No. 05-41347

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KENNETH D. ROGERS; ET AL.,

Plaintiffs,

KENNETH D. ROGERS; ANDREW W. DUNN; PAT H. COONE; BETTY S. COONE; WAYNE D. BUTCHEE; CLINT L. HINES; DAVID G. HINES; SYBIL K. JENKINS,

Plaintiffs-Appellants-Cross-Appellees,

v.

JOE E. PENLAND, SR.,

Defendant-Appellee-Cross-Appellant,

ROBERT L. MCDORMAN; C. MESHELL MCDORMAN; DEON C. THORNTON; MAC-PRO, LTD.; MAC-PRO GP, L.L.C.; MCDORMAN MOTORS, LTD.; MCDORMAN MOTORS GP, L.L.C.; RLM MOTOR COMPANY, LTD.; RLM MOTOR COMPANY GP, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas, Beaumont Division

BRIEF OF APPELLEES ROBERT L. MCDORMAN, C. MESHELL MCDORMAN, MAC-PRO, LTD., MAC-PRO GP, L.L.C., MCDORMAN MOTORS, LTD., MCDORMAN MOTORS GP, L.L.C., RLM MOTOR COMPANY, LTD., AND RLM MOTOR COMPANY GP, L.L.C.

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LIST OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Plaintiffs-Appellants-Cross-Appellees Kenneth D. Rogers, Andrew W. Dunn, Pat H. Coone, Betty S. Coone, Wayne D. Butchee, Clint L. Hines, David G. Hines, and Sybil K. Jenkins, collectively Directors of Mauriceville National Bank (now known as Orange Savings Bank of Texas)

2. Richard L. Coffman and G. Robert Blakey, Counsel for Plaintiffs-Appellants-Cross-Appellees Kenneth D. Rogers, Andrew W. Dunn, Pat H. Coone, Betty S. Coone, Wayne D. Butchee, Clint L. Hines, David G. Hines, and Sybil K. Jenkins

3. Pete Baker, McClersky, Harriger, Brazill & Graf, L.L.P., Counsel for Plaintiffs-Appellants-Cross-Appellees Kenneth D. Rogers, Andrew W. Dunn, Pat H. Coone, Betty S. Coone, Wayne D. Butchee, Clint L. Hines, David G. Hines, and Sybil K. Jenkins

4. Defendant-Appellee-Cross-Appellant Joe E. Penland, Sr.

5. David E. Bernsen, Law Office of David E. Bernsen, P.C.; David R. McCormick, Law Office of David R. McCormick; and Richard J. Clarkson, Law Office of Richard J. Clarkson, Counsel for Defendant-Appellee-Cross-Appellant Joe E. Penland, Sr.

6. Defendants-Appellees Robert L. McDorman and C. Meshell McDorman

7. Defendants-Appellees Mac Pro, Ltd. and Mac Pro GP, L.L.C.; McDorman Motors, Ltd. and McDorman Motors GP, L.L.C.; and RLM Motor Company, Ltd. and RLM Motor Company GP, L.L.C.

8. David L. Horan, Angela V. Colmenero, and David J. Schenck, Jones Day, Counsel for Defendants-Appellees Robert L. McDorman, C.

Meshell McDorman, Mac Pro, Ltd., Mac Pro GP, L.L.C., McDorman Motors, Ltd., McDorman Motors GP, L.L.C., RLM Motor Company, Ltd., and RLM Motor Company GP, L.L.C.

9. Defendant-Appellee-Cross-Appellee Deon C. Thornton

10. Thomas P. Roebuck, Roebuck & Thomas, P.C., Counsel for Defendant-Appellee-Cross-Appellee Deon C. Thornton

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David L. Horan

STATEMENT REGARDING ORAL ARGUMENT

Appellees Robert L. McDorman, C. Meshell McDorman, Mac-Pro, Ltd., Mac-Pro GP, L.L.C., McDorman Motors, Ltd., McDorman Motors GP, L.L.C., RLM Motor Company, Ltd., and RLM Motor Company GP, L.L.C. agree with Appellants-Cross-Appellees Kenneth D. Rogers, *et al.*, and with Appellee-Cross-Appellant Joe E. Penland, Sr. that oral argument is necessary and appropriate for proper disposition of this appeal. Indeed, given the number of parties involved and the adversity between them, the Court may wish to consider extended and divided argument in advance of any request by way of motion.

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JURISDICTIONAL STATEMENT

This is an appeal from a final decision pursuant to 28 U.S.C. § 1291. The District Court had federal question jurisdiction over the action under 18 U.S.C. § 1964(a) and 28 U.S.C. §§ 1331(a) and 1367.

Plaintiffs-Appellants-Cross-Appellees Kenneth D. Rogers ("Rogers"), Andrew W. Dunn ("Dunn"), Pat H. Coone ("Mr. Coone"), Betty S. Coone ("Mrs. Coone"), Wayne D. Butchee ("Butchee"), Clint L. Hines ("Clint Hines"), David G. Hines ("David Hines"), Sybil K. Jenkins ("Jenkins"), and James H. Nugent ("Nugent") (collectively, "Plaintiffs-Appellants" or "Directors") filed a notice of appeal on September 9, 2005, Directors Record Excerpts ("DRE") B,[1] from the District Court's August 18, 2005 Memorandum Order denying Plaintiffs-Appellants' Motion for Judgment as a Matter of Law, Motion to Alter or Amend Judgment, and Motion for New Trial, DRE E.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined as a matter of law that *in pari delicto* is a valid defense to the civil Racketeering Influence and Corrupt Organization Act ("RICO") claims in this case.

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[1] Citations to the record on appeal that is consecutively paginated as "USCA5" will be denoted herein as "R. [volume number]:[page number]." Citations to the trial exhibits will be denoted as "TX [exhibit number]." References to the Record Excerpts filed by the Plaintiffs-Appellants Directors will be denoted as "DRE [tab number]." References to the Record Excerpts filed by Defendant-Appellee-Cross-Appellant Penland will be denoted as "PRE [tab number]." References to the Record Excerpts filed by Defendants-Appellees McDorman Defendants will be denoted as "MRE [tab number]."

2. Whether *in pari delicto* is an appropriate defense in this case where legal relief was sought and where it was clear from the numerous pleadings filed before the District Court that the McDorman Defendants[2] had alleged and pled this defense.

3. Whether the District Court properly applied the correct standard for *in pari delicto* as outlined by the Supreme Court in *Bateman Eichler, Hills Richards, Inc. v. Berner*, 472 U.S. 299 (1985), rather than the outdated and superseded Fifth Circuit standard set forth in *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 604 (5th Cir. 1975), *vacated and remanded, S.D. Cohn & Co. v. Woolf*, 426 U.S. 944 (1976).

4. Whether the District Court properly allowed the jury to impute the Directors' knowledge and conduct to Mauriceville National Bank ("MNB") to support the *in pari delicto* defense and bar the Directors' recovery, due to the overwhelming evidence at trial establishing that the Directors' interests were not adverse to the bank.

5. Whether a new trial is necessary because the District Court instructed the jury on the *in pari delicto* defense and the jury found the McDorman

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[2] The "McDorman Defendants" include the individual Defendants-Appellees Robert McDorman ("Mr. McDorman") and C. Meshell McDorman ("Mrs. McDorman"), who were the owners and operators of the various corporate Defendants-Appellees—Mac-Pro, Ltd. and Mac-Pro GP, L.L.C. (collectively, "Mac-Pro"), McDorman Motors, Ltd. and McDorman Motors GP, L.L.C. (collectively, "McDorman Motors"), and RLM Motor Co., Ltd. and RLM Motor Co. GP, L.L.C. (collectively, "RLM Motor"). Additionally, any reference to "Defendants-Appellees" includes not only the McDorman Defendants, but also Defendants-Appellees Deon C. Thornton ("Thornton") and Joe E. Penland, Sr. ("Penland").

Defendants liable as to some claims but chose to assess no damages and found the McDorman Defendants not liable as to other claims.

6. In the alternative, whether there was sufficient evidence to find the McDorman Defendants liable under RICO, 18 U.S.C. §§ 1962(c) and 1962(d).

STATEMENT OF THE CASE

This is an appeal from the denial of the Directors' motion for judgment as a matter of law, to alter or amend the judgment, or, in the alternative, for new trial. The Directors filed suit on July 3, 2003 against Penland, the McDorman Defendants,[3] and Thornton under the Racketeering Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d), as well as various state-law claims. Penland Record Excerpts ("PRE") 1.

The case was tried to a jury in June 2005. On June 23, 2005, the jury returned its verdict and made the following findings: *First*, the jury found Penland not liable on all counts. *Second*, the jury found the McDorman Defendants and Thornton liable under Section 1962(c) and awarded $3,374,256.00 in damages.

[3] The McDorman Defendants began the case with counsel, but, after their counsel withdrew on May 7, 2004, they moved for appointment of counsel. (R. 8:3594) The District Court denied the McDorman Defendants' motion, and, as a result, they were forced to proceed *pro se*. (R. 8:3596-98) Furthermore, contrary to the Directors' factual assertions in their brief, *e.g.*, Appellants' Brief at 35, Mr. McDorman was not convicted of a federal offense related to this litigation. Instead, Mr. McDorman entered into a plea agreement with the United States Attorney's Office on April 21, 2004 in connection with a charge not based on the alleged schemes at issue in this case. (R. 13:6372) Thus, Mr. McDorman is currently incarcerated in the Federal Correctional Institution Big Springs for the charge in that case and not the matters at issue in the present case.

Third, the jury found the McDorman Defendants liable under Section 1962(d)—for conspiracy to violate Section 1962(a)—and awarded zero damages. *Fourth*, the jury found the McDorman Defendants liable under Section 1962(d)—for conspiracy to violate Section 1962(c)—and awarded zero damages. *Fifth*, the jury found that the Directors were *in pari delicto* by answering "Yes" to Special Issue No. 5. *Sixth*, the jury determined that none of the Defendants-Appellees were liable for common-law fraud or conspiracy to commit fraud. *Seventh*, the jury found the McDorman Defendants and Thornton liable for constructive fraud and awarded zero damages. DRE C.

