes Lemmerz*: last disclosure filed on March 13, 2002 and fees confirmed on May 12, 2003 (Compl. ¶ 71);
- *United*: last disclosure filed on February 13, 2002 and fees confirmed on January 21, 2006 (*id*. at ¶ 75);
- *Mirant*: last disclosure filed on October 27, 2003 and fees confirmed on December 9, 2005 (*id*. at ¶ 78);
- *Lyondell*: last disclosure filed on September 11, 2009 and fees confirmed on April 23, 2010 (*id*. at ¶ 83);
- *Harry & David*: last disclosure filed on June 17, 2011 and fees confirmed on April 29, 2011 (*id*. at ¶ 89);

- *AMR*: last disclosure filed on April 18, 2013 and fees confirmed on October 21, 2013 (*id.* at ¶ 92);
- *AMF*: last disclosure filed on November 21, 2012 and fees confirmed on June 25, 2013 (*id.* at ¶ 98); and
- *Edison Mission Energy*: last disclosure filed on November 23, 2013 and fees confirmed on March 11, 2014 (*id.* at ¶ 100).

Significantly, the statute of limitations provides an independent basis to dismiss Goldstrom and Garcia from this case entirely because the Complaint fails to allege any facts as to them that occurred after May 9, 2014.

Seth Goldstrom. Goldstrom is alleged to have submitted affidavits only in connection with the *Harry & David* and *AMR* bankruptcies. The complaint alleges that McKinsey's fees for the Harry & David bankruptcy were confirmed on August 29, 2011, and that its fees for the AMR bankruptcy were confirmed on October 21, 2013. (Compl. ¶¶ 89, 92.) Accordingly, the statute of limitations for a RICO claim relating to those bankruptcies expired on August 29, 2015 and October 21, 2017, respectively. Plaintiff did not file the Complaint, however, until May 9, 2018. By its own allegations, then, the Complaint is untimely as to Goldstrom, and the RICO counts as to him must be dismissed with prejudice. *See, e.g., Smith v. Cingular Wireless,* No. 05-cv-1149 (MRK), 2006 WL 1272612 (D. Conn. Apr. 10, 2006) (dismissing RICO allegations "[b]ecause Counts Three through Nine are time barred on the face of Plaintiff's complaint"); *Nikchemny v. Allstate Ins. Co.*, No. 16-cv-00407 (NGG), 2016 WL 6082034, at *3 (E.D.N.Y. Oct. 17, 2016) (granting motion to dismiss because alleged predicate RICO conduct was outside statute of limitations period).

Jon Garcia. As for Garcia, the Complaint is devoid of any allegations as to when he engaged in *any* RICO predicate act. The Complaint does not allege that he was involved in any specific bankruptcy proceeding or filing, let alone *when* he was involved. In fact, the Complaint fails to allege any dates or actionable time frame for *any* conduct on Garcia's part. As such, Garcia

should be dismissed on this basis as well. *See Thompson v. Jasas Corp.*, 212 F. Supp. 2d 21, 26 (D.D.C. 2002) ("[P]laintiff has failed to specify an actionable time frame for the alleged defamation. Because plaintiff has not alleged conduct within the . . . statute of limitations . . . [the] claim will be dismissed as time-barred"); *Jenson v. Nat'l Air Traffic Controller's Ass'n*, No. 09-cv-336 (LRS), 2010 WL 1608678, at *1 (E.D. Wash. Apr. 15, 2010) (dismissing in part where "there [were] no dates in conjunction with the alleged facts for the Court to review for statute of limitations issues.").

II. THE STATE LAW CLAIMS FAIL (COUNTS 5-7).

A. Alix's Contract-Based Claims Fail (Counts 5 and 6).

Counts 5 and 6 plead breach of contract and promissory estoppel claims against all the Corporate Defendants based on an alleged agreement arising from verbal discussions between Alix and Dominic Barton. Specifically, Barton allegedly promised that, in exchange for delaying this lawsuit, McKinsey would "remove the senior leadership of McKinsey RTS" and "exit the RTS business by the end of March 2015." (Compl. ¶ 125; *see also id.* at ¶¶ 360, 367.)

To state a breach of contract claim "[w]here there is no written agreement between the parties, the plaintiff must establish, 'through the words and or conduct of the parties, that a contract was made and that its terms are definite.'" *Spithogianis v. Haj-Darwish*, No. 07-cv-4609 (PAC), 2008 WL 82188, at *4 (S.D.N.Y. Jan. 7, 2008) (quoting *Zurich Ins. Grp. v. Grandurismo, Inc.*, No. 00-cv-980 (AGS), 2000 WL 1677941, at *3 (S.D.N.Y. Nov. 8, 2000)). Likewise, a promissory estoppel claim requires "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." *Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03-cv-1537 (MBM), 2003 WL 23018888, at *6 (S.D.N.Y. Dec. 22, 2003).