Based on these findings, the District Court entered final judgment that the Directors take nothing from the Defendant-Appellees. DRE D. The District Court denied all post-trial motions on August 18, 2005. DRE E.

On December 29, 2005, Mr. McDorman filed a motion to have undersigned counsel appointed to represent him on this appeal. That motion was carried with the case. In the interim and pending disposition of the motion, undersigned counsel is representing Mr. McDorman and the other McDorman Defendants in this appeal *pro bono*.

STATEMENT OF THE FACTS

1. The Relevant Parties

Robert L. McDorman. Robert McDorman was a partner in Mac-Pro, Ltd., McDorman Motors, Ltd., and RLM Motor Company, Ltd., and an officer, director, and majority shareholder of Mac-Pro GP, L.L.C., McDorman Motors GP, L.L.C. and RLM Motor Company GP, L.L.C. Mr. McDorman managed and operated all of these entities. Mr. McDorman was Penland's partner in Mac-Pro.

C. Meshell McDorman. Meshell McDorman is Mr. McDorman's wife. Mrs. McDorman was involved in the day-to-day operation of the McDorman Defendants' business operations.

Joe E. Penland, Sr. Joe Penland was Mr. McDorman's business partner. Together, Penland and McDorman established Mac-Pro. Penland also served as President of Quality Mat Company. Penland was a shareholder and a director at Community Bank.

McDorman Motors, Ltd. McDorman Motors was in the business of selling pre-owned vehicles. McDorman Motors owned and operated used car lots in East Texas.

Mac-Pro, Ltd. Mr. McDorman and Penland formed Mac-Pro in 1999. Mac-Pro was in the business of selling pre-owned vehicles in Nederland, Texas. In

December 2000, McDorman Motors, RLM Motor, and other McDorman entities were reorganized and merged into Mac-Pro.

RLM Motor Company, Ltd. RLM Motor was a wholesale motor vehicle acquisition company owned and operated by Mr. McDorman.

Mauriceville National Bank. Mauriceville National Bank ("MNB"), located in Mauriceville, Texas, was one of the financial institutions where Mr. McDorman had accounts for his business entities. MNB is now known as Orange Savings Bank of Texas ("OSB"). After the events at issue in the instant case occurred, MNB was purchased by and merged with OSB.

Directors. The Directors were the directors of MNB. The Directors participated in MNB's operations, managed MNB's financial affairs, and directed and supervised MNB's employees.

Deon Thornton. Deon Thornton was the President, Chief Executive Officer, and a shareholder of MNB.

2. The McDorman Defendants' Business Operations

At all times relevant to this case, the McDorman Defendants have been involved in the used car business in East Texas. (R. 25:17-19, 20-28) The McDorman Defendants not only sold pre-owned vehicles to the general public, but were also involved in the wholesaling of vehicles. (R. 25:23, 135) Due to the nature of their business, the McDorman Defendants required extensive financing,

(R. 25:29-31, 93; 26:124-25), and as a result, the McDorman Defendants established accounts with several banks, including MNB, SouthTrust Bank, and Community Bank. (R. 22:52, 113; 25:90, 100-02; 26:151)

Out of all the financial institutions with which the McDorman Defendants were affiliated, MNB provided the most support to the McDorman Defendants. In particular, MNB offered the McDorman Defendants loan financing for car deals and helped one of Mr. McDorman's companies emerge from bankruptcy in 1997. (R. 25:94; 30:11) MNB also provided the McDorman Defendants with formal loans for various business and personal purposes. (Trial Exhibit ["TX"] 103, 105, 106 [PRE 16, 17, 18])

3. The McDorman Defendants' Business Relationship With Penland

In December 1999, Penland and Mr. McDorman formed Mac-Pro, and Penland invested in this business as a limited partner. (R. 25:147-48, R. 26:145) Mr. McDorman was the day-to-day operator of the business. (R. 25:44-45) Mac-Pro's financing was established at Community Bank. (R. 22:49-50; 26:151) Mr. McDorman opened a checking account at MNB for Mac-Pro and established a borrowing base with Penland individually. (R. 25:149, 167-68; 26:171-73)

At various points during their relationship, Penland loaned additional sums of money to both McDorman Motors and Mac-Pro. (R. 25:170, 173; 26:171) In November 2000, when Mr. McDorman informed Penland that both Mac-Pro and

McDorman Motors did not have enough funds to pay their bills, Penland agreed personally to pay those obligations. (R. 25:166-67; 26:158) However, concurrent with Penland's agreement to fund the obligations, Mac-Pro and McDorman Motors were restructured such that all the assets of Mr. McDorman's other companies were transferred to Mac-Pro. (R. 26:164-65; DRE G) The following year, on June 4, 2001, Penland and Mr. McDorman entered into another agreement whereby Penland converted his partnership interest into loans to be repaid by Mac-Pro and McDorman Motors to Penland or Quality Mat Company. (R. 26:180; TX 175)

4. Overview Of The "Lending Arrangements" Between MNB And The McDorman Defendants

MNB was founded and began operating in July 1986. (R. 19:61) Five of the Directors were part of MNB's organizing group. (R. 19:59-61; 29:96, 210) From the beginning and at all relevant times during this case, MNB was a very small community bank. (R. 19:62) The directors—not the officers—ran and controlled MNB. (R. 19:61; 20:27)

When the McDorman Defendants needed to acquire additional credit for Mr. McDorman's business ventures, MNB was eager to enter into a relationship with the McDorman Defendants. (R. 25:103; TX 747 [PRE 23]) This relationship had immediate and apparent advantages for the bank, and as a result, the McDorman Defendants became the most important borrowing and depositing customers of MNB. (*See* TX 747 [PRE 23]; DRE E; R. 20:31; 25:184; 30:11-12) MNB and the

McDorman Defendants entered into two lending arrangements, both of which involved the issuance of cashier's checks. (R. 29:196-98)

McDorman and the Directors first entered into an lending arrangement in 1999 whereby MNB financed hundreds of vehicles for McDorman by paying off his sight drafts with cashier's checks. (R. 20:251-52; 25:102-09, 132-33) Several of these cashier's checks were issued by MNB without prior payment for them—a clear violation of MNB's own policy governing the issuance of cashier's checks. (*See* TX 21, 22, 23 [PRE 11, 12, 13]; R 29:161) MNB's internal compliance officer, Donna Venable ("Venable"), informed the Directors of these irregular practices on several different occasions in the quarterly audit reports she submitted to MNB's Board of Directors. (R. 29:134-40; TX 21, 22, 23 [PRE 11, 12, 13])

In October 2000, MNB and McDorman entered into a new lending arrangement. (R. 20:214-15; 25:164; *see also* DRE P) Utilizing the McDorman Defendants' banking arrangements, the proposed plan allowed the McDorman Defendants to repeatedly borrow money from MNB by circumventing MNB's formal loan application and approval process. The procedures used here were identical to those used in the sight drafts lending arrangement. (*See* TX 21 [PRE 11]; R. 29:195-97) Essentially, MNB would issue official cashier's checks made payable to McDorman Motors regardless of whether Mr. McDorman had sufficient collected funds in his account to cover them. (R. 21:82-83; *see* DRE P) In order to

facilitate this arrangement, bank tellers at MNB were given special instructions by MNB personnel to monitor the McDorman accounts. (R. 29:235-37)

The procedure in which the McDorman Defendants and the Directors carried out the plan was relatively straightforward. Every morning, Mrs. McDorman would call Teresa Viator ("Viator"), a bank secretary, to confirm the balance in the McDorman Defendants' accounts. (R. 21:12-13; 25:188-89) With this information in hand, Mrs. McDorman would request Viator to prepare one or more cashier's checks payable to one of the McDorman Defendants' accounts. (R. 21:13; 25:187-91) All cashier's checks were paid for out of the same account at MNB and were all recorded sequentially in the same log book. (R. 20:256-58) A runner would then arrive at MNB to pick up the cashier's checks and present several checks made out to MNB and drawn on the Mac-Pro accounts as payment for the cashier's checks. (R. 20:259; 25:191-92) Viator would hold the checks for processing to allow the McDorman Defendants to belatedly cover these checks. (R. 20:220-21; 26:115; 29:20) The cashier's checks were immediately deposited in the McDorman Defendants' accounts at Community Bank and SouthTrust Bank. (R. 20:184-87; 25:185; 26:100-01)

The next day, the McDorman Defendants' runner would return to MNB and deposit checks drawn on their Community Bank and SouthTrust Bank accounts to cover the purchase of the cashier's checks from the previous day. (R. 26:100-01,

104-06; DRE P) Because the checks drawn on the Community Bank and SouthTrust Bank accounts took longer to clear (R. 20:188-95; 26:115), these deposits were not debited to the McDorman Defendants' accounts at MNB, but would show up as uncollected funds. (R. 20:122, 125)

In January 2001, the procedures were temporarily suspended for three months when auditors and bank examiners visited MNB. (R. 25:167) Nevertheless, the alleged scheme resumed shortly thereafter. (R. 20:226-27) The operating procedures were modified in July 2001 and essentially allowed the McDorman Defendants to pick up cashier's checks without presenting a payment check. (R. 20:233-34) MNB approved the new procedures, and MNB's booking and cashier personnel were instructed to pay regardless of the overdraft positions. (R. 20:234-35, 240; 21:82)

5. MNB Enjoyed A Lucrative Relationship With The McDorman Defendants During The Alleged Scheme

Although MNB eventually became undercapitalized following its participation in the alleged scheme, MNB's relationship with the McDorman Defendants had been extremely profitable in the interim. (*See* TX 747 [PRE 23]; R. 22:116-20; 25:179-83, 209-10; 29:25-26; 26:36-38, 40)

During their relationship, the McDorman Defendants and the Directors entered into an indirect loan agreement so that MNB could purchase car loans from the McDorman Defendants. (TX 75) This agreement benefited both parties:

MNB received a profitable loan portfolio, making it appear more profitable to outside investors, while the McDorman Defendants received immediate funding for his operations. (TX 747 [PRE 23]; R. 22:118-120) In addition, the McDorman Defendants also guaranteed the loans for MNB. (R. 25:104-09, 208-09) MNB required the McDorman Defendants to become, in essence, a loan origination and servicing officer for the benefit of MNB. (R. 25:102-09, 132-34, 192-93, 200-05) After MNB extended a loan to a particular customer/vehicle purchaser, the McDorman Defendants were required to continue servicing that customer's loan, including skip tracing, repossession, and telephone communications in the event of late payment. (R. 25:205-09; 22:120-21) Due to these additional tasks, the McDorman Defendants were forced to hire two to three additional personnel who devoted a substantial amount of their time to working for MNB. (R. 25:205) The McDorman Defendants paid these employees' salaries and benefits as well as all other costs of servicing the loans. (R. 25:208-09) By the end 1999, the volume of guaranteed loans had risen to approximately $2 million. (R. 25:204-05)

MNB also benefited on an ongoing basis by retaining overdraft fees on the McDorman accounts. (R. 25:209-10; 26:34-35, 36-38) While collecting these fees, MNB's ledger consistently showed the McDorman Defendants' accounts to be in the black when in fact they were overdrafted. (R. 26:40)

6. The Alleged Scheme Ends in July 2001

During 2001, Penland became concerned about the amount of money being transferred out of McDorman Motors and Mac-Pro. (R. 25:221-22; 26:179-80) In fact, Penland believed that Mr. McDorman had secretly taken between $800,000 and $1 million out of Mac-Pro to pay personal debts. (R. 25:221-22; 26:180) Penland decided to end his relationship with Mr. McDorman and transferred his ownership interest in Mac-Pro on July 13, 2001. (R. 25:223-25; 26:189) The day before Penland officially exited as an owner of Mac-Pro, however, was the day the alleged scheme ended. (R. 26:189)

On July 12, 2001, the McDorman Defendants' runner arrived at the bank and purchased four cashier's checks totaling $1,069,255.00. (R. 29:161, 228) This same day, Penland and Joe Vernon ("Vernon"), Penland's accountant, met with Walter Umphrey, a lawyer and majority shareholder of Community Bank, to discuss the existence of an alleged scheme involving the McDorman Defendants. (R. 26:187-88) After this meeting, Penland instructed Mr. McDorman to issue stop payment orders on the cashier's checks, as well as other checks that had been deposited in the McDorman Defendants' accounts at MNB. (DRE Q; TX 130, 342 [PRE 22])

On July 13, 2001 and July 16, 2001, the McDorman Defendants issued stop payment orders on thirteen checks totaling $2,305,001.56 written on the

McDorman Defendants' Community Bank accounts and one check for $371,140.00 written on one of the McDorman Defendants' SouthTrust Bank accounts. (R. 25:235-36; 26:107) These checks had been deposited in the McDorman Defendants' MNB accounts to cover previous cashier's checks purchases. The issuance of the stop payment orders ended the venture and shifted the loss to MNB.

Following the collapse of the alleged scheme, several investigations ensued. In particular, the federal Office of the Comptroller of the Currency ("OCC") required the Directors to recapitalize MNB for $2 million, to enter into a consent decree, and to report periodically to a fraud investigator. (TX 339 [PRE 20]) Additionally, the Directors held a meeting in 2002 to discuss the alleged scheme. (R. 29:165-68) At this meeting, several Directors claimed they had not received a complete version of Venable's January 2001 audit report that contained information regarding the alleged scheme. (R. 29:164) Nevertheless, Venable reminded them that she had in fact presented a complete report to Directors during the meeting and also in writing. (R. 29:166) One of the Directors, Rogers, even admitted that Venable's recollection of having fully informed the Board was correct and that the Directors had not taken any action with regard to the alleged scheme because "[t]hey trusted [Thornton]." (R. 29:167-68)

SUMMARY OF THE ARGUMENT

The Directors ask this Court to overturn a jury finding that they were *in pari delicto* as to the RICO violations and fraud claims that the Directors alleged against the Defendants-Appellees. The Directors offer a selective recitation of the record evidence and their own self-serving testimony but cannot change the fact that substantial record evidence demonstrated that they were substantially equally responsible for the alleged scheme. Indeed, their sufficiency challenge immediately runs up against the fact that they sued MNB's own president, Thornton, for her involvement in the alleged scheme, as to which she repeatedly invoked her Fifth Amendment privilege at the trial. And, while the Directors cast Mr. McDorman in their brief as though he was convicted of a federal offense based on the alleged scheme at issue in the Directors' claims (which he was not), the Directors ignore the fact that, prior to the filing of their brief but after the verdict, Thornton actually has been.

At the same time, after MNB benefited from the alleged scheme not only through the substantial overdraft fees it charged the McDorman Defendants but also through its own deceptive loan portfolio offered to outside investors that showed millions of dollars in transactions taking place, the Directors now remarkably claim that neither they nor MNB had any knowledge or role in the alleged scheme. But, after hearing the actual evidence in this case, including

testimony concerning the bank's manipulation of the manner in which cashier's checks issued to the McDorman Defendants were shown on MNB's books, both the jury and the District Court found otherwise.

Lacking confidence in their sufficiency challenge—and with good reason—the Directors also challenge the submission of the *in pari delicto* defense to the jury on several grounds, including an argument that *in pari delicto* does not apply to any civil RICO action regardless of how heavily involved a plaintiff may be. In so doing, the Directors encourage this Court to create a circuit split with the Eleventh Circuit on this legal issue. In particular, the Directors raise two statutory construction arguments that would, if accepted, allow convicted criminals to use the civil RICO statute and the courts to recover treble damages from their co-conspirators. However, as the Eleventh Circuit has recently held, nothing in RICO's text or case law supports the notion that Congress intended to exempt civil RICO from the general application of the *in pari delicto* doctrine or to authorize participants in criminal and/or civil RICO violations to use the courts to divide the profits.

Rather, the application of *in pari delicto* to bar recovery by the Directors here advances—and does not interfere with—RICO's purpose of deterring affirmative wrongdoing. The Directors' contention that civil and criminal RICO should be applied in an identical fashion ignores the fact that criminal RICO

involves a separate offense against the sovereign and, if accepted, would only serve to thwart the statute's underlying policies. Thus, while the *in pari delicto* defense is not available in criminal RICO actions brought by the federal sovereign, the same does not—and should not—hold true for civil RICO actions brought by private parties alleging they are victims of RICO violations.

The Directors also argue that the Defendants-Appellees somehow waived an *in pari delicto* defense and that the submission of the defense to the jury somehow unfairly surprised and prejudiced the Directors. Yet, both the McDorman Defendants and Penland pled that MNB knowingly participated in the transactions on which the Directors based their claims and that the Directors had "unclean hands" and could not recover on that account, though the McDorman Defendants and Penland did not couch the plea in the Latin phraseology. Indeed, the Directors themselves filed numerous pre-trial motions addressing *in pari delicto*, and there was extensive evidence at trial that could only relate to that issue. The Directors' argument amounts to little more than a plea to return to antiquated requirements of formal pleading and incantations of Latin.

The Directors' other arguments are equally meritless. The Directors' assertions, for example, that MNB does not act through its president or its Directors is both absurd and contrary to the law they invoke. Likewise, there is no inconsistency *per se* in the verdict finding that the McDorman Defendants were

liable on some claims and but assessing no damages and, at the same time, finding that the McDorman Defendants were not liable on other claims. Rather, the verdict simply confirms that the Directors failed to carry their burden of proof to show either a quantum of damage or a causal nexus between any alleged wrongdoing and any alleged victim (who was in fact, according to the jury, "substantially equally involved in the same pattern of racketeering activity") and to prove separate elements of separate claims.

ARGUMENT

I. STANDARDS OF REVIEW

The Court reviews the District Court's denial of a motion for judgment as a matter of law *de novo*. *See Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 280 (5th Cir. 2002). When a case is tried by a jury, a Federal Rule of Civil Procedure 50(a) motion is a challenge to the legal sufficiency of the evidence. *Brown v. Bryan County, Okla.*, 219 F.3d 450, 456 (5th Cir. 2000). In resolving such challenges, the Court draws all reasonable inferences and resolves all credibility determinations in the light most favorable to the nonmoving party, here, the McDorman Defendants. The jury verdict must be upheld unless "there is no legally sufficient basis for a reasonable jury to find" as the jury did. *Cousin v. Trans Union Corp.*, 246 F.3d 359, 366 (5th Cir. 2001).

The Court reviews the District Court's ruling on a motion for new trial for abuse of discretion. *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992). The Court gives great deference to the District Court's ruling denying a new trial motion and upholding the jury's verdict. *Id*. at 208. "New trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great weight of the evidence." *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 300 (5th Cir. 2005) (citation omitted). This Court's review in this situation is even "more deferential than [its] review of the denial of a motion for judgment as a matter of law." *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1049 (5th Cir. 1998).

The Court reviews a decision on a motion to alter or amend a judgment for abuse of discretion. *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005). A district court abuses its discretion only "when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003).

The Court reviews special interrogatories and jury charges for abuse of discretion. *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1096 (5th Cir. 1994). On appeal, the Court must consider the charge as a whole, and, so long as "the jury is not misled, prejudiced, or confused, and the charge is comprehensive and fundamentally accurate, it will be deemed adequate and without reversible error."