The alleged discussions between Alix and Barton fail to plead an enforceable agreement under either traditional contract or estoppel theories. *First*, the terms of the purported agreement are indefinite and vague: the definition of "senior leadership," the length of time in which Alix supposedly agreed to be "patient and refrain from acting," the details of how RTS would exit the market (including what would happen to its clients and employees), and other key details of the supposed agreement are missing. *In re Merrill Lynch Auction Rate Secs. Litig.*, 886 F. Supp. 2d 340, 346 (S.D.N.Y. 2012) (dismissing claim for breach of oral contract where alleged oral promise was "highly general and prospective in nature" such that enforcement would be "unreasonable"); *Zikakis v. Staubach Retail Servs., Inc.*, No. 04-cv-9609 (NRB), 2005 WL 2347852, at *6 (S.D.N.Y. Sept. 26, 2005) (same in promissory estoppel context). *Second*, there is no allegation that Alix and Barton intended to bind any of their respective organizations. *Third*, the actions of the parties belie the formation of a contract. Alix contends that he refrained from filing this lawsuit in reliance on a promise that McKinsey would exit the restructuring market by the Spring of 2015; but after that did not happen, and RTS continued to obtain chapter 11 assignments, he waited over three years to bring this action. *Fourth*, an agreement like the one alleged—involving dismantling an entire McKinsey business unit which, as alleged by Alix, has earned more than $100 million in fees—is not the kind of agreement that possibly could be oral. *See Stein v. Gelfand*, 476 F. Supp. 2d 427, 432 (S.D.N.Y 2007) (noting that transactions implicating "a host of other matters that quite plainly had to be dealt with in a multimillion dollar transaction before anyone was legally committed" would be written); *Southwick Clothing LLC v. GFT (USA) Corp.*, No. 99-cv-10452 (GBD), 2004 WL 2914093, at *15 (S.D.N.Y. Dec. 13, 2004) (dismissing promissory estoppel claim where "reliance on [promises] would be unreasonable, given the complex commercial venture at issue"). *Finally*, Alix has not alleged any harm flowing from the breach of these

promises and his forbearance from suing, but even if he had, his failure to mitigate any such damages by promptly bringing suit would bar his recovery. *House of Eur. Funding I, Ltd. v. Wells Fargo Bank, N.A.*, No. 13-cv-519 (RJS), 2014 WL 1383703, at *10 (S.D.N.Y. Mar. 31, 2014); *Kaye v. Grossman*, 202 F.3d 611, 615 (2d Cir. 2000); *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 494 (2d Cir. 1985) ("New York's courts adhere to the universally accepted principle that a harmed plaintiff must mitigate damages.").

B. Alix's Tortious Interference Claim Fails (Count 7).

Finally, in Count 7, Alix alleges a tortious interference with business expectancy claim against all the Corporate Defendants. He stakes this claim on the naked allegations that (i) "[AlixPartners] had an expectancy that it would be retained by Alpha Natural Resources, Inc. and/or AMF Bowling Worldwide, Inc." and (ii) that the Corporate Defendants "each knew that [AlixPartners] offered bankruptcy consulting services in high-end bankruptcy proceedings and likely would have been retained by one or both" debtors. (Compl. ¶¶ 373-74.) To say that these allegations are without support would be an understatement. Nowhere in the Complaint does Alix allege, as he must, that AlixPartners had any interactions with these debtors or even bid on the assignments in these bankruptcies. *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 411 (S.D.N.Y. 2009) ("Plaintiffs must demonstrate that, at the time of Defendants' alleged interference, Plaintiffs were engaged in 'a continuing business or other customary relationship not amounting to a formal contract' with the third party." (quoting *Hannex Corp. v. GMI Inc.*, 140 F.3d 194, 205 (2d Cir. 1998))); *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 382 (2d Cir. 2000) (setting forth pleading requirements). Nor does Alix allege, as he must, that McKinsey purposefully interfered with AlixPartners's hypothetical retention by filing purportedly misleading disclosures with the "sole purpose of harming" AlixPartners. *See RSM*, 643 F. Supp. 2d at 412 ("An action taken in economic self-interest is not an action taken 'for the sole purpose

of inflicting intentional harm on plaintiffs."); *Nadel*, 208 F.3d at 382 (setting forth elements of tortious interference under New York law).[32] The disclosures on which the claims are based establish that McKinsey's purpose in disclosing its connections by category, rather than by name, was to protect the confidentiality interests of McKinsey clients.

Moreover, Alix's state law tortious interference claim, which purports to impose liability on a bankruptcy professional for procuring a retention through improper disclosures, is preempted by federal law. As explained above, the federal Bankruptcy Code and the bankruptcy rules promulgated thereunder address the method by which bankruptcy professionals are hired, approved, and supervised, and also provide for a host of remedies that the bankruptcy court can impose for violations of these provisions. *See* 11 U.S.C. §§ 327, 328(c); Fed. R. Bankr. P. 9011. Given this complex scheme, courts have rejected attempts by plaintiffs to seek state law remedies for conduct in a bankruptcy case—including with respect to the filing of pleadings. *See Astor Holdings v. Roski*, 325 F. Supp. 2d 251, 263 (S.D.N.Y. 2003) (federal law preempts state tort claim