Davis v. Avondale Indus., Inc., 975 F.2d 169, 173-74 (5th Cir. 1992). In attempting to reconcile special verdicts, the Court's must look beyond the face of the interrogatories to the District Court's instructions. *Carr v. Wal-Mart Stores, Inc.*, 312 F.3d 667, 670 (5th Cir. 2002). In considering whether allegedly inconsistent verdicts can be reconciled, the Court views the evidence in the light most favorable to upholding the jury's decision in an effort to find consistency. *Ellis v. Weasler Eng'g, Inc.,* 258 F.3d 326, 343 (5th Cir. 2001).

II. *IN PARI DELICTO* IS A VALID DEFENSE TO THE DIRECTORS' CLAIMS AS A MATTER OF LAW

The doctrine of *in pari delicto* is an equitable doctrine by which "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." BLACK'S LAW DICTIONARY (8th ed. 2004). This ancient, generally-applicable common-law defense "derives from the Latin, *in pari delicto potior est conditio defendentis*: 'In case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.'" *Bateman Eichler, Hills Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985). The doctrine is based on the altogether sound policy that "courts should not lend their good offices to mediating disputes among wrongdoers" and "denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id*.

As the Eleventh Circuit has recently held, this doctrine properly applies to this civil RICO action as well as to the Directors' common-law claims. The

Directors' arguments to the contrary are not supported by RICO's text or the governing case law. Additionally, the McDorman Defendants did not waive the *in pari delicto* defense. The issue was facially apparent from both Penland's and the McDorman Defendants' pleadings, the evidence presented at trial, and the Directors' own briefing and argument.

A. *The* In Pari Delicto *Defense Applies To This Civil RICO Action*

The Directors argue that the text of RICO dictates that *in pari delicto* is inapplicable to civil RICO actions (1) because the statutory text does not expressly provide for the defense and (2) because, where the statutory text describes civil RICO liability based on violations of the criminal RICO statute, defenses that cannot be raised to criminal RICO prosecutions by the sovereign cannot be raised in private civil RICO suits. Neither RICO's text nor its purposes support the statutory construction the Directors urge, which would permit even those who are imprisoned for criminal RICO violations to sue their RICO co-conspirators to recover their shares of the proceeds of their joint criminal activities. Congress, however, did not envision Blackbeard as a civil RICO plaintiff.

To begin with, the fact that the RICO statute does not expressly address whether *in pari delicto* will apply is neither here nor there. The common law as recognized in England and the United States has long provided that the courts do not award recoveries in "situations where the plaintiff truly bore at least

substantially equal responsibility for his injury." *Bateman Eichler*, 472 U.S. at 307. Congress enacted RICO with a full awareness of this well-settled rule excluding the courts from policing disputes among equally-culpable wrongdoers. That Congress did not expressly write *in pari delicto* into the statutory text no more suggests that the defense does not apply than does the absence of an express statute of limitations in the civil RICO statute suggest that no civil RICO action can be time-barred. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (selecting a uniform, four-year statute of limitations for civil RICO claims); *see also Meyer v. Holley*, 537 U.S. 280, 285-87 (2003) (holding that, when Congress creates tort actions, it legislates against a legal background of ordinary tort-related vicarious liability rules and thus intends its legislation to incorporate those rules); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994) (when creating a statutory cause of action, "Congress legislates against the strong background of the American Rule," under which, "unless Congress provides otherwise, parties are to bear their own attorney's fees").

The question presented by the Directors' challenge is whether the *in pari delicto* defense is somehow uniquely inapplicable to civil RICO claims. RICO's text and purposes dictate that the defense can and must apply to civil RICO cases.

The text of RICO supports the conclusion that *in pari delicto* applies to civil RICO claims. RICO provides that "[a]ny person injured in his business or

property by reason of a violation of section 1962 of this chapter may sue therefore . . . and shall recover threefold the damages he sustains . . . .” 18 U.S.C. § 1964(c). Section 1962(a), in turn, states that it is unlawful “for any person who has received any income derived ... from a pattern of racketeering activity . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise.” *Id*. § 1962(a). Additionally, Section 1962(c) states that “[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” *Id*. § 1962(c). Section 1962(d) also prohibits conspiracies to violate Sections 1962(a) and (c). *Id*. § 1962(d). Nothing in RICO’s text supports a conclusion that a participant in a “violation of section 1962”—as the jury here found that the Directors were—should be considered a “person injured in his business or property by reason of” that “violation” who “may sue therefore.” *Id.* § 1964(c).

Further, the Supreme Court has made clear that the *in pari delicto* defense applies to causes of action created by federal statutes—including those with civil remedies designed in part to empower private attorneys general—so long as (1) the plaintiff actively participated in the alleged violation and (2) application of the defense does not interfere with the policy goals and enforcement of the statute.

Pinter v. Dahl, 486 U.S. 622, 632-33 (1988); *Bateman Eichler*, 472 U.S. at 305-09, 312-13, 315; *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-40 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *accord Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (11th Cir. 2006), *petition for cert. filed*, No. 05-1335, 74 U.S.L.W. 3618 (U.S. Apr. 14, 2006). Both factors support *in pari delicto*'s applicability to the civil RICO claims here as a matter of law.

First, as discussed more fully *infra* § III.B.2, the evidence in this case establishes—as the jury found—that the Directors actively participated in the alleged RICO violations of which they now complain. The evidence in fact compels the conclusion that the Directors had "substantially equal responsibility" for the allege scheme on which their RICO claims are based. *Bateman Eichler*, 472 U.S. at 308-09. This is not a case of plaintiffs who are merely passive bystanders to an alleged federal statutory violation, such as the "tippees" (*i.e.*, recipients of insider information) in the insider trading securities violations at issue in *Bateman Eichler*, 472 U.S. at 305, or the merely passive violators of the antitrust laws in *Perma Life* whom the Supreme Court found simply "participated to the extent of utilizing illegal arrangements formulated and carried out by others," 392 U.S. at 138-39. Here, "federal RICO violations, as a matter of law, require

[affirmative and deliberate participation and] affirmative wrongdoing rather than passive acquiescence." *Edwards*, 437 F.3d at 1155-56.

Second, the application of *in pari delicto* to bar recovery by the Directors advances the civil RICO statute's purpose of deterring affirmative wrongdoing. As the Eleventh Circuit held in the only federal court of appeals decision that has squarely addressed the issue of whether *in pari delicto* applies to civil RICO, plaintiffs such as the Directors should not be "allowed to recover to serve the deterrent purposes underlying the civil liability provision of RICO regardless of whether the plaintiffs participated in the wrongdoing." *Id.* at 1155. Because RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt," 18 U.S.C. § 1962(c), "[i]t would be anomalous, to say the least, for the RICO statute to make racketeering unlawful in one provision, yet award the violator with treble damages in another provision of the same statute," *Edwards*, 437 F.3d at 1155.

It is beyond dispute that "Congress intended RICO's civil remedies to help eradicate 'organized crime from the social fabric' by divesting 'the association of the fruits of ill-gotten gains" through the empowerment of private attorneys general. *Id.* (quotation omitted). Indeed, the Supreme Court has made clear that civil RICO is designed "to compensate victims" and "to turn [victims] into

prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). However, the Directors' recovery here "would not divest RICO violators of their ill-gotten gains; it would result in a wealth transfer among" participants in an alleged RICO scheme. *Edwards*, 437 F.3d at 1155. Those who are "substantially equally responsible" for RICO violations thus are not, in any sense, "victims"—that is, in the terms of RICO's text, "person[s] injured in his business or property by reason of" that "violation" who "may sue therefore." 18 U.S.C. § 1964(c).

Finally, *in pari delicto*'s application to civil RICO is not prohibited, as the Directors assert, by virtue of this defense's inapplicability to criminal RICO actions. Whether a defense applies in the civil RICO context does not depend on whether it applies in the criminal RICO context—because, as is the case between any civil and criminal cases, "there are significant differences between civil and criminal RICO actions." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997).

First, civil and criminal RICO do not operate in the same manner in many respects and are not subject to the same standards. The differences between criminal RICO and civil RICO cases are, not surprisingly, rather elementary. For example, while courts tend to treat the substantive provisions of civil RICO and criminal RICO the same, *see United States v. Lacy*, 87 F.3d 1324, 1324 (9th Cir. 1996), civil RICO claims must be proven only under the preponderance of the

evidence standard, whereas criminal RICO cases require proof beyond a reasonable doubt, DAVID R. MCCORMACK, RICO: FEDERAL AND STATE, CIVIL AND CRIMINAL RICO § 2.34 (1998 & Supp. 2000). Notably, although Section 1964 civil RICO liability turns on violations of Section 1962, the Directors do not suggest that they should, for instance, have been required to prove liability beyond a reasonable doubt. But this is the logical and unavoidable conclusion to their broad argument that civil and criminal RICO actions must be governed by the same standards and limitations.

Furthermore, a civil RICO action brought by a private party does not give rise to a Double Jeopardy Clause bar to a later criminal RICO prosecution. *See United States v. Beszborn*, 21 F.3d 62, 67 (5th Cir. 1994) ("In order for the Double Jeopardy Clause to have any application, there must be actions by a sovereign, which place an individual twice in jeopardy. The Double Jeopardy Clause does not apply to actions involving private individuals."). This is because civil and criminal RICO actions involve different litigants, bringing different claims, often on behalf of different victims.

More fundamentally, the differing purposes behind criminal and civil litigation in general and criminal and civil RICO in particular belie the Directors' argument. In the prototypical criminal case, the government *as sovereign* initiates a suit against a defendant for committing wrongful acts with the intent of punishing

the criminal on behalf of civil society. In criminal RICO cases specifically, the government seeks to vindicate public harm and to protect the public from systematic and pervasive criminal activities. *See United States v. Turkette*, 452 U.S. 576, 589 (1981). Because it is highly unlikely—perhaps even impossible—for the government to be a participant in the illegal activity it is trying to prevent,[4] the application of *in pari delicto* would be nonsensical in a criminal case. That victim-based defenses are not available against the government in an action brought *qua* sovereign is, therefore, both utterly unsurprising and entirely irrelevant to the applicability of *in pari delicto* against a private civil plaintiff.

Civil RICO, however, is intended to allow the private victims to recover damages from parties who have committed the predicate offenses, both to compensate the injured plaintiff and enforce private rights and to increase enforcement of federal law through the creation of private attorneys general. 18 U.S.C. § 1964; *Rotella*, 528 U.S. at 557. There thus can be no question that in a civil RICO case, plaintiffs can be knowingly involved in the illegal scheme with the defendants and may even benefit from it. In fact, in many circumstances

[4] *Cf. Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (noting "the fiction of *Ex parte Young*—that because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment"); *Saltz v. Tennessee Dep't of Employment Sec.*, 976 F.2d 966, 968 (5th Cir. 1992) (the *Ex Parte Young* "doctrine holds that acts by state officials which are contrary to federal law cannot have been authorized or be ratified by the state").

plaintiffs participating in criminal undertakings may themselves be found liable in separate proceedings.

It would be contradictory and absurd to compel courts to provide a civil monetary remedy among the guilty and to award a plaintiff a recovery of treble damages where the same plaintiff is subject to criminal sanction by incarceration. *See Turkette*, 452 U.S. at 580 (cautioning that "absurd results are to be avoided" when interpreting RICO). To use the most extreme (and yet prototypical) example, although low-level members of La Cosa Nostra may have lost money as a result of racketeering schemes in which they participated, no reasonable construction of RICO could permit these RICO violators to sue as supposed "private attorneys general" and recover treble damages from their criminal RICO co-conspirators at the same time they are incarcerated for the enterprise on which their private civil RICO claims would be based.

Therefore, in order to prevent a RICO plaintiff who is just as culpable as a RICO defendant in the same case from recovering threefold, applying *in pari delicto* in civil RICO cases is crucial. By the same token, "denying judicial relief to an admitted wrongdoer is an effective means of deterring [the] illegality" that RICO is designed to combat. *Bateman Eichler*, 472 U.S. at 306. Declining to the apply the defense of *in pari delicto* to a civil RICO claim because it cannot be applied in the criminal RICO context would thus lead to an absurd result.

B. In Pari Delicto *Is A Valid Defense To The Directors' Common-Law Legal Claims*

The Directors also contend that, because unclean hands is an equitable doctrine under Texas law and *in pari delicto* is its "first cousin," *in pari delicto* is not a valid defense to common-law legal claims. This argument collapses under its own weightlessness. To begin with, the jury found the McDorman Defendants not liable for two of the Directors' three common-law claims, to which the jury's *in pari delicto* finding therefore need not apply. DRE C.

Further, even though *in pari delicto* may be described as an "equitable" defense, the Federal Rules and extensive case law make clear that this doctrine properly applies to common-law legal claims. Federal Rule of Civil Procedure 2 allows a court to try legal, equitable, and admiralty issues in the same action, effectively "eliminat[ing] any procedural impediment to interposing all relevant defenses." MOORE'S FEDERAL PRACTICE CIVIL § 2.05; *see also* FED. R. CIV. P. 2. Rule 8(e)(2) also specifically allows a party to assert as many defenses "as the party has regardless of . . . whether based on legal, equitable or maritime grounds." FED. R. CIV. P. 8(e)(2). Thus, as the Federal Rules themselves clearly indicate and as one district court recently held, defendants can raise *in pari delicto* where plaintiffs seek legal damages. *See Decatur Ventures, LLC v. Stapleton Ventures, Inc.*, No. 1:04-CV-0562-JDT-WTL, 2006 WL 1367436, at *4 (S.D. Ind. May 17, 2006). Furthermore, other courts have recognized that the doctrine of *in pari*

delicto appropriately applies to claims for damages and other legal relief, whereas unclean hands applies to claims for equitable relief. *See, e.g., Pieczynshki v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) ("[T]here is a defense of . . . '*in pari delicto*' (if legal relief is sought)."); *Tarasi v. Pittsburgh Nat'l Bank*, 555 F.2d 1152, 1156-57 (3d Cir. 1977) (same).

C. *The District Court Correctly Determined That* In Pari Delicto *Was Properly Pled And Raised In This Case*

The McDorman Defendants' Answer clearly stated that MNB knowingly participated in the transactions on which the Directors based their claims. (R. 2:439-41) Moreover, the McDorman Defendants' Answer and Penland's Answer also specifically pled the "unclean hands" doctrine—of which *in pari delicto* is a narrowly construed form. (*See* R. 2:442-43; 1:128 [PRE 2]) Additionally, while the Defendants-Appellees never explicitly used the Latin words *in pari delicto*, they filed counterclaims and motions claiming that the Directors were involved in the allegedly illegal activity. (*See, e.g.*, R. 2:633-69; 3:898-919, 922-28) Furthermore, during the trial, the Defendants-Appellees consistently took the position that the Directors knew the extent of the illegal acts being performed.

Moreover, the Joint Final Pre-trial Order,[5] when viewed in the context of the entire case, adequately stated the *in pari delicto* defense. Even though it did not explicitly refer to *in pari delicto*, when read in its entirety—specifically, paragraphs 2, 4, 6, 12, 15, and 16—the Joint Final Pre-trial Order properly pled *in pari delicto*. (R. 10:4686-88 [PRE 9])

The Directors, for their part, had been defending against the *in pari delicto* doctrine from the beginning until the end of the case, including in motions they filed challenging this defense. (*See, e.g.*, R. 10:4361-67 [PRE 7]; *see also* R. 10:4493-96, 4543-49, 4769-78; R. 28:59-60, 63, 89, 92-94; R. 30:113-15) At the charge conference, the District Court even gave the Directors a final opportunity to object to the wording of the instruction for Special Issue No. 5; however, they failed to assert an objection. (R. 31:7)

The Directors nonetheless now assert that the Defendants-Appellees never explicitly pled the *in pari delicto* defense under Federal Rule of Civil Procedure 8 and that the Directors were therefore somehow unaware of or unfairly surprised by the defense because they never received "fair notice." They argue that its presence in the case unfairly prejudiced them and requires reversal and a new trial. This argument defies credulity.

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[5] As previously mentioned, at the time the Joint Pre-Trial Order was submitted, the McDorman Defendants were proceeding *pro se*, Mr. McDorman was in prison, and the McDorman Defendants did not actively participate in the drafting of this order.

Rule 8, of course, requires parties to plead affirmative defenses, and, although *in pari delicto* is not specifically listed as one of the nineteen affirmative defenses under 8(c), it falls under the "catchall" phrase as "any other matter constituting an avoidance or affirmative defense." *See* FED. R. CIV. P. 8(c). However, under well-established notice pleading standards, Rule 8 only requires a short and plain statement of the defense. *See id.* 8(b). Rule 8 only requires defendants to "plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced." *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999). As detailed above, the Directors received that much notice and more throughout the case and are now reduced to arguing for reversal because the Defendants-Appellees did not, in effect, translate the defenses they raised into Latin. Such formalities were rejected in 1938 with the advent of the Federal Rules and have no purchase in this case almost 70 years later.

Moreover, *in pari delicto* was, at the very least, tried by implied consent here under Fed. R. Civ. P. 15(b). Courts must, of course, liberally grant amendments to pleadings. *See* FED. R. CIV. P. 15(a); *see also id.* 8(c). This policy also underlies Rule 15(b), which permits an issue omitted from pleadings to be treated as if it had been pled if the issue is entered into evidence and "tried by the express or implied consent" of the parties. *Id.* 15(b). Even when the adverse party

objects to the late introduction, the District Court has discretion under Rule 15(b) to permit an amendment to the pleadings and states that it "shall do so freely when the presentation of the merits of the action will subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party." *Id*.; *accord Portis v. First Nat'l Bank of Albany*, 34 F.3d 325, 332 (5th Cir. 1994) ("As a general rule, a party impliedly consents by failing to object to evidence supporting issues that go beyond the pleadings."); *Flannery v. Carroll*, 676 F.2d 126, 131 (5th Cir. 1982) (Rule 15(b)'s purpose is to base outcomes on trials, not pleadings).

Here, *in pari delicto* was clearly joined in a "pragmatically sufficient time," and the Directors were not "prejudiced in [their] ability to respond." *Chambers v. Johnson*, 197 F.3d 732, 735 (5th Cir. 1999). The Directors' own briefing of, presenting evidence on, and arguing against the issue leaves no room for debate.[6] Indeed, the District Court acknowledged that *in pari delicto* was not specifically

[6] The Directors also assert that the use of the *in pari delicto* defense severely prejudiced their substantive claims because a substantial amount of "confusing" testimony and trial exhibits—allegedly wholly unrelated to the alleged scheme—were admitted at trial. The Directors, however, overlook the well-recognized rule that a district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 660 (5th Cir. 2002). Even if the court finds an abuse of discretion, it will apply the harmless error rule to determine whether the error affected the substantial rights of the complaining party. *Id.* In light of this highly deferential standard, the Defendants' arguments do not create the kind of "prejudice" that would warrant a reversal or a new trial. If there was any error in admitting this allegedly irrelevant evidence, it would itself be no more than merely harmless error—and the Directors have certainly not demonstrated otherwise. The Directors thus cannot overcome one harmless error standard by pointing to alleged error that is, in turn, itself subject to such a standard, which the Directors make no effort to overcome.

pled, but noted that "the defendants' pleadings do talk about the bad acts of the plaintiffs." (R. 16:17-18) And, because the Directors themselves submitted a pre-trial brief on *in pari delicto*, the District Court correctly determined that the issue had been joined by the Directors. (R. 16:18)

III. THE DISTRICT COURT UTILIZED THE CORRECT STANDARD FOR THE *IN PARI DELICTO* DEFENSE AS SET FORTH BY THE SUPREME COURT AND PROPERLY APPLIED THE DOCTRINE

A. *The Standard Advocated By The Directors Was Superseded By The Governing Standard Set Forth By The Supreme Court's* Bateman Eichler *Decision*

When the District Court issued its jury instructions, it applied the standard for *in pari delicto* set forth by the Supreme Court in *Bateman Eichler* requiring a finding of "substantially equal responsibility." 472 U.S. at 310-11. This standard differs only in semantics, not in practical substance, from the standard the Directors favor—that there be "relatively equal, simultaneous and mutual fault." *Woolf*, 515 F.2d at 604; *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 691 (11th Cir. 1983). In this case, the jury was simply asked whether the Directors were "substantially equally involved in the same pattern of racketeering activity." DRE C. Accordingly, the District Court applied the correct standard for an *in pari delicto* defense based on binding Supreme Court precedent.[7]

[7] Notably, the culpability of the Directors was so blatantly apparent from the record evidence that it does not even matter whether the fault of the Directors was "substantially equal" or "relatively equal." Under either analysis, the Directors were *completely* involved in the alleged scheme.