[32] Although Alix styles his claim under Virginia law (likely to avoid the more stringent requirement under New York law of showing that McKinsey acted with the sole purpose of harming AlixPartners), a conflicts of law analysis dictates that New York law should apply. "It is well-settled that, in diversity cases, federal courts must look to the laws of the forum state to resolve issues regarding conflicts of law." *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The same principle applies where a federal court exercises supplemental jurisdiction over state law claims. *Rostropovich v. Koch Int'l Corp.*, No. 94-cv-2674 (JFK), 1995 WL 104123, at *8 (S.D.N.Y. Mar. 7, 1995). The forum state here is New York, which, applies an "interests analysis" where the substantive law differs between the possible jurisdictions. *Globalnet Financial.com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006). Where, as here, a Plaintiff alleges conduct sounding in fraud, New York courts will look to the place where the injury occurred—not the place where the alleged fraud was committed—to determine the forum with the greater "interest." *See, e.g.*, *Oliver Wyman, Inc. v. Eielson*, No. 15-cv-5305 (RJS), 2016 WL 5339549, at *4 (S.D.N.Y. Sep. 22, 2016). The purported injuries to AlixPartners would have flowed to New York and thus New York law should apply. Even if this Court applied the law of the place of the alleged tort, *e.g.*, *Licci v. Lebanese Canadian Bank, SAL*, 672 F.3d 155, 158 (2d Cir. 2012) (applying New York law to tort claim because "challenged conduct" by Defendants occurred in New York, where Defendants were headquartered and did business), New York law would apply. Because the gravamen of Alix's Complaint concerns purported racketeering conduct emanating from New York, its law should apply. *Aqua Master Enters., Inc. v. Anderson*, No. 16-cv-6776 (LGS), 2018 WL 1009264, at *3 (S.D.N.Y. Jan. 30, 2018) (applying New York law where the "principal acts that [gave] rise to [the] action . . . occurred in New York"). But Alix's claim fails even under Virginia law, because Alix has not pleaded the existence of a valid contractual relationship or business expectancy, knowledge of the relationship or expectancy on the part of Defendants, intentional interference, or resulting damage to AlixPartners. *See 17th St. Assocs., LLP v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d 584, 600 (E.D. Va. 2005).

relating to alleged filing of bankruptcy pleadings in bad faith); *see also In re E. Equip. & Servs. Corp.*, 236 F.3d 117, 121-22 (2d Cir. 2001) (bankruptcy sanctions provisions preempt state law remedies for violation of automatic stay); *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987) (state law remedies for abuse of process in bankruptcy court preempted). This is the case even where a fraud on the bankruptcy court is alleged. *See, e.g.*, *Holloway v. Household Auto. Fin. Corp.,* 227 B.R. 501, 507 (N.D. Ill. 1998) (claimant's state law claim for violation of the Illinois Consumer Fraud and Deceptive Practices Act relating to a fraudulent filing of proof of claim preempted as "the expansive reach of the Code preempts virtually all claims relating to alleged misconduct in the bankruptcy courts"). Because Alix seeks to impose state law remedies for a claim that requires adjudication of whether McKinsey's disclosures in the *ANR* and *AMF Bowling* bankruptcies comported with federal bankruptcy law, Count 7 is preempted and should be dismissed.

CONCLUSION

For all the above-stated reasons, Defendants respectfully request that the Court dismiss each of Counts 1 through 4, for violations of RICO Sections 1962(c) and 1962(d), with prejudice as to all Defendants, and Counts 5, 6, and 7, for breach of contract, promissory estoppel, and tortious interference with business expectancy, respectively, with prejudice as to the Corporate Defendants.[33]

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Respectfully submitted,

SELENDY & GAY PLLC

By: */s Faith E. Gay*

Faith E. Gay
Jennifer M. Selendy
David S. Flugman
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 390-9000
E-mail: fgay@selendygay.com

Robert J. Cleary
Mark D. Harris
Brian S. Rosen
Jordan B. Leader
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000

Attorneys for All Defendants

[33] Notably, the Complaint should be dismissed with prejudice because any attempt by Alix to remedy the myriad failures identified above would be futile. *See, e.g.*, *Baron v. Complete Mgmt., Inc.*, 260 F. App'x 399, 400-01 (2d Cir. 2006) (affirming dismissal with prejudice where plaintiff could not "(1) plead enough facts to state a claim to relief that is plausible on its face, (2) satisfy Fed. R. Civ. P. 9(b)'s requirement that fraud be pleaded with particularity, or (3) satisfy RICO's pleading requirements with respect to standing") (internal quotations and citations omitted).

Catherine L. Redlich
DRISCOLL & REDLICH
110 West 40th Street, Suite 1900
New York, New York 10018
Telephone: (212) 986-4030

Attorney for Defendant Dominic Barton

Richard A. Sauber
Ariel N. Lavinbuk
Michael L. Waldman
Lukman Azeez
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, NW, Suite 411L
Washington, D.C. 20006
Telephone: (202) 775-4500

Attorneys for Defendants Kevin Carmody, Jon Garcia, Alison Proshan, and Robert Sternfels

Reid M. Figel
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7968

Attorney for Defendant Seth Goldstrom