For reasons that remain unclear, the Directors spend much of their brief trying to convince this Court that the standard set forth by the Supreme Court for this defense should not apply here. The Directors in fact claim that, when the Supreme Court issued its *Bateman Eichler* decision, it did not render a rule that would otherwise obviate "more nuanced" standards for *in pari delicto*. However, each of the cases they rely on were decided well before *Bateman Eichler*. Moreover, the plain language of *Bateman Eichler*, as well as the case law interpreting it, show that the Directors' understanding of the precedential effect of *Bateman Eichler* is incorrect and would leave one to wonder what the Supreme Court intended by granting certiorari there.

When the Supreme Court decided *Bateman Eichler*, it clearly established the proper analysis for *in pari delicto*. Specifically, it stated a federal statutory claim "may be barred on the grounds of the plaintiff's own culpability only where . . . as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress." 472 U.S. at 310-11. The Supreme Court also observed that "lower courts [were] divided over the proper scope of the *in pari delicto* defense," and cited both *Woolf* and *Silverberg* as examples. *Id*. at 305, n.10. Thus, the Supreme Court was fully aware of the differing standards for *in pari delicto* when issuing its decision. Nowhere in

Bateman Eichler does the Supreme Court give any indication that it laid down its standard with the intention that varying standards from other courts would survive.

Indeed, the few courts that have actually addressed whether *in pari delicto* is applicable as a defense to a RICO claim have applied the governing *Bateman Eichler* test. *See, e.g.*, *Edwards*, 437 F.3d at 1155; *Bieter Co. v. Blomquist*, 848 F. Supp. 1446, 1446 (D. Minn. 1994) (collecting cases). No other circuit—including this Court—has endorsed the pre-*Bateman Eichler* standard in a post-*Bateman Eichler* case. *See, e.g.*, *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1090-91 (2d. Cir. 1997) (applying the *Bateman Eichler* standard while noting that "[a]t one time this Court recognized that the *in pari delicto* defense was available only when the fault of the parties [is] clearly mutual, simultaneous, and relatively equal" (internal quotation marks omitted)); *cf. Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 163 (2d Cir. 2003) (declining to endorse the "clearly mutual, simultaneous, and relatively equal" *in pari delicto* standard but reviewing the district court's analysis using that standard because "the parties have not urged us to apply a different one").

B. *The District Court Properly Applied The Governing* In Pari Delicto *Standard, Under Which The Jury Found The Directors* In Pari Delicto *Based On More Than Sufficient Record Evidence*

The Directors also argue that, even if the two-part *Bateman Eichler* standard for *in pari delicto* governs here, the District Court failed to properly analyze the

defense's application to the policies and record evidence at issue in this case, which the Directors assert was insufficient to find them *in pari delicto*. The Directors are plainly mistaken on both counts.

One prong of the *Bateman Eichler* test—and arguably the most significant—instructs the court to consider the public policy implications of applying the defense. 472 U.S. at 311. Federal courts have consistently applied a common-law *in pari delicto* defense in adjudicating private rights of action arising under various federal regulatory statutes. *See, e.g., Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1197 (5th Cir. 1995) (securities laws). The other prong of the standard sets forth the essential elements of the doctrine. *See Pinter v. Dahl*, 486 U.S. 622, 633 (1988). Courts apply the defense where the plaintiff has participated in "the same sort of wrongdoing" as the defendant, *Bateman Eichler*, 472 U.S. at 307, and should not allow the defense "unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater," *Pinter*, 486 U.S. at 636. "Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant." *Perma Life*, 392 U.S. at 153. Though a court's assessment of the relative responsibility of the plaintiff will vary depending on the facts of the case, "courts frequently have focused on the extent to which the plaintiff and the defendant cooperated in developing and carrying out the scheme." *Pinter*, 486 U.S. at 637.

The District Court properly denied the Directors' request for judgment as a matter of law and a new trial because: (1) application of the defense does not interfere with—and in fact advances—the statutory policies and enforcement of RICO and (2) the evidence at trial proved that the directors were actively engaged in the illegal scheme and was more than sufficient to support the jury's *in pari delicto* factual finding.

1. The *In Pari Delicto* Defense Advances And Does Not Interfere With Civil RICO's Policy Of Deterring Affirmative Wrongdoing

Running to a fact-bound holding in the Supreme Court's antitrust decision in *Perma Life*, the Directors contend that this Court should refer to the antitrust laws to determine whether *in pari delicto* is a valid defense to a RICO action. They misread that decision. The Supreme Court's reasoning in *Perma Life* actually left open the possibility that a defense of *active* involvement could bar a complaint for an antitrust conspiracy and, thus, provides ample grounds for an extension of *in pari delicto* to civil RICO. *See* 392 U.S. at 140. This Court has in fact barred antitrust claims where the plaintiff was *completely* involved in the antitrust conspiracy, even though, like civil RICO, the antitrust statutes have a private attorney general component. *See, e.g., Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 902 (5th Cir. 1979) (holding that *Perma Life* did not endorse a "wholesale rejection of the *in pari delicto* doctrine in an antitrust treble

damages action" and recognizing complete involvement as a valid defense in an antitrust action), *aff'd*, 451 U.S. 630 (1981).

Further, the policy concerns underlying *Perma Life* are simply not present here because civil RICO claims are distinct from antitrust violations. The *Perma Life* Court premised its holding on the passive characteristics of antitrust participants, noting that the franchisee's participation in the alleged antitrust conspiracy "was not voluntary in any meaningful sense." 392 U.S. at 139. Unlike Clayton Act violations, RICO violations require affirmative and deliberate participation. The statutory language of RICO requires that the defendants "participated, either directly, or indirectly, in the conduct of the affairs of the enterprise . . . through a pattern of racketeering activity." *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir. 1995); *see also* 18 U.S.C. § 1962(c). The defendant also must "knowingly implement[]" and "mak[e]" decisions. *Starrett*, 55 F.3d at 1548; *see Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (holding that the defendant "participates" if he "directs" the pattern of racketeering activity). Because federal RICO violations, as a matter of law, require affirmative wrongdoing rather than passive acquiescence, the Court's reasoning in *Perma Life* does not preclude *in pari delicto*'s application in the RICO context.

Additionally, the public interests involved in antitrust actions differ from those involved in private civil RICO actions. The *in pari delicto* defense is not

available in antitrust actions because "the purpose of the antitrust laws are best served by insuring that the private actions will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life*, 392 U.S. at 139. Thus, "the plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition." *Id*.

While the public interest in competition is implicated in every antitrust action, a similar public interest is not implicated in every private RICO action. Instead, the public interest at issue in RICO is "the eradication of organized crime." *Turkette*, 452 U.S. at 589. Precluding the *in pari delicto* defense would undermine RICO's purpose of deterring affirmative wrongdoing. As noted above, RICO would make racketeering unlawful in one statutory section, but then reward the violator with treble damages in another section. The "remedial" and private-attorney-general purposes of civil RICO thus require courts to apply the *in pari delicto* defense because there purposes are not served by recovery by plaintiffs that "would not divest RICO violators of their ill-gotten gains" but rather "would result in a wealth transfer among" participants in an alleged RICO scheme who are equally culpable. *Edwards*, 437 F.3d at 1145.

2. The Record Is Replete With Evidence Demonstrating That The Directors Were "Substantially Equally Involved" In The Alleged Scheme

The Directors also boldly urge the Court to overturn the jury's factual finding that MNB's Board of Directors "were substantially equally involved in the same pattern of racketeering activity" as the Defendants-Appellees found liable for RICO violations. DRE C. However, throughout the trial, there was considerable evidence that supports only one conclusion: The Directors knew about, approved of, and authorized the alleged illegal acts of the Defendants-Appellees.

To be sure, if one image became clear at trial it was that MNB was an extremely small operation consisting of approximately 25 people. (R. 19:62) The Directors conducted board meetings at MNB in the employee lounge. (R. 29:145-46) Thus, given the intimate nature of MNB, any assertions by the Directors that they were completely ignorant about the alleged scheme are disingenuous at best and certainly subject to rejection by any reasonable juror. Indeed, even in their brief in this Court, the Directors are reduced to arguing (in a footnote, *see* Appellants' Brief at 43 n.13) that MNB somehow did not act through its president Thornton, whom they sued for her alleged involvement in the alleged scheme, who repeatedly invoked her Fifth Amendment privilege at trial, and who has recently (and after the verdict) pled guilty in *United States of America v. Deon C. Thornton*, Case No. 1:06-CR-26-MAC-ESH (E.D. Tex.), to misapplication of bank funds by

a bank employee in violation of 18 U.S.C. § 656 in connection with the alleged scheme at issue here.

The strongest evidence evincing the Directors' active participation in the alleged scheme came from MNB's own employees. This evidence proved that MNB's employees knew about the special lending arrangement with the McDorman Defendants. Viator, the Bank secretary, testified that she issued cashier's checks for sight drafts in 1999 and was involved in the issuance of cashier's checks to the McDorman Defendants in October 2000. (R. 20:248-49; 21:18-21) Her testimony showed that MNB failed to adhere to standard banking procedures when issuing these checks by failing to require advance payment for cashier's checks and not processing the McDorman Defendants' payment checks until the following banking day. (R. 20:220-21, 260-61) In fact, by July 2001, MNB no longer required the McDorman Defendants to provide payment in return for the cashier's checks. (R. 20:233-34) Additionally, a former MNB cashier openly admitted that he had knowledge of the relationship between the McDorman Defendants and MNB. (TX 295 [PRE 19]) In particular, he observed an enormous overdraft/uncollected funds problem with the McDorman Defendants accounts in 2001. (*Id.*)

Finally, Venable described the various audit reports she issued to the Directors informing them of the irregularities with the McDorman Defendants

accounts. Venable reported to the Board in separate reports *three* different times that cashier's checks were being issued for the benefit of the McDorman Defendants account prior to the bank receiving payment. (R. 29:133, 137, 141, 142, 144, 148; TX 21, 22, 23 [PRE 11, 12, 13]) Not once during Venable's presentations did the Directors ask a question, express any sign of shock or disbelief, or take any action to remedy the situation. (R. 29:142, 149-51) Indeed, one year later at another Board meeting in 2002, Rogers *finally* admitted to Venable that the Directors failed to take any action with regard to the problems associated with the McDorman Defendants accounts. (R. 29:167-168) Even though Mr. Coone summed up the position of the Directors as one of "deniability" (R. 28:170), any notion of this was clearly destroyed by Dunn's admission at the Directors' meeting where he stated that the "buck" stopped with them (R. 29:167-68).

A reasonable juror witnessing the logical gymnastics necessary for the Directors to simply assert their claims against the McDorman Defendants and Penland based on the extensive activities at this small bank would have little difficulty concluding that the Directors were fully aware of the alleged scheme, fully approved it, and were completely involved in it. Indeed, the testimony at trial indicated that the Directors were in complete control of the cash flow at MNB and knew exactly what was going on. In particular, the jury heard irrefutable evidence

of the relationship between the McDorman Defendants and the Directors that extended from 1994-2001. (R. 22:107) During this time, while under the management of the Directors, MNB developed the McDorman Defendants' banking relationship in the several ways. MNB assisted one of Mr. McDorman's companies, First Choice Auto Sales, emerge from bankruptcy in 1997. (R. 25:94) MNB fronted the McDorman Defendants money to purchase cars for Mr. McDorman's businesses. (R. 26:107, 116-27; 25:102, 185-86) Additionally, MNB repeatedly loaned the McDorman Defendants money for business and personal purposes. (*See* TX 103, 105, 106 [PRE 16, 17, 18]) MNB effectively gave the McDorman Defendants the keys to the vault in the form of unlimited cashier's checks. (*See* DRE P; R. 21:79) Indeed, it was undisputed that Thornton, with full knowledge of the Directors, exceeded her lending authority in issuing cashier's checks to the McDorman Defendants. (R. 19:65; 28:119-20)

The Directors offer only their own self-serving testimony to support their assertions that there was insufficient evidence to uphold the jury's *in pari delicto* finding. But the ample evidence presented to the jury and outlined above showed otherwise. Thus, even if the evidence did not support an indisputable factual conclusion either in favor of or against *in pari delicto*, the District Court's judgment should not be disturbed. The fact that reasonable jurors could differ precludes a conclusion on appellate review that no reasonable jury could have

found *in pari delicto*. *See Stinnett v. Colorado Interstate Gas Co.*, 227 F.3d 247, 258-59 (5th Cir. 2000).

In all events, this Court should not substitute its judgment for that of the jury here and should refrain from making any independent credibility determinations about witnesses. The jury was free to decide whom they would believe. Though the Directors stand alone in their view of the events, everyone else—the McDorman Defendants, Penland, Thornton, the District Court, the jury, and the witnesses who testified at trial—agrees that something was amiss at MNB and the Directors were all in on it.

Accordingly, the district court properly instructed the jury to decide if "the Board of Directors of [MNB] were substantially equally involved in the same pattern of racketeering activity as the Defendants," DRE C, and the jury's finding on this special verdict that the Directors were *in pari delicto* was amply supported by the evidence at trial.

IV. THE IMPUTATION OF THE STATE OF MIND AND CONDUCT OF THE DIRECTORS TO MNB IS JUSTIFIED AS A MATTER OF LAW AND BY THE RECORD EVIDENCE

Hopeful of turning aside the jury's view of the evidence at trial from yet another angle, the Directors argue that their actions or failures to act should not be imputed to MNB, on whose behalf they now contend they are suing as its assignees. The Directors contend that, if they acted illegally, they were not acting

in the best interests of MNB, which, according to the Directors, "in the long run, . . . realized a crushing loss" from the alleged scheme—notwithstanding any benefits MNB "may have" realized "in the short run." However, the District Court may have put it best in rejecting this argument: it is "incongruous for Plaintiffs to claim that they were trying to help the bank (when they were directors), but (now that they are assignees) because of the scheme's untimely collapse it turns out that really they were not acting in the bank's best interest." (DRE G)

In fact, contrary to the Directors' contention, (1) the Directors' status as assignees of MNB does not shield them from a finding that they were *in pari delicto* when acting for and on behalf of MNB and the ensuing finding that they are thus barred from any recovery, and (2) the record evidence supports the conclusion that the Directors' actions had the intent and effect of benefiting MNB, to which they can therefore be imputed to bar the Directors from recovering as its assignees. The District Court thus properly allowed the jury to impute the knowledge and conduct of the Directors to the MNB Board to find that the Directors were *in pari delicto* and entered judgment barring the Directors from recovering as MNB's assignees based on this factual finding.

The Directors cannot credibly claim that they are now acting on behalf of MNB as its assignees in bringing suit and seeking compensation but that they were not acting on its behalf when they approved of and authorized the alleged scheme

at issue here. If this Court were to allow the Directors to recover as assignees of MNB—in the face of the evidence and the jury's finding that the Directors were *in pari delicto*—the Directors would be compensated individually even though they personally participated *qua* Board (as the jury found) in the alleged scheme. Such a recovery would simply be inequitable.

Neither can the Directors plausibly argue that the Board's actions and knowledge cannot be imputed to MNB because, if illegal, these actions were somehow *ultra vires* and responsible for MNB's losses following the alleged scheme's collapse and therefore not in MNB's best interests. Courts impute a director's knowledge and conduct to a corporation unless the director acts with an interest adverse to the corporation. *See Askanase v. Fatjo*, 130 F.3d 657, 668 (5th Cir. 1997). The imputation doctrine is rooted in the well-recognized principle that a corporation such as MNB acts only through its agents. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 284 (5th Cir. 1999).

Regardless of whether the Directors are now MNB's "assignees," the interests of the Directors and MNB were undeniably same and not adverse: The McDorman Defendants made money for MNB, and MNB's Directors benefited from it both on behalf of MNB's interests and individually as it made their stock more valuable. *See Askanase*, 130 F.3d at 668. Indeed, reasonable jurors could find, based on the evidence at trial, that the alleged scheme beginning in October

2000 and ending in July 2001 was designed to pump funds into MNB and keep the McDorman Defendants' accounts in balance using the funds of other banks. The evidence shows that the Directors authorized bank officers and employees to provide any necessary support to the McDorman Defendants, including millions of dollars in cashier's checks to pay for sight drafts, numerous personal and business loans, and the provision of millions in cashier's checks to be floated at Community and SouthTrust Banks. (R. 20:219-21; 21:30-31; 25:185-86; 26:107; 29:236-37) Further, the evidence proves that MNB manipulated the manner in which the cashier's checks were shown on MNB's books. (R. 21: 56-57) MNB also benefited on an ongoing basis from this scheme by retaining overdraft fees on the McDorman Defendants' accounts. (R. 25:209-10; 26:36-38, 40)

The evidence at trial thus proved that, but for the McDorman Defendants' accounts, MNB would have been less profitable. The McDorman Defendants were responsible for putting more than $68 million into the coffers of MNB that had a total capitalization of $3.5 million. (R. 25:179-83; 29:35) MNB was fully aware of the critical importance of the McDorman Defendants' relationship to it, and testimony at trial indicated that Mr. McDorman was more than simply a "good customer." (R. 28:83-84; 29:25-26; 25:140, 179-83) The Directors were in fact made aware on three separate occasions that the McDorman Defendants were receiving cashier's checks before they properly paid for them but the Directors

nevertheless condoned the alleged scheme. (TX 21, 22, 23 [PRE 11, 12, 13]) Despite the Directors' hollow claim that any actions or failures to act in connection with the alleged scheme were not in MNB's best interests because of losses it ultimately suffered, the record evidence presented to the jury clearly showed that MNB's ultimate losses were caused by the Directors' involvement in the illegal and reckless banking schemes that put every depositors' money at risk in an effort intended to benefit MNB and the Directors themselves. Consequently, the only victims here of the alleged scheme were outsiders to MNB—the depositors and creditors. The evidence thus fully supported a jury finding that, as the majority shareholders of MNB, the Directors were the beneficiaries of their own fraudulent activity while also acting in the perceived interest of MNB—to which their actions, failures to act, and knowledge can therefore properly be imputed through the jury's *in pari delicto* finding and the District Court's take-nothing judgment based on that finding.

The Directors' reliance on *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), to argue for a contrary conclusion is misplaced. *Schacht* involved RICO claims by the State of Illinois Insurance Director, who had stepped into the shoes of an insolvent insurance company, against the company's former business partners, directors, and officers. *Id*. at 1345-46. Under Illinois law, the Director was authorized to bring claims on behalf of the insolvent company. *Id*. The Directors

insist that *Schacht* stands for the proposition that the mental state of the Directors could never be attributed to the bank. Despite the Directors' analysis of *Schacht*, the reasoning of *Schacht* does not support any such conclusion and instead only refers to the idea of imputed knowledge. If anything, *Schacht* holds that a corporation could be held accountable to outside creditors if its directors and shareholders were working to illegally inflate inventories and stock prices. *Id*. at 347. As applied to the record evidence in this case, *Schacht* suggests that the Directors can and maybe should be held liable to the innocent people that the Directors deceived into believing that MNB was actually doing a high volume of legitimate lending. Thus, upon closer examination, *Schacht* addresses and supports the District Court's ruling refusing to allow dishonest directors to recover money by claiming that their actions could not be attributed to the corporation, through the assigned claims of which they now seek to personally recover. *See id*. at 1348.

V. THERE IS NO INCONSISTENCY IN THE JURY VERDICT

The Directors finally argue that they are entitled to a new trial because the District Court erred in instructing the jury on an *in pari delicto* defense, because the jury allegedly failed to follow the instructions on assessing damages, and because there are allegedly multiple inconsistencies in the jury verdict. Before addressing the merits of the Defendants' contentions, it is clear that the Directors waived their right to complain on appeal of any alleged inconsistencies in the

jury's verdict. *See J. Motor Lines, Inc. v. Trailways Bus Sys., Inc.*, 689 F.2d 599, 603 (5th Cir. 1982) (failure to object to inconsistency in verdict prior to jury's dismissal constitutes a waiver). The Directors nevertheless highlight three instances that allegedly necessitate a new trial. Even if they were not waived, each is unavailing.

First, the District Court did not err in allowing the Defendants-Appellees to present the *in pari delicto* defense to the jury. A trial court is required to submit a proper charge to the jury regardless of whether either of the parties submitted a proposed instruction on the *in pari delicto* issue. *See Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983). As previously discussed more fully *supra* § III.B.2, there was more than sufficient record evidence for the District Court to properly present this issue to jury and for the jury to find the Directors were *in pari delicto*. Thus, the Directors' claim that this issue "confused" the jury is meritless. Given all the evidence of wrongdoing by the Directors, the jury fully intended the result it reached—for the Defendants-Appellees to initially be found liable and damages assessed, and then for the entire recovery to be barred by *in pari delicto*.

Second, the jury did not fail to follow the District Court's instructions regarding the assessment of damages. The Directors appear to argue that a complete new trial is required because the jury's answers were the result of compromise. *See* Brief at 53 (citing *Hatfield v. Seaboard Air Line Railroad Co.*,

396 F.2d 721, 724 (5th Cir. 1968)). However, other than simply declaring compromise, the Directors point to no circumstances, such as those described in *Hatfield*, that could possibly indicate the existence of a compromise verdict. Rather, a compromise verdict occurs when a jury, which cannot agree on liability, compromises that disagreement and awards inadequate damages. *See Pagan v. Shoney's, Inc.*, 931 F.2d 334, 339 (5th Cir. 1991). In determining whether a jury reached a compromise verdict, the court examines the "totality of the circumstances" and considers any indicia of compromise apparent from the record as well as other factors that may have caused the jury to reach a verdict for inadequate damages if the jury actually found liability. *Yarbrough v. Sturm, Ruger & Co.*, 964 F.2d 376, 379 (5th Cir. 1992). These factors include: (1) an inadequate award of damages; (2) whether the issues of liability were strongly contested; (3) whether the jury was confused; (4) whether the parties were satisfied with the verdict; (5) how long the jury deliberated; (6) whether the jury requested additional instructions; and (7) whether the jury had attempted to qualify its award in any way. *Pagan*, 931 F.2d at 339. There is no compromise verdict, however, if the court finds another basis for an inadequate award of damages. *Id.*

Application of these factors to the instant case makes clear that the verdict was not a compromise verdict. The record does not indicate that the jury was confused. The jury did not ask the District Court for further instructions, and the

jury reached a verdict one day after the trial concluded—a reasonable time after a twelve-day trial. A far simpler and more obvious answer seems to elude the Directors: The jury was disgusted with everyone. It condemned each and found no just damages or no causation between any alleged wrongdoing and any alleged victim. Thus, the jury awarded no damages to the Directors even though it determined that the McDorman Defendants were liable.

While the Directors point to the fact that the jury found liability, but then assessed no damages with regard to several issues, *see* DRE C, this Court has determined that a jury's finding of liability without a corresponding award of damages does not invalidate the verdict, *see Wingerter v. Maryland Cas. Co.*, 313 F.2d 754, 756-57 (5th Cir. 1963); *see also Bonura v. Sea Land Serv., Inc.*, 512 F.2d 671, 672 (5th Cir. 1975) (stating the "fixing of damages is an integral part of the jury's function"). In particular, in denying the Directors' post-trial motions, the District Court determined that the verdicts were not inconsistent because the jury was only to award "damages to which the plaintiffs are entitled." Jury Instructions at 26 [McDorman Record Excerpts ("MRE") 1]. Even if the Directors sustained damages as a result of Defendants-Appellees' alleged actions, they must face the reality that they failed to carry their burden of proving damages allegedly *caused* by any RICO violations or constructive fraud. During the trial, the burden of proof was on the Directors to prove damages arising from the RICO violation and to

prove an amount that would compensate them for their damages that were proximately caused by any constructive fraud of the McDorman Defendants and Thornton. Based on the evidence presented at trial, the jury was entitled to—and apparently did—reject the Directors' theory of damages despite the theoretical prospect of liability—divorced of course from any consideration of the consequences of the *in pari delicto* defense. The jury was specifically instructed to award damages "for the loss of money and the reduction in value of the Bank." (MRE 1) If the jury determined that MNB benefited from the relationship with the McDorman Defendants and did not suffer any harm, the jury's failure to award damages was warranted and must be upheld on appeal against a jury inconsistency challenge when the jury could have readily determined that the Directors suffered no damages or that there was no causal nexus to support any damages award. The jury's answers thus represent a logical and probable decision on the relevant issues submitted.

Finally, the Directors allege further inconsistencies with the verdict because the jury found certain defendants committed RICO violations, but then did not find that they committed common-law fraud. The Directors, however, openly disregard the fact that these two claims are not identical. For instance, a fraud claim requires falsity and reliance, (MRE 1), whereas a RICO bank fraud claim requires: (1) the existence of an enterprise; (2) that the enterprise had some effect on interstate

commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant knowingly and willfully conducted or participated in the conduct of the affairs of the enterprise; and (5) that the defendant participated knowingly and willfully through a pattern of racketeering. *See United States v. Posada-Rios*, 158 F.3d 832, 855 (5th Cir. 1998); MRE 1.

For these reasons, the alleged jury verdict errors about which the Directors complain do not warrant a new trial.

VI. IN THE ALTERNATIVE, THE JURY VERDICT WAS INCORRECT IN ASSESSING THE MCDORMAN DEFENDANTS WITH LIABILITY AND DAMAGES

If this Court for some reason decides that the take-nothing judgment cannot be sustained based on the *in pari delicto* defense, the Court should, in the alternative, affirm the take-nothing judgment as to the McDorman Defendants because there was insufficient evidence for the jury to find them liable.

As previously mentioned, the McDorman Defendants represented themselves *pro se* during the trial and throughout the post-trial proceedings in this case. Further, although the McDorman Defendants did not challenge the jury's determination that they were liable under Sections 1962(c) and 1962(d) in a post-trial motion or in a cross-appeal, it is well settled that an appellee is not required to file a cross-appeal to support a judgment on appeal. "[A]n appellee may urge any ground available in support of a judgment even if that ground was earlier and

erroneously rejected by the trial court." *Castellano v. Fragozo*, 352 F.3d 939, 960 (5th Cir. 2003). The appellee may take the position on appeal that the record supports the court's judgment on any ground, including one rejected or ignored in the district court. *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 566 n.5 (5th Cir. 1985); *In re Henderson*, 577 F.2d 997, 1002 n.5 (5th Cir. 1978). Moreover, "[a]n appellee who does not desire a change in the decree appealed from is not required to cross-appeal in order to preserve his optional right to urge errors in a district court's ruling that would, if accepted by the appellate court, support an affirmance of the decree appealed from." *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1101 (5th Cir. 1983). Accordingly, the McDorman Defendants are permitted to raise such arguments at this time.

If this Court finds that there was insufficient evidence to support the jury's verdict on *in pari delicto* as to the Directors, then it logically follows that the finding of liability as to the McDorman Defendants must be rejected. Throughout this case, the McDorman Defendants have consistently contended that they did nothing wrong or illegal throughout the course of the alleged scheme. (R. 26:59) Indeed, there is no question that, without the assistance of the Directors, the McDorman Defendants would not have been a part of the alleged scheme.

Consequently, on the record in this case, the evidence would not support a finding that the Directors are not *in pari delicto* but that the McDorman Defendants

are liable for any of the Directors' RICO claims. Because the McDorman Defendants and the Directors both participated in the alleged scheme, a finding of RICO violations only makes sense on the record in this case as to both parties or as to none.

CONCLUSION

This Court should affirm the District Court's final judgment that the Directors take nothing on their claims against the McDorman Defendants based on the jury's *in pari delicto* finding. Further, if the Court determines that there was insufficient evidence to find the Directors *in pari delicto*, it should alternatively hold that the jury's verdict finding the McDorman Defendants liable under 18 U.S.C. §§ 1962(c) and 1962(d) was correspondingly not supported by legally sufficient evidence and, as a result, affirm the take-nothing judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2006, two true and correct copies of the foregoing Brief and a computer diskette with a copy of the foregoing Brief in Portable Document File (PDF) format were served upon the following:

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